This workshop was held at the 2019 Equal Justice Conference in Louisville, Kentucky.

Title:
What is Past is Prologue: The Indian Child Welfare Act

Presenters:
Sarah Carver, Alaska Legal Services Corporation, Anchorage, AK
Yvonne Galey, Oklahoma Indian Legal Services, Oklahoma City, OK
Steve Hager, Oklahoma Indian Legal Services, Oklahoma City, OK
Stephanie Hudson, Oklahoma Indian Legal Services, Oklahoma City, OK
Niki Lindsey, Oklahoma Indian Legal Services, Oklahoma City, OK
Nikole Nelson, Alaska Legal Services Corporation, Anchorage, AK
Greg Razo, Alaska Legal Services Corporation, Anchorage, AK

Presenters will use the Fishbowl method to facilitate a discussion on recent ICWA cases, including cases that attempt to find the Act unconstitutional. The discussion should allow the audience to better understand arguments behind support and opposition of the Act.

If time constraints limit the time of the session, we request to present a 1 hour and 30 minute session on the Indian Child Welfare Act
ICWA: Tribal Advocacy
Brackeen v. Bernhardt: Basic Facts

• A.L.M.: 9 month old boy taken from home in emergency situation
• A.L.M. is an American Indian child
• Placed in Non-Native foster home
• With foster parents for over a year
• Parents terminated parental rights, foster parents filed for adoption
  • A.L.M.’s attorney approved
  • A.L.M.’s parents supported
  • Navajo Nation intervened & identified ICWA compliant placement
• State family court denied petition b/c of ICWA: APPEALED
• Sued BIA to invalidate ICWA, joined by TX, IN, LA arguing unconstitutional
Texas federal court finding

- Major parts of ICWA are unconstitutional
- ICWA operates on racial classification, not on political sovereignty
- ICWA did not surpass the high level of scrutiny required for differentiation based on race

APPEALED
5th Circuit

• 325 tribal nations, 57 Native organizations, 21 states, 31 child welfare organizations, Indian & Constitutional law scholars, 7 members of Congress joined U.S. and 4 intervenor tribes in filing brief to uphold
  • ICWA Constitutional: Constitution gives Congress power to legislate for benefits of Native people—ICWA falls within authority bc applies only to children who are Tribal citizens or eligible & biological child of tribal citizen parent

• Oral Argument heard in mid-March

• A.L.M. adoption continued on—finalized in early 2018
Alaska

- 229 Federally Recognized Tribes
- More than 80,000 Tribal Members
- Spread over 663,268 square miles
ICWA Partnerships

• Embedded attorney model: work with Tribal non-profits to staff an attorney dedicated to ICWA cases for that area
• Contracts for representation
• Regular case review process
## LIFE OF AN ICWA CASE

