High Country News

Fact check: the Goldwater Institute's statements about the Indian Child Welfare Act

Mary Katherine Nagle

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Passed in 1978 to protect Indian children from predatory state welfare and adoption practices, the Indian Child Welfare Act (ICWA) keeps Native children with Native families and prioritizes Native homes in adoption cases. A longtime target ofevangelical Christian organizations and anti-Indian hate groups, ICWA's most recent challenge came this fall from a federal judge in Texas, who ruled the law unconstitutional in Brackeen v. Zinke. *In* Brackeen, *the plaintiffs argued that because ICWA's language refers to "Indian" children, the act violates equal protection and is therefore unconstitutional. The Goldwater Institute, a libertarian think tank, litigation organization and veteran opponent of ICWA, joined* Brackeen *earlier this year to challenge the law.*

In September, Timothy Sandefur, vice president of litigation at the Goldwater Institute, spoke at the Cato Institute, another libertarian think tank based in Washington, D.C., about the 40th anniversary of ICWA., Mary Katherine Nagle of Pipestem Law checked the facts and Sandefur's analysis of them and provided context to some of the statements. Skip to the first fact check.

Sandefur: Thank you very much, Walter, and thank you for hosting us today. I feel very sensibly the difficulty of addressing such a complex statute as ICWA in the short amount of time that I have available, and so I'll try to make my points brief.

We at the Goldwater Institute are litigating or participating in litigation in about a half-dozen cases in state and federal courts on issues relating to ICWA, because of our concern that, due to the compromises that the statute makes between the interests of children and the interests of tribal governments, ICWA actually ends up harming Native American children and their parents in a variety of ways…

We have a lawsuit currently pending in the 9th Circuit Court of Appeals right now, aside from the cases in Texas — the *Brackeen* case that [Mathew McGill of Gibson, Dunn & Crutcher] will talk about and other cases — that raise a whole host of issues, and I won't have time to get to them all, so I'll urge you all if you're interested to pick up a copy of the pamphlet that I've left out on the table that is a shortened version of a law review article I published last year that covers other issues I won't have time to discuss.

When you discuss the issues of ICWA, I don't know if any of you were at the Supreme Court event on Monday when Attorney General of Arizona Mark Brnovich was speaking, but there was a question that I asked him via the internet about ICWA, and he did what often happens when this issue is raised, and that is he talked about the history, about the unjustified removal of Native American children from their parents and their placement in boarding schools for a long period of American history, all of which is certainly deplorable but all of which also has nothing to do with the issues that are raised in the litigation that we're talking about. It doesn't relate to the way that ICWA provides a separate and substandard set of rules for a particular racial category of Americans.

This is a deliberately misleading argument that opponents of ICWA use to undermine the law, one with deep historical roots in the United States. ICWA does not deal with a "particular racial category of Americans." ICWA refers to "Indians," who are citizens of sovereign Nations that pre-date the United States. Just as citizens of the United States can belong to any race, citizens of tribal nations are of many different races. Lumping all tribal citizens together as "one race" is itself racist and undermines the sovereignty of tribal nations.

Furthermore, Sandefur's attempt to characterize ICWA's rules as "substandard" is misleading and baseless. ICWA's rules set an exemplary standard that precludes non-Indian entities from breaking up Indian families based solely on prejudice and cultural misunderstandings — the prominent practice in place before ICWA was passed in 1978. As Congress determined in passing ICWA, removing bias and prejudice from the calculation serves the best interests of Indian children. *–Mary Katherine Nagle*

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Sandefur: This is not, I emphasize this, this is not a statute that is some sort of affirmative action program, this is a statute that harms a racial minority under the guise of benefitting them. And not just the children, but their parents. Let's talk about a couple examples, and before I go into the examples, not long ago I was giving a talk at ASU in Arizona, and after I had recited a half-dozen cases in which these issues were raised, my opponent complained that I was using anecdotal evidence. Well, you know, in the law, cases that talk about and decide legal issues aren't just anecdotes, these are the real-life implications and applications of this statute.

