STATEMENT OF MICHAEL WALLERI, ESQUIRE, TANANA CHIEFS CONFERENCE, FAIRBANKS, AK

Mr. WALLERI. Thank you, Chairman. Thank you for inviting me to testify today.

I've been a tribal attorney for 17 years representing a consortium of 34 tribes in interior Alaska and had the dubious honor and pleasure, I think, of participating in the discussions with the adoption attorneys that ultimately led to the NCAI action in Tulsa.

Generally I would concur with Mr. Allen's comments that the Indian Child Welfare Act works and it primarily works best in involuntary proceedings where the tribes receive notice, they intervene and they have the ability to provide the special and unique services that Indian children require.

Where it doesn't work so well, however, is in the voluntary area where there is no current statutory requirement to provide notice to the tribes. In our own case in Alaska, we have a caseload of about 160 cases on an annual basis. Since the enactment of ICWA, one-half of those cases in terms of our caseload, have moved from State court to tribal court which is an incredible improvement.

We do not receive on a routine basis notices on voluntary adoptions. The only time that we receive them really in Alaska has to do with when an attorney usually specializing in Native adoptions understands the risks their clients face by not involving the tribe and voluntarily goes to the tribe. We have not had a single problem with any of those cases in the time that I've been dealing with ICWA.

What we have had, however, is problems where nobody gives notice to the tribe, either because they didn't know about the tribe or in the few cases where there is active fraud, to try and avoid the application of the act.

The provisions in the NCAI draft really address these issues, and they've been described in more detail in my written comments, with basically giving notice to the tribes in voluntary proceedings, setting up time lines, and very importantly, providing criminal sanctions for people who wish to avoid the application of ICWA.

In addressing Senator Glenn's concerns about retroactivity, we believe that the NCAI amendments do in fact address the concerns about retroactivity. I think as Mr. Waxman pointed out, it's somewhat of a misnomer to refer to this as a problem of retroactive enrollment or membership since in many tribes, a child's birth is the beginning of their tribal enrollment and membership in that tribe. Rather, enrollment in most tribes is actually just a certification or an acknowledgement of that tribal membership.

For professionals who wish to evade the terms of the act, the proposal provides criminal sanctions as a disincentive. In terms of tribes in the situation that Mr. Gradstein points out, fail to or advise people that this child is not a member of a tribe, they're bound by that and that provides a certain stability for the Indian child adoptive placement.

Finally, if adoptive parents engage in the type of activity that was described by the Chairman from Gila River, I'm not exactly sure it's in the best interest of those parents to continue to try and care for that child. Those kinds of activities should be aggressively attacked by the tribes to return those children to their homes.

In the cases where there is no fraud or attempts to evade the Act, where people just simply didn't know and honestly didn't know about the child's Indian ancestry or eligibility for membership, the courts have really dealt with that.

Prior to coming down here, we did a WESTLAW search with regards to this retroactivity situation. Two appellate courts in the country, one out of Oregon, have really dealt with this issue saying it's an evidentiary issue that's presented to the court at the time of the hearing. If at the time of the hearing, these facts were known, then the court should take those facts into account. If at the time of the hearing, and subsequent to the entry of the final order, these facts become later discovered, then that is not the basis to go back and attack the adoption and the adoption is final. That is really dealt with in the existing law with regard to evidentiary standards.

So we really believe that the so-called retroactivity problem is really dealt with by existing case law and also more effectively by these amendments which really avoid the problems that we've seen occur in the past with regards to voluntary proceedings.

Finally, the issue that I think caused the most problem in Indian country that Mr. Gradstein alluded to about this membership issue and the reviewability of membership is a very touchy issue in Indian country. The idea that a court that is not sympathetic, in most cases not very knowledgeable about Indian laws and customs is going to somehow determine what in fact is an Indian harkens back to another dark passage in American history where non-Indians decided who in fact were the Indians, oftentimes to the detriment of the Indian people.

I think we need to be very careful in invading the sovereign rights of the Indian people and the Indian tribes to determine their tribal membership. It is a crucial element of sovereignty. In very limited cases, in very limited cases, when there is a known violation of due process or equal protection under the Indian Civil Rights Act, or where a tribe has simply reached out and exceeded its tribal authority with regard to decisions with regard to eligibility under its tribal law, the courts have tried to fashion remedies which seem to be working in those very, very few cases.

The Eighth Circuit case, *Dement* v. *Ogalala Sioux*, actually allowed the issuance of a writ of habeas corpus to remedy that situation. The Sixth Circuit has agreed with that in some cases, but it requires a sensitivity to Indian sovereignty in the sense that there has to be something more than a de novo review by somebody who is not familiar with Native law. There must be deference to the tribal decisions and there must be a full exhaustion of the tribal remedies.

I think the reason there are only two court cases in the country on this suggests that the tribal courts are doing an excellent job in administering justice in Indian country and while I think there may be a few perceived problems in the area, the existing law really deals with the problem.

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

The CHAIRMAN. Thank you very much.

Senator Inouye.

Senator INOUYE. Mr. Chairman, I'd like to join you in commending President Allen for convening the Tulsa mid-year convention and to initiate this very rational debate on this very contentious matter before us. I join my chairman in saying that you've done a good job and I join my chairman in assuring you that we will study your recommendations very carefully and very likely adopt them almost in total.

I have just one question. We have been advised, Ms. Gorman, that the original adoption lawyer of the Rosts was aware of the Indianness of the biological parents. Is that correct?

Ms. GORMAN. The father, but yes, the testimony adduced at trial was pretty clear that the natural father filled out a form and said he was a Pomo Indian and also told the attorney. The attorney then told him what would happen—they had already chosen the Rosts as their prospective adoptive parents—told them what would happen because of the act, that his family would have to be notified, that the tribe would be notified and that the act would probably apply. The father then said—and this is by his own testimony—I need a new intake form and he filled out a new intake form and said he wasn't Indian.

That's absolutely correct and I believe with all my heart that these amendments would preclude that from happening in the future.

Senator INOUYE. So you would suggest that fraud was committed at that stage?

Ms. GORMAN. I don't want to say that, Mr. Chairman. There is some litigation currently pending between my clients and that attorney and I don't want to get in the middle of it, with all due respect.

No notice was required, so I would hesitate to say that fraud was committed, except possibly and again, I don't want to prejudge the case, but him not notifying my clients was certainly a problem. In terms of notifying the tribe, under the act, it really isn't required. It should be required. Intervention is certainly possible, but no notice is required, so I don't think he broke the law in any way. It isn't good practice, and that's where problems like this come from, but I don't think he broke the law.

Senator INOUYE. So there were no sanctions as a result of this behavior on the part of the original lawyer?

Ms. GORMAN. No.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Thank you, Senator.

The hour is late, Mr. Walleri but I think we need to get into this issue of membership rolls a little bit. Are you telling me that membership rolls, lists of memberships of a tribe are not public documents?

Ms. GORMAN. That's correct. They are not subject to subpoena power. If the tribe asserts that right, their records cannot be subpoenaed because——

The CHAIRMAN. They're not public documents?

Ms. GORMAN [continuing]. They are not public documents.

Mr. WALLERI. There are some significant issues related to that, including for example in our case, let me speak to the situation in Alaska. The Federal Privacy Act really governs our documents in our negotiated compacts with the Federal Government, including our tribal enrollment lists so that we cannot disclose those records without the issuance of a Federal order.

For example, you can't go in and get individual information about an American citizen from the U.S. Government, you have to get a court order to do that. There has to be a showing. In most cases, the courts do not open up, under the Federal Privacy Act.

The CHAIRMAN. But we have to provide proof of citizenship upon request.

Mr. WALLERI. And that is the case. The practice in Alaska which is not the case in many other States is that the tribes do, when they intervene, file a certification with the court and evidence as to the tribal membership. Frankly, that's just the practice in Alaska that's emerged over the last decade. I think that is a pretty good way of handling it. That is what these acts provide for.

That has to be balanced also against simply open access to the general public to tribal enrollments. That raises other concerns about privacy of people who are totally unrelated to the issues before the court and most courts have held that the access to tribal records is allowed to the extent that they are necessary to substantiate the issues in contention before the court in the case at bar.

The CHAIRMAN. Including eligibility for Government programs?

Mr. WALLERI. Correct. But in doing that, it has to also be done procedurally in a correct manner. I can tell you that there is wide ignorance within the bar. We routinely have to remind the State Attorney General's office in Alaska how to go about getting these records properly. It's an embarrassing situation to have to tutor attorneys on the Federal Privacy Act and its provisions, but we routinely do it. In fact, we've got it set up on a computer and push the button and out it spits.

The CHAIRMAN. I can assure you that in light of recent events here in Washington, the Privacy Act is going to get a lot more visibility.

I want to thank the witnesses and thank you all for being here today.

This hearing is adjourned.

