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The Case for Tribal Existence & Brackeen Re-Hearing Update

By

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PLAINTIFFS WANT COURT TO IGNORE US HISTORY & INJUSTICE TO TRIBES & CHILDREN

Since Columbus landed on our shores, the seizure and forced assimilation of Indian children became the primary method by which the colonial powers used to destroy Indigenous communities across the continent. Starting with the Spanish, but continued by the British, the French, the Portuguese, the Dutch, and others, Indian children were cudgeled from their families, and subsequently commodified and collateralized as a manner by which to control their parents and force their communities into submission.

Subsequently, the deleterious effects of these forced removals have had devastating consequences for Tribes. Within a single generation, a language is lost, a family connection broken, traditions forgotten. Decade after decade, Native children have been forced to live in a kind of limbo: Not fitting into mainstream society, unable to communicate with their families of origin, and disenfranchised from their communities, they and their descendants are at higher risks of health problems, incarceration and suicides than any other group in America.

The ripple effects of these separations have lasted for over 500 years. To this day, the pattern of forced removal and assimilation of Indian children continues to be a threat to the continued existence of some of the oldest indigenous communities in the world. *See, e.g.* **AMERICAN INDIAN LAW**, Robert N. Clinton, Nell Jessup Newton, Monroe Price, Section C, The Uneven History of Federal Indian Policy: Politics, Assimilation and Autonomy. Pp 137-164.

The Republic of Texas, Treaties with Native Americans and Tribal Citizenry

Ironically, the modern mentality of how Texas Governmental Agencies treat Native people in Texas

would cause the Republic's First President and later Governor, Sam Houston, to roll over in his grave. Sam Houston, adopted son of Chief John James, was a naturalized Cherokee Citizen that was earned and honored by the Cherokee Nation. Indeed, Sam Houston appeared at the formal surrender ceremony in which Santa Anna and his Generals "bent a knee" and tendered their swords to Gen. Houston who wore his full Cherokee Chief regalia to solidify for all Texans that Texas was a state inclusive to all peoples in debt to native peoples service in the war for independence and abstention in serving Mexico that ultimately assisted in winning Texas Independence and establishing a Republic that entered into Treaties with the Texas Tribes. Sam Houston's time as President of the Republic issued in Treaties, Peace and Policies of Respect despite a majority of bigotry towards Native Peoples of the times. Houston's Policies of fair dealing, respect and peace faded when Sam Houston left office but it is important to understand the foundations of the Republic at its beginning in light of the policy now of the current litigation with the Indian Child Welfare Act. *See*, History of Texas Independence at the San Jacinto State Monument, La Porte, Texas.

Plaintiffs' make a wish list and claim that considering the history of injustice in trafficking in Indigenous children in the United States should not be considered in analyzing the reasons for enacting the Indian Child Welfare Act, that 25 years of independent medical studies and legislative history prior to enacting ICWA does not support that children are psychologically harmed be removing them from the Tribe and claim that it has nothing to do with removing children from Indian "families." And even more sadly make a disingenuous claim that they want to help Indian Tribes and parents because it does not harm sovereignty and other federal Indian law. The Congress determined after extensive study that the Best Interest of the Child is to be with a family of its Tribe that is why the act was enacted to preserve the rights of an Indian Child, its parents and its Tribe.

The Plaintiffs ask the Court to Ignore The Policy of Forced Removals & Forced Orphanages

The State of Oklahoma, which was originally established as "Indian Territory" by the federal government, has one of the highest Native American populations in the country, second only to California. It is the final destination of dozens of tribes who were either coerced or forcibly relocated by there as a part of the government's policy of Removal that began in the 1830s. Known today as the Trail of Tears, these forced relocations were the result of President Andrew Jackson's refusal to obey the rule of law in the landmark Supreme Court decision in *Worcester v. Georgia*, which held that individual states had no authority or dominion over Indian tribes. Including all of the Five Muscogean Nations of the Cherokee, Chickasaw, Creek , Seminole and Choctaw.

Ignoring the Court's decision, Jackson ordered federal troops, in cooperation with state militias, to begin the forced migrations of the Tribes in the Southeastern United States nearly a thousand miles from their indigenous homelands.

