Texas Attorney General Ken Paxton Is a Linchpin Of The Right-Wing Judicial Strategy

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THE SUPREME COURT is back in session and once again has taken cases that could result in major anti-regulatory wins. In the next few months, Supreme Court rulings could gut the Clean Water Act, kill off affirmative action, and undermine tribal sovereignty. While the pipeline of right-wing jurists built by operatives like longtime Federalist Society executive Leonard Leo has been well-documented, less attention has been paid to another key part of the strategy to expand corporate rights: state attorneys general and the cases they craft, often in concert with corporate law firms, to push forward constitutional changes. It's the parallel track that makes all those judgeships really pay off.

When Ken Paxton was first announced as Texas attorney general-elect in 2014, he listed Leo as part of his transition team. Now Paxton, who declined to comment for this story, is up for reelection for the second time since taking office. Although his Democratic challenger, Rochelle Garza, is proving to be a bigger threat than anyone expected, Paxton is still favored to win despite the fact that no attorney general has been more beleaguered by scandal.

Paxton has been under indictment on securities fraud charges the entire time he's been in office; he pleaded not guilty but has yet to stand trial. In 2020, Paxton's deputy attorneys general, along with several other senior staffers, blew the whistle on their boss, accusing him of bribery and abuse of office. The FBI is investigating the allegations, which Paxton has denied, and the whistleblowers were subsequently fired in what they alleged in a complaint was an act of retaliation. Paxton argued that Texas's whistleblower protection law didn't apply to him, but so far the courts have not agreed. He's now asking the Texas Supreme Court to weigh in. Meanwhile, he recently made headlines after a process server accused him of fleeing his home to avoid being served a subpoena for an abortion case. Paxton tweeted that he fled because he was trying to avoid "a stranger lingering outside."

The attorney general may have legal woes, but he also has an outsize hand in shaping the law. He is a key element of a right-wing judicial operation that aims to dismantle protections for the environment, marginalized groups, and workers while expanding rights for corporations and Christian churches. In his seven years in office, Paxton has successfully fought the federal government over immigration policy, fishing limits, pollution permitting, the EPA's mercury

rule, voter ID laws, and trans rights. A case he is arguing before the Supreme Court this week — Haaland v. Brackeen — is a window into how it all works.

Trojan Horse

The case calls into question the constitutionality of the Indian Child Welfare Act, or ICWA, a law that passed with unanimous support in 1978 to combat a history of forced family separation in the United States. First there was the Indian boarding school period, from the late 1860s to the 1940s, which saw Native children sent across the country to live in boarding schools, where their names were changed, their hair was cut, and they were no longer allowed to speak Indigenous languages. That was followed by the Indian Adoption Project, a U.S. government program that lasted well into the 1960s and incentivized the removal of Native children from their homes to be placed with white Christian families. By the mid-1970s, nearly a third of Native kids had been separated from their families and tribes. ICWA was drafted as a solution, making it harder to terminate Native parental rights and establishing placement preferences for kids: first with extended family, then members of the same tribe, then members of any tribe, and then non-Native families.

ICWA went relatively unchallenged for decades but became a target of conservative legal groups beginning with the 2013 Supreme Court case Adoptive Couple v. Baby Girl. The case involved a young girl, the white couple who wanted to adopt her, her birth mother (who supported the adoption), and her biological father, a citizen of the Cherokee Nation who invoked ICWA to fight for custody. The adoptive couple argued that far from protecting anyone from discrimination, ICWA actually discriminated on the basis of race, violating the Equal Protection Clause of the 14th Amendment by applying different child welfare policies to Native families. That argument didn't hold, but the adoptive couple won the case anyway on narrow technical grounds.

The case, and the media circus that surrounded it, prompted a lot of interest from various pro-industry groups in the question of ICWA's constitutionality — not because they were suddenly interested in family or Indian law, but because of the opportunity it presented. The Goldwater Institute, a libertarian think tank in Arizona, launched an anti-ICWA program with funding from the Bradley Foundation, best known for its role leading the charter school movement and, more recently, "Stop the Steal" and related voter suppression efforts. Goldwater has filed more than a dozen cases attacking ICWA, with supporting briefs from organizations like the Koch-funded Cato Institute.

