

AMENDMENTS TO THE INDIAN CHILD WELFARE
ACT

DUPLICATE

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

TO PROVIDE CONSTRUCTIVE DIALOG ON HOW TO IMPROVE THE
INDIAN CHILD WELFARE ACT

JUNE 26, 1996
WASHINGTON, DC



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AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

WEDNESDAY, JUNE 26, 1996

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:58 a.m. in room 216, Senate Hart Building, Hon. John McCain [chairman of the committee] presiding.

Present: Senators McCain, Inouye, Campbell, Thomas, Gorton, and Dorgan.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. I want to apologize for the delay in beginning this very important hearing. As I hope most of our visitors and witnesses know, we had a vote on the floor of the Senate.

I want to welcome all the witnesses, some of whom have traveled a great distance to testify.

At the outset, let me say that the issue of Indian child welfare stirs our deepest emotions. Nothing is more sacred than our children, but what I hope to hear from each witness today is not passionate polemics but constructive dialogue on how the Indian Child Welfare Act of 1978 can be improved to better serve the best interests of Indian children without trampling on tribal sovereignty and eroding fundamental principles of Federal Indian law.

Last week, our committee struck the provisions of title III of H.R. 3286 which the House had passed last month by a narrow margin after extended debate. We deleted that controversial title because of our serious concern about the breadths of its language and the fundamental changes it would make to the government-to-government relations between the United States and Indian tribes.

Title III has been strenuously opposed by virtually every tribal government in the Nation and by the Justice and Interior Departments. At the same time, I believe that some of the problems identified by the proponents of title III are legitimate. Adoptive families seek certainty, speed and stability throughout the adoption process. They don't want surprises that threaten to take away from them a child they have loved and cared for after they have followed the law.

There is no doubt in my mind that in the case of an Indian child, there are additional interests that must be taken into account during an adoption placement process, but these interests, as provided

for in ICWA, must serve the best interest of the Indian child and those best interests are best served by certainty, speed and stability in making adoptive placements with the participation of Indian tribes.

My point is this. These concerns can be addressed far more narrowly than the way they are addressed in title III. They can be addressed in ways that preserve fundamental principles of tribal sovereignty by recognizing the appropriate role of tribal governments.

After we hear from a panel of various members of the House and Senate who have asked to testify and from two administration witnesses, the committee will hear from representatives of tribal governments and of the adoption community who have worked together for more than a year to develop compromise language that each community can support.

As with all compromises, I'm sure each side would prefer language that is better for them. I imagine the Indian tribes would rather not have any amendments at all and that the adoption community would rather have the House passed amendments be the law of the land.

On behalf of the Indian children and their parents, both biological and adoptive, I want to extend my personal thanks to each of you who have led the way to a compromise in which both sides and, most importantly, Indian children are the winners.

I'm especially grateful for the position taken by the Indian tribes and particularly for the leadership of the National Congress of American Indians and the National Indian Child Welfare Association. Your efforts to reach out to the adoption community, even as the debate was becoming increasingly sharp on both sides, has made all the difference.

Likewise, we are all indebted to the reasonableness and fair-minded approach taken by adoption advocates.

The compromise appears to provide the adoption community with the certainty, speed and stability it seeks and the tribal community with the protections of tribal sovereignty it seeks. Because it seems to be a delicately-balanced package, at the conclusion of this hearing, I expect we will be able to ask our colleagues to join us in moving this compromise language without substantial changes as quickly as possible through the Senate and the House in the coming weeks.

Let me say that if we reach this compromise with the agreement of my partner, the vice chairman, I would like to move it as a free-standing bill and also if this compromise is agreeable to all parties, as an amendment to reinsert it as title III if the bill moves through the Senate as planned, in other words, I would like to move it in the most expeditious fashion.

Again, that is based on the premise that all parties would agree to this compromise.

Senator Inouye, I understand you want to wait on your statement?

Senator INOUE. Yes.

The CHAIRMAN. Senator Campbell.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S.
SENATOR FROM COLORADO

Senator CAMPBELL. Thank you, Mr. Chairman.

I'd like to make just a few comments and observations on the draft amendment to the Indian Child Welfare Act and certainly I appreciate your efforts in trying to develop a proposal that will accommodate all concerns of the affected parties.

Over the past year, there's been a considerable amount of controversy, as you know, surrounding the implementation and the scope of the Indian Child Welfare Act, often inflammatory and often very impassioned, as you alluded to. As a result, there have been legislative proposals introduced in this Congress in an attempt to clarify the scope of the act.

Most recently, the provisions of title III of the House-passed Adoption, Promotion and Stability Act, H.R. 3286, sought to define the applicability of the ICWA to child custody proceedings involving a child whose parents do not maintain an affiliation with their respective tribal communities.

When title III came before this committee last week, I was supportive of the committee's action to strike those provisions. It was my understanding that title III provisions would essentially transfer jurisdiction over child custody proceedings involving a child not residing on a reservation from the tribal courts to the State courts.

One of the reasons ICWA was first enacted by the Congress in 1978 was the fact that non-Indian institutions, including State courts, do not completely understand the unique culture and tribal relationships and therefore, should not be independently responsible for child custody decisions involving Indian children.

In addition, reverting determinations of tribal membership and enrollment back to the State courts, I believe, infringes on the most basic rights of tribal self-determination.

Another concern I had too was because of my own experience, if you will indulge me for a moment, Mr. Chairman. As I think back to my own childhood which was probably uncommon in those days for Indian children or Indian mixed-blood children, I was raised in California many miles from the Northern Cheyenne Reservation in Montana. Where I was born and raised, my sister too, was not in our control as my father had moved away from the reservation at an early age. However, the fact that we weren't raised on the reservation did not take away from our cultural identity or our affiliation with the tribe.

During my childhood, I spent some time, as you know, in an orphanage and in foster care homes and I don't believe that was uncommon at the time. I was fortunate enough to be reunited with my family but had I been placed up for adoption and provisions such as those included in title III were in place at the time, both my father and I may not have been considered enrolled members of the Northern Cheyenne Tribe due to our separation from the reservation community.

While I understand the concerns of the proponents seeking to amend ICWA, I also have concerns that these recent proposals do not provide an equitable remedy for both Indian and non-Indian families. I briefly reviewed the compromise legislation which will be discussed today and certainly, it's a step in the right direction.

It's my understanding that these amendments are the result of the coordinate work of representatives from both the tribal and adoption communities. It is this kind of effort that will produce amendments to ICWA which are not only equitable to all parties involved, but will clarify the adoption process involving Indian children. I look forward to these hearings.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Campbell. As always, you bring an insight into this issue which is of incredible value.

Senator Thomas.

Senator THOMAS. I'll hold off, Mr. Chairman.

The CHAIRMAN. Thank you.

The vice chairman has chosen to hold off on his opening statement as well until after we hear from the panelists.

I'm not exactly clear how to proceed except perhaps, Senator Glenn, if you would like to begin and then perhaps Congressman Solomon. In order of seniority, I guess is the usual standard of procedure. Certainly age as well, which means you, Senator Glenn.

STATEMENT OF HON. JOHN GLENN, U.S. SENATOR FROM OHIO

Senator GLENN. You're always so considerate, Mr. Chairman. [Laughter.]

Thank you, Mr. Chairman. I appreciate the opportunity to testify before the Committee on Indian Affairs regarding revisions to the Indian Child Welfare Act [ICWA].

As you and members of the committee know, I've introduced S. 764, the Indian Child Welfare Improvement Act. The bill addresses a very narrow change in the existing application of ICWA during adoption proceedings. Some of these same concerns are reflected in Representative Pryce's bill in the House, H.R. 1440, which she will address later. It's a companion piece. They are not identical, but they deal with similar matters.

Since my bill was introduced in May 1995, a little over 1 year ago, the Committee on Indian Affairs has received a series of amendments to ICWA developed by a number of tribal groups and others. These amendments are known as the Tulsa Agreement. They deal with several issues critical to the application of ICWA to child custody proceedings, including notice to Indian tribes for voluntary adoptions, time lines for tribal intervention in voluntary cases, criminal sanctions to discourage fraudulent practices in Indian adoption, and a mandate that attorneys and adoption agencies must inform Indian parents of their rights under ICWA.

I commend the development of this document which addresses existing flaws in the application of ICWA. I believe that this alternative approach to refining ICWA preserves the participation of tribal interests while offering greater certainty for potential adoptive families.

Mr. Chairman, the legislation that I introduced last year was a direct response to a situation that developed involving a family in Columbus, OH, the Rost family. They received custody of twin baby girls in the State of California in November 1993 following the voluntary relinquishment of parental rights by both birth parents. The biological father did not disclose his Native American heritage

in response to a very specific question on the relinquishment document.

In February 1994, the birth father informed his mother of the pending adoption of the twins and 2 months later in April 1994, the birth father's mother then on her own enrolled herself, the birth father and the twins with the Pomo Indian Tribe in California. The adoption agency was then notified that the adoption could not be finalized without a determination of the applicability of ICWA.

My interest in reforming ICWA is to ensure that the law could not be applied retroactively in child custody proceedings. I have no intention to weaken ICWA protections, to narrow the designation of individuals as members of an Indian tribe, or to change any tribe's ability to determine its membership or what constitutes that membership.

My sole intention is to require that ICWA cannot be retroactively applied. To this end, my office has met with the National Congress of American Indians, the National Indian Child Welfare Association, and other tribal representatives to resolve this issue.

Mr. Chairman, all I'm saying is that once a voluntary, legal agreement has been entered into, I don't believe it's in the best interest of the child for this proceeding to be disrupted because of the retroactive application of ICWA. To allow this retroactive application could have a harmful impact on the child.

I know the chairman and other members of the committee share my overriding concern in ensuring the best interest of the children awaiting placement is what we concentrate on. The chairman already mentioned that, the interest of the child.

As I said earlier, I believe the Tulsa Agreement is a very significant step in resolving certain issues pertaining to application of ICWA and child custody procedures. I look forward to working to incorporate language addressing the problems of retroactive application with those involved in the Tulsa agreement.

I appreciate the committee's work in this matter and the opportunity to testify on my views.

Mr. Chairman, the scope of my legislation is deliberately narrow, very narrow to maintain ICWA's purpose while preventing disruption in the placement and adoption of children in cases where ICWA is retroactively applied. I know what a mess that caused in this *Rost* case in Columbus, and it was a mess. They've been back and forth in the courts, tried to take the kids away and take them back again and back and forth all because the original birth parents had denied any Indian connection whatsoever, then later on the mother enrolls them and it really created a legal quagmire.

So Mr. Chairman, I hope we're acting in the best interest of the children and that's my principal concern.

Thank you.

The CHAIRMAN. Thank you very much, Senator Glenn.

I appreciate your continued involvement and consultation with the committee on this issue. I also appreciate the importance that you place on this issue.

I know that you have to be at another committee hearing and I appreciate your being here.

Thank you again, Senator Glenn.

Now we will turn to the second oldest, I believe, Congressman Solomon. We're glad to have you with us. Thank you for joining us.

**STATEMENT OF HON. GERALD SOLOMON, U.S.
REPRESENTATIVE FROM NEW YORK**

Mr. SOLOMON. Thank you, Chairman McCain and Senators Inouye, Campbell, and Thomas. We appreciate very much your allowing us to come over today and testify in this other body over here which is going to be extremely busy in the coming weeks.

I want to thank you for the opportunity to testify today on the reform of the Indian Child Welfare Act. I too want to apologize because I have to leave directly after my testimony to try to arrange the floor schedule for the rest of the week so that we can leave town with you all at the end of the week.

Mr. Chairman, it is indeed unfortunate that some of our sociologists and social workers negatively portray adoption and adoption families and that is so very sad. It is up to those of us with personal experience of adoption to relay its importance to the formation of our children and the strengthening of our families.

I'm here today because I have always been a strong supporter of adoption and the generosity of families who have sought to make homes for children who, for whatever reason, were not able to be raised by their biological parents. I, like my good friend Senator Campbell, am one of those.

Those of us who have been adopted, not only need to share our stories with others, but we need to speak out in favor of the adoption decision. My support has grown out of my fundamental views that every human life is so precious and that every person deserves the right to life and a happy home.

For those reasons, Mr. Chairman, I wholeheartedly support the recent adoption legislation in the House. This bill makes adoption an option for families of all income levels by offering a \$5,000 tax credit while also streamlining the process for interracial cases.

This groundbreaking legislation will decrease the backlog of children in foster care and help find caring homes for all children, not just those that are in foster care today but those in the future as well.

This legislation is extremely important in reforming adoption regulations in the limited legislative schedule we have remaining. We must finish work on this bill to allow for the soonest relief for American families. I am here today to also offer my full support for reform of the Indian Child Welfare Act to add to this adoption legislation.