Upon arrival in Indian Territory, there were so many orphaned children that mission schools were established throughout Oklahoma to take in children whose parents succumbed to diseases, Dysentery and exhaustion on those sad journeys.

The same policy and issues were applicable to removals of Tribes from the Republic of Texas from During Lamar's regime to Indian Territory, Oklahoma (Choctaw word for Red Earth) as well as the State of Texas after 1845.

"Kill the Indian and Save the Man": Native American Boarding Schools

In the 1870s, during the peak of the so-called "Indian Wars," the federal government began establishing boarding schools for the express purpose of assimilating Native children. Initially begun by religious orders (*See*, *eg*., Catholic mission schools), the government initially paid these religious institutions to provide education on the reservations.

But the establishment of Carlisle Indian School in Carlisle, Pennsylvania, by Richard Henry Pratt ushered in a radically darker period in the history of Native children in America, who were rounded up in “sweeps” by government agents and sent to boarding schools hundreds of miles away from their families. Notable for his directive to “Kill the Indian, and save the man,” Pratt subjected his “wards” to harsh physical and emotionally abusive punishments for speaking their Native languages. Further, he demanded that they renounce their Native identities by cutting their hair, taking English names, and dressing in American-style clothing (military uniforms for boys, dresses for girls).

Finally, they were cut off from any communication with their families and communities, and allowed to return home only occasionally. Carlisle was the flagship institution that became the model for 26 boarding schools in 15 states.

In reality, however, Carlisle and its sister institutions were a disaster that did not provide the outcomes promised by the federal government: Out of nearly 12,000 students who attended Carlisle from its founding in 1879 to its closure in 1918, for example, only 158 ever graduated. Moreover, many of the students reported physical, emotional and sexual abuse at the hands of the staff, while nearly 200 died with little documentation as to their cause of death.

Further, in spite of the mandate to “educate and assimilate” Indian children, many of the students were instead turned into unpaid laborers and given very little instruction, leading many to leave school without having acquired even basic literacy and math skills.

Meanwhile, when the students were able to return home, they faced language barriers, hostility and even shunning from their Tribes. Many were unable to adapt to mainstream society because of the racism toward Native people and were therefore unable to secure employment or obtain housing. Lost and alone, many turned to alcohol and other negative behaviors and drifted into lives of poverty and despair.

The Indian Adoption Project – Termination Era

From 1958 to 1967, the Indian Adoption Project was a federal policy in which Indian children were separated from their families with little notice or paperwork and sent to live in residential institutions, placed in foster care or put up for adoption, according to a 1976 report by the Association on American Indian Affairs. In conjunction with the prestigious Child Welfare League of America, churches were also involved.

Across the country, the Church of Jesus Christ of Latter Day Saints, the Catholic Church and other denominations took thousands of Native children to live in residential institutions they ran nationwide, from which some children were then fostered or adopted out.

According to a 1976 Senate report, over one-third of Indian children were separated from their families during the Indian Adoption Project.

According to Sandy White Hawk, a member of the Rosebud Sioux Tribe of South Dakota and adult adult adoptee, many adoptees from this era suffer from a psychological condition referred to as “Lost Bird” syndrome, which has many components similar to Post Traumatic Stress Disorder (PTSD).

“The stories vary from the most abusive to the most beautiful, but that’s not the point,” says White Hawk, who is also founder and director of the First Nations Repatriation Institute’s annual adult adoptees summit. “Even in loving families, Native adoptees live without a sense of who they are. Love doesn’t provide identity.”

The Indian Child Welfare Act

In response to the crisis impacting American Indian/Alaska Native families and communities over the continued loss of their children, the Indian Child Welfare Act (ICWA) was enacted in 1978, according

to the National Indian Child Welfare Association (NICWA). For decades, large numbers of Native children had been separated from their parents, extended families, and communities by state child welfare and private adoption agencies. The Legislative History for the ICWA is more extensive than most legislative histories on any other Federal Acts. Studies revealed that more than one-third of all Native children were being removed, 85 percent of whom were placed outside of their families and communities—even when fit and willing relatives were available.

The express intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902).

ICWA established federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.
ICWA requires caseworkers to make several considerations when handling an ICWA case, including:

1. Providing active efforts to the family;
2. Identifying a placement that fits under the ICWA preference provisions;
3. Notifying the child's tribe and the child's parents of the child custody proceeding; and
4. Working actively to involve the child's tribe and the child's parents in the proceedings.