[Whereupon, at 1:47 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

I appreciate this opportunity to address the Senate Committee on Indian Affairs. I strongly support the committee's move to eliminate title III from H.R. 3286, the Adoption Promotion and Stability Act. Title III would have altered the Indian Child Welfare Act of 1978, and changed the rules by which tribes participate in the process of certifying tribal membership and overseeing the welfare of Indian children. I object to those changes, and so do the Indian tribes that would be effected. I am delighted the committee has reported the bill out without this ill-considered amendment.

As you know, when the Indian Child Welfare Act (ICWA) was passed in 1978, over a third (35 percent to 40 percent) of all Indian children were being placed for adoption outside their families and tribes. The ICWA was intended to provide a rational context for promoting the welfare of these children and placing them, in order of preference, within their own nuclear families, their extended families, their tribes, other Indian tribes, or other suitable families. The act has been successful in this purpose. The vast majority of adoptions under ICWA have proceeded smoothly; only a few (41) have been disputed. Therefore, we should proceed to amend this act only with caution and with full consultation with the tribes that will be affected.

The largest of the Indian tribes, the Navajo Nation, is located in New Mexico as well as Arizona and Utah. The Navajo have developed a highly competent set of 9 professional social workers and 8 more administrative staff to deal with the issues of Indian child adoptions off the reservation in such towns in New Mexico as Farmington, Gallup, and Albuquerque. At the very time the need for their services is clearly increasing, the BIA funds that enable their services are being cut. It is wrong to cut these funds and it is wrong to proceed without due consideration to the strong opposition these professionals have for title III.

Every tribe that has contacted my office opposes the changes proposed in title III as does the National Indian Child Welfare Association and the National Congress of American Indians. They believe the changes involved would do much more than merely "clarify" or "make minor changes in" the Indian Child Welfare Act. The tribes believe they must retain control over determining tribal membership. Fifty State court systems, making independent judgments about what constitutes significant social, cultural and political affiliation with Indian tribes, strikes at the heart of sovereignty.

Meanwhile, earlier this month the tribes themselves met at the National Congress of American Indians' Mid-Year Conference in Tulsa, Oklahoma, to draft potential amendments to ICWA as alternatives to title III. These draft amendments address the issues of 1) notice to Indian tribes of voluntary adoption proceedings; 2) a reasonable time line for tribal intervention in such cases; 3) sanctions to discourage fraudulent practices in such adoption proceedings; 4) reasonable limits on the length of time within which birth parents can withdraw consent for adoption; 5) State courts' option to allow biologic parents' contact with children when the adoptive parents agree; 6) tribal membership certification; and other provisions. The point is,

Mr. Chairman, that processes are under way in which the Indian tribes are working with each other and with adoption lawyers and others to identify realistic methods to accommodate the special issues that arise in cases of adoption of Indian children.

Changes to the Indian Child Welfare Act should not be pushed through as a part of H.R. 3286. They should be approached thoughtfully and with input from all participants. Therefore I applaud the Committee on Indian Affairs for removing these important Indian issues from the Adoption Act and for undertaking a thoughtful process in which the tribes are full partners for further refining the Indian Child Welfare Act of 1978.

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

Mr. Chairman, thank you for the opportunity to appear before the committee this morning and present my testimony. I know we are all in need of being in three places at once this morning, so I will necessarily make my statement short, but 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 gets my close attention.

I want to speak today 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 adoptions 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 deliberation. 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, and the House did so without even a comprehensive hearing.

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 for only 6 days, and within that period Committee Republicans and Democrats alike rejected the method and language used in the bill.

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

Mr. Chairman, it is important to note that the Indian Child Welfare Act does not require that Indian children be adopted by Indians. Other races are permitted to, and do adopt Indian children. This was not a racist act, 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.

The Indian Child Welfare Act was enacted because there were serious problems with the adoptions of Indian children. The outrages that prompted the passage of the act were numerous. Prior to its enactment, the rate of adoptions 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 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 a people is being placed in jeopardy."

I realize that there are problems with the Indian Child Welfare Act. I know that one is with adoption attorneys who pressure parents not to acknowledge their Indian heritage on adoption forms. But 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 by the House.

I objected strongly to the language passed by the House on this issue and I continue to object strongly. I respectfully urge the Members of this committee to also reject that language.

Thank you Mr. Chairman

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, June 24, 1996.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

Dear Senator McCain: I have been active on the issue of adoption of Native American children for several years now. As you know, the House passed a bill which would have a substantial impact on Indian children placed for adoption.

Many of us in the House have strong feelings on the issue of the adoption of Indian children by Indians versus non-Indians and I would like to provide my thoughts to the Committee on Indian Affairs. I am pleased the committee is holding a hearing on the Indian Child Welfare Act, and respectfully request that I be permitted to testify at the hearing on June 26, 1996.

Sincerely,

ENI F.H. FALEOMAVAEGA, *Member of Congress.*

PREPARED STATEMENT OF FAY GIVENS, EXECUTIVE DIRECTOR, AMERICAN INDIAN SERVICES

Chairman McCain and Committee Members, American Indian Services is concerned about the changes proposed regarding the Indian Child Welfare Act, under H.R. 3275. We ask that our written testimony be included as part of the hearing record of June 26, 1996.

American Indian Services, Inc. is located in the Detroit Metropolitan area. We have provided services to Native American families in Wayne County, Michigan since 1972.

The legislators proposing the changes in the I.C.W.A. apparently know very little of Native American history. The legislation requiring significant social, cultural or political affiliation with your tribe fails to consider the following issues:

(A) Many Native Americans live a great distance from their reservations.

(B) Native people were forced into the cities by the policies of the Federal Government during the termination, relocation period of the 1950's and the 1960's.

(C) 90 percent of the Native people, both on and off the reservations lack reliable transportation, making it difficult to go short distances, much less long distances to maintain close contact.

(D) Few, if any, state judges would be qualified to determine if significant "social, cultural or political affiliation" were being maintained. They lack the knowledge to make this kind of determination.

(E) Under the proposed changes, state courts rather than Indian Nations could decide who is an Indian.

(F) The legislation fails to consider the rights of Indians as sovereign nations.

(G) H.R. 3275 seeks to make who is an Indian an issue of geography rather than culture. Those who have decent transportation and money that can afford to go home periodically, would be considered to have "close ties."

An Indian family that lives far removed from their reservation is not any less Indian-just further away. The staff at American Indian Services is made up of members of many Indian nations. We live far from our reservations, but come together as a family of Indian people and maintain our cultural ways within the context of a big city. Most of us are not able to go home too often, but we band together as a community of Indian people, as we have historically done. To tie membership to a geographical location, reveals how little these legislators know about Indian customs.

Our professional experience in Wayne County indicates that the I.C.W.A. has not and is not being followed today in many cases in the Juvenile Division of the Probate Court in Wayne County. If the act is followed from the inception in a child custody proceeding, the problems such as those of the Rost twins would not be an issue today. If private attorneys were disbarred for placing Indian children in non-Indian homes, which violates the I.C.W.A., perhaps it would be followed.

If non-Indian families were made aware that Indian children are covered by a unique set of Federal statutes, perhaps they would defer to the tribe at the earliest moment if the possible outcome was known.

The question that concerns us is what gives Congresswoman Pryce the right to even contemplate changes in the I.C.W.A. without in-put from the people most affected? Her behavior is typical of the arrogance we have faced in the past. Decisions

have been made for us-and about us, without any consultations with us! There is no democracy in this.

Legislators Pryce and Tiahrt are attempting to make this a simple issue, which it is not. State courts do not and should not have jurisdiction over sovereign Indian nations within their boundaries. What right do these legislators have to limit appeals, or restrict when an Indian child is determined to be a member? The determination regarding who and when a person is eligible should rest solely with the tribe.

The stories of denial of due process, duress and sale of Indian children is well documented. This legislation if passed would deny Indian families the right to appeal such injustice.

Legislator Pryce's vision is only through the eyes of the Rost family that she is involved with. The private attorney that arranged for the placement of the Rost twins had no respect for the I.C.W.A., no regard for Indian people, the adoptive family or the children themselves. Where is he now? There has been no price that he has had to pay for his deceit, while everyone else has suffered.

When Congress passed the I.C.W.A. in 1978, its purpose was clear-to preserve Indian families. Indian people who were adopted out as children come into our agency everyday. The prisons and institutions house many of them. They have been robbed of their identity and they are angry. To view this matter as a simple one is to deny what we know is true.

The Rost twins will come looking for us whey they grow up. (They all do.) They are Indian in the white world and white in the Indian world. They will be depressed and will have twenty times more likelihood of committing suicide than any group in America. They will have little if any understanding of who they are. They will be in crisis when they find us. We will provide mental health services, they will need it at a rate of 200 percent, more than any other group. Some come to us in their teens with serious emotional problems, substance abuse, teen pregnancy, and all the problems related to low self-esteem. Regardless of their problems they will receive fewer services that they need because they are "Indian". Early "Chief Wahoo" experiences will contribute to their esteem when they see Native American culture ridiculed.

The sacred "Sundance" for them will be a car. The proud Cherokee people will be a four wheel drive recreational vehicle. Television programming will fill in the cultural gaps with various segments on savage scalping, wagon burnings and drunken Indian displays. They will have no elders to combat the stereotypes. Will this produce Indians with positive self-esteem and pride?