The Indian Child Welfare Act was passed, as you know, Mr. Chairman, in 1978 in response to a terrible problem within the Indian community, the high numbers of Indian children being placed in foster care and the breakup of many Indian families because of the unwarranted removal of their children by nontribal, public and private agencies, and that was a reaction and a badly needed reaction to a problem. This was clearly an unjust situation that needed to be corrected in order to protect the sanctity of the Native American family.

Though this act was meant to remedy this situation, the reality is that the act has been detrimental in some cases. There are loop-

holes, there are people that have fallen through the net. The problem that the act was created to correct, namely the inordinate number of Indian children in foster care has actually risen since its enactment because of the increased authority the act can give an Indian tribe.

There have been cases of parents, which you've heard some here today, being blocked from adopting children because the Indian Child Welfare Act allows retroactive tribal registration even after the biological parents have given up all legal rights to the child. This committee is discussing today compromise legislation to amend the Act to respond to many of those concerns.

This compromise between the tribal governments and the adoptive community represents is, I think, a very strong step in the right direction in reforming that act. I am encouraged that portions of this language will limit the length of time for tribes to contest adoption while also facilitating voluntary agreements between Indian families or tribes and non-Indian adoptive families.

However, I and many of my colleagues are concerned that this language, while commendable, will not address cases where the adoptive child is retroactively registered in an Indian tribe. With future negotiations in the adoption legislation between the House and the Senate, these concerns can hopefully be rectified.

This legislation is extremely important to the families of this country, Indian and non-Indian. Adoption plays a vital role in strengthening the family unit and protecting the values of this great Nation. We must remember that the best interest of the children must be paramount in all child custody proceedings. Congress must work diligently to remove these barriers to adoption and provide a sense of security to adoptive parents and children that their adoptions will be permanent.

For this reason, Mr. Chairman, I hope the chairman will continue to pursue and pass reform legislation that you have before you. This window of opportunity cannot be missed in the final weeks of this legislative session.

Let me assure you that if there is an agreed-to, negotiated compromise that I, as the chairman of the Rules Committee that controls the flow of legislation in the House assisted by my right arm, a member of my Rules Committee, Deborah Pryce here, we will do everything in our power in the 27 legislative days left to try to get through 85 major priority items of which I consider this to be one. We will do everything we can to assist you in getting this legislation signed into law.

Mr. Chairman and members, I really want to thank you for your leadership and your effort. I know all of you are sincere. Let's get this done and see if we can't help people that truly need to be helped.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Chairman.

Before you leave, I appreciate very much that commitment if we can get an overall agreement. I believe that we could do the same thing over on this side if we can get everybody to agree. I very much appreciate your pledge of cooperation and I do recognize how heavy the schedule is.

When you said you were going to try to get out by the end of the week, is that tomorrow?

Mr. SOLOMON. That's Thursday. If things go right, Mr. Chairman, we will be out of here by Thursday at 6 p.m.

The CHAIRMAN. Thank you very much, Mr. Chairman. That's encouraging to note.

Thank you for being here.

Mr. SOLOMON. Thank you, so much.

The CHAIRMAN. Congressman Geren, welcome.

**STATEMENT OF HON. PETER GEREN, U.S. REPRESENTATIVE
FROM TEXAS**

Mr. GEREN. Thank you, Mr. Chairman.

I appreciate very much the opportunity to be here today and to testify on an issue that is very close to my heart. I'm the parent of two adopted children and have a very strong interest in the resolution of this issue.

I do appreciate the chance to be here and the leadership that Senator Glenn and Congresswoman Pryce and many of you have shown on this issue. I thank you for this opportunity to testify.

You have heard and you will hear from many representatives and members of Native American tribes and I certainly appreciate and respect their concerns.

The Indian Child Welfare Act was enacted to address the very real and serious problem affecting the families and culture of Native Americans. Unfortunately, the remedy that has been created by the Indian Child Welfare Act has led to its own abuses and, I believe, injustices.

The act, as currently enforced, has created uncertainty and, in many cases, heartbreak in the adoption community. It is unreasonable for the adoption of a child, a child with no cultural ties and with remote Indian ancestry, an adoption that is consented to by the birth parents, approved by lawful State authorities chosen by the birth parents who are U.S. citizens to be interrupted by any third party, even a sovereign nation such as a Native American or a European nation.

The Pryce language that is included in the Adoption, Promotion and Stability Act passed by the House preserves the goals of ICWA but eliminates the potential for injustice and abuse. Pryce respects the personal rights of those intimately involved in the adoption decision.

Under Pryce, jurisdiction and intervention rights of Indian tribes are based, not just on the blood ancestry of the child, as under ICWA, but also on the involvement of a biological parent in the cultural life of an Indian tribe.

Pryce recognizes the legitimate role of Native American tribes in child custody proceedings involving children where at least one of the child's biological parents is of Indian descent and where a birth parent maintains, by his or her choice, a significant social, cultural or political affiliation with a tribe.

It allows birth parents, U.S. citizens who have chosen not to establish ties with their ancestral nations, to make the decision they believe is in the best interest of their child. This change makes the

Indian Child Welfare Act more reflective of its original intent and it respects the rights of American citizens.

Last, the Pryce language prohibits a birth parent from asserting tribal membership—Mr. Solomon and Senator Glenn both discussed this retroactive issue. Once the adoption is complete, it ought to be respected by all parties. This change provides certainty for adoptive parents and prevents distant relatives or tribes from asserting custody over children sometimes years after an adoption has been completed.

I've had an opportunity to examine the preliminary language proposed as a compromise and I do think it's a step in the right direction, but it falls short of the reform we must have if we're going to make this act truly respectful of the rights of the people involved in this very difficult situation.

It's progress but it does not address the underlying problem with ICWA. It does not give the birth parents the freedom to make the decision they believe is in the best interest of their biological child. The tribe still has standing in consensual adoption cases to dictate how these children will be placed.

If a mother and father are American citizens and choose to subject themselves to the laws of one of our 50 States, our Federal law must respect that decision. What right is a more fundamental human right than the right of a biological mother and a biological father to act in what they believe is the best interest of their biological child? No ancestor, certainly no great grandparent, whether he's Navajo or German, should be able to deny that American citizen that fundamental right.

Second, the language does not address the retroactivity issue. In order for any reform of ICWA to be meaningful, it must place prohibitions on the assertion of tribal membership after adoption has been completed under applicable State and United States law.

The *Rost* case is a painful and poignant example of the injustice of the current retroactivity provisions. After the *Rost* children lawfully were placed for adoption, the grandmother enrolled the children and the biological father in the Pomo tribe. This action of retroactive membership was asserted to destroy a living family.

We must respect and honor the laws and rights of Native American tribes but we also must honor the God given, human rights of every person who is a citizen of the United States of America. Our country is built on the principle that our citizens are free of the claims of ancestral nations, whatever ancestral nation they choose to leave behind.

Neither the hand beyond the grave, nor a great grandparent who is a citizen of another sovereign nation has a claim on the present and future of those who hold the privilege of American citizenship. It should not matter if that ancestor is German, Navajo, British, or South African.

We talk about ICWA as applying to Indian children. Well, Mr. Chairman, I suggest that other parties ought to lawfully be included in the decision of who is an Indian child. Is a child that is 1/32 of Indian blood an Indian child if the birth parents, the birth grandparents, the birth great grandparents have chosen to not affiliate, have chosen to forsake that tribal membership.

An example that points up the problem is if a boy and a girl, 14 years old, were born in Fort Worth, TX, their parents were born in Fort Worth, TX, if they happen to have an unplanned pregnancy, this young girl, her parents, the parents of this mother and this father are faced with this situation.

If there is a grandparent that happens to have Indian blood, this girl, faced with the most difficult decision of her life, cannot work with her mother and father and decide to place that child in an adopting and loving home in Fort Worth, TX so she can have some relationship with that child, they can't make the decision they think is in the best interest of the child.

It's possible that because a grandparent happened to have some Indian blood, that this girl is going to be faced with the decision of keeping the baby which she may not be financially able to do, placing it for adoption and losing it to California or wherever or having an abortion. Those options that confront this child under these circumstances.

That girl, that American citizen, her parents ought to be able to make the decision that's in the best interest of that child. No third party, no sovereign nation of whatever sort should be able to reach in and get involved in that decision. That ought to be a fundamental right in the United States of America for every American citizen, regardless of their ancestry.

The way this act has been applied, the potential for its application denies that fundamental right for American citizens.

Mr. Chairman, I respectfully disagree that the compromise that has been worked out addressed that fundamental problem with the enforcement of the act.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Congressman, and thank you for being here.

We do disagree, we disagree strongly, and I must say, in all due respect, when we lump German, Navajo, British, and South Africans all together as you do in the conclusion of your statement, it shows to me a fundamental misunderstanding of Indian tribes, their relationship with the Federal Government and American society, but we will continue to try to work for a reasonable agreement, hopefully one that you can agree to.

From your statement, you probably will not, but there are a lot of people who are making a good faith effort to resolve this issue. We also understand the history of what happened to Native American children for a long time in the history of this country and it's a regrettable and black chapter in the history of this country. So we are trying to balance all those interests and will continue to do so.

We respect your views and appreciate the passion that you bring to the issue.

Thank you very much.

Mr. Chairman, go ahead, please.

Mr. YOUNG. I know these people have been sitting here but I have another meeting to chair at 11 a.m. that's very, very important. I'll ask permission.

The CHAIRMAN. The other witnesses are more than happy because they fear retribution as you know?

Proceed, Mr. Chairman. It's very nice to have you back and it's wonderful to see your again.

**STATEMENT OF HON. DON YOUNG, U.S. REPRESENTATIVE
FROM ALASKA**

Mr. YOUNG. Mr. Chairman, as one who used to sit on my committee, you know full good and well that I don't use that tactic. [Laughter.]

Thank you again and I submit my statement for the written record.

I am chairman of the Resources Committee that has jurisdiction over American Indians. I want to thank my colleagues in the Senate for allowing me to testify on Title III of H.R. 3286.

I oppose very strongly the inclusion of Title III in H.R. 3286. The full committee, on a bipartisan consensus, voted unanimously—I want to stress that—to strike title III out of the bill. However, the House Rules Committee chose to reinstate that title in an omnibus adoption bill. When it was considered on the House floor, it was a very close vote. By five votes, that provision was adopted.

H.R. 3286 is intended to promote family values, avoid prolonged and unnecessary litigation in adoption, get away from race-based tests in child placement decisions. I support families but title III of the bill is anti-Indian family legislation and fails to accomplish all three of these goals.

The bill was introduced without consultation with Alaskan Natives and the American Indian tribes. Very frankly, I was very, very concerned at this important issue. Without the understanding of the history, Mr. Chairman, I'm glad you mentioned the history, of where we are and how we got there, that's the most important thing.

I understand that Congresswoman Pryce's introduction of this bill and understand Congressman Geren's interest in this and Congressman Solomon's interest, but we did have a hearing earlier on in 1995 and everyone who appeared before that committee opposed the inclusion of that provision in the bill.

I would also like to suggest the National Congress of American Indians met the last week of June to discuss the working draft document of ICWA and very frankly, I think we're very nearly where we want to be. I do think the compromise has made great strides forward.

Very frankly, Mr. Chairman, I think the *Rost* case is an example of how things can go wrong, but let us not look upon this whole act as one case. Let's say this was a bad case which have never happened. There was a lawyer who I think was incompetent and that has to be stressed. Let's not forget the thousands and hundreds of thousands of Indian children that previously were excluded from their tribes by actions of certain individuals and adopted out.

It was a form of a brain drain, it was a form of a genocide that we no longer will acknowledge in American society today, moving young people, infants away from their mothers and fathers without their say so, and putting them into families that had no connection with the tribes or their culture.

I voted for ICWA and I know you did, Mr. Chairman. I think everybody in this room—maybe Ben Campbell didn't, he wasn't here at that time—voted for ICWA. Overall, the act has worked. What we have to do is address some of the problems. I think the compromise has addressed those problems and I'd strongly suggest we continue to work together and reach the solution.

I do not approve of what happened in the House. I'm sure the Senate also does not approve. What we have to do now is to work to solve this problem. If we don't reach that conclusion, then we're faced with what we have today. I hope that we will work together and solve that problem.

Mr. Chairman, I want to thank you and the members of this committee. Understand that there is a distinct difference between the American Indians and the relationship between the Congress and the tribes. We forget that in the Congress. On the floor of the House, I heard people talking about citizenship, I heard people talk about the comparisons to Hispanics or African Americans. There isn't that similarity. This is a trust relationship and only the Congress can act together with the tribes. That is our responsibility.

When we shirk that responsibility, which we just did also recently in an amendment that allowed the States to impose taxes upon tribes, that is only the authority of the United States Congress. That is our responsibility; that is our trust relationship between those nations, the tribal nations, and the Congress. We must not forget that.