Cases Attacking the Protection of Native American Children

In January 2016, the Supreme Court accepted certerori on *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565, 2584-85 (2013), perhaps the most contested Native adoption case in U.S. History.

The case involved Dusten Brown, an unmarried father, who sought to stop his ex-fiancée from terminating his parental rights and allowing their daughter to be adopted by Matt and Melanie Capobianco, an educated, middle class, white couple from South Carolina. The father argued that the law applied to his situation because he is an enrolled member of the Cherokee Nation.

Under ICWA, a parent's rights cannot be involuntarily terminated in the absence of notice to the parents and the tribe, appointed counsel, a showing that active efforts were made to prevent the breakup of an Indian family, and a finding that continued custody by the parent will harm the child. Dusten Brown, in this case, wanted custody of his daughter, and there was no suggestion made at any time that he caused her harm.

After a protracted, four year battle, the Supreme Court skirted the issue of tribal sovereignty and membership, ruling in favor of the Capobiancos on the narrow scope of "continued custody."

In *Adoptive Baby Couple v. Baby Girl*, 133 S. Ct. 2552, 2565, 2584-85 (2013). the Court held that the biological Cherokee father of an Indian child could not obtain custody of the child under the Indian Child Welfare Act (ICWA) after the child had been adopted by a non-Indian couple. The Court based its decision on straight statutory interpretation. Justice Thomas did, however, discuss the potential equal protection implications of the application of ICWA in such situations. "As the State Supreme Court read [ICWA], a biological Indian father could abandon his child in utero and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns . . .."

Since the ruling which did not overturn ICWA, nor even address the legislation as enacted by Congress, the adoption industry has launched multiple attacks on its legitimacy.

Additional Attacks on the Indian Child Welfare Act

The series **Swept Away** followed *Oglala v. Van Hunnik* , case cite in South Dakota, in which the state continues to remove Indian children in alarmingly high rates in direct violation of not only federal law, but also South Dakota's own state statutes. In 2014, citing the enormous amount of evidence against the state, federal Judge Jeffrey Viken ruled against the state defendants issuing a summary judgment.

In September 2018, the 8th Circuit Court of Appeals set aside Viken's ruling, writing that he went "too far" in ordering South Dakota to improve compliance with state and federal laws.

In the series **Broken**, we followed the case of a Choctaw child who goes by the name Lexi in California, *Children and Family Services v. J.E., et al*., case cite, involving a non-Indian foster couple claiming the same Constitutional rights and standing as biological parents; although the court's in California have unanimously ruled five separate times in favor of the girl going to live with her relatives in Utah under the placement preferences outlined in ICWA.

In spite of a massive media push by her foster parents and their allies, the child was ultimately ordered back to Utah to live with her ICWA-compliant relatives.

Children in the Crosshairs, follows the heartbreaking story of a Yupik grandmother fighting for her granddaughter in *Tununak v. The State of Alaska*., case cite,This case is unique because it is a direct descendant of Adoptive Couple. The state of Alaska had used the ruling in the Baby Veronica case to justify their decision in removing this child from her family because grandma did not have "continued custody" and had not filed a formal "adoption petition" with the courts. As it turns out, Tununak's ICWA worker, Richard Lincoln, was himself a foster kid who left his foster parents and returned to his village with the express mission to find his four brothers and work to retain the children in his village.

Baby Deserai follows the story of an Absentee Shawnee girl who was taken from a hospital parking in Stillwater, Oklahoma, the day after her birth in 2013 by an elderly couple from South Carolina. The couple did not have an ICPC, nor any formal paperwork that gave them the legal right to take the child. The adult children publicly came out against their parent's actions in illegally adopting an Indian child without following state or federal laws. Case citation

Oklahoma **granted custody** of Baby Deserai back to her Absentee Shawnee birth mother and tribal family after nearly two years in limbo between South Carolina and Oklahoma. Today, Deserai is happy and thriving with her brothers and sisters.

In spite of the sad outcome of Adoptive Couple, many positive things have come about since the fall of 2013, which include: The **new ICWA guidelines and rulemaking** recently published that provide clarity and more direction for state courts to comply with the federal statute;

In 2015, three federal agencies, the Department of Justice, the Administration on Children, Youth and Families and the Bureau of Indian Affairs issued a joint memorandum of understanding to work within their agencies to bring better enforcement of ICWA.

