"Magic Words," "Magic Broth," and Indian Law Stories Connected to *Brackeen v. Haaland*

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The Indian Child Welfare Act of 1978 aims to increase the likelihood that Indigenous children and those eligible to be enrolled in a Native Nation who face foster care or adoption will stay in their communities. The law was created in response to the long history of separation of children from their families and communities. A quote from the Congressional hearing in 1978 emphasized the loss: "The wholesale separation of Indian children from their families is perhaps the most troubling and destructive aspect of American Indian life today. Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions." (Establishing Standards, 1978, p. 9) ICWA was established in Federal Indian policy through plenary power, trust responsibility, and treaties (Indian Child Welfare Act, 1978). Fast forward to 2022, Judd Stone, an anti-ICWA lawyer for the State of Texas, during the oral arguments in the *Brackeen v. Haaland* consolidated cases, deviates from Federal Indian policy. In an exchange with Justice Gorsuch, Stone points to the racial identity of the Indian child as one of the central premises for the law and questions whether ICWA falls within the parameters of Congressional plenary power.

> *JUSTICE GORSUCH:*
> *So this is a magic words problem we have here today?*
> *MR. STONE:*
> *Certainly not, Your Honor. Congress is not free as a matter of fact to regulate 50 state child -- 50 state child adoption proceedings on the basis of race regardless of what it calls it.*
> *(Brackeen v. Haaland Transcript of Oral Argument, 2022, p. 82)*

Earlier, Justice Gorsuch asks Lawyer Stone what the "magic broth" is, or what makes up the problem Stone claims exists in the law (p. 69). With that series of questioning, Justice Gorsuch was able to get at a crux of the anti-ICWA argument during Texas's turn. Gorsuch inquires about which legal authority and doctrines provide or limit Congress's power to establish ICWA and to get a better sense of the Congressional authority in Federal Indian policy as understood by Stone. Beyond the legal "magic words problem," there are several themes in Indigenous Studies that add context and help to clarify the case with a wider lens. Those themes can be viewed as "Indian law stories" based either in the "the logic of elimination" or more toward "survivance." Indian law stories are the stories behind the scenes that shape court cases, but that don't get fully told in the legal record. (Goldberg, Washburn, & Frickey, 2011) These themes are both part of the oral argument and the stories that shape the case.

Examining, the law story through the "logic of elimination" is to examine the ongoing colonial system at work. Elimination is a part of settler colonialism not as an event, but as a long progression constantly at work without an end point (Wolfe, 2006). Not only the attack and

potential elimination of the ICWA policy, threats are pointed at diminishing sovereignty and the recognition of the political identity of Native Nations. A *New York Times* piece stated, "The case could turn on whether the justices see tribes as racial groups or sovereign nations" (Hoffman, 2022). McGill the lawyer for the *Brackeen* party in the oral argument stated, "[Y]ou don't have to do anything with respect to Congress --the federal government's trust relationship with Indian tribes to recognize that that power does not extend to regulating the placement of Indian children in state courts" (*Brackeen v. Haaland* Transcript of Oral Argument, 2022, p. 52). McGill argued that the equal protection clause was violated by ICWA, and Native Nations do not have a proprietary interest in children. McGill and Stone limited plenary authority in such a way that further diminishes Indigenous sovereignty, but simultaneously advocated for state rights. However, Gorsuch had stated earlier that: "…there is some irony to your position that you're here to vindicate states' rights? We have 23 states who've lined up on the other side. We've never had a state court, near as I can tell, in the 40 some years since ICWA was adopted complaining about this arrangement…But I'm not aware of anybody holding ICWA facially unconstitutional in the manner that you're asking us to do. (*Brackeen v. Haaland* Transcript of Oral Argument, 2022, pp. 41, 42) Gorsuch points out that there are 23 states that signed an *amicus* friend-of-the-court brief submitted to support the side of the Tribes and the Federal Government, which is evidence against McGill and Stone's premise that states generally find ICWA intrusive and unlawful. Stone also contends the anti-commandeering doctrine applied, meaning states could not be forced by the Federal Government to provide services and keep records for ICWA. Justice Jackson hinted through her line of questioning that the anti-commandeering doctrine was not a doctrine common in Federal Indian law. (*Brackeen v. Haaland* Transcript of Oral Argument, 2022, p. 54). In other words, using the doctrine in this situation was an unusual strategy.

Additionally, an equal protection argument made claims that Native children's rights were violated by automatically enrolling them into a Native Nation without the child's consent. McGill argued, "…[T]he most fundamental point…embedded in this argument is that tribes have a proprietary interest in these -- in these children. And they are human beings. They are citizens of the United States and the states in which they reside. They are persons within the meaning of the Fifth Amendment. And they have liberty interests that the tribe cannot override simply by unilaterally enrolling them." (*Brackeen v. Haaland* Transcript of Oral Argument, 2022, p. 43). Preventing and discouraging enrollments by Native Nations means limiting who can become a member of a Native Nation, reducing numbers in a community, and furthering the elimination of Indigenous Peoples.