For those that would like to upset this concept and this agreement we've had over the years, I beg them to study the history of where we were, how we've broken our word, how, in fact, we've not implemented what we agreed to. Let's not do that today in modern society. I think that would be a travesty of justice.

There are some cases—I have a case in Alaska that just tears my heart out under ICWA, but I would also suggest respectfully that is rare and far between and we will solve those type cases, I believe, with the compromise.

I thank you, Mr. Chairman and members of the committee.

[Prepared statement of Mr. Young appears in appendix.]

[Applause.]

The CHAIRMAN. Mr. Chairman, I want to thank you for that—please, I would remind the audience that you are guests here and we don't have displays in a hearing. It's not appropriate to do so and I understand the strongly-held feelings on both sides of this issue, but we really can't do that and I would appreciate there not be any further displays. I thank you for your courtesy.

Mr. Chairman, I thank you for a very eloquent statement. Those of us who are getting a little older and frankly with the guidance and leadership of Mo Udall on these issues, I think have an appreciation for these issues. It really is our obligation to, if I may say in all due respect, provide that knowledge and experience on Native American issues to newer members of the Congress who understandably have not had the kind of involvement that we have had over the years.

At the same time, I want to emphasize Congressman Geren, we do respect your views and we appreciate them. I believe our mis-

sion is to try and reach consensus and compromise. I thank you Chairman Young for your efforts in that direction.

Senator CAMPBELL. Mr. Chairman, I also thank my colleague from the House, Don Young, and remind him in front of the witnesses here today that for 5 years, he's owed me a handmade trap-per sled with genuine baleen runners that his father-in-law was making for me. [Laughter.]

With that, nice to see you here, Don.

The CHAIRMAN. You never know what happens when you're going to be a witness. [Laughter.]

Mr. YOUNG. Mr. Chairman, in all due respect, we're on Indian time and it takes a little while. [Laughter.]

The CHAIRMAN. Congressman Geren, did you want to make a comment?

Mr. GEREN. Can I ask a question because I appreciate what you just said that there are those of you who have been involved in these issues for a long time.

The CHAIRMAN. Sure.

Mr. GEREN. I can tell you with the utmost sincerity, I do not understand a law that says this 14-year-old girl in Fort Worth, TX can have an abortion and the Indian tribe has no say so in whether she does that; can keep the baby and the Indian tribe has no say so in how she raises that child; but if she wants to place the child for adoption across the street with her godparents who could provide a loving home for that child, the Indian tribe can block that. I really don't understand that. It seems like an incredible anomaly. Maybe that's just the product of the sausage-making of legislation.

She can have an abortion, she can keep it, but she can't place it in across the street so she can look after it and be a part of its life as it grows up. It's not realistic for this 14-year-old girl to move to California.

Could you explain to me the history of this act that would justify forcing a 14-year-old girl into that type of a difficult decision?

The CHAIRMAN. The tribe cannot block it, Congressman Geren. The tribe can be involved as any governmental agency can be involved. This compromise that we're working out I think would resolve that problem. I know of no way the tribe can block that adoption. As an enrolled tribal member, the law is that the tribe can be involved in that decision.

Go ahead, Mr. Vice Chairman.

Senator INOUE. If I may respond to that, most respectfully, every sovereign country, whether it be South Africa or China or England, France or Ireland, has very clear and distinct laws affecting membership or citizenship.

If I wanted to adopt a child in France or in China, or any one of these countries, it would have to be done subject to the laws of that country. I may have all the money in the world and I can provide the finest lifestyle for this child and the natural biological parents may agree with that, but if that nation says no, you may not adopt this child unless we want to go to war, that's the nature of sovereignty.

Oftentimes laws that are enacted by sovereign nations may not fit in our lifestyle but we have to live with that. That's part of sovereignty.

In order to understand the problem before us, I think two things must be reviewed very carefully. One is the history that Chairman Young and Chairman McCain have alluded to, and the other is the concept of sovereignty which I realize may be at times rather difficult for my fellow Americans to understand because the Indians live as our neighbors, but they are sovereigns, sir.

The CHAIRMAN. Could I ask Senator Campbell to respond?

Senator CAMPBELL. It's a complicated thing but I think that there is a fundamental misunderstanding about Indian culture. You have to remember, my friend, Congressman Geren, that their law, if I can use that word, goes back thousands of years before there was any what is commonly called white man's law. Their law is based on religious values primarily and not settled in what we call white man's courts.

It's the only culture I know, in fact, Mr. Chairman, where you can have several fathers and several mothers all at the same time. In Indian culture, you can have a biological father and mother, but you can have an adopted father and mother or mothers, several, or several adopted families at the same time. Those traditional ways of adopting are really just a joint agreement between the person that's being adopted and the person that wants to adopt them. In a case with a youngster, they announce they want to take that youngster as a son or as a daughter.

Within the Indian culture, that holds up with the respect of an adoption that any law would hold on the outside. So they are treated exactly as a family member once that so-called adoption is made but they don't need a certificate and they don't need a document. It's just an agreement between people. It literally lasts a lifetime.

I have another mother that is not my biological mother. A lady whose children who were about my age on the reservation, one of them died and his name was Ben, the same as mine, and when that son died, his mother asked me if she could take me as a son to help relieve her grief. This has been years ago. I agreed to that, so I immediately inherited about one dozen other brothers and a sisters and a new mother, but within the Indian culture that's based on religious beliefs, it's absolutely as solid as some document filed in a court of law.

I think that because of that kind of complete misunderstanding, we often try to apply non-Indian logic and non-Indian systems of laws to a culture that never did recognize them and, in many cases, doesn't now and in fact. Sometimes our own religious beliefs come in conflict with those laws. I think it's difficult perhaps for non-Indian people to understand how the heck you can have two or three mothers and fathers and it's certainly difficult for traditional Indian people to understand how somebody that has nothing to do with their culture can arbitrarily make a law that overrules your religious beliefs.

It's an extremely complicated thing and I think that very often it just goes right on by you. You just wouldn't understand it or see it unless you were very close to Indian people or reservation people.

Mr. GEREN. That was helpful to me and if I could just respond real briefly to Senator Inouye.

The one difference I would suggest about the application of this law that would differ from your analogy with China perhaps, if a

person is a Chinese citizen, forsakes Chinese citizenship, moves to the United States and gets American citizenship, no matter what China tries to dictate to that person who is now an American citizen, we ignore those dictates from China.

Once that person becomes a U.S. citizen, he or she has all the protections and the rights of any American citizen. That in no way denigrates the sovereignty of China; it just respects the sovereignty of the United States and the choice of that individual to assume all the responsibilities, privileges and rights of American citizenship.

The CHAIRMAN. Congressman Geren, let me commend to your reading the statement by the Honorable Seth Waxman who is the next witness here who is going to testify and from his written statement, he says,

Since the formation of our Union, the United States has recognized that Indian tribes have the authority to govern their members and their territory. In *Cherokee v. Georgia*, the United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribe's right to the highest and best of form of self-government.

ICWA is a constitutionally-valid statute that is closely tied to Congress' unique obligations to Indian tribes by protecting the best interests of Indian children and families while promoting tribal rights of self-government.

Congressman Geren, you can disagree with the Justice Department's interpretation and this committee's traditional role and the clause in the Constitution that gives the Congress the unique responsibility concerning relations with Indian tribes, but there is nothing clearer than the statement by the Justice Department, and you are free to disagree with that, but that's the fundamental principle upon which the Congress and this Government has conducted its relations with Indian tribes.

In my view, we need to modify ICWA, but we cannot violate this fundamental principle which has guided my behavior, that of the vice chairman and those of us who understand the Constitution of the United States and our unique obligations to Indian tribes which understandably most Americans do not.

Mr. GEREN. I don't argue that Congress doesn't have the right to do what ICWA has done; I'm arguing that it's not good policy.

You've indulged me and I appreciate very much the chance to interact with you. You all have worked with this much longer than I.

The CHAIRMAN. Thank you very much.

Congressman Faleomavaega, it's nice to see to see you back and thank you for being with us this morning.

STATEMENT OF HON. ENI F. H. FALEOMAVAEGA, U.S. DELEGATE FROM AMERICAN SAMOA

Mr. FALEOMAVAEGA. Mr. Chairman, since the gentledady from Ohio is much more attractive and good-looking than I, I would defer to her.

The CHAIRMAN. I was going to sort of let her bat cleanup here but if it's okay with you.

Ms. PRYCE. Go right ahead. I think we're going by age. [Laughter.]

Mr. FALEOMAVAEGA. Mr. Chairman, a couple of observations in the dialog and I certainly would like to reinforce the statement made by my good friend Senator Campbell.

A classic example is myself. When I was born, my grandparents raised me. Literally, I didn't even know who my parents were, but at some point later in my life, I knew who my parents were and I ended up with 50 uncles and 100 cousins and 1,000 relatives, the fact of the extended family system that Indian culture has is exactly the same that we also have in our culture that even though I may have a cousin who is tenth removed, genealogically, as far as I'm concerned, he's my first cousin.

This is the reason why all the NFL football players who are of Samoan ancestry are my cousins. [Laughter.]

For the record, also the fact that we have 20 Samoans who play for the NFL and three made all-pro this year, so it's nice to have cousins around that do well and I know for a fact, many don't even know that they're Samoans.

With that note, Mr. Chairman, I'd also note the fact that Indian tribes are the only ethnic group that is expressly stated under the provisions of the Federal Constitution that this Government is to deal with them, not French Americans, not Chinese Americans, not Black Americans, but that Indian tribes as specifically stated under the Federal Constitution, that Congress does have that trust responsibility toward them and I think this is the reason why we are here this morning.

Mr. Chairman, thank you for the opportunity to appear before the committee this morning. I know that we're all in need of being in three places at once this morning, so I will necessarily make my statement short. Please do not take my brevity to mean that the issue I am addressing is not of concern to me.

Indian issues are of particular importance to me and any action by the Congress which would harm Indian children certainly gets my attention as I'm sure this intent and the spirit of my colleagues on both sides of the aisle feel very much about the needs of Indian children.

Today, we do have a philosophical disagreement on the provisions of title III of the bill. I want to speak in opposition to any efforts to amend the Indian Child Welfare Act which would limit the review of tribal governments over members of their tribes, particularly concerning the adoption of tribal members.

In 1978, Congress passed the Indian Child Welfare Act to stop the hemorrhage of Indian children being separated from their families. This Act was passed after long and careful deliberations over years, Mr. Chairman. Hearings were held, drafts were circulated and questions were asked.

Last month, the House passed legislation which would greatly reduce the influence tribal governments would have over the adoption of members of their tribes. The House did so without even a comprehensive hearing.

Mr. Chairman, the legislation considered by the House was not even referred to the Committee on Resources, the committee of jurisdiction on Indian Affairs in the House until the last minute. The referral was only for six days and within that period, the commit-

tee both Republicans and Democrats alike rejected the method and language used in the bill.

House legislation would require that a child's significant cultural, social and political contacts with a tribe determine his or her Indianness instead of tribal membership. It ignores the important role of the extended family in Indian culture and would lead to increased litigation.

It's important to note that the Indian Child Welfare Act does not require that Indian children be adopted by Indians. Other races are permitted to adopt Indian children. This was not a racist act, Mr. Chairman, but rather, the purpose of the Act was to ensure the cultural differences between Indians and other cultures were fairly taken into consideration in adoption proceedings. This is an important point which I do not believe has been brought out during the recent public debate.

Let me cite an example. In 1995, twin baby boys from the Salish-Kootenai Tribes of the Flathead Reservation in Montana were placed with a non-Indian couple in Montana. Though understandably frightened by the scores of horror stories they had heard, the parents and their adoption attorney rightfully followed ICWA and notified the tribe of their intention to adopt.

The paternal grandfather of the adoptive children desperately wanted to maintain contact with the twins, especially since his only child, the birth father, had been killed in a car accident.

The tribe not only consented to the adoption of the children by their non-Indian grandparents but it took the extra step of helping with a creative arrangement that allows the children to maintain a connection with their Indian family while being raised by their white grandparents. Books, pictures, art work and traditional writings done by the twins' biological family members have followed and the adoptive parents have welcomed the twins Indian heritage with respect and gratitude. This is the attitude, Mr. Chairman, that I think we should all adopt as Congress considers any change to this crucial piece of legislation.

The Indian Child Welfare Act was enacted because there were serious problems with the adoptions of Indian children. The outrages prompted the passage of the Act were numerous. Prior to its enactment, the rate of adoption of Indian children was wildly disproportionate to the adoption rate of non-Indian children. Indian children in Montana were being adopted at a per capita rate 13 times that of non-Indian children; in South Dakota, 16 times the per capita rate of non-Indian children; and in Minnesota, at 5 times the rate of non-Indian children.

The act's principal sponsor and my good friend, Congressman Mo Udall, said during the floor debate, "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and as a people are being placed in jeopardy."