Society will continue to pay the price for the injustice to Native people. Efforts to rob us of our children is the worst in a long stream of injustice. We urge you to oppose any changes in the I.C.W.A. until after consultation and in-put from Indian Nations, agencies and concerned parties. Our children are our future.

Prepared Statement of Hon. George Miller, U.S. Representative from California

I am pleased to provide this statement to the Senate Committee on Indian Affairs as it examines amendments to the Indian Child Welfare Act (ICWA). As you know, the House recently passed H.R. 3286, the Adoption Promotion and Stability Act, which in Title III contains certain very controversial provisions affecting the adoption of American Indian and Alaska Native children.

Despite the controversial nature of the Indian provisions, the unanimous opposition of Indian tribes, the clear opposition of the Administration to those provisions, and the fact that my Committee which has primary jurisdiction over Indian matters in the House had not had the chance to hold even a single hearing or otherwise examine the new legislation, the House leadership saw fit to schedule this legislation for a floor vote just weeks after its introduction. In fact, the leadership originally attempted to bypass the Resources Committee and bring this legislation directly to the House floor.

Although the House narrowly passed this measure as part of H.R. 3286, I remain convinced that the amendments to the ICWA contained in Title III of that bill are not the answer that we need to guard against the few but high-profile Indian adoption failures that have occurred since 1978. I believe that there are alternative measures that this Congress can take that would more effectively prevent cases like these from happening again. I want to emphasize, however, that we must not let these few cases overshadow all of the good that the Act has done. What's been left out of this emotional and anecdotally driven debate are the thousands of success stories where ICWA has had the intended, positive impact on children and families alike.

Let me relate one of these success stories:

In 1995, twin baby boys from the Salish and Kootenai Tribes of the Flathead Reservation in Montana were placed with their non-Indian maternal grandparents. Though understandably frightened by the scores of horror stories they had been led to believe could occur, the prospective parents and their adoption attorney rightfully followed the 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 consented to the adoption of the children by their non-Indian grandparents and also took the extra step of helping to arrange a creative arrangement that allows the children to maintain a close connection with their Indian family and tribal heritage while being raised by their white grandparents. Books, pictures, artwork 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 we should all adopt as Congress considers any change to this crucial piece of legislation.

In 1978, Congress found evidence that state courts and child welfare workers placed over ninety percent of adopted American Indian children in non-Indian homes. Sixteen years later, studies indicate that nearly 60 percent are still adopted by non-Indians. Prior to enactment of ICWA, the House held hearings which yielded information demonstrating that approximately 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.

The Indian Child Welfare Act was enacted after years of Congressional study in order to protect Indian children and Indian tribes from these patterns of abuse. The House Committee on Interior and Insular Affairs reported that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." The 1978 bipartisan legislation was hailed as a long-overdue correction to this practice. In short the law gives tribal governments the right to have a voice in child custody proceedings involving their own members as a means of fulfilling the obligations they have to both their families and to their communities. The law allows for concerned Indian relatives to intervene in adoption and foster care cases involving an Indian child and in certain instances to ask the court to transfer proceedings to tribal courts.

Although the law gives tribes the right to play a role in all cases involving their own children, unfortunately, the law does not always require that the parents, their attorneys, or adoption agencies notify the courts or the tribe when such a case is pending. The problem is that some in the adoption profession fear that by notifying the courts that an Indian child is involved in an adoption proceeding, they either will bog down the proceedings or scare off potential adoptive parents. Often, the tribes are given no notification while parties to the adoption are encouraged to conceal the child's Indian identity, causing the number of cases where the intent of the law has been skirted to multiply rapidly. The consequences of this noncompliance can lead to emotionally troubling results for everyone involved.

Unfortunately, misunderstandings also have led to unwarranted criticism of the act. I'd like to clear at least two of those up. First, the law does not give the tribe the right to undo adoptions once they have been finalized. Second, the law gives the courts wide discretion to keep any Indian custody proceeding in state court for "good cause" which allows the court to weigh such factors as the wishes of the parents, the location of the tribal court, and the amount of time the child has spent with the adoptive or foster parents.

We have all seen the tragedy of the *Baby M* case. Nobody on either side of the debate wants anyone to go through that kind of agony and heartache, least of all the children. The ICWA's notification and good cause provisions are intended to prevent these tragedies from ever happening. When the adoptive parties follow the intent of the ICWA such tragedies are avoided. The act is not perfect in all respects and I agree that some changes will strengthen it. But the few number of troublesome Indian adoption cases should not be made to stand for the whole story and then held up as justification for the dismantling of the ICWA. The point is that we need to look at the act in a careful manner involving hearings and candid debate in the committees of jurisdiction. But if we allow ourselves to rush in and dismantle, rather than reform, the ICWA, we will destroy the careful balances struck in the act, and it is the children who will lose due to our shortsightedness.

Some have tried to blame the few but well-publicized failures on the Indians, some have concluded that rolling back the ICWA is necessary to prevent future mis-

carriages of justice, and some have even asserted that they are doing it with the best interests of the Indians at heart. But Indian people have heard claims like these all too many times before. I understand how hard it must be for them to live with this rhetoric, especially when the stakes are so high. We must bear in mind that from an Indian perspective, it is the very future of their people and their culture that is at stake.

Title III of H.R. 3286 would radically alter key definitions of how tribal membership is determined and in so doing, infringe upon the most fundamental of all tribal rights. These changes will interfere with Indian people's ability to ensure a loving and culturally sensitive environment that is in the best interests of the child and his or her community. Furthermore, these changes will not expedite custody proceedings but will in fact delay pending and future adoptions by creating a new cause for litigation.

The Resources Committee that I serve on voted to strike Title III from the bill for two critical reasons.

We struck Title III first because it goes to the heart of the act—the survival of Indian cultural protection of Indian children yet not a single tribe in the country was ever consulted. We cannot forget that we have a trust responsibility to protect Indian tribes and their resources. Congress, in passing the ICWA, and the Supreme Court in the 1988 field case, both recognized "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." Yet the House went on to make major changes to the act without any tribal consultation whatsoever or even a single hearing.

Second, the Committee disagreed with the substance of Title III in that it adds additional requirements for Indian parents to meet before the protections of the act, namely tribal court jurisdiction, kick in. I think it is especially important to remember that while the act sets up adoption preferences, it gives tribal and state courts great latitude to make any placement they want, including placement with non-Indian families, as long as there is good cause. In fact, that is exactly what happened in the 1988 *Holyfield* case. I disagree with the assumption that tribal courts are bound to make wrong or misguided decisions in these case.

We were also concerned that changing the coverage requirements is not only going to exclude certain bona fide Indian children from the act's coverage, but will move the determination back from tribal courts into state courts. We passed the Act in 1978 in response to the state courts' inability to grasp the nature of Indian culture. We also disagreed with the Title III because it would tie membership and coverage to written consent and enrollment when Indian tribes themselves do not. By focusing on the degree of Indian blood, Title III's sponsors miss the fact that Indian tribes, as sovereign governments, have the right to set membership requirements on their own terms. The second largest tribe in the nation, the Cherokee Nation, does not rely on blood quantum in determining membership, yet many Cherokees who have a limited degree of Indian blood are an integral part of and play important roles in Cherokee culture.

Last, Title III's heavy reliance on the parents' contacts with the tribe entirely misses the important role of the child's extended family. In Indian culture the extended family has a special role in caring for Indian children. They are the first line in representing the tribe's interest in that child and in nearly every instance when they have knowledge of a case are willing to adopt Indian children when their natural parents can't take care of them. This is a major point: unlike other minority adoption cases where there are often no prospective adoptive families, in Indian country there are more than enough relatives and families who are willing to assume custody of Indian children. In enacting ICWA we recognized that there should be someone to speak for the tribe, and for the child's interest in his or her heritage. It should be clear that tribal courts, not state courts, are going to be in a better position to recognize this as well as be in contact with a child's relatives. The reason this is so important is because that knowledge will promote quicker foster care or adoptive placements of Indian children, something directly in their best interests.

Having agreed that the provisions our respective committees struck from H.R. 3286 are not the answer, we need to focus on what the appropriate next steps should be.

We can begin by agreeing that if a law is being ignored, especially one which fundamentally affects children, then paring that law down is simply not an answer. Commonsense dictates that the law be strengthened and enforcement be stepped up, and all voices be heard. We must put aside partisan politics and prejudice. We need to think carefully and deliberately about what is best for the children and what is best for an entire culture.

This is the commonsense approach that has gone into an effort by the National Congress of American Indians to draft new language to amend ICWA. It will bring

renewed fairness and stability to this troubled debate. One critical provision, for example, will place deadlines on tribes for when they can intervene in a voluntary adoption proceeding, once they have been notified. This will provide closure and security for adopting families as well as an incentive to notify the tribe early rather than later. Another provision will impose criminal sanction on attorneys or adoption agencies that knowingly violate the act.