Additionally, the department of Health and Human Services, under Title IVE and IVB, began requiring states to identify not only Indian children going into state custody and foster care, but also which specific tribe to which they belong.

But legal challenges across the country remain.

***Brackeen v. Zinke* and the Soul of Indian Country**

The *Brackeen* case, aka *Texas v. Zinke*, cite, involves three Indian children in need of foster care and adoptive placement. As Indian children, the federal ICWA takes precedence in their foster care and adoptive placement proceedings in state court, requiring preferences for placing Indian adoptees in

Indian homes to preserve Indian families and tribal cultures. Congress enacted ICWA in 1978 with its placement preferences in response to the Indian adoption era, a period of approximately thirty years in which 25 to 35% of Indian children were forcibly removed from their homes and 90% were placed in non-Indian homes resulting in broken families and cultural depletion in many tribal communities.

The *Brackeen* case was brought by individual non-Indian parents seeking to adopt Indian children, who were joined by three state governments (Texas, Louisiana, and Indiana) and supported by anti-ICWA groups that filed numerous similar suits throughout the country, but had not prevailed in striking down ICWA. The defendants included the federal government, with several Tribes intervening in the proceedings.

The district court first held that ICWA's preference to place Indian children in Indian homes is race-based, and under "strict scrutiny" review, the law is not narrowly-tailored to further a compelling government interest. The district court held that ICWA, therefore, violates the equal protection component of the Fifth Amendment's Due Process Clause. This holding ignores well-established Supreme Court precedent regarding American Indian tribes as political entities, not racial groups, to which the federal government owes a unique trust responsibility. *See Morton v. Mancari*, 417 U.S. 535, 554–55 (1974). Moreover, just last year, the Supreme Court declined to review the argument that ICWA is a race-based law, resulting in the upholding of an Arizona Court of Appeals' decision that ICWA is not based on race. *See S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017), *cert. denied sub nom.S.S. v. Colorado River Indian Tribes*, 138 S. Ct. 380 (2017)).

The Texas district court then held that the federal government unlawfully requires states to commit resources to enforcing ICWA, in violation of the Tenth Amendment's prohibition on commandeering state legislatures. The district court also briefly addressed the plaintiffs' other arguments, holding that Congress unlawfully delegated legislative power to tribes under ICWA, in violation of Article I of the Constitution, and that the Indian Commerce Clause does not constitutionally save ICWA. The court also found the ICWA regulations invalid.

Numerous organizations and state governments supporting tribes and ICWA have filed amicus briefs in the case and have expressed desire to continue supporting the case on appeal. When appealed, the case will progress to the U.S. Court of Appeals for the Fifth Circuit. On Oct 30, 2018 the Court denied a Motion to Stay the Order Pending decision on appeal in the 5th Circuit.
Final Order: 10/4/18 https://www.indian-affairs.org/uploads/8/7/3/8/87380358/167_-_final_judgment.pdf

Although the decision in *Brackeen* purports to strike down ICWA and its regulations as unconstitutional, the ruling only affects the parties in the case. The Tribes as Appellants were granted a stay and are seeking a restoration of the law as it has stood for the past 41 years Numerous organizations and state governments supporting Tribes and ICWA have filed amicus briefs in the case and have expressed desire to continue supporting the case on appeal. The case was argued by the parties on March 11th, 2019. In one exchange where the State of Texas was referring to the prospective children as their children a justice interrupted and stated they are not your children, they are the Tribe's children.

For centuries, the theft and displacement of Indian children has historically been the most direct route by which Native cultures were destroyed. Often, as a matter of colonial and then governmental policy, they were rounded up against their parent's will and forced into missions and later boarding schools. Many times, they were also adopted under illegal circumstances, literally taken out of hospital nurseries and sent to live with white families because it was determined that it was in their "best interest" to be raised in a white family. Sometimes, the children were taken from their parent's homes simply because they could not speak English, did not wear shoes or appeared poor.

The passage of ICWA in 1978 was a Congressional attempt to halt the illegal and systematic abduction of Indian children by giving Native parents extra protections under the law to reinforce the

fragile fabric of tribal culture, communities and families being systematically decimated in population in the United States. Within only one generation, a language was lost, a family connection was broken and a tribe disintegrated piece by piece as their children were scattered across the country.

