Supreme Court Considers Dismantling Native Sovereignty in Haaland v. Brackeen

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Anywhere colonizers have invaded, Indigenous children have been separated from their communities. Whether through boarding or residential schools, child protective services, or outright murder, the theft of Indigenous children destroys tribal nations — which is what's at stake in the U.S. Supreme Court case *Haaland v. Brackeen* heard Wednesday.

The case will determine the fate of the 1978 Indian Child Welfare Act (ICWA), which was passed with the aim of halting cultural genocide by requiring, among other things, that if a state court determines that certain Native children must be removed from their homes, a Native family or tribal member be given priority placement and tribes have the right to be involved in the process.

Oral arguments in the case went on for over three hours as the Supreme Court considered claims by the plaintiffs, who are attacking the anti-genocide measure by arguing that it furthers child

abuse, constitutes reverse racism and undermines state's rights. The plaintiffs are arguing that the ICWA violates the Constitution in multiple ways. If the Supreme Court sides with them, the case could destroy decades of legal precedent. As *Vox* notes: "The *Brackeen* plaintiffs make one argument so aggressive that it could potentially invalidate much of the last century of federal law—including landmark statutes such as the Affordable Care Act, the ban on whites-only lunch counters, and the federal ban on child labor."

In the worst-case scenario, the court could usher in a new termination era in which tribes' nation-to-nation relationship with the U.S. would be terminated as was done in the 1950s and 60s. Tribal sovereignty and nationhood would be eliminated, with disastrous consequences for Native people.

Fawn Sharp, National Congress of American Indians President and Vice-President of Quinault Nation, told *Truthout*: "I think to some degree we are in a termination era," mentioning the Supreme Court's ruling last session in *Oklahoma v. Castro-Huerta*, where it gave states criminal jurisdiction over reservations.

Attacks on Tribal Sovereignty

Beginning in 1953 the federal government used a series of methods to end its nation-to-nation relationship with tribes. It began to break up tribal nations in a number of ways, including through their relocation. The 1952 Urban Indian Relocation Program encouraged Native people to leave their lands with the promise of good jobs, housing and education, but the federal government once again betrayed its promise, leaving many in poverty. By 1960, 33,466 American Indian and Alaska Native people were relocated. Presently, 71 percent of American Indians and Alaska Natives live in urban areas.

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In 1960, Congress also attacked tribal criminal jurisdiction through Public Law 280, which placed federal jurisdiction over crime involving a non-Native into the hands of some states. The federal government didn't provide funding or resources to the states, furthering the fraught relationship between tribes, law enforcement and state governments. Under PL 280, the Bureau of Indian Affairs no longer funds tribal court operations, placing more burden on tribes themselves.

Worse yet, the federal government terminated the federal recognition of 109 tribes, primarily in Oregon (62 tribes terminated with 9 federally recognized tribes remaining) and California (44 terminated and 110 federally recognized tribes remaining). Through termination, the government removed over 1.3 million acres of land from trust status during this period, and over 13,200 tribal members lost tribal affiliation. Some tribes have since had their federal recognition restored, but some have yet to recover their lands. Much of their lost land was sold to non-Natives and cannot easily be placed back in tribal control. Without a land base, as was argued by the anti-ICWA plaintiffs in court, we're no longer tribes, so our sovereignty doesn't apply. During this pre-ICWA time, Native children were continuing to be removed from their communities through both boarding schools and child welfare services.

Congress Enacted the Indian Child Welfare Act in an Attempt to Counter Cultural Genocide

Enacted by Congress in 1978 after decades of Native resistance to tribal termination policies, the non-partisan ICWA was intended to strengthen and preserve Native families and culture. Under ICWA, child welfare placement cases involving Native children who are enrolled or eligible for enrollment in federally recognized tribes must be heard in tribal courts when possible, and a child's tribe is permitted to be involved in state court proceedings. The law also requires testimony from

expert witnesses who are familiar with Native culture before a child can be removed from their home. If a child is removed, ICWA requires that they be placed with extended family members, other tribal members, or other Native families prior to placement in non-Native homes. Prior to ICWA, studies found that 25% to 35% of all Native children were removed from their home by state child welfare and private adoption agencies. Of those, 85% were placed with non-Native families, even when good homes with relatives were available.

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According to the National Indian Child Welfare Association, ICWA "lessens the trauma of removal by promoting placement with family and community." Positive and continuing connections to one's family, community and culture are key factors in ensuring health and well-being.

Even with ICWA in place, however, Native children are still removed from their homes at a rate 2–3 times that of white children and aren't often placed with relatives or other Native families. Native families are the most likely to have children removed from their homes as a first resort, and the least likely to be offered family support interventions to keep their child.

In a press conference following the hearing, Chairman Tehassi Hill of the Oneida Tribe of Wisconsin stated: "ICWA helps our most vulnerable families that find themselves in state child welfare proceedings. The law makes sure there are active efforts to help families reunify when safe and possible and makes sure tribes are a part of the proceedings so they can provide resources to family at an early stage, something we know leads to family reunification."

