



NICWA

National Indian Child Welfare Association

Child and Family Policy Update

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Hot Topics

Supreme Court Hears Oral Arguments in *Haaland v. Brackeen* ICWA Case

The United States Supreme Court (Court) heard oral arguments in *the Haaland v. Brackeen* case (21-376) on November 9, 2022, starting at 10:00 a.m. Eastern. In this case, the Court was asked to assess whether the Indian Child Welfare Act was constitutional. The plaintiffs, the State of Texas and private parties (foster and adoptive parents), asked the Court to focus on the following issues: 1) that Congress did not have the constitutional authority to enact ICWA—does Congress have the authority to legislate on behalf of Indian tribes and what are the boundaries of this authority?; 2) that ICWA violates the Equal Protection Clause—is ICWA a race-based law?; (3) that certain provisions of ICWA violate the anti-commandeering doctrine—does ICWA require state agencies to pursue federal purposes unlawfully?; and (4) whether ICWA violates the non-delegation doctrine—does the ICWA requirement that requires a state court to accept tribal placement preferences violate the delegation doctrine? Defendants in the case included the federal government and intervening tribes, Cherokee Nation of Oklahoma, Oneida Nation in Wisconsin, Morongo Band of Mission Indians, Quinault Indian Nation, and Navajo Nation. Materials for the case, including oral argument [audio](#) and [transcripts](#), are available [here](#).

The Court used its time to focus on the authority of Congress to enact ICWA, whether ICWA violates the anti-commandeering doctrine under the Tenth Amendment, and whether ICWA, in particular one of its placement preferences (other Indian families that are not members of the child's tribe), violates the equal protection clause. The Court did not explore the non-delegation doctrine. One unusual thing about the hearing was the amount of time the Court allowed for oral arguments, which significantly exceeded the scheduled time and continued for just over three hours. This underscores the complexity of the legal issues being addressed and the interest of the Court's justices.

The plaintiffs argued that states should only be required to apply the best interest standards they use with non-Native children in their state child welfare system in state child custody proceedings involving Indian children. ICWA provides standards similar to the best interest standard often used in state courts (e.g., placement in least restrictive setting, placement with siblings) but also requires consideration of the importance of the child's connection to their tribe and extended family. The plaintiffs also argued that Congress did not have authority to enact ICWA and that the Indian commerce clause in the Constitution was not intended to apply in child welfare proceedings in state courts. The plaintiffs argued there should be restrictions on Congress's authority to legislate for Indian people. They suggested Congress's authority should only apply to legislation that addressed issues "on or near reservation" and the Indian commerce clause authority should not apply beyond the boundaries of business or economic pursuits. A number of the justices pushed back on these arguments and cited other laws or interpretations that differed. At one point Justice Gorsuch asked the plaintiffs how they believed they had standing to challenge ICWA on equal protection grounds, which was suggested earlier by the federal government's attorney, related to a condition of standing which requires demonstrating some type of harm or injury the party has suffered.

On anti-commandeering, Texas argued that ICWA requirements, like active efforts and record keeping, unlawfully require state agencies to meet federal purposes without their agreement. There was back and forth between the justices, plaintiffs, and defendants' attorneys on how ICWA applied to public agencies and in privately initiated placements. A possible defense of ICWA in this area is that ICWA's active efforts requirement, for example, applies evenly to both state and private entities. Justice Sotomayor asked about several federal laws, some that were federal Indian laws and others that were not, and whether these federal statutes were also unconstitutional based upon anti-commandeering doctrine, since they also required state agencies to take certain actions. One of the federal statutes cited applies to active military service members that requires notice, appointment of counsel, stays of proceedings, and possibly setting aside judgements in state courts in child custody cases.

Questions regarding whether ICWA violates the equal protection clause were brought up several times by the justices. Chief Justice Roberts and Justice Kavanaugh tried to connect a perceived disadvantage to Indian children compared to non-Indian children based upon ICWA's application and the "other Indian families" placement preference requirement. The defendants countered with the importance of that placement preference for children who have parents who are members in two different tribes and in the cases of tribes that share reservations, geographic proximity, or cultural ties.