It is time for non-Indians to understand that Indian families are not necessarily opposed to other people raising their children and giving them loving homes. But it is even more critical that they understand that Indian people must have a voice in these adoptions and that their voices be heard for the good of everyone. Although we in Congress are often the first to prescribe what is best for American Indians, we usually fail in our attempts to deliver on our promises, largely due to our unwillingness to listen to the very people we're trying to help. Time is running out, and the welfare of Indian children may be hanging in the balance. Difficult legislation demands a fair and balanced approach. I am committed to that approach and I hope the rest of Congress is too.

Prepared Statement of Virgil Murphy, Chairman, Stockbridge-Munsee Community, Band of Mohican Indians

The most important resource of the Stockbridge-Munsee Community Band of Mohican Indians is our children. For many years, Indian children were removed from their homes and denied the opportunity to be raised in their culture. In 1978, the Indian Child Welfare Act ("ICWA") was passed to ensure that Indian tribes have a key role in the placement of Indian children who are being removed from their families. Recently the procedures and safeguards of ICWA were challenged. The Stockbridge-Munsee Community believes it is important to address the concerns about ICWA while preserving the best interest of Indian children and tribes.

In May, Congresswoman Deborah Pryce authored a provision of H.R. 3286 that contained extensive amendments to ICWA ("Title III"). The amendments provided that ICWA would not apply to child custody proceedings involving a child whose parents do not maintain an affiliation with their tribe. Such a change in the law would have been a large step backwards in ICWA's protection of Indian children and Indian tribes' role in the placement of Indian children. The Stockbridge-Munsee Community and numerous other tribal governments opposed Title III. We thank the Committee for voting to strike Title III when it was referred to the Committee.

Subsequently, the "Tulsa amendments" were developed by a cooperative intratribal effort coordinated by the National Congress of American Indians and may become a part of H.R. 3286 or introduced as stand-alone amendments to ICWA.

The Stockbridge-Munsee Community supports the "Tulsa amendments" because they were developed with the participation and support of tribal governments. Furthermore, the amendments maintain the spirit of ICWA while thoughtfully and prudently addressing the concerns of adoption attorneys and others.

We believe the amendments would improve ICWA by (1) requiring states to notify tribes in voluntary adoption or foster care placements; (2) providing sanctions against attorneys and agencies who encourage misrepresentation of a child's Indian heritage or status; and (3) clarifying the timeframes under which a tribe can intervene in a proceeding. These are changes to ICWA that the Stockbridge-Munsee Community can support.

Much of what we do as a tribal government revolves around planning for the future of our grandchildren. Through ICWA, we are able to ensure that our people's grandchildren will be in the community in the future. The maintenance of our future is the foundation of our survival as a tribe. ICWA is a law that is very precious to tribal governments. Any misguided or hasty attempts to change it could cripple the long-term survival of our tribal community.

We thank the Senate Indian Affairs Committee for your efforts to act with the best interests of Indian children and communities in mind. We support the Tulsa amendments and strongly oppose any amendments in the form of Title III, as passed by the House. ICWA has served tribes well since its enactment and will continue to do so as long as the integrity and essence of ICWA remains intact. Thank you very much.

Prepared Statement of The Oneida Indian Nation, Oneida, NY

The Oneida Indian Nation is deeply concerned over recent Congressional attempts to undermine the Indian Child Welfare Act (ICWA). We thank Chairman McCain and the members of the Senate Committee on Indian Affairs for this opportunity

to share our thoughts regarding improvements to the Indian Child Welfare Act. We would like to offer our support for the alternative amendments proposed by the National Congress of American Indians (NCAI).

There are ways to address the concerns expressed by the sponsors of House bill without forgetting the original purpose of the Indian Child Welfare Act. The National Congress of American Indians recently met to address these concerns and drafted proposed legislation that will effectively place requirements on all parties in voluntary proceedings. These alternative amendments signify the willingness of Indian governments to address the specific concerns of those who feel that ICWA does not work. But these amendments also address other issues of concern to Indian people. The only effective solution is one that will actually provide more security for prospective adoptive parents and still allow for meaningful participation of Indian governments where it is appropriate.

The proposed legislation drafted by NCAI addresses nine (9) specific concerns which are outlined below:

No. 1. Notice to Indian Tribes for Voluntary Proceedings—This provision would extend the notice provision to voluntary as well as involuntary proceedings. It also clarifies what should be included in the notice so a tribe can make an informed decision on whether the child is a member or eligible for membership.

No. 2. Timeline for Intervention—This provision would place a deadline for when a tribe could intervene in a voluntary proceeding. The time would start running from the time of notice of the proceeding. If a tribe did not intervene within the time period, then it could not intervene in the proceeding.

No. 3. Criminal Sanctions—This provision imposes criminal sanction on attorneys or adoption agencies that knowingly violate the Act by encouraging fraudulent misrepresentations or omissions.

No. 4. Withdrawal of Consent—This provision establishes a time limit for when a parent could withdraw their consent to a foster care placement or adoption. Currently, a parent can withdraw their consent to an adoption until the adoption is finalized This change would place an additional requirement that the child be in the adoptive placement for less than 6 months or that less than 30 days have passed since the commencement of the adoption proceeding.

No. 5. Application of ICWA in Alaska—This provision would clarify that Alaskan villages are included in the definition of reservation.

No. 6. Open Adoption—This provision allows state courts to provide open adoptions where state law prohibits them.

No. 7. Ward of Tribal Court—This provision clarifies that the tribe shall retain exclusive jurisdiction over children who become wards of the tribal court following a transfer of jurisdiction from state court to tribal court.

No. 8. Duty to Inform of Rights Under ICWA—This provision imposes a duty on attorneys and public and private agencies to inform Indian parents of their rights under ICWA.

No. 9. Tribal Membership Certification—This provision requires that any motion to intervene in a state court proceeding be accompanied by a tribal certification detailing the child's membership or eligibility for membership pursuant to tribal law or custom.

We urge the members of the Committee and Congressional leaders in both houses to enact the alternative amendments proposed by NCAI and to keep the Pryce amendments (Title III of H.R. 3286) out of the final version of Adoption Promotion and Stability Act of 1996.

We thank you for your efforts to strike Title III from the Senate bill, and for this opportunity to share our thoughts with you regarding enhancement of the Indian Child Welfare Act.

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

As Chairman of the Resources Committee, I want to thank my colleagues in the Senate for allowing me to testify on Title III of H.R. 3286 and provide the Resources Committees views. I opposed very strongly the inclusion of Title III of H.R. 3286 and the full Committee on a bipartisan consensus, voted unanimously to strike Title III out of the bill. However, the House Rules Committee chose to reinstate that title in the Omnibus Adoption Bill when it was considered on the House floor.

H.R. 3286 is intended to promote family values, avoid prolonged unnecessary litigation in adoptions and to 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 the consultation of the Alaska Natives and American Indian Tribes. It is an outrage

that the U.S. House of Representatives considered a very sensitive and important issue which proposes a major change in the adoption of a Native American child without Native American input.

Last year, Congresswoman Pryce introduced H.R. 1448 and our Subcommittee on Native Americans and Insular Affairs held a hearing on May 10, 1995. Alaska Natives and Tribes opposed that bill. The Committee on Resources and I directed the Tanana Chiefs Conference to begin a consultation effort with tribes, the National Association of Adoption Attorneys, the Alaska Federation of Natives, and the National Indian Child Welfare Association to draft a working document on H.R. 1448 and the issues it raised regarding the Indian Child Welfare Act (ICWA).

The National Congress of American Indians met the first week in June to discuss this working draft document on the ICWA and accepted this alternative proposal. The proposed legislation responds to issues raised in H.R. 1448 and to issues in Title III of H.R. 3286. It provides for notice to Indian tribes for voluntary adoptions, terminations of parental rights, and foster care proceedings. It provides for time lines for tribal intervention in voluntary cases and provides criminal sanctions to discourage fraudulent practices in Indian adoptions. Additionally, it clarifies the limits on withdrawal of parental consent to adoptions and provides clarity on the application of ICWA in Alaska. The proposal opens adoptions in states where state law prohibits them and clarifies tribal courts authority to declare children wards of the tribal court. In addition, it states that attorneys and public and private agencies have a duty to inform Indian parents of their rights under ICWA, and provides for a tribal membership certification in adoptions.

Mr. Chairman, I have always maintained that the Tribes needed to work with the National Association of Adoption Attorneys to ensure that ICWA is followed in the adoption of Alaska Native and American Indian children. I understand the tribes have informally discussed this new proposal with the National Association of Adoption Attorneys and that some tentative agreement has been reached. It has always been my goal to introduce ICWA legislation with the full consultation of tribes in conjunction with the National Association of Adoption Attorneys. I believe that we have a workable draft document and I plan to work with your Committee to resolve the problems associated with the unfortunate and tragic adoption cases such as the *Rost* case.