Rachael Lorenzo, co-founder and director of the reproductive justice organization, Indigenous Women Rising, told *Truthout* that a ruling against the ICWA could also result in a loss of trust and treaty health care. When Native children are adopted to non-Native families, they're "not able to exercise their treaty right to IHS [Indian Health Service]," she said. "A generation or two down the road our people won't even be able to access IHS." All three states involved in this case are among some of the worst ranked for women and children.

The Threat to Indigenous Sovereignty Posed by *Haaland v. Brackeen*

Despite being the "gold standard" of child welfare, ICWA has faced more legal challenges than the Affordable Care Act. The Supreme Court consolidated four other ICWA-related cases for briefing and oral argument into *Haaland v Brackeen*.Native families are the most likely to have children removed from their homes as a first resort, and the least likely to be offered family support interventions to keep their child.

Three states — Louisiana, Texas and Indiana — and seven individuals have challenged ICWA, claiming that it creates an illegal race-based federal child-custody system that states are required to implement for all Native children, even those that don't reside on reservations. Texas argued in the court that they "suffer a classic pocket book injury" in implementing ICWA. Justice Elena Kagan stated during Texas argument that "this is a matter for Congress, not the courts."

The U.S. Constitution recognizes tribes as sovereign nations with an inherent right to self-govern and gives Congress authority to work with tribes. Tribal citizenship is a political classification that allows for self-determination. It's not a racial classification.

At the center of this case are Chad and Jennifer Brackeen, a wealthy white, Christian couple who returned their first foster child because the child was too "difficult." They then fostered a Native child, knowing they couldn't adopt the child because of ICWA. They fostered anyway, as Jennifer wrote in her blog about her family, "I thought a baby for 3 months would be a nice way to get our feet wet again."

The Brackeens, who are now also attempting to adopt another ICWA-protected child, decided they wanted to adopt the child, and a court battle soon ensued. With the pro-bono help of legal firm Gibson Dunn, the Brackeens had their case placed in the favorable court of former President George W. Bush appointee, Judge Reed O'Connor, who's infamous for ruling in alignment with right-wing causes. The podcast *This Land*, by Cherokee Nation citizen Rebecca Nagle, details how Gibson Dunn cherry picked the right family and court to overturn ICWA, a decision that has nothing to do with the welfare of Native children.

Haaland is the latest front in a systematic assault on Native sovereignty being waged by Gibson Dunn and other right-wing lawyers to the benefit of their corporate clients. Matthew McGill, who represented the Brackeens in court, argued that "Congress doesn't have the power to treat these children like property." McGill also argued on behalf of Energy Transfer Partners Dakota Access Pipeline in court, a pipeline that was fought heavily by Indigenous youth. The three states attempting to overturn ICWA all have large oil and gas industries.

Cris Stainbrook, president of the Indian Land Tenure Foundation — anational, community-based organization serving American Indian nations and people in the recovery and control of their rightful homelands — told *Truthout*:

The very basic premise of the Marshall Trilogy cases was about recognizing the sovereignty of Native Nations and their identity as political entities, not just a different race. The cases were decided to protect the tribes from interference and takings by the states. ICWA was passed to prevent a taking of the most precious resource Indian Country has — our children and hence, our future. Sadly, only Justice Gorsuch seems to have any understanding at all about Indian law."

Sharp had a similar opinion of the court based on the hearing "they don't even understand the basic concept of inherent sovereignty and to have the inherent rights to every single Native child born into this generation.

On the other side, the Libertarian Cato and Goldwater Institute claimed in a court brief that "ICWA is *not* a benefit to 'Indian children,' but a handicap to their safety and well-being."

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ICWA is widely supported by Native and non-Native stakeholders: 497 federally recognized tribes and 62 Native organizations, 23 states and D.C., 87 congresspeople, 27 child welfare and adoption organizations, and many others signed on to 21 briefs submitted to the Court in favor of ICWA.

Chairman Charles Martin of the Morongo Band of Mission Indians, one of the tribes involved in the case, said outside the court, "Look around you today and you see tribes united in making our case." Sharp added: "We know that this case is so much more than our children. There is dark money out there that is strategically targeting our children, our natural resources, our sacred sites in a way that they [the plaintiffs] want to continue to enrich profits at our expense."

Gibson Dunn represents two of the three largest casinos in the world. In January 2022 it filed a legal complaint in district court claiming that tribal gaming is unconstitutional. It used the same legal argument in this complaint as the *Brackeen* case. *Haaland* is the latest front in a systematic assault on Native sovereignty being waged by Gibson Dunn and other right-wing lawyers to the benefit of their corporate clients.

In a press release, the National Indian Gaming Association, an inter-tribal association of federally recognized tribes, said: "While not grounded in law or fact, we take this challenge head-on because of what's at stake. For fifty years, more than 240 Tribal Governments have used Indian gaming to revive our communities."

With so much at stake — facing a hostile court and an opposition with endless coffers — it's hard to be optimistic, but Cherokee Nation Principal Chief Chuck Hoskin Jr. believes that despite the odds, a win is possible.

"I think certainly we will win because the facts and the law are on the side of Indian Country," he told *Truthout*. "However, Indian Country is wise to remain vigilant because the federal government has taken away, has terminated, has disposed."