The original panel clearly and correctly decided The ICWA is constitutional just as previous Courts for since 1978. The 5th Circuit sua sponte on its own motion decided to re-hear the case despite the overwhelming stare decisis on the issues presented to the Court. Thus, today, again, Indian Country awaits the 5th circuit's ruling in *Brackeen,* American Indian children continue to live under constant threat of being taken from their homes and forced into a foster system that has willfully failed to comply with federal standards for the foster placement and termination of parental rights.

The Plaintiffs' also want the Court: to take an independent view that their definition of who is an "Indian" despite federal definitions of who is an Indian and federal dictate on Tribes about that definition. *See*, *US v Rogers*, 45 U.S. (4 How.) 567 (1846). *See also*, **AMERICAN INDIAN LAW**, *infra*, (1993). Pp. 79-108. Thus clearly showing it is not race based nor a national origin based classification and rely soley on the federally imposed blood quantum requirement of some Tribes so that the federal government could diminish indigenous populations and terminate federally recognized Tribes claiming insufficient numbers of its citizens outside the mandated blood quantum during the Termination Era in the United States from 1950 to 1978. The Plaintiffs also incorrectly analogize that indigenous here are US citizens not subject to international adoption laws but instead indigenous who are enrolled in federally recognized Tribes are dual citizens of this country and the Tribes and some of the Tribes are also citizens of other countries *e.g.* Mexico and Canada. The justices had several questions as to whether the citizenship enrollment was based solely on blood quantum which is was discussed that it was an element to be considered for enrollment but it varies for the different 573 Tribes in the US.

Further the State's claim that ICWA which is distinctly different than gambling laws is federal government's position on ICWA as "commandeering", and a "police power" against States promulgating federal laws that the states would have the responsibility to enforce. First, The federal government has passed laws affecting State's domestic relations laws, but more importantly, the "Indian Constitutional Clause under Article I, section 8 of the Treaty Powers, Commerce Clause and Congress' Plenary power with and over Indian Tribes derives differently than *Murphy* case, see *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018), was a United States Supreme Court case involving the Tenth Amendment to the United States Constitution. The issue was whether the U.S. federal government has the right to control state lawmaking. Justice Alito wrote "Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution." The 5th Circuit Justice that dissented in the original opinion was asking questions to understand if the power was Plenary (constitutionally based) and exclusive and there was discussion about private actors acting as State agencies in fostering and adoptions matters and discussion about the exclusivity of States over domestic relations and discussions over other federal statutes that pre-empted State over their domestic relations laws. Most importantly, there was a discussion about Congress having the ability to vest exclusively where the jurisdiction of a Indian Child custody proceeding regarding a adoption occurred but Congress took the middle ground and allowed jurisdiction to remain where the child is located rather than it be exclusively in a Tribal Court of a Federal Magistrate or District Court. The justices seemed focused on the Murphy case and how it might apply to the ICWA even though the focus on the case was on the 10th amendment and not the Plenary power of Congress with the affairs and diplomatic relations and trust responsibility to Indian Tribes in the United States.

THE POLITICAL OBJECTIVES DESIRED BY ANTI-INDIGENOUS FACTIONS

Prior to the filing of the ***Brackeen*** case, numerous other lawsuits nationwide have been filed on these same issues and dismissed until ***Brackeen***. The focus of the powers and political objectives of the litigation have nothing to do with children, the ICWA or application of the act. The objective is to attempt to eradicate a constitutional basis for the Plenary Power relationship between Congress and Tribes as well as the remainder of Tribal Sovereignty and allow Courts to define who is an Indian.

The Legal Determination of Who is an Indian is Under Attack: We are political and governmental citizens and not racial classifications.

Political Classification of Citizenry not Racial Classifications

Forty-five years ago, the Supreme Court decided in *Morton v. Mancari*, 417 U.S. 535 (1974). that federal laws specifically benefiting Indian tribes are based upon a classification of tribes as political or governmental units – and are not racial classifications. The Court recognized that without this principle, almost the entire body of federal legislation relating to Indian and Alaska Native tribes could be found unconstitutional as racially discriminatory. This fundamental principle in the framework of federal Indian law is still intact, but it is now under serious attack based on recent trends in discrimination law.