I know that Congresswoman Pryce and others are sincere in their concern about litigation which has delayed a few adoptions. But ICWA is not the problem. The *Rost* case is a sad and tragic case. But it was caused by an attorney who tried to cover up the natural parent's tribal membership and purposefully avoided checking with the grandparents and extended family of the children to see if the family was available to adopt these children. The sad part is that this attorney did not violate the law, but he inflicted untold sorrow on the Rosts, the grandparents of the children, and, ultimately, on the children themselves. The proposed legislation will impose criminal sanctions on attorneys who violate ICWA requirements in the adoption of a Native child. In closing, I can understand the desire to solve the problems of a few high profile cases, however, we must not do so at the cost of placing thousands of Indian children at risk of harm. I believe we have a workable ICWA document and you have my commitment to work with all affected parties to pass alternative legislation. I thank the Committee for allowing me to testify.

STATEMENT OF SENATOR PAUL WELLSTONE
SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON AMENDMENTS TO THE INDIAN CHILD WELFARE ACT

Mr. Chairman, I want to commend the distinguished Chairman and Vice-Chairman on their leadership on this important issue. As usual, they convey their profound understanding of the history that gave rise to the Indian Child Welfare Act, as well as the deep significance to the Native American community, of the principles underlying the Act. I know that my friends in Indian country in Minnesota are deeply appreciative of this Committee's role, under the Chairman's leadership, in opposing those changes that would undermine the Act, and in creating a forum for testimony on compromise amendments. I also want to thank the witnesses who have taken the time to come and give testimony on how to improve the Indian Child Welfare Act.

The Indian Child Welfare Act of 1978 was enacted to put an end to the practice of removing Indian children from their families, their tribes, and their cultures. Unfortunately, there is a long and shameful history of this practice in the United States. In 1978, prior to the enactment of ICWA, State courts and child welfare workers placed over 90% of adopted Native-American children in non-Native American homes. ICWA creates a framework in which Indian tribes can participate in the placement process instead of being shut out. Their assured participation has helped to preserve the cultural integrity of Indian tribes by ensuring that tribal leadership retains the ability to make decisions on matters involving the adoption and custody of Indian children. Any changes or improvements to ICWA must not supersede an individual tribe's right to determine the criteria for tribal membership as well as respecting the sovereignty of tribal governments.

Both the Department of the Interior and the Department of Health and Human Services agree that ICWA has worked well to safeguard the interests of Indian children, especially when its provisions are applied in a timely manner. It is important to note that the high-profile problematic cases under ICWA, while undoubtedly painful for the participants, represent less than one-half of one-percent of the total number of Indian adoptions since the Act was passed. I think it is important to consider the amendments developed by Indian tribes and adoption advocates in order to better serve the needs of Indian children and families. The most important concern in any custody or adoption case is the best interest of the child. The proposals developed by the NCAI in conjunction with tribal attorneys and adoption attorneys, reflect improvements to ICWA that will benefit Indian children, especially changes to reduce delay in custody proceedings and to strengthen federal enforcement tools to promote compliance with the Act.

Mr. Chairman, Minnesota is home to a large number of Native Americans, and the Twin Cities of Minneapolis and Saint Paul have

one of the largest urban Indian populations in the country. In 1990, Indian children accounted for nearly twelve-percent of total adoptions statewide. I am confident that, with the help of ICWA, the adoption of Indian children will continue to be a cooperative action involving all concerned parties. Maintaining and strengthening the participation of tribal authorities in the adoption process is clearly in the best interest of the children, families, and Indian tribes.

Thank you, Mr. Chairman.

MICHAEL O. FREEMAN
COUNTY ATTORNEY

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2000 GOVERNMENT CENTER
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June 25, 1996

The Honorable Paul D. Wellstone
U.S. Senator
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Wellstone:

I am writing, as one public representative to another, to urge you to work against any weakening amendments to the Indian Child Welfare Act, 25 USC 1911 et seq. The amendments added in the House of Representatives to H.R. 3286, The Adoption Tax Credit legislation and removed in the Senate Indian Affairs Committee on June 19, would seriously undermine the spirit and intent of the Indian Child Welfare Act.

Hennepin County has the largest urban Indian population in the country outside of the County of Los Angeles. We have a large number of cases that involve the Minnesota Chippewa Tribe, Red Lake Band of Chippewa Indians, and other various Tribes both within and outside of the state of Minnesota. We strive to work closely with the Tribal Representatives to ensure that the Act and its mandates are closely followed. We have found that the procedures that are set out in the Act are not a burden but an added protection to a sovereign nation.

Hennepin County meets regularly with Tribal Representatives to work closely together in resolving cases involving Indian children. The Tribes act as an appropriate third parent willing and able to make decisions regarding their children's welfare. Clear and consistent communication between the County and the Tribes has resulted in better protection and services for Indian children.

The proposed amendments would greatly damage Indian children as it would remove decision-making from a third appropriate parent. The Tribes have consistently demonstrated that their only concern is for the future of their culture and their children. To take away that ability would truly not be in the best interests of Indian children.

I strongly urge you to work against any weakening of the Indian Child Welfare Act. It does not serve the interests of the people of Minnesota or America – Indian or non-Indian – to allow the proposed amendments to move forward.

Sincerely yours,

MICHAEL O. FREEMAN
Hennepin County Attorney

Department of Justice

STATEMENT

OF

SETH P. WAXMAN

ASSOCIATE DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

CONCERNING

PROPOSED AMENDMENTS TO

THE INDIAN CHILD WELFARE ACT

PRESENTED ON

JUNE 26, 1996

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, I am Seth P. Waxman, Associate Deputy Attorney General at the Department of Justice. Thank you for inviting the Department to present its views on proposals to amend the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq. The Administration and the Attorney General support the right of Indian tribes to self-government and recognize the important needs of Indian children for caring families and nurturing homes. We understand that the proposals under consideration represent an effort to reach consensus among adoption attorneys and tribal representatives, including the National Congress of American Indians ("NCAI").

Recently, the application of ICWA to a relatively small number of voluntary adoption cases has evoked intense debate in 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 prospective parents, and especially to the children, who find themselves caught in the center of these disputes.

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 on June 19, 1996, that eliminated Title III of the Adoption Promotion and Stability Act of 1996. Although the Department otherwise supports H.R. 3286, we opposed Title III because, in our view, it was inconsistent with tribal self-government in matters of tribal

membership. See Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs to Chairman McCain, June 18, 1996.

We are informed by the Departments of the Interior and Health & Human Services that ICWA 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. As noted below, our comments on the draft proposals are preliminary in nature. We would be pleased to assist the Committee in its effort to develop concrete proposals that are both respectful of tribal self-government and promote timeliness and certainty in voluntary adoptions of Indian children.

I. The Right of Indian Tribes to Self-Government

Since the formation of our Union, the United States has recognized that Indian tribes have the authority to govern their members and their territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the "highest and best" form of government, "self-government." Ex parte Crow Dog, 109 U.S. 556, 568 (1883). 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. See Morton v. Mancari, 417 U.S. 535, 555 (1972).

II. The Statutory Framework of the Indian Child Welfare Act

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of tribal membership, is fundamental to that relationship. ICWA establishes a dual jurisdictional system for Indian child custody proceedings: a) Congress confirmed the exclusive jurisdiction of tribal courts in Indian child custody proceedings when the Indian child is domiciled in tribal territory; 25 U.S.C. § 1911(a);[1] and b) Congress created a procedure to transfer off-reservation Indian child custody cases to tribal courts, but allowed state courts to retain jurisdiction of such cases where good cause exists. Notably, ICWA reserves the right of either parent to "veto" the transfer of a case involving their child to tribal court. 25 U.S.C. § 1911(b).

ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state-court proceeding to place an Indian child outside the home, ICWA requires notice to the Indian parent or custodian and the child's tribe, and imposes a ten-day stay of proceedings, which may be extended to thirty days. 25 U.S.C. § 1912(a). ICWA also establishes a right to counsel for indigent parents and a right to examine records, and it requires state child welfare

[1] See Fisher v. District Court, 424 U.S. 382 (1976) (tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

agencies to make remedial efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(b)-(d).

In any voluntary state-court proceeding for relinquishment of custody or parental rights, ICWA requires the court to certify that it has explained the consequences of the action and that the Indian parent has understood those consequences. 25 U.S.C. § 1913(a). No consent to adoption is valid if made before an Indian child is born or within ten days after birth.[2] Id. Consent to adoption may be withdrawn prior to entry of a final decree, 25 U.S.C. § 1913(c), and consent to foster care placement may be withdrawn at any time. 25 U.S.C. § 1913(b). After 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. 25 U.S.C. § 1913(d).

III. The Operation of the Indian Child Welfare Act

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.[3] They report that ICWA generally has worked well to preserve the integrity of Indian families and tribal relations, especially when parties are informed

[2] The ICWA ten-day protective period is consonant with many state laws. More than half of the states do not permit parental consent to adoption until 3 days after a child is born. M. Hansen, "Fears of the Heart," ABA Journal (November, 1994) at 59.