I realize there are problems with the Indian Child Welfare Act. I know that one problem is with adoption attorneys who pressure parents—note this, Mr. Chairman—who pressure parents not to acknowledge their Indian heritage on adoption forms. I also know that there have only been problems with less than one-half of one percent of the total number of Indian adoptions since the act was

passed. This small problem does not warrant the shotgun approach proposed by the House.

The fact of the matter is that Indian child adoptions laws have been on the statute books since 1978, a 15 to 20-year period and I cannot believe for a second that these adoption attorneys were not aware of the Federal statutes that provide the guidelines and the process to adopt Indian children.

I also believe that there seems to be, by implication, a question as to the integrity of the tribal courts. Perhaps non-Indian clients who want to adopt Indian children purposely want to avoid tribal courts and not give the tribal courts an opportunity and a chance to provide fair judgment and assessment in adoption cases.

I strongly objected to the language as passed by the House on this issue and I continue to object very much. I respectfully urge the members of the committee to also reject the language.

I might also add as a suggestion that perhaps in the process of our negotiations with the NCAI and other tribal organizations specifically, I endorsed and supported amendments that would specify time limits for tribal intervention and for withdrawal of parent consent for termination of parental rights. These are steps in the right direction and an indication of a good faith manner in which the tribes have approached this serious problem.

I urge my colleagues in the Senate to look seriously at these recommendations and suggestions which could be a way that we could find common ground or agreement, not only to meet the serious needs addressed by my good friend, the gentlelady from Ohio and her colleagues, but certainly to maintain the integrity of the adoption process for our Indian children.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Faleomavaega appears in appendix.]

The CHAIRMAN. Thank you very much, Mr. Faleomavaega.

Let me just point out that the adoption attorneys have been working with the committee and with the Indian tribes and I think have played a very constructive role. I appreciate their efforts.

Congresswoman Pryce, let me just say that I appreciate the communications you've had with my office, I appreciate your deep concern over this issue. I know how difficult and emotional this issue has been for you and your job is to make sure that the best interests of your constituents are represented and I'm very grateful that you would take a deep and abiding interest in this issue. I thank you for the many contributions you've made and I look forward to continuing to work with you as we try to resolve this.

Thank you very much and welcome before the committee.

**STATEMENT OF HON. DEBORAH PRYCE, U.S.
REPRESENTATIVE FROM OHIO**

Ms. PRYCE. Thank you very much, Senator. It's an honor for me to be here in front of you and the other distinguished members of your committee.

Mr. FALEOMAVAEGA. Will you yield?

Ms. PRYCE. Certainly.

Mr. FALEOMAVAEGA. Mr. Chairman, I apologize. Chairman Young and I have a Puerto Rican bill pending before the committee and I must leave.

The CHAIRMAN. Thank you for joining us.

Ms. PRYCE. I'm very, very grateful for the opportunity to be here today and I'll summarize to the extent that I can if I can have consent to put my full statement in the record and any extraneous material.

The CHAIRMAN. Without objection.

Ms. PRYCE. I come to you today encouraged by the movement toward needed reform of the Indian Child Welfare Act. Let me begin by saying that I believe the ICWA was well-intended legislation and I continue to support its original intended objectives. It has done much good, it has corrected many problems, all of which I knew nothing of before I started on this trail. It has been an amazing learning process for me.

However, today an overly broad interpretation of the ICWA by many courts has gone far beyond the protection and preservation of Indian families and Native American heritage. Mr. Chairman and gentlemen of the committee, children in adoptive homes have faced the horrifying possibility of being removed from the only parents and homes they have ever known, even under circumstances where their natural parents were not enrolled members of a tribe, never resided on a reservation, never had any meaningful contact with a tribe or Indian culture, where a primary cultural heritage other than Native American voluntarily relinquished their parental rights and even some chose the couple they wanted to raise their child.

It is the application of ICWA in these cases that concerns me and which serves to discourage potential adoptive parents from pursuing adoption. As passed by the House, Title III would prevent disruption in adoption of children whose parents have no significant affiliation with a tribe. That is true.

All I can say is if a child's birth family maintain no affiliation with the Indian culture or tribe to begin with, that child was not going to be raised in a setting which would reflect the "unique values of Indian culture" to begin with.

As an aside, I would just urge this committee, and I didn't really know where to place this in my remarks but I think from what I have learned over the course of the last year, I would urge the committee to give due consideration to European Americans, African Americans, Asian Americans, Spanish Americans, Hispanic American heritages, all different heritages of children in addition to their Native American heritage rather than ignoring all other ethnic and racial backgrounds in determining when ICWA should apply, particularly under circumstances where there's no affiliation with a tribe and in situations where the child's blood relationship is attenuated.

I think a continued disregard for all these other heritages, in my mind, will no doubt lead to the eventual demise of ICWA and with it, all the good things that ICWA is doing. That's just an aside and I felt it incumbent upon me to say that.

Back to the proposal that is before you today, I believe it contains many, many worthy objectives and provisions, but I fear it fails to address some of the issues and current problems with ICWA which led to the introduction and passage of Title III by the House.

First, let me focus on what I feel is positive about the National Congress' proposal. I agree that parents of Native American descent wanting to place their children for adoption should be apprized of all available placement options and especially the application of this Act. I also understand the importance of notification to the tribes and although the requirements set down before us in this draft are more cumbersome and complex than I would like, I do believe that they will cut down on future interventions. So that is movement definitely in the right direction.

Further, you may be assured that I in no way condone unscrupulous or unethical conduct of attorneys in any capacity under any circumstances.

Finally, allowing for visitation agreements between adoptive families, birth parents and their tribes may serve to decrease the likelihood of disruptions while enabling children to maintain the desired ties to their culture and their heritage and I think that is something that we all would like to see.

However, I have some serious reservations about what is not addressed in the draft. I see problems associated with the required notification when a biological parent chooses not to disclose the Native American ancestry of the child or if that biological parent is not aware of it.

Any amendment to this Act, I believe must afford protection to adoptive parents and children in those instances where there was no reasonable way of knowing that a Native American heritage was present. I think that's a minor thing, but I think it is a very important one.

Also, the proposal does not address the issue of retroactive membership and we have talked about that already at length today. I don't believe Congress could have intended that legitimate, voluntary adoptions be reversed as the result of birth parents joining or being enrolled by another in a tribe after the relinquishment of parental rights, the placement of children in loving homes, and the commencement of adoption proceedings.

Even those of us, and I am an adoptive parent, who are adoptive parents can't begin to imagine the heartbreak associated with the loss of a child under some of these circumstances. Who among us could even pretend to understand the horror and pain felt by a child of tender years being removed from the only parents and family he or she has ever known.

Mr. Chairman, so many of these issues are ones of fundamental fairness and recognition of basic human rights of all people. Children are not chattels nor are they the personal property of an Indian tribe, their birth parents or their adoptive parents. They are individuals who have unique, fundamental rights and needs. Above all, they have the right to permanency and a loving, nurturing family environment providing them stability and security. They should have all these rights irrespective of their race as do all other American children.

I understand and appreciate that this proposal is continually evolving and that further changes have been suggested. I'm very hopeful that is the case. I sincerely appreciate the efforts of all the tribes and the individuals who have participated in discussions and

negotiates leading to the proposal offered by the National Congress of American Indians.

I look forward to continuing to work with them and with you and your committee. I remain most hopeful that we can achieve a consensus regarding ICWA reform.

There are so many problems we don't know how to fix, but I think we have a pretty good handle on how these can be fixed. I think it's our responsibility to do it during this Congress. I respectfully ask the committee to act on this and focus on language that will truly address the problems at hand.

Once again, I thank you for the privilege of being able to testify.

[Prepared statement of Ms. Pryce appears in appendix.]

The CHAIRMAN. Thank you very much, Ms. Pryce, and I appreciate again your continued involvement and leadership.

I want to thank you and all the other witnesses. Congressman Geren, thank you for being here.

Anyone have any questions?

[No response.]

The CHAIRMAN. Thank you very much.

Ms. PRYCE. Thank you.

Mr. GEREN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Inouye, would you like to make your statement at this time?

STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUE. Mr. Chairman, I thank you for this opportunity to reserve this time.

The matter before us is of grave and critical concern to Indian country. I believe the testimony later on will give weight to that.

Like all of my colleagues on this panel, I commend those who have introduced these measures for their noble intent. I do not question their intention, they intended very well and only good. But like most well-intentioned measures concerning Indian country, this measure did not involve the wisdom of Indian country. It was a measure that was conceived and made in Washington for Indian country. I hope we will learn as time progresses that the best laws are those laws that originate in Indian country.

As a result of this title III, my office has received literally tons of letters from Indian leaders throughout this land. If I may, Mr. Chairman, just to paraphrase some of their concerns, these tribal leaders strongly oppose these amendments because "They seriously undermine the sovereign authority of tribal governments and their efforts to preserve Indian families." They oppose these amendments because "They directly infringe upon one of the most important aspects of tribal sovereignty, the power to determine tribal membership." They oppose these amendments because "They authorize State courts to review tribal membership practices and procedures as part of a child custody proceeding and to render judgment as to tribal membership that may be in conflict with the membership determination of tribal governments. These amendments dramatically alter the definition of persons covered under the Indian Child Welfare Act.

They oppose these amendments because "They remove tribal governments from any role in determining both child custody arrangements and tribal membership for purposes of the Indian Child Welfare Act." These leaders feel that these measures are clearly inconsistent with the well-established Federal policy which for over one quarter of a century has consistently recognized and reaffirmed the inherent sovereignty of tribal governments and the right of those governments to determine tribal membership.

The Supreme Court underscored the tribe's right to define its own membership in the case of *Santa Clara Pueblo v. Martinez* when it observed that "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

Mr. Chairman, most respectfully, I believe that to better understand and appreciate the deep concerns of Indian country, a brief review of the history of the matter before us may help because the removal of Indian children from their families and tribal communities has deep roots in this country. It is nothing new.

From the very beginning of our history as a Nation, deliberate attempts and efforts by Europeans to civilize and christianize the inhabitants of this country were directed at Indian children. As early as 1609, it was suggested that Indian children be taken from their families and placed in schools to be educated. Tribal resistance to efforts to remove Indian children from their communities was evident as early as 1744 when a tribal leader declined an invitation by colonists to educate their Indian boys at the College of William and Mary.

As early as the 18th century, missionaries intent upon christianizing Indians according to their standards established boarding schools in an effort to isolate Indian children from their traditional surroundings. This was done with noble intentions.

These early attempts at educating Indian children were, for the most part, a failure and caused many children to become ill, languish in despair and ultimately perish.

Later in 1819, the Congress enacted a law which established a civilization fund for the education of Indians. This fund was turned over to religious and mission groups and was used to establish mission schools for the education of Indian children.

In the late 1840's, the Federal Government and private mission groups combined efforts to launch the first Indian board school system and the first non-mission Federal boarding school was started in 1860. Richard Henry Pratt, the founder of the Carlisle Indian School and considered to be the father of Indian education, believed that in order to transform a people, you must start with their children. This attitude was also expressed by the Federal Superintendent of Indian Schools in 1885 when describing his duty to transform an Indian child into a member of a new social order.

As a result of this ideology, Indian children were taken from their grieving parents and kept away from them for many, many years. These children were typically punished for speaking their own language and cleansed of all traces of their Indianness. By the end of the 19th century, the pattern of forcibly removing Indian children from reservations and sending them to faraway boarding schools had become so pervasive that the Congress enacted legisla-

tion in 1895 which made it a crime to induce Indian parents by compulsory means to consent to their children's removal from the reservations. However, there is no evidence that this law enacted to prevent the forcible removal of Indian children by agents of the Department of Indian Affairs was ever enforced.

The earliest reported case that involved an Indian child custody proceeding and illustrated the tensions that existed between tribal and State jurisdictions was in the *Laalapuckachee* case decided in 1899. This case involved an Indian girl whose State-appointed, non-Indian guardian forced her to attend a school far way from her reservation. The Indian agent for the Sac and Fox Tribes of Iowa had obtained legal guardianship for all of the children from an Iowa State Court and removed them from their homes.

The parents succeeded in their habeas corpus petitions for the release of their children. The Iowa Federal District Court concluded that only courts of the United States could determine the custody of an Indian child who resides on a reservation and whose tribal relations have not been severed.

In sum, I believe it is very clear that for hundreds of years, Indian children have been the innocent victims of a cultural war waged against them by those who later immigrated here. The issue is clearly demonstrated, I believe, that the idea of separating Indian children from their tribal communities is deeply embedded in the fabric of American society.

These attitudes have also served to promote the removal of Indian children from their homes and place them in adoptive homes. The adoption of Indian children became popular at a time when there was a decline in healthy white children available for adoption. Religious groups also encouraged their members to become foster and adoptive parents to Indian children. The Latter Day Saints Placement Program removed as many as 2,000 Hopi and Navajo children every year from their reservations placing them in Mormon homes throughout the country.