The elimination theme goes further with the interest groups involved in and behind the case. Three non-Native couples, a non-Native birthmother, and Texas (with Indiana and Louisiana as part of the case as it wound through the courts) stood opposed to Indigenous Nations, including the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians, and the Interior Department and Interior Secretary, Deb Haaland. *ICT News* indicates that those supporting the *Brackeen* side over the years of litigation include "an unlikely alliance of right-wing political, legal, economic and religious groups that outwardly appear to have little connection to Indian Country or its children…right-wing think tanks, representatives of the private adoption industry, the evangelical adoption movement, anti-treaty rights organizations and conservative fossil fuel industrialists." (Pember, 2019) Media and expert opinions echo that

much is at stake for federally-recognized Native Nations. Lewis (2019) warned us about this moment and reminds us of the constant pendulum swinging of Federal Indian law, and that we could be in a moment when the pendulum swings extremely far backwards and toward the possible undoing of the recognition and policies that support Native Nation sovereignty, basically, connected to the logic of elimination. "This is a critical juncture for Native Nations as they stand at the brink of a new era, one that will hopefully continue to move toward increasing recognition of the sovereignty of Native Nations and away from policies of forced assimilation and termination…the United States now enters a time when the… branches [of government] are largely populated by those who have proven hostile to American Indians… and the practices of Native Nation sovereignty." (Lewis, 2019, p. 148) This court case exemplifies this "new era."

Matthew McGill for the *Brackeen* party insists that this case is only limited to the Indian Child Welfare Act in terms of off-reservation situations, and not to a larger body of law establishing Native Nations as political entities (Hoffman, 2022). However, Judd Stone, Solicitor General from Texas, in his oral arguments, refuses the concept of political citizenship or potential political citizenship for eligible children. When pressed by Judicial questioning, he emphasizes that Native Nation citizenship and the potential for Native Nation citizenship is based on a racialized identity, and not a political identity. Therefore, Stone is contradicting McGill, by recategorizing the legal term "Indian" as a "race." Since "race" based resources and opportunities need to reach a specific standard to remain lawful, following this path of legal explanation could lead to the determination of ICWA as being unconstitutional. There is "fear" in Indian Country that partly comes out of the essentializing terminology of "race" being a replacement for "sovereign nation" within the halls of U.S. power, in certain media coverage, and even encouraged in some law journals (Sandefur, 2021). "Fear" is a word repeated by an Indigenous journalist from the NDN Collective (2022) who was attending and reporting on a rally outside the Supreme Court on the day of the oral argument.

Reports in the media industry on this case can add to Indian law stories of survivance, but also those of elimination. The second season of a podcast by Rebecca Nagle, "This Land," brought out stories and context for the court case. The podcast included the story of Jennifer Brackeen (one of the petitioning couples) who fosters and adopts children as part of missionary work in her church. This missionary work to "save" kids can be viewed as part of the elimination actions of colonization. "Saving" kids can mean taking children away from their home communities.

Many Indigenous families and children have been impacted in some way with child welfare, foster care, and adoption, and their stories resonate with the stories at the heart of this court case (CLAN, 2022). In many of these stories, the concept of survivance is part of the law stories, as well. This would be the story of survivance—the concept by Vizenor (2008) that depicts the continuation, endurance, and adroitness of Indigenous Peoples in order to persist.

These stories are told in a wide array of media: podcasts, livestreams, radio news, and internet news. News reports told the story of a Beauty pageant or scholarship program recipient, Rachel Evangelisto, a Miss Minnesota winner who advocates for the Indian Child Welfare Act as part of her platform of activism and works as an ICWA Guardian ad litem (CLAN, 2022; Crann & Felegy, 2022; Whipple, 2022). She has stated, "…[M]y biggest passion in life is the Indian Child

Welfare Act. So, I will absolutely continue to advocate for Native children everywhere, whether that's as Miss Minnesota, or as a future attorney." (Crann & Felegy, 2022) In an online interview, she explained that she personally was impacted by ICWA (CLAN, 2022). The news cycle also covered adults and children who were directly involved in the events that lead up to the court case.

Sahan Journal, in Minnesota, focused on a child who was a member of the White Earth Ojibwe community, and her grandmother, Robyn Bradshaw. Bradshaw was at her granddaughter's every court appearance, and worked for years to get custody. The Cliffords (who joined the Brackeens in court), a White family in Minnesota, wanted to adopt this child. They argued their wealth and resources made them the best home for the child and that the child already had lived two years with them (Spears, 2022). Covering the same individuals, one episode in Season 2 of the "This Land" (2021) podcast, "Grandma versus the Foster Parents" uses storytelling to depict the survivance of Bradshaw and her granddaughter. There were many different angles of these ICWA and foster/adoption stories being covered in the media.