[3] See Hearing Before the Senate Committee on Indian Affairs, (1995) (statement of Joann Sebastian Morris, Acting Director, Office of Tribal Services, BIA); id. (statement of Terry L. Cross, Executive Director, National Indian Child Welfare Ass'n); id. (statement of gaiashkibos, President, National Congress of American Indians).

about ICWA and it is applied in a timely manner.[4] In fact, despite some recent concern about ICWA's application to certain off-reservation cases, legislators seem to agree that ICWA works. As Representative Pryce explained, "ICWA has worked, and it is still working." See Statement of Representative Pryce, 142 Cong. Rec. H4808-4809 (May 10, 1996).

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. The application of ICWA to a limited number of cases involving adoptive placements that are later challenged by biological parents or the child's tribe, however, has drawn criticism. This criticism, in turn, provides the impetus for amendments to the ICWA.

These cases are difficult and heart-rending, often having tragic consequences for all parties to the dispute. It is important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of instances. Further, many of those cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the In re Bridget R. decision by the California Court of Appeal.

4 Other positive results reported under ICWA are the development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.

49 Cal. Rptr. 2d 507 (1996). 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. The ensuing protracted litigation has disrupted the lives of all those who are involved in the dispute. Had ICWA been complied with in that instance, 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 statutory mechanisms to provide incentives that ICWA is complied with early on in the adoption process.

Many supporters of Title III, focussing solely on Bridget R. and other anomalous cases, make the assumption 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 decision on ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), however, demonstrate that this assumption is mistaken. In Holyfield, three 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. 490 U.S. at 52-53. The Supreme Court noted that "[h]ad the mandate of the ICWA been followed [at the outset] much potential anguish might have been avoided." Id. at 53-54. The Court deferred to the "experience, wisdom, and compassion of the Choctaw tribal courts to fashion an appropriate remedy." Id. at 54. Following transfer of the case to tribal court, the tribal court determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent. 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 interests of the child.

IV. Proposed Amendments to the Indian Child Welfare Act

The Administration and the Attorney General strongly support the Adoption Promotion and Stability Act of 1996, without Title III.[5] The Department, however, 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.[6]

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[5] In a letter from Assistant Attorney General Fois to Speaker Gingrich, dated May, 10, 1996, the Department also indicated that to avoid Eleventh Amendment concerns, Title II should be amended to reflect that it is passed pursuant to both Congress' spending power and its enforcement authority under the Fourteenth Amendment.

[6] As passed by the House, Title III of the Adoption Promotion and Stability Act of 1996 would have amended ICWA to provide that:

> (a) th[e ICWA] does not apply to any child custody proceeding involving a child who does not reside or is not domiciled within a reservation unless--
>
> (1) at least one of the child's biological parents is of Indian descent; and
>
> (2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.
>
> (b) The factual determination as to whether a biological parent maintains significant social, cultural or political affiliation with the Indian tribe of which either parent is a member shall be based on such affiliation as of the time of the child custody proceeding.
>
> (c) The determination that this title does not apply pursuant to subsection (a) is final, and, thereafter, this title shall not be the basis for determining jurisdiction over any child custody proceeding involving the child.

The Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that 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 government institutions. As the Supreme Court explained in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987): "Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority because tribal courts are best qualified to interpret and apply tribal law." Moreover, Congress found that States "have often failed to recognize the essential tribal relations of Indian people." 25 U.S.C. § 1901(5); see United States v. Kagama, 118 U.S. 318, 384-385 (1886).

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 recognized rights of tribal self-government. To the extent that 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 an inquiry to 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 placements.

V. Tribal Proposals for Reform of ICWA

A. Procedural Reforms

In response to some of the concerns raised in the context of voluntary adoptions, Indian tribes have made proposals to promote timeliness and certainty in voluntary adoptions. NCAI, which represents over 200 Indian tribes, has worked with tribal attorneys and adoption attorneys on proposals that, consistent with the right of Indian tribes to self-government, ICWA be amended by, inter alia, providing clear standards for notification to tribes in voluntary adoptive placements of Indian children; establishing deadlines for tribal intervention in such cases; and limiting the time for biological parents to withdraw consent to adoptive placements.

The Department supports efforts to develop consensus on proposals to increase certainty in the early stages of child custody proceedings and is willing to work with Congress to explore these provisions. The NCAI proposals relating to the procedural aspects of ICWA generally appear to provide a constructive alternative to the more radical changes of Title III, which represent a departure from the goals of ICWA and undermine tribal sovereignty.

B. Clarification of ICWA Requirements

The NCAI proposals also seek to clarify ICWA's requirements. The Department does not at this juncture have comments on the particular language of most of these, except one proposal that requires attorneys who facilitate adoptive placements to advise the parents of Indian children concerning the scope of the ICWA. The Department of Justice has reservations about this provision only to the extent that it might be construed to limit an attorney's ability to discuss the feasibility of various options with his or her client.

VI. Noncompliance and Enforcement

In testimony before this Committee in May 1995, the Department of the Interior and a number of other witnesses cited widespread noncompliance with ICWA by states.[7] Reports by the Departments of the Interior and Health & Human Services on Indian child welfare

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[7] The Department of Health and Human Services issued a program instruction on August 11, 1995, requiring states beginning in FY 1996, to report measures taken under their child welfare service plans under Title IV-B of the Social Security Act to comply with ICWA.

also have emphasized enforcement problems.[8] To address the problem of noncompliance, NCAI proposed criminal sanctions to discourage fraudulent practices in Indian adoptions. The proposed NCAI language would add a new Section 1924 to Title 25, making it a criminal violation to

> (1) encourage[] or facilitate[] fraudulent representations or omissions regarding whether a child or parent is Indian, or (2) conspire[] to encourage or facilitate such representations or omissions, or (3) aid[] or abet[] such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act.

The section specifically exempts any "parent of an Indian child," which under the current ICWA definition includes both biological and adoptive parents. 25 U.S.C. § 1903.

As currently proposed, Section 1924 would apply broadly to "any proceeding or potential proceeding involving a child who is or may be an Indian child for purposes of this Act" and would target anyone who "encourages or facilitates fraudulent representations or omissions." Several of these phrases raise the constitutional concerns of vagueness and overbreadth. In addition, the underlying conduct targeted by proposed Section 1924, "fraudulent representations or omissions," is often difficult to prosecute. Parts 2 and 3 of the proposed sanctions, which address "conspiracy" and "aiding and abetting," are not necessary, because these offenses are already codified in 18 U.S.C. § 371 and 18 U.S.C. § 2. As the Committee considers this issue further, it may be fruitful

[8] Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Off. of the Insp. Gen., Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Dept. of Interior (1988).

to consider 18 U.S.C. § 1001 as a model for sanctions to improve compliance with ICWA.

CONCLUSION

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 the Chairman, the Vice Chairman, and the Committee are making to foster dialogue on issues related to ICWA, consistent with the government-to-government relations between the United States and Indian tribes.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 1996

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

Enclosed are the responses to the questions regarding amendments to the Indian Child Welfare Act that you sent to Associate Deputy Attorney General Seth Waxman on June 28, 1996.

The Office of Management and Budget has advised this Department that it has no objection to the presentation of these responses from the standpoint of the Administration's program.

Please do not hesitate to contact us if we may be of additional assistance.

Sincerely,

Andrew Fois
Assistant Attorney General

CC: The Honorable Daniel K. Inouye
Ranking Minority Member

Question 1. In your view, would the compromise adequately protect tribal sovereignty? How?

Response:

The set of proposals cooperatively developed by the National Congress of American Indians ("NCAI"), tribal representatives, and adoption attorneys would amend the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 et seq., by providing clear standards for notification of Indian tribes in voluntary adoptive placements of Indian children; establishing deadlines for tribal intervention in such cases; establishing time limits on withdrawal of consent to adoptive placements by biological parents; and providing sanctions for willful violations of ICWA, among other things. The compromise proposals are designed to promote timeliness and certainty in voluntary adoptions of Indian children while providing due respect for tribal self-government.

We understand that S. 1962, The Indian Child Welfare Act Amendments of 1996, is, to a large extent, based on these proposals. The Department believes S. 1962 represents a sound approach to amending the Indian Child Welfare Act (ICWA) to address the concerns of its critics without compromising tribal sovereignty or the best interests of Indian children.

Question 2. Would the compromise sufficiently advance the goals of certainty, speed and stability in adoptions involving Indian children? How?

Response:

The NCAI/adoption attorney compromise proposals seek to promote timeliness in voluntary adoptions of Indian children by providing clear standards for notification of Indian tribes in voluntary adoptive placements. In addition, the compromise proposals are designed to promote certainty and stability by ensuring that biological parents are advised of their rights prior to giving consent to adoption, thereby enhancing sound decision-making, and by establishing time limits on any withdrawal of consent to adoptive placements by the biological parents, which would promote stability. The compromise proposals also provide a framework for crafting consensual visitation arrangements, whereby Indian children would be able to maintain contact with their extended Indian families and Indian tribes even though they are placed with a non-Indian adoptive family.

Question 3. The attorney for the Rost family says in her written testimony that if these compromise amendments had been law in 1993 the "tragedy" which ensued in the Rost case would never have happened. Do you agree with her assessment?

