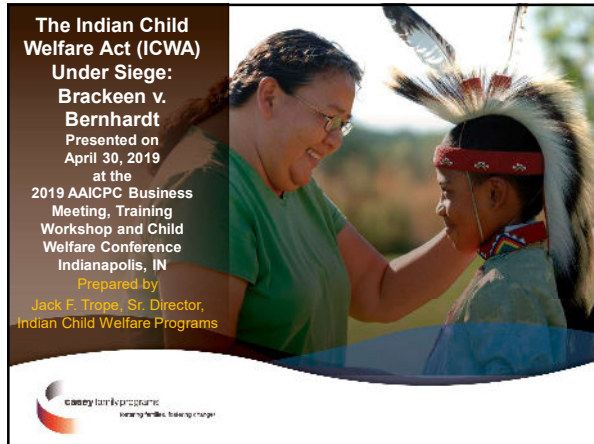


The Indian Child Welfare Act (ICWA)
Under Siege:
Brackeen v. Bernhardt
 Presented on
 April 30, 2019
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 keeping families, holding change

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Indian Child Welfare Act of 1978

- ICWA is based upon Indian Commerce Clause, plenary power of Congress, and trust relationship between federal government and Indian tribes/people
- Core of the Act is the recognition of tribal sovereignty and the important role of tribes in protecting the well-being of tribal children
- Response to problems identified in state child welfare systems




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Indian Child Welfare Act of 1978

- Act pertains to children in state systems; it does not apply to children under tribal jurisdiction; families who currently live or have a permanent home on the reservation are subject to the Tribal Code, not ICWA
- Purpose of Act: to curtail state authority
- Adds federal standards to state child welfare law, but does not replace state law except where state law is inconsistent with ICWA



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“Indian Child”
[25 U.S.C. §1903(4)]

Means: *“any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”*

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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- Federal District Court for the Northern District of Texas
 - Foster parents, biological parents, and states of Texas, Louisiana and Indiana are plaintiffs
 - Three specific cases are listed in the complaint – cases from Texas, Minnesota and Nevada involving Navajo, Cherokee, Yselta del Sur and White Earth children
 - Four tribes intervened (a fifth intervened at the appellate level)

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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- District Court ruled that the Indian Child Welfare Act is unconstitutional on several grounds
 - It is a race-based law that violates the Equal Protection Clause
 - It commandeers state agencies and courts to enforce federal law in violation of the Tenth Amendment which protects states' rights
 - It improperly delegates authority to tribes to change the placement preferences
- First court decision finding ICWA unconstitutional in its totality in the 40 years since enactment
- Court also ruled regulations are invalid as a violation of the Administrative Procedures Act


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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- The ruling has been appealed to the 5th Circuit Court of Appeals and argument was held on March 13
- The 5th Circuit has granted a stay of the trial court decision pending its ruling




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Standing/Absentee – Equal Protection

- Plaintiffs arguments – have standing:
 - Finalized adoption subject to ICWA on post-judgment challenge
 - Federal court judgment means they are more likely to win in state court
 - Fact that ICWA treats persons differently based on race is enough
 - State has right to bring constitutional challenges on behalf of its citizens
- United States/tribes arguments – do not have standing
 - Brackeen’s adoption final and no evidence it will be challenged
 - Other cases are pending in Minnesota and Nevada state courts – those courts would not be bound by the federal court’s decision
 - States lack standing to bring equal protection claims against the United States on behalf of their citizens
 - Tribal right to change placement preferences has not harmed any party
- If standing, then court should abstain and defer to the state courts




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Equal Protection

- Plaintiffs arguments – ICWA violates equal protection
 - Statute used ancestry as a proxy for race; inclusion of the eligibility language in the Indian child definition brings children under the statute simply because they are related to a tribal ancestor by blood
 - Strict scrutiny must be applied and the ICWA is overbroad and not narrowly tailored to accomplish statute’s goals
- United States/tribes arguments – ICWA does not violate equal protection
 - Indian legislation is based upon political status, not race; definition of child is based upon citizenship/membership and not the child’s race
 - Rational relationship” standard established in Morton v. Mancari applies, not the “strict scrutiny” standard, and ICWA meets that standard
 - If one section of ICWA violates equal protection, then sever that section from the statute but leave the rest of the statute intact




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Tenth Amendment (states' rights)

- Plaintiffs arguments: violates 10th Amendment; commandeers states
 - Requires federal standards in state created causes of action
 - State courts and legislatures appear responsible for federal standards
 - Shifts the cost of federal regulations to the states
 - Regulates states, not individuals
 - Places requirements on state agencies, not just courts
- United States/tribes arguments – ICWA valid preemption of state law
 - Valid under Indian Commerce and Supremacy clauses; preempts contrary state laws.
 - Supreme Court has upheld laws that modify state law causes of action.
 - ICWA mostly directed to courts and to both individuals and states, except for information requirements that do not raise 10th Amendment issues
 - Spending Clause may also be grounds for upholding the ICWA




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Non-delegation

- Plaintiffs arguments:
 - Congress may not delegate to Tribes the authority to regulate non-Indians outside of Indian country
- United States/tribes arguments
 - ICWA does not delegate to tribes, but instead merely recognizes Tribes' sovereign authority to regulate child welfare proceedings for their children
 - Tribes are governments, not private entities, and Congress can delegate authority to them




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke) - Issues

Validity of the regulations

- Plaintiffs argument:
 - BIA did not adequately explain the change in its earlier position that the statute did not authorize it to promulgate binding regulations and that decision does not require deference
 - Statute did not authorize binding regulations
- United States/tribes arguments
 - BIA adequately explained its decision to promulgate regulations
 - BIA has authority under the statute to issue binding regulations




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Brackeen v. Bernhardt (a.k.a. Brackeen v. Zinke)

- Amicus briefs were filed in support of ICWA on behalf of 321 tribes and numerous national Indian organizations, 21 states and 31 child welfare organizations (led by Casey Family Programs), as well a number of law professors
- 1 state and a handful of organizations filed in opposition to ICWA – most notable group is the American Academy of Adoption Attorneys



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**Casey Brief: Indian Child Welfare Act =
"Gold Standard" of child welfare**



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Why the *Gold Standard* of child welfare?




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For Further Information

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