The objective is to overturn the *Morton v. Mancari* decision and return to the concepts of the Termination Era where Indigenous Peoples in this nation have no Indigenous standing as a Tribe. Tribes have standing and are political entities with governments and tribal citizens that are a political not racial classification because of the Constitutional relationship between Tribes and Congress. The objective is to completely destroy tribal sovereignty, sell off the remaining tribal lands and the status of tribal citizens nothing more than indigenous peoples in South and Central America.

The *Mancari* decision has been challenged for decades by anti-Indian and extreme conservative groups, and it has recently been twice called into question by the Trump Administration, once by the President in a formal signing statement last year and again in 2018 by an agency of the Department of Health and Human Services. Most recently, a federal district court declared major parts of the Indian Child Welfare Act unconstitutional by reading the *Mancar*i decision in an exceedingly restrictive manner. The decision would, if upheld, greatly narrow the range of federal legislation the *Mancari* decision protects.

Further challenges to *Mancari* will probably arise in the form of federal administrative action or litigation. The stakes for tribes are very high, because the ability of the federal government to carry out its trust responsibilities to tribes, particularly to provide programs and financial assistance to tribes, could be greatly diminished if these challenges succeed. Indian and Alaska Native tribes and organizations are already addressing these challenges, but new attacks could arise almost anywhere.

Supporting and defending the *Mancari* decision and the rule that it stands for – that laws benefiting tribes are not unconstitutional racial classifications – is a very high priority, perhaps the most urgent and important Indian law issue of our time. This paper reviews the decision in *Mancari* and the law leading up to and following it. We then turn to a discussion of the present challenges to the *Mancari* rule. Good advocates and scholars understand all of the possible ways to support the decision and its rationale, and there are many legal arguments and approaches for defending the constitutionality of legislation benefiting Tribes.

In 1970, President Nixon declared any policy of forced termination to be wrong. Soon thereafter, Congress began exercising its unique obligation to tribes in a manner more in conformity with Marshall's original articulation, passing, for example, the Indian Education Act of 1972, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978, and the American Indian Religious Freedom Act of 1978.*See*, Indian Education Act of 1972, Pub. L. No. 92-318, 86 Stat. 235; Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq.; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq.; Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; American Indian Religious Freedom Act, 42 U.S.C. § 1996. And See also, Felix Cohens Handbook on Indian Law.

Thus, The Court in *Morton v. Mancari* anchored the federal-tribal relationship in the Constitution and imbued it with Marshall's concept of a "duty of protection" shielding tribal self-government – while at the same time accounting for the modern norm of nondiscrimination. Cohen's view of broad federal

authority to protect tribal self-government, at once rooted and constrained by the Constitution, seemed to have been fulfilled.

Since *Adarand*, the Supreme Court has maintained *Mancari's* central formulation of tribes as political or governmental rather than racial entities. The Court has declined, therefore, to characterize Indian-specific federal legislation or policy as a racial classification. *See, e.g., Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995).

It is clear from the *Baby Veronica* case that Anti-Indigenous factions in government control are attempting after decades of unsuccessful attempts at bringing back the Termination Era that the key to their success is to create a division between Native peoples, Tribes and in governmental policy to dictate **"Who is an Indian?"**

Most importantly this is evident in Justice Sotomayor in her dissent (joined by Justices Kagan, Ginsburg and Scalia (in part)), rejected the suggestion of an equal protection problem:

"It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. See *United States v. Antelope*, 430 U. S. 641, 645-647, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Morton v. Mancari*, 417 U. S. 535, 553-554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). **The majority's repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here**. *See ante*, at ___, ___, 186 L. Ed. 2d, at 735, 739; see also ante, at ___, 186 L. Ed. 2d, at 744 (stating that ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor — even a remote one — was an Indian" (emphasis added)). I see no ground for this Court to second-guess the membership requirements of federally recognized Indian tribes, which are independent political entities. *See Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 72, n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). I am particularly averse to doing so when the Federal Government requires Indian tribes, as a prerequisite for official recognition, to make "descen[t] from a historical Indian tribe" a condition of membership. 25 CFR §83.7(e) (2012)." See, 133 S.Ct. at 2584-85.