Response:

In its testimony before the Committee on June 26, the Department noted that if ICWA had been complied with at the outset of the Bridget Rost case, most of the delay involved in that case might have been avoided. The NCAI/adoption attorney compromise proposals are designed to promote better compliance with ICWA by providing clear standards for notification of Indian tribes in voluntary adoptive placements of Indian children, providing deadlines for intervention by Indian tribes, ensuring that biological parents are advised of their rights prior to giving consent to such adoptions, providing greater flexibility in adoptive placements through consensual visitation agreements, and enhancing federal enforcement tools. The Department, therefore, believes that the NCAI/adoption attorney compromise proposals will help to avert tragedies such as the Rost case.

In her testimony, Jane Gorman, the attorney for the Rost family, suggested that the protracted litigation in the Rost case, and its attendant delay, would not have happened if the compromise proposals had been in place. Ms. Gorman has personal knowledge of the case, and we know of no reason to question her assessment.

Question 4. In your view, is the compromise the product of good faith efforts on the part of the adoption community?

Response:

The Department of Justice did not participate in the communications between the National Congress of American Indians, tribal representatives and the adoption community. We have no reason to doubt that the compromise is not a good faith effort on behalf of the adoption community.

Question 5. What issues are addressed in Title III that have not been addressed in the compromise language? Can and should these issues be addressed legislatively? How?

Response:

The Department of Justice opposed Title III of the Adoption Promotion and Stability Act, as passed by the House, because it was inconsistent with tribal self-government determinations concerning tribal membership and potentially would have

interfered with tribal court jurisdiction. We support this Committee's action striking Title III and its efforts to develop consensus on ICWA amendments that are both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children. Accordingly, the Department believes that Title III has been dealt with appropriately by the Committee.

Question 6. Is it possible that the Title III provisions on "Indian descent" passed by the House would make ICWA vulnerable to challenge under the U.S. Constitution and the Adarand case?

Response:

We do not believe so. We read the term "Indian descent" in section 114(a)(1) of Title III as referring to the definition of "Indian" set forth in section 1903(3) of ICWA. That section defines "Indian" as "any person who is a member of an Indian tribe." Accordingly, under Title III, the application of ICWA would continue to be based on the tribal status of either the Indian child or one of the child's biological parents. The Supreme Court has upheld legislation based upon tribal membership criteria. See Morton v. Mancari, 417 U.S. 535 (1972).

Question 7. Would you briefly discuss some of the procedural due process issues raised by Title III? In particular, the potential for State court determinations regarding tribal membership without notice to Indian tribes, and the possibility that such determinations would not be subject to appellate review?

Response:

Title III would not authorize state courts to determine tribal membership. The right of Indian tribes to make such determinations would remain undisturbed. However, Title III does provide that, by itself, the tribal membership of either an Indian child or a biological parent of a child eligible for tribal membership would be insufficient to trigger the federal protections of ICWA. Rather, in deciding whether ICWA would apply, state courts also would be required to assess the extent of the social, cultural, and political ties maintained between the tribe and at least one of the child's biological parents.

In our view, the problem created by this provision of Title III is not one of procedural due process. Title III would undermine the traditional deference given by Congress to tribal government determinations of tribal membership for purposes of determining whether particular individuals are "Indian" and hence eligible for the protections of ICWA.

Question 8. In what ways does ICWA work, or not work, for the best interests of Indian children?

Response:

The Department of Justice has only a limited role in the litigation of ICWA cases, 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 ICWA has generally worked well to preserve the integrity of Indian families and tribal relations, especially when parties are informed of the requirements of the statute and it is applied in a timely manner.

ICWA's statutory design is intended to protect the best interests of Indian children by protecting the integrity of Indian families and, except when necessary and appropriate, by preventing involuntary removal of Indian children from their homes. See 25 U.S.C. §§ 1902, 1912-1913. ICWA also establishes a presumption that maintaining tribal relations is in the best interests of Indian children.

To ensure that courts have the latitude to determine the best interests of the child, ICWA contains "good cause" provisions in 25 U.S.C. §§ 1911(b), 1915(a) and (b). These provisions are designed to provide tribal and state courts with the necessary flexibility to tailor their orders to serve the best interests of each Indian child when in a particular circumstance serving the best interests of the child is in tension with the other dictates of ICWA.

Question 9. From your review of the actions taken by Indian tribes in the area of child welfare, how have tribal governments and tribal courts exercised their responsibilities under ICWA?

Response:

The Department of Justice defers to the Departments of the Interior and Health and Human Services for a response to this question.

Question 10. How does current law balance the best interests of Indian children and the interests of Indian families and Indian tribes?

Response:

ICWA protects the best interests of Indian children by preserving the integrity of Indian families, and by preventing involuntary removal of Indian children from their homes, except when such action is necessary and appropriate. 25 U.S.C. §§

1902, 1912. ICWA also establishes a presumption that tribal courts are better situated than state courts to make Indian child custody decisions, but in cases arising off-reservation, provides that either parent may veto transfer of an Indian child custody proceeding from state court to tribal court. 25 U.S.C. § 1911.

Further, ICWA establishes a presumption that maintaining tribal relations is in the best interests of Indian children and promotes placement of Indian children with Indian families. ICWA recognizes that the preferences of the parents and the Indian child must be considered, and directs the courts to "give weight" to a parent's desire for anonymity. 25 U.S.C. § 1915(c). Significantly, through its "good cause" provisions, ICWA provides tribal and state courts with the flexibility to tailor their orders to serve the best interests of each Indian child based upon the unique circumstances of that child. 25 U.S.C. §§ 1911(b), 1915(a) and (b); see also 25 U.S.C. § 1916 ("best interests of the child").

Question 11. How does current law protect the interests of a biological parent who objects to transfer of a child welfare case from State to tribal court jurisdiction?

Response:

With regard to children who do not reside on the tribe's reservation, ICWA provides that foster care or termination of parental rights proceedings shall be transferred from state court to tribal court absent good cause to the contrary, "absent objection by either parent." 25 U.S.C. § 1911(b). If either parent objects to such transfer, the proceedings would remain in state court. Thus, ICWA gives both parents a "veto" over any request to transfer an Indian child welfare proceeding from state court to tribal court.

TESTIMONY OF

THE HONORABLE DEBORAH PRYCE (OH-15)

BEFORE THE

SENATE COMMITTEE ON INDIAN AFFAIRS

ON

JUNE 26, 1996

IN

ROOM 216 HART SENATE OFFICE BUILDING

Mr. Chairman, distinguished members of the Committee on Indian Affairs: Thank you for affording me the opportunity to address you concerning the Indian Child Welfare Act of 1978.

I come before you today encouraged by the movement toward needed reform of the ICWA, and I am willing to work with the Committee and other interested parties, some of whom will testify before you today, in hopes that a true compromise that satisfies the interests of all sides can be reached.

Let me begin by saying that I believe the ICWA was well-intended legislation, and I continue to support its original and intended objectives. Protecting the best interests of Indian children and promoting stability and security among their families are certainly among the most worthy of all goals.

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. Children have been denied placement and adoption in permanent, stable homes, as their rights and those of their parents are made subordinate to tribal claims based often on remote and minimal tribal connections.

Mr. Chairman, 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
-were of a primary cultural heritage other than Native American
-voluntarily relinquished their parental rights
-AND in some instances, even 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. Title III attempts to address these concerns. As passed by the House, Title III would prevent disruption in both the placement and adoption of children whose parents have no significant affiliation with a tribe.

The goals underlying Title III and which I believe should be the basis of any ICWA reform include the following:

To place children in need of permanent, loving homes and minimize the risk of disrupted or failed adoptions.

To give due consideration to European-American, African-American, Asian-American, and Hispanic-American 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 exists no affiliation with a tribe and the child's Indian blood relationship is attenuated at best. Continued disregard for all other heritages will no doubt lead to the eventual demise of ICWA, and with it the good which it is achieving.

To respect the rights of birthparents of Native American descent, who choose to place their children for adoption.

To promote the best interests of children as a paramount consideration in all child custody proceedings.

Although it contains many worthy objectives and provisions, the proposal before you today fails to address many of the issues and current problems with ICWA which led to the introduction and passage of Title III of H.R. 3286, by the House of Representatives.

First, let me focus on what I feel is positive about the NCAI's proposal. I agree that parents of Native American descent wanting to place their children for adoption should be apprised of all available placement options as well as the application of this Act.

I also understand the importance of notification to the tribes, and support time limits upon a tribe's ability to intervene in voluntary, adoptive placements, as this will help to ensure the timely placement of children in permanent homes.

Further, you may be assured that I in no way condone unscrupulous or unethical conduct on behalf of attorneys in any capacity, under any circumstances. I feel that penalizing such behavior is necessary.

Finally, allowing for visitation agreements between adoptive families, birthparents and their tribes, as part of an adoption decree may serve to decrease the likelihood of disruption in adoptive placements, while enabling children to maintain desired ties to their culture and heritage.