While it is difficult to determine how the Court will rule in this case, the defendants presented their arguments and responded to questions from the justices very well. In addition, it was clear that a number of the justices had very strong interest and good questions that pushed back on arguments made by the plaintiffs. There is no timetable for when a decision will be issued, but because of the complexity of the case it is likely that a decision will not come forward until the spring and possibly as late as June of 2023.

NICWA, with Protect ICWA Campaign partners the National Congress of American Indians, Native American Rights Fund, and Association on American Indian Affairs, is leading efforts to defend ICWA through litigation, communications, and policy work. You can find information on how to support ICWA by following the Protect ICWA Campaign @ProtectICWA on [Twitter](#) and [Instagram](#). The Protect ICWA Campaign is continuing media and communication efforts as we wait for a decision from the Court and will be providing information and resources after the decision as well.

New 118th Congress—New Challenges and Opportunities Await Tribal Advocates in 2023

Following the results of the 2022 midterm elections, tribal advocates will be working with new leadership and rules in the House of Representatives and a slightly larger Democratic majority in the Senate. The Democratic Party lost enough seats in the House to lose the majority, but in a surprise to many, the number of seats Republicans gained was much smaller than original forecast. Starting in January when the House reconvened, Republicans have a nine-seat majority over Democratic members of the House (222 Republicans and 213 Democrats). With that majority, Kevin McCarthy (R-CA) was elected the new Speaker of the House and all of the House committees and subcommittees will have new Republican chairs. Below are a few of the new House committee chairs:

- House Natural Resources Committee: Chairman Bruce Westerman (R-AR, Fourth District)
- House Ways and Means Committee: Chairman Jason Smith (R-MO, Eighth District)
- House Appropriations: Chairwoman Kay Granger (R-TX, Twelfth District)
- House Rules Committee: Chairman Tom Cole (R-OK, Fourth District)
- House Education and Workforce Committee: Chairwoman Virginia Foxx (R-NC, Fifth District)
- House Budget Committee: Chairman Jodey Arrington (R-TX, Nineteenth District)

New House rules have also been adopted as part of Speaker McCarthy's election. The new rules will place greater restrictions on some processes, such as approval of new funding in legislation and opening up the process of considering amendments to appropriations bills. Speaker McCarthy has stated his intention to cut overall spending in domestic programs to FY 2022 levels, while holding defense spending harmless. This would require decreases in the neighborhood of \$130 billion. Some of the new rules include the following:

- A three-fifths majority of the House would be required for new spending in legislation (tax increases). This is designed to limit increases in mandatory spending. In the 117th Congress, tax increases only required a majority vote of approval.
- “Cut-as-you-go” provisions would direct Congress to offset the cost of any legislation with spending cuts instead of tax increases. This is tied to mandatory spending bills. In the 117th Congress, legislation could be adopted without a coinciding revenue offset for new spending. Revenue offsets usually are decreases in other federal spending or reductions in tax subsidies (tax credits or exemptions for individuals or companies).
- Committees would be required to adopt and submit an authorization and oversight plan, listing all unauthorized programs and agencies in the committee’s jurisdiction that received funding in the previous fiscal year, as well as an assessment of whether any mandatory funds in those programs should be moved to discretionary spending. Spending bills that do not have a separate authorization by Congress will not be increased. Previously, Congress has often funded federal programs that have not been reauthorized on time. This rule would also seek to identify mandatory funding in unauthorized federal programs and change the funding to discretionary funding. Mandatory funding is provided for in the authorizing law and does not require an annual appropriation vote like discretionary funding does. Title IV-E Foster Care, Prevention, and Permanency is an example of a mandatory funded program and BIA Indian Child Welfare Act grants is an example of a discretionary funded program.
- Limits to long-term spending will seek to prevent any bill estimated to spend more than \$2.5 billion in any four consecutive years in the next decade.
- Changes to the Congressional budget and appropriations process would allow for stricter enforcement of certain budget control measures while allowing members to bring amendments to the floor on appropriations bills and have them considered as a package instead of individually. Also, the amount of time spent on votes will be cut significantly. The design is to spend more time on floor debates and takes many more votes. Some advocates have suggested that relaxing restrictions around who and how amendments to appropriations bills can happen on the floor will create an unwieldy process that will make it much more difficult to pass appropriations bills.
- House members will have access to the legislative text of a bill 72 hours before a floor vote.