<table>
<thead>
<tr>
<th>WHAT HAPPENS</th>
<th>ICWA’S ROLE</th>
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<tbody>
<tr>
<td>INVESTIGATION</td>
<td>Investigate, support family preservation</td>
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<tr>
<td>TEMPORARY CUSTODY (probable cause) HEARING</td>
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<tr>
<td>Within 48 hours</td>
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<tr>
<td>OCS files Petition for Emergency Custody and/or Adjudication</td>
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<tr>
<td>Unless parents stipulate, judge holds contested hearing and decides:</td>
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<tr>
<td>- If OCS has proven child is in need of aid</td>
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<td>- If OCS has proven active efforts to prevent removal</td>
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<td>- If OCS has proven that either</td>
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<td>o removal necessary to prevent imminent physical harm or</td>
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<td>o (QEW) that child likely to suffer serious emotional/physical harm if home</td>
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<tr>
<td>- If OCS followed placement preferences or proven good cause not to</td>
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<td>ADJUDICATION HEARING</td>
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<td>Within 120 days</td>
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<td>Unless parents stipulate, judge holds contested hearing and decides:</td>
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<tr>
<td>- If OCS has proven that child is in need of aid</td>
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<tr>
<td>- If OCS has proven (with QEW) that child likely to suffer serious emotional/physical if removed</td>
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<td>- Has OCS followed placement preferences or proven good cause not to</td>
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<tr>
<td>DISPOSITION HEARING</td>
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<tr>
<td>OCS Disposition Report 15 days before hearing; GAL Report 10 days before hearing</td>
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<tr>
<td>Unless parents stipulate, judge holds contested hearing and decides:</td>
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<tr>
<td>- If OCS has proven (QEW) that child likely to suffer serious emotional/physical harm if removed</td>
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<tr>
<td>- If OCS has proven active efforts and unsuccessful result</td>
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<tr>
<td>- Has OCS followed placement preferences or proven good cause not to</td>
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<tr>
<td>- How long child should be in state custody</td>
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<td>PERMANENCY HEARING</td>
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<td>Within 12 months</td>
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<td>OCS files Permanency Report 10 days before hearing</td>
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<td>Unless parents stipulate, judge holds contested hearing and decides:</td>
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<tr>
<td>- Whether to approve OCS proposed permanency plan</td>
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<td>- If OCS has proven active efforts and unsuccessful result</td>
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<td>- Has OCS followed placement preferences or proven good cause not to</td>
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<tr>
<td>TERMINATION HEARING</td>
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<td>Within 180 days or sooner to Terminate</td>
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<td>OCS files Petition to Terminate Parental Rights</td>
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<tr>
<td>Unless parents relinquish rights, judge holds contested hearing and decides:</td>
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<tr>
<td>- If OCS has proven it provided active efforts and unsuccessful result</td>
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<tr>
<td>- If OCS has proven beyond a reasonable doubt (with QEW) that custody with parent would likely result in serious emotional/physical harm to child</td>
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<td>- If termination is in the child’s best interests</td>
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<td>PLACEMENT REVIEW</td>
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<td>Any party or anyone who requested placement can ask for a hearing at any time</td>
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<tr>
<td>Judge decides:</td>
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<td>- Has OCS proven the proposed placement is “unnatural”</td>
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<td>- If not, the proposed placement a higher preference under ICWA</td>
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<td>- All relatives are equal preference unless tribe resolves otherwise</td>
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<td>- If the proposed placement is not a higher preference, is there some good reason for OCS to deny it</td>
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<tr>
<td>- If the proposed placement is a higher preference, can OCS prove good cause to deny it (not bonding/attachment)</td>
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<td>MEDIATION</td>
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<td>Can be requested by any party at any time to resolve entire case or single issues — everyone must agree to mediate</td>
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**Request and Review Discovery**
- May call or question witnesses in court
- Argue for...
Opportunity for Advocacy: Education

Child in Need of Aid (CINA)

When the state removes a child from his or her home, it must petition the state court to approve the removal and to make the child a ward of the state. In Alaska, these child welfare cases are called Child in Need of Aid cases, or CINA (pronounced "Chains") cases. Other states have different names for these types of cases. For example, in Washington, they are "dependency" cases.

Child welfare cases differ from ordinary custody cases because the state has legal authority over the children, and the dispute is between the state and the parents. In ordinary custody cases, the court is deciding custody disputes between parents or other family members and a child welfare agency is not involved.

The Tribe’s right to participate in a child welfare case is guaranteed by federal law, the Indian Child Welfare Act. The child’s Tribe has a right to participate as a party.
Why ICWA?

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Assimilation policies of the United States from the late 1800’s through 1960s swung like a pendulum between active hostility and isolationism, but attacks on the family and tribal structure remained a historical constant. If manifest destiny requires unlimited access, Indians – and their children– were nothing but obstacles in the dominant culture’s way.
Who has seen me beat my wives or abuse my children? – Sitting Bull

- Forty-one years after passage, the law of the Indian Child Welfare Act is far from settled
- Why is the Act still controversial? Why is it so often challenged?
Initially, Indian Children were considered combatants

Damn any man who sympathizes with Indians! ... I have come to kill Indians, and believe it is right and honorable to use any means under God's heaven to kill Indians. ... *Kill and scalp all, big and little; nits make lice.*

— Col. John Milton Chivington at the Sand Creek Massacre
“...And there, directly between us, wrapped in a buffalo robe, lay the cause of my anxiety - a little Indian girl, probably ten years old; not a full blood, but a half-breed.

She was terribly frightened to find herself in our hands, with none of her people near. Why was she left behind in this manner?

This little girl, who was at first an object of our curiosity, became at once an object of our pity...”