The PBS News Hour, in national media, covered the story before the oral arguments, by asking "what if" questions. The following exchange says much about the power of ICWA, when Juli Skinner (Ponca) explains her take on the policy which was conducive to her own adoption.

Stephanie Sy [Interviewer]:…Do you ever think about what your life would have been like if you had had [sic] been severed from your tribal family?

Juli Skinner: That would be a huge loss for me that I don't think I could have got over. I know I would not be here where I am right now. I think I would have – probably be lost. (Sy, Cuevas & Jackson, 2022).

The feeling of being lost resonated with many adoptees before ICWA took effect (Simon & Hernandez, 2008). Testimony shared in 1974 before the Subcommittee on Indian Affairs included statements by mental health workers who indicated that the loss of culture and identity was associated over the life course with negative mental health impacts for adoptees adopted outside their community (Indian Child Welfare, 1974, pp. 45-51; 54-64). The negative impacts of growing up in a different culture can reverberate through many areas of the adoptee's life. These experiences add to the multi-faceted stories that connect to this case.

In conclusion, Indian law stories of survivance, and those that push the logic of elimination are both part of this ICWA case. This piece only covers some of these Indian law stories. Survivance and elimination, when taken together, connect the anti-ICWA interest groups and Native Nations to larger histories, the contemporary moment, and to short- and long-term futures. The goal

would be to apply the law stories to work against the colonial logic of elimination and promote Indigenous well-being and flourishing.

References

Brackeen v. Halaand (21-380), Transcript of Oral Argument before the Supreme Court of the United States. (2022). https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-376_k536.pdf

CLAN Culture Arts Language Network. Interview with Rachel Evangelisto Season 2 Episode 3. Facebook. https://m.facebook.com/N8VCLAN/videos/337853075136673/

Crann, T, & Felegy, A. (2022). First Indigenous Miss Minnesota competes in Miss America Pageant. MPR News. https://www.mprnews.org/story/2022/12/15/first-indigenous-miss-minnesota-competes-in-miss-america-pageant

Establishing Standards for the Placement of Indian children in foster or adoptive homes to prevent the breakup of Indian families, and for other purposes: Hearing before the House of Representatives. 95th Congress (1978). https://narf.org/nill/documents/icwa/print/app1.pdf

Hoffman, J. (2022). Race question in Supreme Court adoption case unnerves tribes. The New York Times. https://www.nytimes.com/2022/11/07/health/native-american-adoption-icwa.html

Indian Child Welfare: Problems that American Indian families face in raising their children and how these problems are affected by federal action or inaction: Hearing before the Subcommittee on Indian Affairs, 93rd Cong. (1974). https://narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf

Indian Child Welfare Act, Pub. L. No. 95-608. (1978). https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg3069.pdf

NDN Collective. (2022). NDN Live: Coverage surrounding Major #ICWA Case Brackeen v. Haaland-Washington D.C. https://www.youtube.com/watch?v=9sY1uF_VJVI

Pember, M. A. (2019, November 24). Indian Child Welfare legal challenge is about ending tribal sovereignty. ICT News Retrieved from https://ictnews.org/news/indian-child-welfare-legal-challenges-is-about-ending-tribal-sovereignty

Sandefur, T. (2021). The unconstitutionality of the Indian Child Welfare Act. Texas Review of Law & Politics, 26(1), 55-101.

Spears, N. M. (2022, October 20). How an Ojibwe mother's adoption fight ended up in the Supreme Court. Sahan Journal. Retrieved from https://sahanjournal.com/policing-justice/brackeen-v-haaland-native-adoption-us-supreme-court-minnesota-bradshaw-icwa/

Sy, S., Cuevas, K, & Jackson, L.L. (2022, November 4) Supreme Court hears case challenging who can adopt Indian children. PBS Newshour. Retrieved from https://www.pbs.org/newshour/show/supreme-court-hears-case-challenging-who-can-adopt-indigenous-children

This Land. (2021). Crooked Media. https://crooked.com/podcast-series/this-land/#all-episodes

Vizenor, G. (2008). Survivance: Narratives of Native Presence [Kindle edition]. University of Nebraska Press.

Whipple, C. (2022). The first Indigenous Miss Minnesota Rachel Evangelisto prepares for Miss America Pageant. The Circle. Retrieved from https://thecirclenews.org/cover-story/the-first-indigenous-miss-minnesota-rachel-evangelisto-prepares-for-miss-america-pageant/

Wolfe, P. (2006). Settler Colonialism and the Elimination of the Native. Journal of Genocide Research 8(4), 387–409.