In the early 1970's, the erosion of Indian family life received extensive publicity. Surveys that were conducted in 1969 and 1974 by the Association of American Indian Affairs disclosed the shocking disparity in placement rates for Indian and non-Indian children. These surveys revealed that over 25 to 35 percent of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions. In some areas of the country, the problem was even worse with one in every four Indian children under the age of one being adopted.

This study clearly demonstrated that over the years, Indian children have been unnecessarily removed from their families, clans and tribal communities and placed in mission and Federal boarding schools, non-Indian adoptive families, and foster homes and institutions.

State courts and social service agencies have severed the ties of thousands of Indian children from their families and tribal communities through the use of unwritten policies that gave an automatic preference to middle-class, non-Indian homes and institutions in adoption, foster care and child custody proceedings.

The Indian Child Welfare Act, the Act before us, was a reform measure enacted by Congress in 1978 to combat "The wholesale

separation of Indian children from their families and tribal communities." With the passage of this act, Federal law required that preference be given to Indian families and Indian foster care and group homes in the placement of Indian children by State and private social agencies. The act authorized an Indian tribe to intervene on behalf of a child in court proceedings that involved child custody matters and the placement of Indian children.

When the Congress passed the Indian Child Welfare Act, it made a commitment to protect Indian children by officially proclaiming—I believe we should remember this quotation,

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 of or are eligible for membership in an Indian tribe.

As a result of the passage of the Indian Child Welfare Act and the subsequent use of Indian Child Welfare Act as a Federal remedy, the removal of Indian children from their families is not as widespread as in the past and has motivated courts and agencies to place greater numbers of Indian children into Indian homes. Social workers and court personnel are slowly becoming better trained and educated in working with Indian children, their families and the Indian Child Welfare Act.

Nevertheless, there continues to be many shortfalls that plague the implementation of the act such as inadequate Federal assistance, the small number of lawyers and judges who are knowledgeable about this act, the inertia of State social service bureaucracies and their insensitivity to traditional Indian cultures, the uncertainty about the degree to which the Act preempts State laws, the lack of funds to attack the underlying social and economic problems that pervade many Indian communities and compel outsiders to believe that they must rescue Indian children, and the parents of Indian children who attempt to evade the act.

Despite these shortcomings, the Indian Child Welfare Act serves as a real hope and promise to Indian people striving to retain their heritage and pride in a pluralistic society. The law was enacted by Congress to secure a long, overdue protection for Indian children. Tribal leaders have been resisting the removal of their children for over 2½ centuries for each time an Indian child is taken from their ranks, their very existence as a culturally distinct people is diminished and this Nation's first Americans are threatened to the point of extinction.

I believe it is time that we in Washington hear from Indian country on this matter that is of such critical importance to their efforts to preserve Indian families. After all, it is their children that will be affected by any amendment to this act.

Mr. Chairman, I thank you very much for providing me this opportunity to relate what I consider to be a rather bleak chapter in American history that still concerns, understandably, Indian people and Indian country.

Senator CAMPBELL. Mr. Chairman, may I compliment my colleague, Senator Inouye, for that very eloquent statement. My dad was in a boarding school in those days and I remember hearing the stories of forced assimilation, of beating them for speaking their language, of cutting their hair. I guess the closest thing I could call

that was sort of a cultural cleansing which was ethnic cleansing without the blood I suppose. They didn't kill them but certainly they killed many of their spirits, their traditions, their religions, their beliefs, their pride in many cases, and I just have to say that I think Indian people have every right to be scared to death of a complete reversal of the Indian Child Welfare Act because of that.

During the times that the Senator mentioned, a lot of the youngsters were what is termed simply lost in the Indian culture. I guess that's why there is, according to the Bureau, something like 1.3 million enrolled American Indians but according to anthropologists backed up by census figures, there's about 15 million Americans who claim Indian ancestry. So I think that disparity speaks to how many of those youngsters actually did lose their tribal identity.

I thank the Senator from Hawaii for that very fine statement.

The CHAIRMAN. Thank you very much, Senator Campbell.

Next we will hear from Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice and Ada Deer, Assistant Secretary for Indian Affairs, BIA.

Welcome back to both witnesses, we appreciate you being here. As you know, it's the custom of the committee to ask you to deliver your statement in whatever way you feel most effective. Your complete statement, of course, will be made part of the record.

Welcome, Mr. Waxman. It's good to see you again. Thank you for being here. Before you begin your statement, did I misquote you?

Mr. WAXMAN. I don't know. It was quite eloquent. I hope that I said what you read. [Laughter.]

The CHAIRMAN. Thank you. Would you care to go first, sir.

STATEMENT OF HON. SETH WAXMAN, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. WAXMAN. I'd be pleased to go first.

Thank you, Mr. Chairman, Mr. Vice Chairman, and other members of the committee for inviting the Department of Justice to present it's views on proposals to amend the Indian Child Welfare Act.

I want to say, sitting here and having had the opportunity to listen to the panel before me that, although I have had the pleasure and the honor of testifying before many committees in this House and the other, testifying before this committee is a unique pleasure for me. I tell the Attorney General it's more like attending a seminar for me, I always learn much more after I leave here than I felt I knew when I came in. I was greatly educated by the comments of both the members of the committee and the previous panel.

Mr. CHAIRMAN AND MR. Vice Chairman, the Justice Department supports the right of Indian tribes to self-government and recognizes the important needs of Indian children for caring families and nurturing homes. We understand that the proposals under consideration, particularly those of the National Congress of American Indians, represent an effort to reach consensus among adoption attorneys and tribal representatives.

In considering amendments to ICWA, Congress should be mindful of ICWA's important purposes and tribal rights of self-government. The Justice Department supports the committee's action of June 19, 1996 that eliminated Title III of the Adoption, Promotion

and Stability Act of 1996. Although the Department otherwise strongly supports H.R. 3286, we believe title III would interfere unnecessarily with tribal self-government in matters of tribal membership and potentially complicate rather than streamline the adoptive placement of Indian children.

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how and how well ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services. They report that the act generally works well, particularly when the affected parties are apprised of their statutory rights and duties and its provisions are applied in a timely manner.

We believe that many of the proposals developed by NCAI, tribal attorneys and adoption attorneys move the debate in the right direction. These amendments would clarify ICWA, provide deadlines to reduce delay in custody proceedings, and strengthen Federal enforcement tools to promote compliance with ICWA in the first instance.

My longer, written testimony includes some preliminary comments on the draft proposals and we would be pleased to assist the committee in developing concrete proposals that are both respectful of tribal self-government and promote timeliness and certainty in voluntary adoptions of Indian children.

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families and tribes. We understand that the vast majority of these cases are adjudicated without significant problems.

Recently, however, the application of ICWA to a relatively small number of voluntary adoption cases has evoked intense debate, both in this house and the other house of Congress. Generally, in these cases, Indian parents or a tribe alleging that ICWA was not complied with or was evaded seek to recover custody of the Indian children.

The tragedy in these situations arises from the length of time consumed by the legal proceedings. Delay causes anguish and disruption and one's heart goes out to all the parents and perspective parents and, especially to the children who find themselves caught in the center.

It's important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of circumstances. Further, many of these cases would either not have arisen or would not have been so problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases prominently cited for the need to amend ICWA is the adoption that provided the factual predicate for the *In re Bridget Rost* decision in the California Court of Appeals. I know you've already heard about the *Rost* case from the previous panel and I understand that the *Rost* attorney will also be testifying later today.

In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption and the ensuing protracted

litigation has disrupted the lives of all those who have been involved in the dispute.

Had ICWA been complied with at the outset, however, most of the delay and quite possibly the litigation itself would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights and when they did so, they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred and that created the problem. *Bridget R.*, therefore, signals a need to fine tune ICWA's mechanisms to provide incentives that ICWA be complied with early on in the adoption process.

Many supporters of title III, focusing solely on *Bridget R.* and other unusual cases, assume that ICWA's application to these cases will produce a particular outcome, namely the removal of children from non-Indian adoptive parents. The facts of the very case addressed in the Supreme Court's seminal and only decision on ICWA, the *Holyfield* case, demonstrate that this assumption is mistaken.

In *Holyfield*, 3 years after a State court had issued an adoption order placing Indian children domiciled on the reservation with a non-Indian family, the Supreme Court reversed the order, holding that the tribal court had exclusive jurisdiction over the case. The court noted that "Had the mandate of the ICWA been followed at the outset, much potential anguish might have been avoided." The court deferred to the "experience, wisdom and compassion of the tribal court to fashion an appropriate remedy."

Following transfer of the case to the tribal court, the tribal court in that case determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent, but in order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the tribe.

As *Holyfield* demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child. Rather, it allows courts to make that decision on a case-by-case basis taking into account the best interest of the child.

The Department of Justice opposes the title III amendments to ICWA as passed by the House because they would interfere with tribal self-government and undercut tribal court jurisdiction. As Senator Inouye previously noted, the Supreme Court held in *Santa Clara Pueblo v. Martinez*,

The power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law which should be determined by tribal court institutions and other tribal government institutions.

As Congress recognized, "States have often failed to recognize the essential tribal relations of Indian people", and we've heard from other members of the panel today and from the previous panel specific examples of instances in which that occurred.

Title III's proposal to establish a system wherein Federal statutory protections turn not on tribal government determinations of tribal membership, but on a tribal member's degree of "social, cultural or political affiliation with an Indian tribe" is contrary to the

recognized rights of tribal self-government. To the extent Title III authorizes State courts to make these determinations, it further undermines tribal self-government and the objectives of ICWA.

Moreover, title III grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA, tribal membership and eligibility for tribal membership, is readily discernible by inquiry into the relevant tribal government.

In contrast, the social, cultural or political affiliation test incorporates subjective criteria more likely to create additional litigation with attendant delays in the adoptive placement of Indian children than to streamline adoptive placement.

Mr. Chairman, Mr. Vice Chairman, we hope today's hearing will promote consensus on proposals to amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. We appreciate the efforts that you—the Chairman, the Vice Chairman and the whole committee—are making in this area to foster dialog consistent with the government-to-government relations between the United States and Indian tribes.

Thank you and I would be pleased to try and answer any questions the committee has.

[Prepared statement of Mr. Waxman appears in appendix.]

The CHAIRMAN. Thank you very much.

Welcome back, Ada.

STATEMENT OF HON. ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Ms. DEER. Thank you very much, and good morning, Mr. Chairman and Mr. Vice Chairman.

I'm pleased to be here to present the Department of the Interior's views on the proposed amendments to the Indian Child Welfare Act of 1978. I will summarize my written testimony for the record and ask that my written statement be entered into the record in its entirety.

The CHAIRMAN. Without objection.

Ms. DEER. I want to mention that Rosetta White Mountain will submit a moving and personal account which relates her adoptive experience and her efforts to trace her roots and finally make her journey home to reconnect with her family and tribe. The ICWA was enacted to prevent similar situations like Ms. White Mountain's from occurring to future generations of Indian children.

First, I want to thank you, Mr. Chairman and Mr. Vice Chairman, and members of the committee, for your commitment to Indians and for having the House passed amendment removed from H.R. 3286 during the markup last Wednesday. Again, I want to thank both of you for your very eloquent and informative statements today.

The strongest premise of ICWA is the premise that an Indian child's tribe is in a better position than a Federal or State court to make decisions or judgments on matters involving the relationships of an Indian child to his or her tribe. The clear intent of Con-

gress was to defer to Indian tribes on issues of cultural and social values as they relate to child rearing.

In the case of my tribe, the Menominee Tribe of Wisconsin, the application of the act has had a profound impact on the tribe and its future, especially when you recognize that a new generation of tribal members will assume the mantle of leadership for the 21st century. Let me say that I'm a social worker and that these matters are very close to my heart.

Since enactment of ICWA, my tribe has intervened in no less than 920 off-reservation child custody actions. This alarming number represents 12.1 percent of the entire membership of the tribe or roughly, 37 percent of the members under the age of 18. It is important to recognize that the Menominee Tribe only asserted jurisdiction in less than one-half of these cases. Their compelling motivation is always the welfare of the child.

My example illustrates an important distinction between a tribe's right to intervene in a case and a tribe's discretion to transfer a case to tribal court jurisdiction. Tribal decisions to intervene in involuntary State-child custody proceedings have enabled tribes to access the official records of the proceeding which, in turn, further enabled them to monitor case plans being developed and implemented on behalf of their tribal children.

Tribes have the right to determine their own membership. The right stems from the nature of tribes as political entities with sovereign powers. A tribe's power over its membership includes establishing the membership requirements, the procedures for enrollment and the benefits that go with membership.