The case currently before the Supreme Court, Brackeen, repeats the equal protection claim, arguing that the placement preferences laid out in ICWA are race-based. But ICWA, like the rest of Indian Law, is politically based. Its legal justification is derived from the sovereignty of tribal nations and the sanctity of the treaties those nations signed with the U.S. government. If ICWA is found to be race-based, it could call into question all of Indian Law, from certain cultural allowances like the ability to possess eagle feathers to broad-reaching land and water rights. Which brings us back to Texas, a state with very few federally recognized tribes, and its attorney general, who has spearheaded this constitutional challenge.

It starts with the hunt for the perfect plaintiffs, which for Paxton has more to do with location than demographics. The bulk of his constitutional cases are filed in one county — Tarrant County — where U.S. District Judge Reed O'Connor, who has repeatedly sided with Paxton, is highly likely to hear them. That's where the Brackeen case began.

In June 2016, a Navajo baby referred to as "ALM" in court documents was placed in foster care in Fort Worth, Texas. The foster parents, Jennifer and Chad Brackeen, were told from the beginning that the child's custody fell under ICWA and thus, the chances for adoption were slim. "It's very unlikely he'll be ours forever," Jennifer Brackeen wrote in her blog, "so we aren't even going to pretend it might happen."

A year later, however, they decided to fight for custody. Their initial petition to adopt ALM was denied, and according to Jennifer Brackeen's blog, appealing the decision was too expensive a proposition. But then "God moved some very big mountains" to bring them an attorney pro bono: Matthew McGill, a partner at Gibson, Dunn and Crutcher. Gibson Dunn does not have a family law practice, let alone an ICWA practice. But it does have a lot of clients in the two industries most likely to benefit from an erosion of tribal sovereignty: fossil fuels and gaming.

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McGill added a new argument to the anti-ICWA arsenal, one he previously used to win a gaming case. Now in addition to arguing that ICWA violates the Equal Protection Clause, McGill is arguing that it violates the anti-commandeering doctrine of the 10th Amendment. That doctrine stipulates that any rights not explicitly granted to the federal government or prohibited to the states are automatically reserved to the states. According to McGill, both gaming and child welfare policy fall into that camp. It's an argument that makes ICWA an even more compelling Trojan horse for anti-regulatory interests, which have long seen a bolstering of states' rights as the most effective way to limit the federal government's regulatory powers.

With Gibson Dunn on board, the Brackeens were no longer fighting an uphill battle. Now they had one of the world's most powerful corporate law firms working for them pro bono — and the Texas attorney general was suddenly on their side. In September 2017, the Brackeens headed to family court in Tarrant County with their new law firm and an unusual document in support of their case: an aggressively worded brief from Paxton, alleging not only that ICWA shouldn't apply to the Brackeens' case, but also that the law was unconstitutional.

"It's extraordinary for high-level attorneys in the state AG's office to step down into the trial level," said University of Michigan law professor and Indian Law expert Matthew Fletcher. Normally, "a state AG's office would not participate in a case like that at all unless it reached perhaps an appellate or even a Supreme Court level within the state."

But that's what happens when the corporate law firm that's decided to take up your adoption case not only has deep industry ties, but also shares a revolving door with the state attorney general's office. At least three attorneys who worked on the Brackeen case while at the Texas AG's office worked for Gibson Dunn either before or after their time there.

James C. Ho, who led the firm's Dallas office and co-chaired its national appellate and constitutional law practice group when the Brackeens' federal case was filed, previously worked as solicitor general of Texas. Today, Ho is a justice for the 5th U.S. Circuit Court of Appeals; he recused himself when the Brackeen case hit the 5th Circuit, citing a conflict of interest. His wife, Allyson, also a successful appellate lawyer, slotted into his partnership in the Gibson Dunn Dallas office, where she now co-chairs the same practice group. Allyson Ho is also vice chair of the Federal Judicial Evaluation Committee, appointed by U.S. Sens. John Cornyn (former Texas AG) and Ted Cruz (former solicitor general of Texas) to evaluate potential appointments of federal judges and U.S. attorneys in Texas. James Ho served on that panel during the years that O'Connor, the judge in Tarrant County, was appointed.