(A) case we worked on not long ago called (*S.S., S.S. v Stephanie H., et al]*) — it's a case that involved two children of a tribal member in Arizona, the father. The father wanted to sever the parental rights of the birth mother on the grounds of neglect and improper behavior, and the problem with that is that because the children are Indian children under the statute, the separate standard of evidence, the separate evidentiary requirement that applies in termination of parental rights cases applied to these children that would not have applied to these children had they been white, black, Asian, Hispanic or a member of any other racial minority. And what that meant was that the father was required, before he could terminate parental rights of the neglectful birth mother, he was required to show that he had made active efforts to repair the relationship of the children and the mother. Now nobody really knows what active efforts means, but we know that it means more than ordinary efforts. More than reasonable efforts, which is the federal standard and the standard that applies under state law to children of all other races.

Contrary to Sandefur's dispersions here, what constitutes "active efforts" under ICWA is no mystery. The law clearly defines "active efforts," and gives numerous examples of what satisfies the legal requirement, from taking steps to keep siblings together whenever possible to identifying community resources for the child's parents, with the ultimate goal of reuniting a child with his or her family. Ensuring that "active efforts" are used prior to the termination of parental rights ensures that Indian families are not broken apart — a process the Goldwater Institute continues to undermine and destroy. It is important to note that "active efforts" do not dictate the outcome of a case and in many instances, do result in a non-Indian family adopting an Indian child. Thus, the "active efforts" standard provides a procedure in which termination of parental rights only occurs when it is in the Indian child's best interests. *–Mary Katherine Nagle*

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Sandefur: And he lost his case, the court ruled against him, on the grounds that he had not made active efforts because he had not allowed the children to have contact with the birth mother. Of course, the reason that he had not allowed the children to have contact with the birth mother is because she was a neglectful and inappropriate guardian for the children. So, the very fact that he had taken steps to protect his own children was held against him and found to be grounds for denying him the relief that he sought in an effort to protect his own children. This ruling does absolutely nothing to prevent the removal of Indian children from their birth parents by state or federal agencies and their forced assimilation into white culture, which is what ICWA was passed for 40 years ago. This was simply a statute that denies a Native American parent the right to take actions to protect his own child as he sees fit, and unfortunately, it's definitely not an isolated incident.

In a case in Washington state a couple of years ago called *(Matter of Adoption of) T.A.W.*, a birth mother, a Native American birth mother, sought to sever the parental rights of a white, non-Indian birth father who was abusive, was a repeat criminal, had been in jail many times for crimes. She was supported in her efforts by the tribal government and we supported her also as amicus curiae in the case. But the court ruled that even though the birth father was not a Native American, he could use the Indian Child Welfare Act to block the efforts of the birth mother to terminate parental rights of the birth father.

Sandefur's reliance on this case to attack the legitimacy of ICWA is misleading. To be sure, Goldwater's reliance on Matter of Adoption of T.A.W., 383 P.3d 492 (2016), demonstrates that ICWA is designed to keep Indian families together, regardless of whether the family member

who receives protection under the law is Indian or not. In this instance, the Washington Supreme Court remanded a case back to the trial court because the trial court failed to apply the "active efforts" standard. The Washington Supreme Court did not instruct the trial court to reach a specific determination with regards to whether the non-Indian parent's rights could or should be terminated, and certainly the court did not, as Sandefur misleadingly suggests, conclude that the father could use ICWA "to block the efforts of the birth mother to terminate parent rights of the birth father." Again, ICWA's "active efforts" standard creates the procedure through which a court, legitimately and lawfully, may terminate a parent's rights. When a lower court fails to follow the procedural guideposts outlined in the law, appellate courts — as was the case here — will send the case back to the trial level for proceedings that conform to the law. *–Mary Katherine Nagle*

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Sandefur: In another case we worked on not long ago in Arizona called *J.P.C.*, very interesting set of facts. In that case, an Indian birth mother, who's a tribal member but lives off-reservation, sought to terminate the parental rights of her former spouse, again with a criminal record and so forth; she considered him unfit, and she wanted to terminate the parental rights. Had she lived on reservation, the tribal law would have applied, and the tribal law would have permitted that termination to go forward because the tribal law was the same as Arizona law on this subject. So, had the mother not been a member of a tribe but been a white, black, Asian or Hispanic American living in a suburb near Tucson, she would have been allowed to terminate parental rights under state law. And had she lived on reservation, she would have been able to terminate parental rights under tribal law. But because she's a tribal member living off reservation, the child qualifies as an Indian child under ICWA and ICWA went into place with its much higher, more severe burden that barred her from making that choice to protect the best interests of her children.