Because the United States has a government-to-government relationship with Indian tribes, the Department of the Interior is committed to the protection of their sovereign status, including the preservation of tribal identity and the determination of Indian tribal membership as it relates to voluntary child custody proceedings under ICWA.

Tribes came together at the NCAI mid-year conference in Tulsa, OK earlier this month and developed a consensus-based legislative alternative to the proposed amendments of ICWA. We support the tribal governments' efforts to revise the existing ICWA. The tribal amendments will clarify the applicability of ICWA to voluntary child custody matters so that there are no ambiguities or uncertainty in the handling of these cases.

This administration will work tirelessly to ensure that tribal sovereignty will not be sacrificed, especially the right of tribal government to determine tribal membership and the right of tribal courts to determine internal tribal relations. We must prevail on this issue for sovereignty's sake and for the sake of our children.

[Prepared statement of Ms. Deer appears in appendix.]

The CHAIRMAN. Thank you very much. Thank you for a very strong statement.

Mr. Waxman, would certain provisions of title III as passed by the House be open to constitutional challenge, especially for example, the part on Indian descent, might be challenged under the *Aderand* case? In other words, giving jurisdiction to State courts over tribal issues, wouldn't that be open to constitutional challenge, in your view?

Mr. WAXMAN. We don't think that it would. We think that although for the policy reasons that I've articulated orally here today and at some greater length in my written testimony, it's not the conclusion of the Justice Department that inclusion of Title III, any or all provisions of title III, would violate the Constitution.

While we believe that title III would undermine tribal sovereignty and this is inconsistent with the premise that Indian tribes are best situated to determine what's best for their own children, Congress does have, we believe, the authority to limit ICWA's application in cases where a child, for example, is not domiciled on a reservation, to instances where an Indian parent has a significant social, cultural or political affiliation with other tribes.

Our very, very strong and unequivocal opposition to title III is not based on our understanding of the Constitution.

The CHAIRMAN. Thank you very much.

Senator Inouye.

Senator INOUE. Thank you very much.

In your prepared statement, Mr. Waxman, I believe you addressed a concern put forth by Senator Glenn and others on the retroactive nature of this act. Could you advise this committee as to what circumstances may bring about an overturning of the *Rost* judgment?

Mr. WAXMAN. I'll try. The issue that Senator Glenn raised with respect to retroactivity and retroactive application for tribal membership is one that I think is very, very difficult and is very fact sensitive. Before making any kind of evaluation, I personally, and I know the Department of Justice generally, would need to see the specific retroactivity provisions in order to be able to make a judgment as to whether they were appropriate, legal or constitutional.

It's interesting, I think Senator Glenn and many of the other members of the previous panel used the *Rost* case as an example of the ills of permitting retroactive membership in a tribe. I didn't participate in the *Rost* case and unfortunately because I need to go testify at another Senate hearing that is going on right now, I'll have to leave after I finish testifying, so I won't be able to hear the testimony of the *Rost* family attorney, but my reading of that case suggests to me that retroactivity really isn't at issue in the case because under the rules of the particular tribe to which the birth father had lineal descent, he was considered under the tribe's pre-1973 rules to be a member of the tribe even though the tribe subsequently changed its rules to require affirmative enrollment.

I realize this is a long-winded and confusing answer. I think the short answer is, we would like to review very carefully specific language that would adjust what many people call retroactivity and retroactive applications to make sure that they were consistent with the way in which the wide diversity of Indian tribes define membership.

Senator INOUE. Mr. Waxman, I'm looking over the statement of yours and I quote,

At the entry of a final adoption decree, a collateral action may be maintained only on the grounds of fraud or duress within two years of the decree unless a longer period is provided for by State law.

Am I to interpret this that if we can find fraud or duress, you can have a retroactive application?

Mr. WAXMAN. I don't have my written statement in front of me, but the fraud or duress provisions I believe are found in Section 19.13 of Title 25 which provides that after there is entry of a final decree of adoption, a parent may withdraw consent on the grounds that parent's consent was obtained through fraud or duress and thereby petition the court to vacate the decree.

Senator INOUE. So you can do this anytime after the issuance of the decree?

Mr. WAXMAN. Under ICWA, that is right and there are similar provisions in State laws. I'm not an adoption attorney, I never was an adoption attorney and I don't consider myself to be a student of child custody law, but my understanding is that provisions exist in many, if not most, if not all, States with respect to custody.

If I could just take the opportunity in answering your question, Senator, to answer the question that the Congressman from Texas had raised with respect to his hypothetical: ICWA defines an Indian child to be,

An unmarried person who is under age 18 and 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 hypothetical that the Congressman was raising was, a child born of two parents who want to put the child up for an open, non-Indian adoption but the child has a grandparent with some minimal degree of Indian blood that might or might not qualify that person to be or become a member of a tribe and what an injustice it appears, in the Congressman's mind, to be that the tribe could intervene and seek to block the otherwise consensual adoption.

I think the best answer, the shortest answer to that problem is that it is not a problem. In real life, it is not a problem because if two parents, either one or both of which have Indian blood, don't want to have an adoption that is subject to the provisions of ICWA, they can take themselves and their child out of ICWA by simply renouncing their membership in the tribe, in which case ICWA wouldn't apply. If that happened in the hypothetical case raised by the Congressman, there would be no argument, I believe, that ICWA would apply.

The situation he's addressing is, the extraordinarily unusual situation in which one or both parents want to maintain their membership and affiliation with a tribe, but want to have an adoption that does not take account of ICWA. In those instances, this Congress has concluded, and rightly so, that the interests of the tribe are such that it should be given notice and a say.

Senator INOUE. Thank you very much.

May I ask Secretary Deer, you have given us an illustration. Is there any other illustration you can point out of the impact of ICWA?

Ms. DEER. Of course each tribe has its unique experience. In my preparation for this session, I became aware of the situation with the Cherokee Tribe. Last year, the Cherokee Tribe received 5,528 ICWA notices. They sought transfer of jurisdiction but intervened in only 96 cases and sought jurisdiction of 15 cases to the tribal court. Only 12 notices out of those 5,528 were complied with fully under ICWA. So you can see that's a very startling situation.

Senator INOUE. These are recent statistics?

Ms. DEER. Yes.

Senator INOUYE. Thank you.

The CHAIRMAN. Thank you very much. I thank the witnesses. Next, we will hear from Deborah Doxtator, chairwoman of the Oneida Tribal Council and Mary Thomas, Governor of the Gila River Indian Community.

Perhaps, Chairman Doxtator, you would want to identify the people who are here with you and Governor Thomas, you would want to do the same for the record, beginning with you?

STATEMENT OF DEBORAH DOXTATOR, CHAIRWOMAN, ONEIDA GENERAL TRIBAL COUNCIL, ONEIDA, WI

Ms. DOXTATOR. Good morning, Mr. Chairman and Mr. Vice Chairman.

My name is Deborah Doxtator and I'm the Chairwoman of the Oneida Nation of Wisconsin. Accompanying me today are our tribal attorney for Indian child welfare issues, Aurene Martin and also I have the unique privilege of being able to introduce my daughter, Amanda Doxtator. Her Oneida name is Kahawhita which means she takes it with her, so she takes her mother with her. [Laughter.]

I am very privileged to have her here with me this morning.

The CHAIRMAN. Thank you.

Mary, do you want to introduce Mr. Lewis?

Ms. THOMAS. Good morning, Mr. Chairman, Mr. Vice Chairman and committee members. With me today at the table is the honorable counsel for my community, Rod Lewis.

The CHAIRMAN. Thank you.

Chairwoman Doxtator, would you proceed?

Ms. DOXTATOR. Mr. Chairman, my Oneida name is Yukhiwananun and I received that name from a tribal elder. Her name is Maria Hinton and it means, she keeps our words for us. I think that carries a large responsibility with it in that I need to, as an individual, carryout the responsibility of keeping our Oneida language and culture intact within our nation. So I take that responsibility very seriously. I think it is with that tone that I would like to present my testimony this morning.

We thank you for the opportunity to address the committee on this vitally important issue. We all recognize there is a tremendous desire to protect the best interest of Indian children. My testimony this morning will focus on the tribal perspective of the Indian Child Welfare Act and the alternative amendments developed by the National Congress of American Indians.

The Indian Child Welfare Act states in part, "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." As a people rich in tradition, the Oneidas are taught that every decision we make must not only take into account the next generation, but the next seven generations as well. Just as we are a seventh generation to our ancestors, someone tomorrow will be a seventh generation to those of us alive today.

The Oneida tradition tells us we must walk carefully on Mother Earth because the faces of those that are yet to be born are coming out of the ground. Those are the faces we have to think about for the next seven generations.

I cannot emphasize enough how important family and children are to the Oneida Nation. This idea is based upon Iroquois traditional law, or the great law of peace. The family is the very center of our culture and as a member of the Oneida Nation, I have a responsibility not only to assist any member of my family who is in need today but to protect the interests of those children who will be living 175 years from now.

Additionally, the Oneida definition of family is different from that of majority culture. In Oneida, we define family as parents, grandparents, aunts, uncles, cousins. This extended family is our support system. It provides for us in our times of need and is there to share in good fortune and prosperity.

The Oneida also believe that it is vital for our children to have knowledge of their identity as Oneida people and to know our language and our customs. At some point in each of our lives, our identity as Oneida and our sense of family are the only anchors we have as we make our way in the world.

It is extremely important to Oneida that any change in ICWA continues to allow Indian nations to be involved in the upbringing of our children. Children are the resource that continues the existence of our culture. At the same time, our culture gives them the tools they need to establish a firm self-identity and a healthy sense of who they are.

We certainly believe that this Congress will not want to be remembered for reinstating an extinguishment policy in regards to Indian nations and the value that we bring to this natural world through our culture, our traditions and our children.

In Oneida, 98 percent of the children we serve through ICWA are victims of abuse and neglect. In terms of real numbers, Oneida presently serves 229 children, 225 of which have been placed in foster care or adoptive placements through State-initiated actions. Only 4 of the 229, less than 2 percent of our entire caseload, have been placed by private adoption agencies.

With these beliefs in mind, we went to the NCAI meeting in Tulsa, OK to develop alternative amendments that address the perceived problems with ICWA. These alternative amendments signify the willingness of Indian nations to address the specific concerns of those who feel ICWA does not work. More importantly, the amendments meaningfully address these concerns.

The NCAI amendments will provide more security for prospective adoptive parents and still protect tribal sovereignty. Highlights of the alternative amendments include expanding the notice provision and placing a deadline on intervention which will provide an incentive for parties to notify a tribe early on in an adoption proceeding. This change will allow tribes to participate in the initial adoptive placement decision.

The alternative amendments also impose a criminal sanction on attorneys who knowingly violate the Act. This change is important because virtually all controversies over ICWA began when the Act was not followed.

The Oneida Tribe has made efforts in Wisconsin to reach out to representatives of the adoption community with whom we regularly work to discuss our overall alternative amendments and their concerns. An attorney in our legal department, who is Aurene, cir-

culated correspondence locally about these issues. She has also recently been involved in discussions with other adoption attorneys, including those testifying today.

The language developed by NCAI does much to address the need for certainty in adoption proceedings. This need for predictability is common to all attorneys who work with Indian children in out-of-home placements. Additionally, those outside the adoption community understand that the House amendments do not address the perceived problems.

The State Bar of Wisconsin is on record as opposing the House amendments and believes the House amendments will have a detrimental effect on child welfare practice in Wisconsin, thereby resulting in more litigation.

The changes to ICWA that were passed by the House take away our ability to carry out our responsibilities as a nation and as individual family members. I urge you to continue to recognize the incredibly rich legacy that the Oneida Nation and all Indian nations leave not only to their children, but all Americans regarding dedication to the family by adopting the NCAI language.

ICWA is a very complex statute and any attempts to amend it should be done with great deliberation and valuable input from tribal members. The amendments proposed by NCAI do just that.

Thank you for giving me this opportunity to speak about the best interests of Indian children. I have a written statement to submit for the record and I would be happy to answer any questions you may have.

[Prepared statement of Ms. Doxtator appears in appendix.]

The CHAIRMAN. Thank you very much.

Amanda, may I ask your age?

Amanda Doxtator. I am 10 years old..

The CHAIRMAN. Do you have anything you'd like to tell the committee?

Amanda Doxtator. No.

The CHAIRMAN. Thank you. If you do, just speak up.

Governor Thomas.

STATEMENT OF MARY THOMAS, GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, AZ

Ms. THOMAS. That's what I was going to say, Mr. Chairman, just give her some time. [Laughter.]

She'll be like her mother, I'm sure.

The CHAIRMAN. Welcome, Mary.

Ms. THOMAS. Thank you, Senator McCain and Vice Chairman Inouye.

I'm really flattered and honored to be invited to submit testimony. I have two, in fact, one from the Intertribal Council of Arizona representing 19 tribes and my own community, the Gila River Indian Community in Arizona.