On the Senate side, Democrats increased their majority by one seat, giving them 51 seats to Republicans’ 49 seats. In the previous Congress, Democrats held the majority with 50 seats because under Senate rules the Vice President serves as a tie-breaker when the Senate is evenly split between Democrats and Republicans. While the increase for Democrats is helpful, it still is not enough to break filibusters that can stall legislation, especially if Senate members vote along party lines. Sixty votes are required to break a filibuster. Another complicating factor is that three of the Senate members that are counted in the Democrats majority are registered as independents, although they chose to caucus with Senate Democrats. Senator Sinema (D-AZ) recently announced she was switching parties to become an independent and will likely remain a key senator in legislative negotiations along with Senator Manchin (D-WV).

What does this mean for tribal advocates? With Democrats having a slim majority in the Senate and Republicans in the House, it likely means smaller numbers of legislative bills getting adopted by both the House and Senate and the appropriations process to fund federal programs running into numerous roadblocks in either the House or Senate. This will set up key challenges for both parties for getting their legislative and budget priorities enacted into law and possibly creating showdowns over the funding of the federal government later in the year. Already we are seeing a showdown on extending the debt ceiling limit between House Republicans and Senate Democrats and the White House, which may be a harbinger for things to come.

For child welfare advocates, there are some key bills that did not make it through the 117th Congress that are priorities in this Congress. One example is the reauthorization of the Title IV-B program that contains child welfare funding for states and tribes. In the omnibus bill that passed in December 2022 before the new Congress started, “Consolidated Appropriations Act, 2022”, Title IV-B and another important program, the Temporary Assistance to Needy Families program (TANF) authorizations, were extended through fiscal year 2023 (September 30, 2023), but this does not provide opportunities to update sections of the law or funding levels. While it could be a pretty lean 118th Congress in terms of new legislation and appropriations, there have been occasions in the past when tribal advocates have been able to work with Congress to pass important legislation and increase funding to important programs for Native children and families. A bipartisan approach is always recommended and now more than ever if we want to gain support for tribal child welfare priorities. Below are some legislative bills that made strides in the 117th Congress, but will need to be reintroduced in the new Congress.

- Truth and Healing Commission on Indian Boarding School Policies (H.R. 5444 and S. 2907)
- Tribal Family Fairness Act (H.R. 4348)
- Native American Child Protection Act (H.R. 1688 and S. 2326)
- Reauthorization of Child Abuse Prevention and Treatment Act (H.R. 485 and S. 1927)
- Strengthening Tribal Families Act (H.R. 8954)

Administrative

Commission on Native Children Continues Hearings on Native Children’s Issues

The establishment of the [Alyce Spotted Bear and Walter Soboleff Commission on Native Children](#) was a vision of former Senator Heidi Heitkamp (D-ND) and Senator Lisa Murkowski (R-AK). It was established by Public Law 114-244 passed by Congress in 2016. The legislation authorized the establishment of a commission and advisory committee that would examine issues that impact the well-being of Native children and produce a report to Congress and recommendations. The appointment process for the commission, recruitment of advisory committee members, securing appropriations to fund the commission’s work, and hiring of staff took the next 2–3 years.

In October 2019, the commission held its first meeting and created a schedule for public hearings in 2020. Unfortunately, the pandemic hit just as the commission was getting ready for its first hearing in Indian Country. Hearings were suspended until 2022, although the commission continued work to virtually research and examine issues related to Native children’s well-being. The public hearings relaunched in 2022 and the first hearing was held in Phoenix, Arizona. It featured several panels on issues like child welfare, behavioral and mental health, education, childhood development, and systems innovation and best practices in Indian Country. NICWA Board Member Mikah Carlos (Salt River Pima-Maricopa Indian Community) provided testimony for NICWA on child abuse and neglect in Indian Country, best tribal practices in child abuse and neglect prevention, and improving implementation of the Indian Child Welfare Act. Mikah provided background and examples on these issues, while also sharing some of her own experiences. The commission is continuing to hold public hearings and has information on its [website](#) regarding its schedule and agendas.