The example Goldwater puts forth here confirms that when parties and lower courts attempt to circumvent ICWA's clearly defined procedures, courts applying the act will instruct those entities to go back and follow protocol. According to Sandefur's own account of the factual and procedural history in this case, the parties seeking termination of parental rights never asked the court to make a determination of "active efforts" as required under the law. Instead, they asked the court to rule that the "active efforts" standard didn't apply, which the court refused to do. Rather than follow the procedures outlined in ICWA to properly effectuate termination, the parties sought an appeal. Again, this case does not demonstrate that the "active efforts" standard in ICWA precludes the termination of a parent's rights when that parent has been abusive, committed criminal conduct, or engaged in behavior that threatens the health and welfare of a child. What this case demonstrates is that entities may not terminate parental rights based on prejudice or cultural misunderstandings alone. As Congress determined, this serves the best interests of Indian children. *–Mary Katherine Nagle*

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Sandefur: These and many other cases illustrate how ICWA harms the very people that allegedly it was designed to benefit. And it does so in order to benefit tribal government interests rather the interests of children. And the way that it does this — there's multiple ways, I'll go

through a few of them — one is, as I've mentioned, the different burdens of proof or termination of parental rights. It requires a beyond-a-reasonable-doubt evidentiary standard with testimony from expert witnesses, which is a higher standard than is applied in criminal cases where you send somebody to jail for life. That is a very severe standard. In fact, it's a standard so severe that the U.S. Supreme Court refused to apply it in *Santosky v. Kramer* on the grounds that such a severe burden would make it too difficult for the state to protect children in cases where termination of parental rights is appropriate.

The racial categorization that ICWA applies to adoption and foster care that make it virtually impossible for Indian children in need to find the loving, permanent adoptive homes that they need to survive and thrive. And these racial categories that make it incredibly difficult for a Native American child to find an adoptive home with a non-Indian, these categories apply to Indians generally. If you read the statute, it says, "an Indian family, any Indian family," it doesn't say members of the same tribe, which means that ICWA applies to Indian children not on the basis of tribal affiliation but on the basis of Indianness generically.

This is a gross mischaracterization of the law. It's hard to understand what Goldwater means by "Indianness generally" — but ICWA does not apply to humans who have "Indianness generally." ICWA only applies to citizens of federally recognized tribes. Indeed, the statute has no application unless an "Indian child" is at issue, and "Indian child" is defined as "Any unmarried person under the age of 18 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." The act is directly and inextricably linked to citizenship in a sovereign nation. If a child and his/her parents are not citizens of a sovereign nation, ICWA will have no application to that child's foster placement, adoptive placement, or the possible termination of the parents' rights — regardless of how much "Indianness" generally that child may have in the eyes of Goldwater or anyone else. *–Mary Katherine Nagle*

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Sandefur: But the very concept of generic Indianness is a racist white construct that was forced on Indians by settlers. It's absurd that this was written into the statue.

Contrary to what Sandefur claims, this concept was not written into the statute. Many people claim "Indianness" — for instance, the millions of Americans who claim some form of "Indianness" through DNA tests, but cannot enroll in a tribal nation because they have no political right to citizenship in any tribal nation. No matter how much "Indianness" an individual may claim, ICWA will only apply to enrolled citizens of tribal nations and their children (if their children are also eligible for citizenship). It is important to note that citizenship in a tribal nation is a consensual relationship between a nation and a citizen. A citizen may terminate his or citizenship at any time, and thus ICWA only applies to Indian children where the parents have elected to maintain their citizenship and the child is a citizen or eligible for citizenship. ICWA does not perpetuate stereotypes that all Indians are "one race" — these are mere dog whistles and coded messaging employed by the Goldwater Institute and other anti-Indian activists. *–Mary Katherine Nagle*

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Sandefur: ICWA overrides the best interests of the children's standard that applies under state law and is generally considered the lodestar of all cases involving child welfare. In fact, the Texas courts and some other courts have ruled that the best interests of the child standard is a racist construct that shouldn't be applied to Indian children.