The CHAIRMAN. Without objection, they will be made a part of the record.

Ms. THOMAS. Thank you. I guess, first, I want to start off by saying that we were caught off guard, I guess, which we always should have up in regards to the method of how this came about, and we were not consulted and we were not informed, but we put our

thinking hats altogether and as a result, at the meeting Tulsa, came up with some compromise language I think will address the concerns of Congresswoman Pryce. However, I think this has been going on for about 1 year and she should have known the concerns we had and maybe even studied a little bit more.

I believe she needs to know about the different reservations and how unique we are in setting up our membership rolls. In Gila River it's very complicated, sophisticated and it's very thorough on how we provide people opportunities to enroll in our community. I think that has to be taken into consideration.

We also have a good working relationship with the State of Arizona itself. The late Honorable C. Kimball Rose, who was the presiding judge of the juvenile courts in Maricopa County in 1978, was instrumental in causing the Superior Court of Arizona to endorse and conform to the mandates of the act, so the act does work. I believe when you circumvent the act, that's when a lot of things come out and I think this is the case. That's what I'm hearing.

In Arizona, we have 1,300 cases alone regarding adoptions and foster care. I think we're just below Alaska which is the highest. In Gila River, we have 60 every year. With the agreements set up and the intergovernment memoranda with the State of Arizona, the State has recognized that they do have the option of overriding the tribal objections to placement in foster care. We do not raise those objections unless it's for the benefit of our children.

I believe the Pryce amendments, although they seem to indicate those are very minimal, will have a detrimental effect on the way it benefits our children.

I come before you with some stories involving our reservation alone because we have a lot of returning adoptees who, for some reason, when they grew out of their infancy and were no longer so dependent on the parents, they were rejected in later years as teenagers, as young adults. Maybe it's because of the standards or the apparent noticeable differences between the parent and the adopted child, whether it be the color of the skin, the eyes, whatever, but we find them back on our doorsteps asking if we can trace back their ancestry.

These are the stories that we don't hear about but there are many. Some of these children have gone into depression, relied on drugs, alcohol and have there have been suicide stories because they could not identify with who they were attached to.

Then there are stories of those who completely ignore the Indian Child Welfare Act and kidnap our children. I am searching for one now who is in Missouri somewhere and through a church affiliation, they seem to block every road that I try to find. Her mother wants to see her before she passes on and it's heart rending when she comes to my office and says what can you do and I'm still trying. I need every help that I can get.

You will see in my testimony what my feelings are about the amendments. I want to relate to you the Navajos have a concern about the time limits because of the vastness of their reservations and also because there is an unjustifiable site issue with regards to funding. There's still a lot of funding cuts going on in Indian country and most of them cannot survive. It's hard for them to survive, so some of these parents, the alternative is adoption because

they have no way of taking care of their children. That's the sad part.

In conclusion, Honorable Chairman McCain, Vice Chairman Inouye and the committee, as a tribal leader I'm very aware of the imposed standards of the great majority on American Indian life today. Within the walls of our hogans, our pueblos, our adobe homes, our straw huts, there is laughter, there is discipline, there is education, care and most important, love and also the life and the spirit.

We look into the eyes of our children, as you see one sitting here with us today, we look into the eyes of our grandchildren, and we see our future, see the future of Indian country, and the destiny of our people.

We ask for the support and respect for our living treasures and to defeat the amendments known as title III.

Thank you.

[Prepared statement of Ms. Thomas appears in appendix.]

The CHAIRMAN. Thank you very much.

Deborah, you said that 98 percent of the children are victims of abuse that you have in custody. Would you elaborate on that situation?

Ms. DOXTATOR. 98 percent of the 229 children that we're serving in these situations through ICWA are victims of abuse and neglect. It's very unfortunate and a lot of that relates to what Mary was talking about, the statements of the Honorable Daniel Inouye earlier talking about the historical context of Native Americans and what we've had to deal with over time. A lot of that is lack of our self-identity and who we are as Native American people. I think that leads to the alcohol and drug abuse and then from there we go into the abuse and neglect.

The CHAIRMAN. Governor Thomas, you make a very eloquent statement. Can you tell us a little bit more about the woman whose child has disappeared in Missouri? How did that happen?

Ms. THOMAS. When I was working for the public schools, I was driving a bus for the handicapped children and we had a teacher there who seemed to be obsessed by this child. That's not the only one, I also have another one. Every day she was encouraging reliance from this child upon her. Eventually when the child got older, she wanted her to move with her to Salt Lake City. Through this church affiliation, she did move there and there was contact with the parent, then all of a sudden she didn't want the child anymore and she was adopted by a non-Indian family living in Utah, then decided to move to Missouri.

They told the mother that they would correspond with her and let her know how she was doing. They did point their property because they were there on the pretext of just looking around and they did point property there and then all correspondence stopped.

We tried to trace this family and we got as far as the move to Missouri and it ended there. The church did not support our efforts to try to find out where they were in Missouri. I don't know if they changed the social security number of the child, but I did find out we do have a social security number on her. She is reliant on services provided by mental health departments because she is re-

tarded. She is now about 30 years old and her mother is in her late 60's, diabetic and wishes to see her one more time.

The other one involves a person involved in an Indian organization in the City of Phoenix, a non-Indian member. I guess he had a fatal attraction for a child on the reservation who was in our custody and constantly made contact, tried in every way. He got so desperate that he came to my office asking for my intercession. I couldn't do that.

When the child turned 18 and out of our jurisdiction, naturally he disappeared. He finally got his wish. To me, he was still a child and now he's with the man wherever he is.

The CHAIRMAN. Senator Inouye.

Senator INOUE. Thank you.

Madam Chairwoman, do you believe ICWA should be amended?

Ms. DOXTATOR. I think that ICWA works as it stands at the present time. I know there are persons who are concerned about the specific instances of the *Rost* case that have been created as a result of that but I think at the present time, it's working for the most part. Some of those instances do need to be corrected, but it's working if everyone follows the law to the letter of the law.

Senator INOUE. Governor, you were part of the Tulsa compromise. Are there any provisions that you do not agree with or do you agree with all of the alternative proposals?

Ms. THOMAS. I'll say I agree to a certain degree of those. For instance, in the Navajo situation, the time lines, that poses a problem for them and in the area of membership, that poses a problem for me. We have in our English language different forms of relationships that we call each others. It even goes down to the fine hair on your leg, that's what we call [native word], which means we are related in a very, very minute way, so the membership is a little concern to me.

There are other young tribal leaders who are wishing that there would be no amendments like Brian Wallace from the State of Nevada because it's working for him. There are various levels of tribal government where it is working, they have no problem with it and so they are comfortable with it.

For other sophisticated tribes who have a lot of issues confronting them like in my case because we're so close to metropolitan Phoenix, we are working within it and it is so important that we work with the State and that is what we've done.

There needs to be careful consideration of the amendments but generally, we support them.

Senator INOUE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Amanda, it's your last chance.

[No response.]

The CHAIRMAN. I want to thank the witnesses for being with us today. Thank you very much.

Our next panel is Ron Allen, President of the National Congress of American Indians; Marc Gradstein; Jane Gorman; and Michael Walleri who are adoption attorneys.

While they are coming, Mr. Vice Chairman, I would note with interest that both the Attorney General of the State of Washington and the Attorney General of the State of Nevada have written this

committee in opposition to title III as enacted by the House and both state they would like to see them removed from the legislation. Those letters, without objection, will be made a part of the record.

[Information appears in appendix.]

The CHAIRMAN. I believe that I can get a similar letter from the Attorney General of Arizona and perhaps Hawaii as well.

Welcome to the witnesses. Thank you for being here and I know you understand the hour is late, but we do want to get complete testimony from you.

We will begin with Ron Allen, President of the National Congress of American Indians. Welcome back, Ron.

STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Mr. ALLEN. Thank you, Mr. Chairman. It's always an honor and a pleasure to be here before you and Vice Chairman Inouye. We always appreciate the efforts of this committee in championing our cause and caring for the issues that we face in Indian country. I'm delighted to be able to be here to share with you some of the recommendations that we have through the National Congress of American Indians.

As you well know, in our conference in Tulsa, this issue was debated and discussed thoroughly by the tribal leadership. We had our best mid-year conference ever and this was one of the key issues that faced Indian country that brought them to Tulsa, OK to discuss. It was rather exhaustive in terms of the concerns the tribes weighed.

I know that I, as president of NCAI, am very appreciative of Chairman Brian Wallace from the Washoe Tribe in Nevada and Chairman Tracy King from the Fort Belknap Tribe in Montana who cochaired this effort. They spent a great deal of energy there and as you can see from the audience, you have a number of chiefs and chairmen here from across the Nation who exhibit the concern that we have over the impact of this.

The CHAIRMAN. By the way, Ron, over 100 tribal chairmen and chiefs requested to testify at this hearing. I think that shows the depth of concern on this issue.

Mr. ALLEN. It isn't surprising one bit because we certainly concur with many of the comments that have already been made by you, Senator Inouye and others about the concern that we have for our children.

We have submitted to you for the record our testimony and it is enclosed, our resolutions and recommendations that we have. Should the Congress choose to move forward with title III or some variation thereof, we have some proposals that we think are reluctantly acceptable in terms of moving forward with the ICWA amendments.

We want you to know that these proposals were proposals developed by the tribal leadership. It is not by a set of lawyers who are guiding and leading us; it was by the leadership in terms of us liberating on what we feel is in the best interest of the tribes' right to address Indian child welfare proceedings and processes. We feel that we've done a very good job.

We're rather concerned and somewhat disturbed sometimes when proposed amendments to legislation or even renewal of such legislation is submitted and based on exceptions to the rule. We know, understand and empathize along with Congresswoman Pryce and the others, such as, Senator Glenn, regarding the concerns that they have.

What we want the committee to recognize is that when you take a couple of isolated cases, and then all of a sudden you want to change the laws that will have serious impacts on Indian country, we have great concern. I know the chairmen who led this effort in our forum have a heavy heart over what is working and what is not working.

You will see a variety of different successes in ICWA, but as a general rule, it's working exceptionally well. No one yet has talked about the literally tens of thousands of cases that have proceeded and been administered effectively and very successfully. I know that Governor Thomas and Chairman Doxtator have shared just a few of those many exceptions and also share the great deliberation and concern that our court systems and our programs that administer these programs do it with great deliberation and with great concern. We think we do that very well. The perception by the Congress is something that needs to be kept in the right kind of focus.

Our amendments have a number of conditions that we think are probably acceptable and reasonable and a whole lot of the problems that we feel are behind Congresswoman Pryce, Senator Glenn and others is rooted in noncompliance with ICWA, not necessarily with what ICWA doesn't do, it's are they complying with ICWA conditions and requirements such as notification to the tribe.

If a child has been put into a family and that child has been there for a couple of years but that tribe has not been notified or the processes haven't been made so the tribe is aware of the child so they can cooperate and work with the child and the adoptive parents to assure the tribe knows where his or her roots are with regard to the tribal ancestry or tribal community.

We know you understand that we want them to know what the tribe is all about, our history, our culture, our traditions, our practices so that they don't have to start looking for them and backtracking when they become a young adult wondering where their roots are in terms of their community.

We think there are other problems out there and we have suggestions in there such as severe sanctions to attorneys and firms that divert or misuse their responsibilities when they are advising parents and when they are placing Indian children into families, and not notifying the tribes and the appropriate authorities.

We think we have some suggestions that provide some certainty, some predictability and some assurances that people want. We do believe that many of these things are already in place and you see them being administered very effectively through further detail and implementation with State and tribal agreements.

Deadlines, things along that order, are important. We understand they are important and we are very concerned over any kind of hypotheticals that you may see surfacing from people who may want to explain to why a certain clause or a certain set of languages need to be considered by this committee and the Congress.

We would urge you not to act in a way or propose language in a way that would be detrimental to the tribe's sovereignty, the tribe's jurisdiction, and undermine the success that you're seeing through ICWA across Indian country.

The current law does provide mechanisms by which the courts outside of the tribal court jurisdiction can coordinate with the tribe in terms of whether or not they should have jurisdiction over the tribe et cetera. Many of these mechanisms are already in place. I reiterate your comment that a lot of the problems are because no one is telling them.

Where you see the tribes and the States working together with regard to adoption practices off the reservation, it's working exceptionally well. Often you see tribes deferring to the recommendations of the State or the State court. So all those successes are out there.

We're very concerned over some conditions that may cause new problems, new sets of litigation that are worse than what you're experiencing today. We think we can take a look at it.

We would rather see this on a separate track, this proposal. We would like to see further deliberation in terms of how to consider fine-tuning amendments to ICWA which could make it a better and more effective law. We want it to be with clear and full deliberation, with the involvement of the tribal leadership. This is a very serious concern for us, including any impacts to our sovereignty.