Lastly, The Order of the District Court does not directly challenge *Mancari*, but rather reads and applies *Mancari* in an exceedingly narrow and restrictive fashion to the Indian Child Welfare Act and seems to say that the *Mancari* decision is so narrow that it applies only to the particular facts of the *Mancari* case. Such a narrow reading is inconsistent with the treatment of the decision by the Supreme Court itself and out of keeping with the character of Supreme Court decisions as precedent. The District Court's decision leaves the *Mancari* rule intact though read extremely narrowly.

In *Brackeen*, the District Court reasoned that the preference in *Mancari* applied only to members of federally recognized tribes, whereas the Indian Child Welfare Act applies to enrolled members of federally recognized tribes and to Indian children who are eligible for membership in a federally recognized tribe though they are not yet members. The scope of the Indian Child Welfare Act – applying both to enrolled children and children eligible for enrollment – is, of course, necessary to effectuate its purpose of supporting the continued existence and integrity of tribes against state laws and policies that have long facilitated the removal of Indian children from Indian families. However, the court, without any examination of the interests of tribes or of Indian children in their eligibility as future members of tribes, found that distinction alone was sufficient to find much of the Act unconstitutional as a racial preference. Whether there is a meaningful distinction between a child who is a member and one who is eligible for membership was not discussed. The court's reasoning suggests that its understanding of tribal membership and the purposes of the Indian Child Welfare Act was scant and perhaps mistaken in some major ways. The decision, in its narrow and technical application of *Mancari* to the Act, discounts the purpose of the Act of supporting the continued existence and integrity of tribes as distinct entities. *See, Brackeen v. Zinke*, Civil Action No. 4:17-cv-00868-O, Order (October 4, 2018).

Texas Indian Child Welfare Act

Interestingly, Texas has its own Indian Child Welfare Act and has as a State Legislative matter determined that members (citizens) of federally recognized Tribes are political classifications not racial according to State law, that has not been raised in the *Brackeen* case oddly as an issue. The question of these State statutes means that the Texas Legislature has its own imposition of criteria regarding Native Children and the Federal Indian Child Welfare Act of 1978. What do these statutes mean in terms of the Brackeen litigation since none of the parties have raised them as an issue in the case?

Texas Family Code
Sec. 152.104
Application to Indian Tribes

(a)

A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act of 1978 (25 U.S.C. Section 1901 et seq.) is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(b)

A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this subchapter and Subchapter C.

(c)

A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter D. Added by Acts 1999, 76th Leg., ch. 34, Sec. 1, eff. Sept. 1, 1999.

And:

Texas Family Code
Sec. 162.015
Race or Ethnicity

(a)

In determining the best interest of the child, the court may not deny or delay the adoption or otherwise discriminate on the basis of race or ethnicity of the child or the prospective adoptive parents.

(b)

This section does not apply to a person, entity, tribe, organization, or child custody proceeding subject to the Indian Child Welfare Act of 1978 (25 U.S.C. Section 1901 et seq.).

In this subsection "child custody proceeding" has the meaning provided by 25 U.S.C. Section 1903. Added by Acts 1995, 74th Leg., ch. 20, Sec. 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, Sec. 77, eff. Sept. 1, 1995.

Why? Because State law defines the relationship exactly as the Federal Indian Child Welfare Act does and specifically under the law does not see preferential placement as a racial discrimination but

rather a political and governmental classification regarding a person's citizenship in that community and political entity.

Thus, do these statutes mean that the Attorney General has no standing to bring the *Brackeen* lawsuit because the State Legislature has spoken on this issue and it has been State law since 1995?

Does it further mean that if as the District Court in *Brackeen* mean Federal Statutes may not be applicable in the Northern District of Texas then Courts must apply State law as required by State law. Interestingly, no State District Court has applied the *Brackeen* litany to a case.

Current Issues involving the ICWA in Texas – Expert Witnesses.

Expert Witnesses are required to place a child in foster care. 25 USC Section 1912(e). The plain language states "that no foster care placement, which includes permanent guardianships, may be ordered without expert-testimony on whether a parent's or an Indian-relative custodian's continued custody of a child will likely result in serious emotional or physical damage to the child." Therefore a Court must hear expert witness testimony before ordering a permanent guardianship.