George Custer, “My life on the Plains, or Personal Experiences with Indians,” University of Oklahoma Press, 1962
Wounded Knee

20 Soldiers of the 7th Calvary were given the Congressional Medal of Honor for the massacre at Wounded Knee (there were only been 17 Medals of Honor issued in the Afghanistan war (2001-2014))

“The women and children, who were standing to the side of the camp, began to run for the ravines. Some were later found up to two miles away from the camp after soldiers had hunted them down and killed them. Four babies were found alive beneath their mother's bodies.”

April 4, 1867, by order of George A. Otis, the Assistant United States Attorney General:

“...it is chiefly desired to procure sufficiently large series of adult crania of the principal Indian tribes to furnish accurate average measurements. Medical Officers will enhance the value of their contributions by transmitting with the specimens the fullest attainable memoranda, specifying the locality whence the skulls were derived, the presumed age and sex, and, in the case of 'Mound' skulls, or of those from cemeteries, describing the mode of sepulture, and any traces of weapons, implements, utensils found with the specimens, or any other circumstance that may throw light on their ethnic character.”

More than 4,000 skulls were eventually collected. The collecting order remained in place until 1917.

American Indians were given full U.S. citizenship in 1924.
The Modoc War

The beheadings were done as a matter of course. After his capture at the end of Modoc War, Modoc Chief Captain Jack was executed in 1873 along with three other Modoc warriors.

Army Surgeon Henry McElderry cut off their heads and sent them to Washington, where the skull of Captain Jack remained until 1984.

Captain McElderry was singled out with praise for his actions.
Cultural Breakpoints Continued:

• When beheading lost its luster, the United States moved on to other options, like
• Moving Tribes from their land; then moving families away from tribes (Wilma Mankiller in California)
• Cultural Stereotyping (not really human)
• Family Separation
The Reality of Indian Child Policy in the United States, 1900

Indian Children at Carlisle Indian Industrial School, Carlisle, Pennsylvania
“A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. *Kill the Indian in him, and save the man.*

The policy of removal and “killing the Indian” did not change much throughout the twentieth century.

A 1974 study by the Association of American Indian Affairs showed that 25 to 35 percent of all Indian children had been removed from their families and placed in foster, adoptive, or institutionalized care at some point in their life.
The national adoption rate for Indian children was eight times higher than for non-Indian children, with ninety percent of those placements in non-Indian homes.
Removal before ICWA

--Proportionately, four times more Indian children from Oklahoma and Arizona were either adopted by non-Indians or in foster care.

--In New Mexico, twice as many Indian children were in foster care as any other population group.

--In California and Minnesota, the number climbed to eight times as many; in Washington state, nineteen times as many.

Yet man is born to trouble, as sparks fly upward.  

Job 5:7

- ICWA passed in 1978
- Still between 40 and 60 published appellate decisions each year
- Between 200 and 300 UNPUBLISHED opinions each year
- Now, after 41 years, a federal judge has ruled most the Act unconstitutional (on a motion for summary judgment)
25 U.S.C. § 1901: 

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds ---

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power To regulate Commerce with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
25 U.S.C. § 1901:

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members or are eligible for membership in an Indian tribe;
25 U.S.C. § 1901:

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.
Why is ICWA still under attack?

If a tribe is fighting over water rights, who represents the tribe?

If a tribe is challenging a city tax code, who represents the tribe at the court hearing?

If an Indian child is being processed by the state, who represents the tribe?
I get to use a German word.

- The ICWA is the *Schwerpunkt* of sovereignty attacks, or as Felix Cohen would say, “the canary in the coal mine.”
- The attacks on ICWA center around Indian children and are based on their race, not their political membership.
- If the Supreme Court finds that Indian children under ICWA are a racial, not a political, classification, then what else can be deducted from tribal sovereignty?
Think it can’t happen?

Reclaiming Native Truth
https://rnt.firstnations.org

Here’s a fun poll!

--40 percent of respondents didn't think Native Americans still exist (keep in mind that 55 percent of Americans believe they have guardian angels*)

-- 59 percent agreed the United States committed genocide against Native Americans.

-- 36 percent of people thought Native Americans experience significant discrimination.

-- Bias against Native Americans depends on region, with the greatest bias shown among those who live nearest Indian reservations.

-- People held diametrically opposed ideas about Natives; for example, that they live in abject poverty but also are "flush with casino money" or care about the environment but live on trashed reservations.

Great Falls Tribune, August 7, 2018