As you well know, we absolutely object to any legislation that erodes our sovereignty and our governmental jurisdiction. Our member tribes, 210 to date, are firmly holding that position.

So we ask the committee to recognize those concerns, we ask the committee to recognize that we have been able to move fast for you in terms of responding to what your needs are, we know that this legislation is moving fast, we know it's inside another piece of legislation that is very attractive to the Congress and to the Administration, but we do not want them to do things that will negatively impact the welfare of Indian country and our children's welfare.

I will conclude my comments. Thank you and we'd be more than prepared to answer any questions you may have.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Thank you very much.

I would comment on the rapidity of the action that was taken in Tulsa and we appreciate it very much. We know that this coming together could not have been possible without the cooperation and active participation of our other witnesses. As a prelude to yours and the other testimonies, we thank you for your efforts. I don't think we'd be where we are without it. Thank you.

Mr. Gradstein.

Mr. GRADSTEIN. Senator, if it's not imposing on the protocol, I'd like to ask Ms. Gorman to speak first and then I'll follow?

The CHAIRMAN. Sure.

STATEMENT OF JANE GORMAN, ESQUIRE, TUSTIN, CA, ON BEHALF OF THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS AND THE ACADEMY OF CALIFORNIA ADOPTION LAWYERS

Ms. GORMAN. I'm Jane Gorman. I'm a California attorney and am here on behalf of the American Academy of Adoption Attorneys and the Academy of California Adoption Lawyers, but most importantly and personally, I'm here to urge passage of the NCAI amendments with a few technical, but nevertheless we feel pretty important, changes. I outlined them in my written testimony but they are better outlined in Jack Trope's written testimony from the Association of American Indian Affairs. I would ask you to strongly consider making those technical changes.

The CHAIRMAN. I did read those last night and I found nothing objectionable associated with the proposed amendments. Obviously we'd like to have the input of the tribes.

Ms. GORMAN. The most important reason that I'm here, however is so that what happened to the people who became my clients—I was not their original attorney—the Rosts, will never happen to anybody else again. I believe these amendments, the NCAI amendments, will go a long way toward making that happen.

Right now, no notice to tribes in voluntary placement—

The CHAIRMAN. May I ask, if these amendments had been a part of the law at that time, could the Rost tragedy have been avoided?

Ms. GORMAN. It would not have happened. I will outline three or four reasons if you will indulge me for a few moments. I will confine my testimony to 5 minutes so I won't be very long.

The CHAIRMAN. All right. Please go ahead.

Ms. GORMAN. Right now, no notice to tribes in voluntary placement is required. You would be astounded, I think, even as knowledgeable about the Indian Child Welfare Act as you are, at how many times no notice is given. I, as a member of the adoption bar and my practice is limited to litigation so I only see the problem adoptions, can't believe how often this happens.

After the *Rost* case made headlines last year, I got dozens of phone calls from adoptive parents. Some of their adoptions were finished. Some of them were pending. Each said I have a Native American child, some of them were even tribal members, in my care. Maybe the adoption was finished. Am I going to lose this child, and what should I do? I didn't have an answer for these people because if they did what they're supposed to do, which is what I told them to do, they very well stood to lose these children. My only real answer to them is, work with us in amending the Act so notice is required and will be given.

In the *Rost* case, as in countless others, the former attorney knew the children were Native American. This wasn't all a problem with the birth parents lying. The adoption attorney really knew they were Native American and he chose not to give notice to the tribe, not to tell the adoption agency which became involved, and not to tell my clients, the Rosts, that they were taking children into their care that had Native American heritage.

This bill would preclude that scenario ever happening again, I believe. If an adoption agency or attorney had reason to believe a child is Native American, notice must be given or that person

would be subject to fairly severe criminal penalties. I don't know if this would actually ever happen, but I think it would have a totally chilling effect on practices of not notifying an Indian Child Welfare Act cases.

This bill provides something for adoptive parents that outweighs any burden that would be placed on their attorneys or agencies—finality and security, the comfort of knowing soon after a child is placed with them, whether or not the child they're caring for will come to be a child that they will raise as their own.

Under the NCAI amendments, 90 days after notice is given and 60 of those days can be before a child is born and placed, if the tribe hasn't intervened, it never can and that will be the end of that. This provision also would have saved the Rosts. When the adoption agency found out about the twins' Native American heritage a few months after their placement, the agency did notify the tribe and the tribe did nothing for a period of 6 months until the Rosts retained new counsel and we brought the matter to a head because they needed to know if they were going to be raising these kids.

Under the proposed amendments, if that had been the law then and the tribe had been given proper notice, they would have known. The tribe would have either acted, or they would have been out of it.

The proposed amendments would not only provide cutoff times for tribal intervention, but would require a tribe to make up its mind at the time it intervened whether a child is a member, not pass a resolution 1 year later to declare the child a member.

This probably addresses the retroactivity problem raised by Senator Glenn. The more I think about it, the more I believe that it would, because under the NCAI provisions, a tribe at the time that it chose to intervene in an action, would have to, at that point, determine whether a child is a member or not. So I believe that largely addresses the retroactivity problem. You may want to look at that carefully and see if it doesn't address Senator Glenn's issues.

The notice cutoff section could also enable adoptive parents to rely on a tribe's waiver. Right now, under current law, and this doesn't happen very often but again, I see only those awful cases where it does happen, if a tribe is properly noticed and says "We waive the right to intervention," but then later on in the adoption process decides it does want to intervene, it has the right to do so and that's a problem to adoptions.

The final provision of these proposed amendments, which would be incredibly helpful to both tribes and adoptive parents, is the open adoption section. When a tribe, a biological family and adoptive parents agree to post-adoption contact, the court, under these provisions, could make that agreement legally enforceable.

Interestingly, this provision could be the conduit to finally, once and for all, settle my nightmare case, the *Rost* case. An agreement is sort of in the works, but one major drawback is that the family and the tribe don't trust the Rosts to live up to the agreement because they live in Ohio and the tribe and family members are in California. Such an agreement would be enforceable possibly under California law but probably not under Ohio law. If this provision became law quickly, before the Supreme Court either decides to

take it or it goes back to trial court, we may very well be able to settle the *Rost* case.

In an era when we all recognize the importance of adopted children knowing their biological and ethnic roots and maintaining a connectedness with their heritage regardless of who is raising them, this open adoption provision is crucial.

This bill, if enacted, would equally benefit the adoptive parents and tribes and would place similar burdens on each. Indisputably, the notice and cutoff provisions, as well as the open adoption amendment, would benefit the children the act was passed to protect. If a child is subject to the act, and a tribe or family member wants to stop the placement, they should be able to do so. They should know about the placement, and they should have to make that decision in a timely manner—forget about the adoptive parents, before the child forms the attachment to the only people that child knows as parents. If a tribe doesn't act within an appropriate timeframe, the adoption should continue and the child should remain in his placement.

I appreciate the opportunity to testify here, Chairman McCain, but equally, I appreciate the opportunity over the last year to work with members of the Native American community in reaching what we believe are fair compromise amendments. I share in the committee's concern and the concern of many of the witnesses who have testified about the Native American community not being contacted for input.

I testified before the House in May of last year and I believe Mr. Trope, when he testified, brought it to the committee's attention, that none of us had contacted them about what they wanted. It really hit home and we began a year-long process and have had just incredible results and cooperation.

I believe we have some amendments that really may help everybody. I thank you.

[Prepared statement of Ms. Gorman appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Gradstein.

STATEMENT OF MARC GRADSTEIN, ESQUIRE, BURLINGAME, CA

Mr. GRADSTEIN. Thank you, Senator. I'll try to be brief and kind of mop up a little.

I think the most interesting thing we haven't said yet that affects my practice where I'm doing voluntary placements of mostly children that are not Indian children. We have a fairly substantial number of children who are of some Indian ancestry and the distinction I'm making, as we all know, is that the act speaks of Indian children as being members or children of members who are themselves eligible, but there is a vast number, as Senator Campbell indicated, of people of Indian ancestry in this country who no tribe would say are tribal members.

In the years I've been doing adoptions, and I've contacted tribes and asked, is the child of this perspective birth mother a member of their tribe, the vast majority of the time, the tribe says no. I'm saying probably 90 percent of the time, the tribe says no because there are that many people out there who are of some Native

American ancestry but have overwhelming ancestry and have no tribal connection.

Those adoptions go through as non-Indian cases but always with the concern under the present law that could go sideways if something changed right up until the adoption became final because of the fact that there are no cutoffs, because of the fact that if you contact the tribe as I did in my nightmare case 2 years ago and you get back a letter saying—this is the unusual case, I'm not saying tribes do this routinely at all—this child is not eligible for membership and we will not intervene on what looks like an official tribal letterhead, signed by a tribal Governor, and I advise my clients, go ahead and adopt this child, and then they change their minds under the law as it stands now and make that child a member and intervene before the proceeding is over, we were out of luck. We tried to do it right.

I'm not saying this in a committee that is obviously very friendly to Native Americans, as am I, to trash anybody but what I am saying is as the adoption attorneys have given us permission to come here and say, go ahead and criminalize aiding and abetting fraud among our people, that's a hard thing to sell to a group of adoption attorneys because they're afraid not that they will do that, but that they will be wrongfully accused of doing that and have to deal with defending that.

I'm just saying that the fear that has brought me in here in part is the fear that in that rare case, we will get a waiver or we will get a determination of noneligibility and it won't stand up. Under these amendments, a waiver means it's waived. A determination of noneligibility means it's noneligibility and I think that's very, very important for that very few number of cases where that kind of problem could exist.

To me, the big advantage of these amendments is for all those other children who are just slightly Native American in heritage who are right now very high risk adoptions to our clients who we have to advise are at total risk, really at the whim of a tribe to call that child a member without any review.

I think that the opposition which we've heard here today, which fortunately is extremely limited, is really not primarily aimed at this proposed legislation. I think almost all of the opposition we've heard today has been an effort to say that Title III should have been enacted and it could be better, it could be stronger.

I don't want to minimize that and I'm not pushing title III, but I think there is a problem that Title III addresses that perhaps in years to come, this committee might want to at least focus on and see if it can't find a better mechanism than using—I know this is anathema to some, but using membership as the criterion for applicability of the Indian Child Welfare Act.

The problem is, membership means as many tribes as there are, a different thing. It means yes, sovereignty comes into play, this critical issue to Native American tribes, because it's a membership question. It's not a blood quantum question; it's a membership question. I think it's possible to craft an act, I'm not saying it will ever happen, where we made applicability of the Indian Child Welfare Act based on something other than membership. Once membership becomes the issue, sovereignty gets into the problem and

obviously, the Native American community is never going to want to relinquish any sovereignty.

I think the California court that ruled in Ms. Gorman's case favorably to the Rosts did so because it was trying to find a constitutionally valid way of getting around this membership problem which, in one of the briefs that I thought was very, very persuasive by the child's attorney in that case, argued that Congress had delegated its legislative authority unconstitutionally to the tribes by giving the tribes the right to decide when the act applies and when it doesn't with no guidelines and with no method of review.

A tribe says somebody is a member, we lawyers have no way of challenging that. We can't even get their membership records. It presents a problem. The joint amendments that we, as a group, had tried to put forward that were not all accepted by the NCAI included a provision that was near and dear to my heart which would have required tribes to follow their own membership rules and give us a remedy in Federal court to question an arbitrary or capricious membership determination that did not follow the membership rules for obvious political and no doubt sophisticated reasons about sovereignty beyond my understanding.

The NCAI did not accept that as a good proposal and I'm not pushing that either, but I think there is a problem here with constitutionality when we're talking about membership as the sole issue. That's where this Indian family doctrine that Congresswoman Pryce was putting forward comes from. It's the idea that maybe somebody really isn't enough Indian to be brought within this act.

I don't know how to solve that problem but I think that's what the Congressman from Texas was speaking to and I think there are problems when you have a very, very small amount of Indian as kind of the tail wagging the rest of that non-Indian creature, that 1/64th person. I think it presents a problem that is worthy of consideration here, if not now, then in the future.

Two final thoughts. I think the Indian family doctrine, which I know is not going to be enacted in this Congress, part of why it is seemingly so horrible to a lot of lawyers in terms of lots of litigation is because it would have a lot of applicability to involuntary placements. I think Congresswoman Pryce probably only meant it to apply to voluntary placements. I think that is a very significant difference, when somebody, as the Congressman from Texas said, voluntarily wants to place her child versus somebody who involuntarily is having that child taken away.

Last, I'd like to say that I may be all wrong about my concern because Mr. Walleri here tells me that the Indian bar knew about ways that the membership arbitrariness of determination could have been challenged under existing United States Supreme Court law and I'd be very interested in having him explain that to the committee if he is willing to.

Thank you.

[Prepared statement of Mr. Gradstein appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Walleri.