In the *Lexi* case *(In re Alexandria P.)* two years ago, the California court of appeal literally created a separate but equal standard. Literally.

> Nowhere in this decision does the court mention the words "separate but equal," nor does the court apply any standard equivalent to the standard the U.S. Supreme Court articulated in Plessy v. Ferguson, which allowed for the segregation of African-Americans based on a societal prejudice that whites were superior, and that therefore "separate but equal" was constitutional. Goldwater's attempt to appropriate the rhetoric of the civil rights movement to dismantle ICWA is not only misleading and shameful, but is a tactic commonly used by anti-Indian hate groups, as identified by human rights organizations in the United States. *–Mary Katherine Nagle*
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Sandefur: It said that for children of other racial groups, the best interests of the child, that's the most important consideration. But when it comes to Indian children, the best interests is "one of a constellation of factors" for the court to consider. So there are two separate best-interest considerations, depending on the child's genetics. Personal jurisdiction is a major problem in ICWA cases that is virtually never been resolved by a court. To my awareness, only one court has actually decided this issue, and that's the Ohio Court of Appeals just last year in a case that we're litigating.

ICWA purports to extend personal jurisdiction of tribal courts, or at least allow the assertion of personal jurisdiction by tribal courts over children anywhere in the United States based on the blood in their veins. No minimum context there.

> This is also not true. ICWA only applies to foster placement, adoptive placement, or termination of an Indian parent's rights when the child is an "Indian child."
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> To be clear: ICWA's application depends not on the blood in your veins, but rather, hinges entirely on your citizenship in a tribal nation. One can have "Indian" blood and be ineligible for citizenship in a tribal nation (i.e., Sen. Elizabeth Warren, who claims to have Cherokee ancestry but cannot enroll as a tribal citizen). One could also elect to disenroll himself or herself from his/her nation, in which case ICWA would have no application. Many citizens of tribal nations have no "Indian" blood whatsoever — for instance, the Cherokee Freedmen, who are citizens of the Cherokee Nation as a result of a treaty signed between the nation and the United States after the Civil War. They do not have what Goldwater considers to be "Indian blood," but they would still be subject to ICWA because ICWA's application hinges on one's political relationship to a sovereign nation, not ancestry, race, or blood. *–Mary Katherine Nagle*
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Sandefur: The standard rule for personal jurisdiction under the Constitution, under the due process clause, is that no tribunal can decide a case over parties who have no minimum contact

with that tribunal. A California court can't decide a case involving a car accident in Maine by two people who have lived in Maine all their lives. But under ICWA, tribal courts assert personal jurisdiction over children regardless of their residency, simply because of their ancestry.

Goldwater repeatedly claims that ICWA is contingent on Indian ancestry and attempts to reframe citizenship in a tribal nation as a matter of race. This is not true. ICWA defers to a tribal nation's definition of "membership" for purposes of defining "Indian" under federal law and fulfilling the federal government's trust responsibility to tribal citizens.

Inherent in Sandefur's rhetoric is the suggestion that tribal courts are bad places to litigate the rights of children, parents and families — a tactic that blatantly distorts facts and perpetuates a narrative of white superiority in matters of justice. Goldwater has not presented any evidence to conclude that families who must litigate in tribal court suffer any actual prejudice and instead relies on dog whistles to signal that tribal courts are inferior to state or federal courts. In fact, the ACLU has documented numerous instances where state court judges have denied Indian parents their due process rights in proceedings where their parental rights have been terminated, and yet Goldwater has never focused any attacks on the courts whose failure to comply with ICWA has violated the constitutional due process violations of Indian parents. *–Mary Katherine Nagle*