Decision in AFCARS Lawsuit Continues Uncertainty for Native Data Elements

Plaintiffs and advocates for Native children were glad the waiting was over for a decision in the lawsuit filed by tribes, Indian organization, and LGBTQ+ groups, but the outcome did not help efforts to restore the 2016 Adoption and Foster Care Analysis Reporting System (AFCARS) data elements for Native children in state court proceedings. The decision from Judge Maxine Chesney ruled in favor of the federal government and against tribal and LGBTQ+ advocates who were hoping the court would rule in favor of

the plaintiff's request for summary judgement and set aside the Trump Administration's 2020 AFCARS Final Rule which removed over 85% of the Native data elements. [Judge Chesney's decision](#) relies on HHS concerns that the 2016 AFCARS Final Rule would unnecessarily burden states while also finding that HHS's lack of focus on the benefits of the 2016 Final Rule were appropriately considered. The plaintiffs have publicly shared that they are going to file an appeal, but there are questions about how this will further delay an acceptable solution. Meanwhile, HHS officials have said they are in favor of restoring the 2016 data elements and are considering their options with this decision.

The Native data elements were part of a 2016 Final Rule that would have provided, for the first time, federal data collection from states of data elements related to implementation of the Indian Child Welfare Act with Native children subject to the law. The coalition of tribes and advocacy organizations that filed the lawsuit claimed the removal of the AI/AN and LGBTQ+ data elements was unlawful and the 2020 Final Rule eliminating these data elements should be vacated. The plaintiffs include the California Tribal Families Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ruth Ellis Center, Ark of Freedom Alliance, and True Colors. AFCARS is the federal government's largest source of data on children who are in out-of-home placement.

NICWA has led efforts since the early 1990s to include ICWA data elements in AFCARS and has previously provided testimony and comments promoting the critical importance of new data elements in AFCARS to address disparities in outcomes and disproportionality in state foster care systems for American Indian and Alaska Native children. Of important note, ICWA is the only major federal child welfare law that does not have a structured and regular data collection system that tracks implementation.

Budget

Fiscal year 2023 appropriations followed the same pattern as many previous years with a continuing resolution to keep the government and federal programs funded temporarily and then an omnibus spending bill coming later. The Consolidated Appropriations Act 2022 is over 4,000 pages long and contains both appropriations and policy provisions. While continuing analysis of the omnibus bill is occurring, some of the notable provisions include the following:

- Bureau of Indian Affairs (BIA) Indian Child Welfare Act grant program received a \$500,000 increase to \$17.3 million in FY 2023. In previous years, a portion of this was reserved for off-reservation competitive grants for Indian organizations providing services in off-reservation communities, but current language in the omnibus does not specifically mention the off-reservation grant program.
- BIA Social Services received an increase of \$1.6 million to \$54.9 million in FY 2023.
- BIA Welfare Assistance received the same level as in FY 2022 at \$78.5 million.
- The Child Abuse Prevention and Treatment Act received an increase of \$5 million in the Community-Based Child Abuse Prevention competitive grants, which tribes are eligible to apply for under a small tribal set-aside.
- Title IV-B and the Temporary Assistance to Needy Families (TANF) programs authorizations were extended at level funding through FY 2023 (September 30, 2023).
- An increase of \$960 million for Head Start programs of which tribes are eligible to operate.
- Child Care and Developmental Block Grant received an additional \$1.85 billion in funding for FY 2023, of which tribal allocations will benefit from an additional \$215 million.

- The Home Visiting program received an increase of \$300 million and the tribal set-aside was increased from 3% to 6% of the total appropriation.
- The Low Income Heating and Energy Assistance Program (LIHEAP) received a \$2.2 billion increase and tribes are eligible to operate this program.

For FY 2024, the new House rules described above and the ability of Senate Democrats to find agreement with Senate Republicans on appropriations will be major factors in the ability to reach agreement on a bipartisan appropriation bill for FY 2024. The House and Senate have both said they want to avoid the continuing resolution process used in previous years and instead pass individual appropriation bills as was the standard prior to the mid-2000s. The Biden Administration will be submitting their budget recommendations to Congress in March this year, which will be given consideration, but likely will receive little attention by House Republican leadership as they develop their new budget plans.

For more information relating to this update, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org.