All of which is to say that when Gibson Dunn and the attorney general tag team on your custody hearing in Texas, the tide tends to turn your way. On October 27, 2017, Navajo Nation sent a letter to the court stating that they would not oppose the Brackeens' adoption of ALM. So the Brackeens won custody. Nonetheless, two days before that letter was officially stamped as received by the court, the Brackeens and the Texas attorney general filed a federal suit challenging the constitutionality of ICWA. Less than a year later, when they learned that ALM's birth mother had another baby who was being fostered elsewhere in Texas, the Brackeens filed for custody of that child as well. They were awarded custody over a blood relative last year; yet the Brackeens, Gibson Dunn, and Paxton still argue that ICWA violated their constitutional rights. On Wednesday, they will make that argument before the Supreme Court.

The RAGA Strategy

Documents received via a Freedom of Information Act request to the Ohio Attorney General's Office reveal the mechanics behind another key component to the Texas judicial approach: recruiting other states as co-plaintiffs. It's a strategy pioneered by the Republican Attorneys General Association, or RAGA, the organization co-founded by Cornyn when he was Texas AG in the late 1990s as a way to keep anything like the sweeping litigation against tobacco companies from happening again.

In its first decade of existence, RAGA concentrated primarily on getting more Republican attorneys general elected. Then Citizens United, a case Gibson Dunn argued and won before the Supreme Court, made anonymous political donations legal, and RAGA's coffers exploded. McGill was second chair on that case. Today, the organization, along with its 501(c)(4) arm, the Rule of Law Defense Fund, funnels millions of dollars to state attorneys general in support of the cases and candidates its donors choose.

"It's had an enormously distorting effect on U.S. law," said Lisa Graves, executive director of True North Research, who has been following RAGA's evolution over the past 20 years. "It provides a mechanism for corporations to pass money through to help attorneys general in ways that they would not be able to individually solicit for their own campaigns, given their regulatory role over those very industries."

Graves said the Brackeen case is a perfect example of the sort of suit that has been made possible by the rise of RAGA. "So you have this attorney general in a state that is particularly friendly

and warm to Koch, to the other oil and refinery companies," she said. "It has very, very few tribal holdings in the state, but yet it's getting involved here."

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The same day the Brackeen case was filed, David Hacker, an attorney in Paxton's office, wrote an email to the RAGA member list with the subject line "New Federalism Case Opportunity."

"Friends, today, Texas filed a new complaint against the federal government concerning application of the Indian Child Welfare Act," he wrote. "I write to ask if any of you want to join this effort as co-plaintiffs. … ICWA creates foster-care and adoption preferences that require state courts to choose Indian families over non-Indian families when determining placement of an Indian child. These preferences set aside state law that would look to the best interest of the child in favor of racial discrimination that violates the Fourteenth Amendment."

Compared to Paxton's anti-abortion, anti-immigration, and anti-climate policy cases, which typically entice a dozen or so co-plaintiffs, Hacker's efforts were relatively unsuccessful. Indiana and Louisiana signed on as co-plaintiffs, and Ohio wrote an amicus brief. Indiana and Louisiana have since dropped out of the case. Despite that, the Brackeen case shows how well the Republican judicial machine works in Texas, and how critical the AG's office is to making it all run, not just in Texas but on a national level. "What you have now with the judicial selection committee in Texas and the very strategic composition of the 5th Circuit and then the Supreme Court now too is an extreme form of forum shopping, where all you need is someone willing to file the initial complaint," Graves said. "The Texas AG's office sets the docket for the 5th Circuit — it's a really important role."

Which raises the question: What if the Texas AG's office suddenly, after more than 20 years, stopped playing ball?

The Democrats have their own version of RAGA, the Democratic Attorneys General Association, but its funding could best be described as anemic. "They don't have the option of calling up the tobacco companies or the oil companies, or Leonard Leo, so they're at a distinct competitive disadvantage," Graves explained.

In the 20 years since RAGA began winning races and courting donors, the Democrats have never mounted any sort of counter effort. According to Texas Democratic Party Chair Gilberto Hinojosa, Paxton is "the most vulnerable Republican in statewide office in Texas," and defeating him "could open the door for Democrats to start winning statewide elections." The party "would have to have not read any of the stories involving the litigation he's been filing and not be paying attention to national news not to notice his influence on national Democratic policy," Hinojosa added.

And yet, Paxton outraised his Democratic opponent, Garza, 8 to 1, and outspent her by an even wider margin. "Texas hasn't had a Democratic statewide official in a generation," Hinojosa said. "There's a big interest on behalf of the national party to do that. Whether or not they're putting resources toward it, that I don't know."