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Sandefur: Federalism concerns come to the forefront in ICWA also. The Constitution does not allow Congress any authority to pass a general adoption, foster care or child welfare statute for the United States. There just is no such constitutional authority. When this issue is raised, usually the response is, "Yes, but Congress has plenary authority over Indians." Where is that in the Constitution? The Constitution, to my knowledge, extends plenary authority in only two cases. One is over territories of the United States, such as the District of Columbia, and the second is in military matters. Are we really going to say that ICWA was passed as a military measure? I don't think so. And it certainly wasn't passed as a treaty. Even if it were passed as a treaty, it would still be unconstitutional in this regard under *Reid v. Covert*, a Supreme Court case from the 1950s that said even when acting under the authority as military commander or through a treaty, Congress cannot force U.S. citizens into a tribunal where their due process rights are not fully protected, and that is the case in ICWA cases that force litigants into tribal court where they don't have the ability, thanks to the Indian Civil Rights Act misconstrual by the U.S. Supreme Court, to appeal like they would from some ordinary court, by which I mean state courts that are governed by the normal appellate process.

Now it's a very good development, I think, that we've seen state attorneys general in Texas, Louisiana, Ohio and Indiana step forward on this issue, and they've recognized that they have a duty to defend both the authority of the state to protect their children and the best interests of children within their jurisdiction. And I applaud those attorneys general, I hope very much that other attorneys general will do the same. In discussing this issue, though, I have found that it's not really a legal objection that my opponents have raised. Instead, it appears to me more of a psychological objection, and that is, it seems to me, that people often just habitually think that when we're talking about Indian children in the United States that we're talking about foreigners. That we're talking about — because Indian children have a relationship to a tribal government,

which has retained sovereignty — people sort of assume that when we're talking about Indian children, it's similar to like when we talk about children from Russia or China or Spain or something. But there's a crucial difference: Indians are not foreigners; all Native Americans are citizens of the United States entitled to the same equal protection of the laws as members of every other racial category. And they're denied that under this statute.

Because "Indians" were excluded from the 14th Amendment's reach, we were not granted United States citizenship when the 14th Amendment was adopted in 1868. Less than two decades later, in 1884, the United States Supreme Court, in Elk v. Wilkins, concluded that the 14th Amendment did not make "Indians" United States citizens because the amendment explicitly excluded Indians based on their political classification, that is, the fact that the legal term "Indians" refers to members of "distinct political communities" — tribal nations — and does not refer to a classification based on race. As a result, Indians did not become citizens of the United States until Congress passed the Indian Citizenship Act in 1924.

The irony of the Goldwater Institute's attacks on ICWA is that if the congressional classification of "Indian" were deemed unconstitutional under the Fourteenth Amendment's Equal Protection jurisprudence, the very congressional act that granted Indians citizenship in the United States would be rendered unconstitutional. Indeed, a conclusion by the Supreme Court that "Indian child" under ICWA constitutes an impermissible race-based classification would call into question the entirety of federal Indian law dating back to the founding of the United States, at which time the United States entered into treaty agreements with tribal nations that required Congress to pass legislation identifying citizens of those nations as "Indians."

By way of example, the majority of lands in the United States today came into the United States' possession through the signing of treaties with tribal nations. Many of those treaties secured the transfer of lands to the United States in exchange for certain services, such as education and health care. Those services, according to the treaties signed, are to flow from the United States to the citizens of the tribal nations that signed those treaties — which is why Congress passes laws defining "Indian" as a citizen of a tribal nation. Declaring the words "Indian" to be an unconstitutional racial classification would render the United States unable to comply with its treaty-born trust duties and obligations to tribal nations and their citizens. Declaring "Indian" to be an unconstitutional classification would place Congress in a constitutional quagmire and threaten the future of Indigenous people in the United States. – *Mary Katherine Nagle*

Sandefur: They're deprived of the protections that they need in order to satisfy the desires of tribal governments that, in ICWA's own terms, define children as "tribal resources." That's a shame. And it harms the people who need protection the most. The only sensible solution is to prioritize the best interests of children and the best interests of parents above all other considerations in all child welfare cases. Thank you.