Texas has the following case on this issue: In the Interest of D.E.D.I, a Child, 2019 WL 38795 (Ct. App. Eastland 1/31/19). The Trial Court Terminated the parental rights of D.E.D.I 's parent and the mother and father appealed. The Choctaw Nation of Oklahoma intervened and notice of Intervention was filed by Penny Drinnon as a Choctaw Nation ICW Specialist. It is unclear if the Tribe was represented by an attorney at the Trial but no counsel of record appears on the case as it simply identifies Penny Drinnon as *pro se*. Who appeared via "Skype" It is unclear if she is an attorney or what her training is to be a ICW Specialist. She testified that the Texas Dept. complied with the ICWA and the Court ruled in favor of the Appellees. The cases set out who may serve as a qualified expert witness in the CFR regulations prumugated by the BIA. In D.4.

(a) A qualified expert wintess should have specific knowledge of the Indian Tribe's culture and customs.
(b) Persons with the following chracteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:
    (1) A member of the Indian child's Tribe who is recognized by the tribal community as knowledgeable in the tribal customs as they pertain to family organization and childrearing practices.
    (2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe beased on their knowledge of the delivery of child and family services to Indians and the Indian child's Tribe.
    (3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's Tribe.
    (4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's Tribe.
(c) The Court or any party may request the assistance of the Indian child's Tribe or the Bureau of Indian Affairs agency serving the Indian child's Tibe in locating persons qualified to serve as expert witnesses. See, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146-02, 10157 (February 25, 2015).

The Court qualified Ms. Drinnon under the ICWA and the Federal Regulations. In the Appeal Court ending footnote the Court notes that portions of the ICWA were recently declared unconstitutional by a federal district court in Texas. *See, Brackeen v. Zinke*, 338 F. Supp. 3d 514, 546 (N.D. Tex. 2018), appeal docketed, No. 18-11479 (5th Cir. Nov. 19, 2018). Because an appeal has been filed in *Brackeen* and because the constitutionality of the ICWA was not challenged or addressed in the trial

court below, we do not reach any issue related to the constitutionality of the ICWA in this appeal. Nor is this Court's opinion to be read to express any opinion as to *Brackeen* or the constitutionality of the ICWA. ---S.W. 3d ----, 2019 WL 386795 footnote 2.

Interestingly, the Court makes this note in this case. Sadly, many Courts rarely or poorly apply the ICWA. The appellate caselaw opinions are so vast it is hard to prepare an adequate paper or treatise to list the divergent issues. Nevertheless, what is and is not required is still a matter of standing law.

1) A cultural "existing Indian family" is not required
2) It applies to all indigenous who are federally recognized Tribes
3) Notice to the Tribes that may have lineage to the Indian child is required to be provided by the Courts.

As advocates in Texas consider that there are both Federally recognized Tribes and citizens of those Tribes in Texas as well as non-Federally Recognized Tribes that may qualify under the Family Codes Sections 152.104 and 162.015 as being "Treaty Tribes" still recognized by the State of Texas under the Treaties that the Republic of Texas made with those Tribes and may be argued under the full faith and credit of the Law of Treaties as well as the Declaration of the Rights of Indigenous Peoples. See, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Regarding International Human Rights law and the DRIP, as trial advocate should cite and argue that when a non-federally recognized tribal child is involved in a custody proceeding that the Court should examine and follow the Family Code as it relates to an Indian Child and interpret such placement in light of the International Norms of the DRIP.

Sources for ICWA Assistance.

Oklahoma Indian Legal Services, Inc.

http://oilsonline.org/http www.oilsonline.org/Welcome_to_OILS.html

National Indian Child Welfare Association

www.nicwa.org

National Congress of American Indians

www.ncai.org

Association of American Indian Affairs

www.indian-affairs.org

Pre-ICWA Children Group. Karl Minzenmayer, DefendICWA on Facebook

https://www.facebook.com/Defendicwa/

CONCLUSION

January 22, 2020, the Rehearing *en banc* before the 5th Circuit Court was argued and we await the Court's decision. In the previous hearing Arguments, the State of Texas said "our Children" and the attorney was interrupted by the Justice who stated in part "they are not your children (Texas), they are the Tribes children." Our Children are our future, our cultures, our history and the health of our nation. Our Children are everything.