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NCLA Amicus Brief Tells Supreme Court that the ICWA Wrongly Divests Legislative Power

Deb Haaland, Secretary of the Interior, et al. v. Chad Everet Brackeen, et al. (and related cases)

Washington, DC (June 3, 2022) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil liberties group, has filed an *amicus* brief with the U.S. Supreme Court in the cases consolidated with *Haaland, et al. v. Brackeen, et al.* NCLA is urging the Supreme Court to declare that the Indian Child Welfare Act (ICWA) divests Congress's lawmaking function to an entity outside of the federal government (*i.e.*, Indian tribes), which Article I, Sec. 1 of the U.S. Constitution forbids.

The ICWA is a federal law that regulates state foster-care and adoption proceedings involving Indian children. The act purports to delegate authority to Indian tribes to re-write legislative default rules governing adoptive placement of Indian children, which would unlawfully divest Congress's legislative powers. NCLA strongly supports judicial enforcement of the Vesting Clause's constitutional mandate that "[a]ll legislative powers ... shall be vested in a Congress." The ICWA violates this mandate.

The States of Texas, Louisiana, and Indiana filed suit in district court, seeking a declaration that the ICWA violates the Vesting Clause. The district court granted the States' motions for summary judgment, accurately stating that "an Indian tribe, like a private entity, is not part of the federal Government at all" and therefore that "Article I does not permit Congress to delegate its inherent authority to the tribes." A divided *en banc* Fifth Circuit reversed the district court's ruling, holding that the ICWA does not violate the nondelegation doctrine.

The Fifth Circuit majority further asserted that Congress may freely delegate to Indian tribes its legislative authority on *any* subject matter that Congress is authorized to regulate pursuant to the Indian Commerce Clause. But the flawed logic underlying that broad assertion would undo the vesting of "all" legislative power in Congress. If Congress were entitled to divest the powers it possesses under the Indian Commerce Clause, it follows that Congress would be permitted to divest its powers under other Article I provisions—*e.g.,* the taxing power, the spending power, and the power to regulate interstate commerce. But Congress would then hardly have all legislative power. In fact, it would have hardly any left.

The Fifth Circuit stated that Indian tribes are exempt from the nondelegation doctrine—that tribes possess sovereign authority and that the Vesting Clause does not bar Congress from adopting as federal law the laws of another sovereign. This premise and its conclusion are both flawed. Congress cannot adopt another sovereign's future laws sight unseen without unlawfully divesting its legislative power. The Supreme Court should enforce the Vesting Clause of Article I, Sec. 1 and reverse the decision below.

NCLA released the following statement:

"The Indian Child Welfare Act delegates to Indian tribes the authority to re-write Congressional rules governing the placement of Indian children for adoption. That delegation violates the Vesting Clause of Article I that vests such power solely in Congress. Such improper divesting must not be permitted to stand."

— Brian Rosner, Senior Litigation Counsel, NCLA

For more information visit the *amicus* page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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