However, I have some serious reservations about what is not addressed in the draft amendments we are discussing today. I wholeheartedly agree with Senator Glenn regarding the problems associated with required notification when a biological parent chooses not to disclose the Native American ancestry of their child or is not aware of it. Any amendment to this Act must afford

protection to adoptive parents and children in those instances where there was no way of knowing that Native American heritage was involved at the time of the adoptive placement.

Ironically, many birthparents feel the need to conceal their heritage, in order to avoid the intrusive consequences of ICWA. Sadly, many parents see abortion as their only option, when instead, we should be providing all possible alternatives to abortion and assurances to birthmothers who choose to place their children for adoption, that it will be done in a timely manner, and that they will have a voice in that decision.

No other population within our society faces the risk of having decisions about their children thwarted by unwanted, third party intervenors. Those who parent children of Indian descent would be required to provide notification of the most personal, of all decisions, rather than enjoy the right to privacy afforded the rest of us.

Further, it is my impression the notification process called for by this proposal would be extremely cumbersome, and I suspect many of us would not be able to provide all the information requested.

As written, this proposal could serve to broaden the likelihood of disrupted adoptions by permitting not only a biological parent, but also a tribe, to petition the court for nullification of finalized adoptions in the event the proposed notification requirements were not complied with in every detail.

Furthermore, the variations in time limits concerning tribal intervention would prove to be most confusing even to courts well-versed in the ICWA, as it appears separate notifications would be required in each of the proceedings involved. I am most concerned that these provisions which are intended to facilitate the timely placement of children in permanent homes could have instead, the unintended effect of delaying such placement.

Finally, this proposal does not address the issue of retroactive membership. Congress could not have intended that legitimate, voluntary adoptions be reversed as the result of birthparents 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. A prohibition against retroactive enrollment and recognition of membership for purposes of ICWA's application is most certainly within the authority of the U.S. Congress as we have the responsibility to determine the scope of ICWA's application as a federal law.

Not addressed by this proposal is the fact that children are being claimed by tribal authorities even in the absence of any prior recognition of their parents

as tribal members, and based upon the smallest fractions of genetic Indian ancestry. Our nation's courts are in desperate need of direction from Congress on this point. Currently, individuals are deemed members of a tribe when, the tribe says they are members, irrespective of the actual date of enrollment or acknowledgment of membership. And as we have seen, sometimes it may be months following the relinquishment of parental rights and placement for adoption.

Even those of us who are adoptive parents cannot begin to imagine the heartbreak associated with the loss of a child under these circumstances, and 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 the basic human rights afforded all citizens who live within our great democracy.

Children are not chattel, nor are they the personal property of an Indian tribe or their parents. They are individuals who have unique and fundamental rights and needs. Above all, they have the right to permanency in 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.

Mr. Chairman, I understand this proposal is continually evolving and that further changes have been suggested, and I am hopeful that is the case. I sincerely appreciate the efforts of all the tribes and individuals who have participated in discussions and negotiations leading to the proposal offered by the National Congress of American Indians. And I remain most hopeful that we can achieve a consensus regarding ICWA reform.

In closing, I look forward to working with the Committee, the Native American community, and all interested parties toward acceptable, consensus legislation. I respectfully ask this Committee during its deliberations to focus on language that will truly address the problems at hand.

Thank you, Mr. Chairman.

Congress of the United States

Washington, DC 20515

June 14, 1996

Senator John McCain
241 Russell Senate Office Building
Washington, DC 20510

Dear Senator McCain:

We write in response to comments recently provided by Mr. Terry L. Cross, Executive Director of the National Indian Child Welfare Association, concerning Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, passed by the House on May 10, 1996.

We believe the Indian Child Welfare Act of 1978 (ICWA) was well-intended legislation and we continue to support its original objectives: to protect the best interests of Indian children and promote the stability and security of Indian tribes and families, through the establishment of federal standards for the removal of Indian children from their families and placement of such children in foster or adoptive homes reflecting the unique values of Indian culture. ICWA has worked to prevent the removal of Native-American children from their families and culture, and we remain most supportive of the Act's original and intended purpose.

In response to the comments of Mr. Cross, we respectfully offer the following observations for your consideration.

- Title III in no way negates or denies any of the protections currently afforded Indian children under ICWA. Tribes retain all of the following:

  - Preference in placement with extended family, other tribal members, or Indian families, in adoptive placements of Indian children under state law;

  - Exclusive jurisdiction over child custody proceedings involving Indian children domiciled or residing within reservations;

  - Ability in state court proceedings to request transfer of foster care placements and cases involving the termination of parental rights to an Indian child not domiciled or residing within a reservation;

  - Right to intervene in state court proceedings for the foster care placement of, or termination of parental rights to, an Indian child;

- Title III of H.R. 3286 simply serves to clarify the scope of ICWA's application in order to prevent disruption in both the placement and adoption of children whose parents have no significant affiliation with an Indian tribe. ICWA protects against the "removal" of Indian children from their families and tribes. It is hard to argue that children of minimal Indian heritage and whose parents have no affiliation with an Indian tribe are, in fact, being "removed" from an Indian family, tribe, or culture.

- If a child's parents maintain no affiliation with a tribe or Indian culture, that child is not going to be raised in a setting which would reflect the "unique values of Indian culture." (Section 1902- Congressional declaration of policy). Children of Indian descent whose parents were not raised in an Indian environment should not be forced into cultural surroundings and home settings that are foreign to them.

- Section 301 of Title III contains common sense, clear language, currently used by some courts, that clarifies the Act while at the same time embodying the original intent of ICWA. Under H.R. 3286, courts and tribes will know from the outset the scope of ICWA's application. Precious dollars currently being spent to engage in expensive and protracted litigation can instead be placed in the Indian child welfare system, where too many children continue to languish in foster placements while awaiting loving, permanent, homes.

- The possibility of adoptions being overturned under ICWA is but one issue of grave concern. Of equal concern is the fact that ICWA is being applied to child custody proceedings involving children for whom the Act was not intended to apply. Children are subjected to claims of tribal jurisdiction solely because of their race or lineal descent, irrespective of their parents' wishes. Furthermore, children are denied placement in permanent and loving homes for months and in some instances years prior to the finalization of adoptions as their rights and interests and those of their natural parents are made subordinate to tribal claims.

- Contrary to the assertions of Mr. Cross, the House Resources Committee was originally requested to hold hearings on proposed amendments to the Indian Child Welfare Act at the beginning of the 104th Congress. On May 10, 1995, hearings were held on H.R. 1448, a bill similar to Title III of H.R. 3286, before the Subcommittee on Native American and Insular Affairs that covered the issues of Indian adoption under ICWA.

- On July 24, 1995, Senator Glenn (sponsor of S. 764, companion legislation to H.R. 1448), Representative Solomon and I hosted a meeting concerning ICWA reform and invited all of the groups who attended the Subcommittee hearing. These groups included the National Congress of Native Americans, The Association of American Indian Affairs, and the National Indian Child Welfare Association, to name a few. No one attended except an attorney from a local Washington firm who lobbies Congress on behalf of Native Americans. Input and advice were requested yet none were received.

- Most recently, Title III of H.R. 3286 was referred to the Committee on Resources, which could have amended the bill to its liking but did not.

- A review of ICWA cases considered only by state supreme courts, as suggested by Mr. Cross, does not provide an accurate accounting of the extent of litigation resulting from ICWA's application in adoption proceedings. As you know, the majority of state court litigation never reaches the state supreme court. In addition, unpublished and pending cases are likewise not included.

- During hearings before the Senate Select Committee on Indian Affairs on May 11, 1988, while testifying on the issue of tribal intervention in voluntary adoptions, Ross Swimmer, Assistant Secretary for Indian Affairs stated, "We have seen case after case of this happening under current law." Our research has identified hundreds of cases throughout the country where ICWA has been an issue in adoptive placements.

- Nothing in Title III prevents tribes from providing young Indian parents with all available information to help them make informed decisions regarding adoptive placements for their children.

- Contrary to the assertions of Mr. Cross, at no time have we stated that the Indian Child Welfare Act was not intended to provide protections to off-reservation Indian children. At the time of ICWA's enactment, off-reservation Indian families were among the most vulnerable and accessible to scrutiny by state agencies. It does not follow, however, that ICWA should apply in state court proceedings where the natural parents are not enrolled members, and have no meaningful ties to an Indian tribe, Indian country or culture. Under such circumstances, the state has a legitimate interest in assuring that the best interests of children residing and domiciled within its jurisdiction are served.

- In cases where ICWA is determined to be the applicable law, off-reservation parents currently have the right to object to a transfer to tribal court and the state court has the right to retain jurisdiction for good cause. This remains unchanged by Title III.

- Any suggestion that a grandparent or extended family member can maintain the requisite tribal affiliation for ICWA to be applied is flawed. The current definition of "Indian Child" requires the child to be a member of the tribe or the biological child of a member of a tribe.

- If Congress had intended ICWA to extend to all blood relations irrespective of their affiliation with a tribe, the definition of "Indian Child" would instead only require that the child be a lineal descendant of a member of a tribe. Such an assertion was previously rejected by the Senate during consideration of S. 1976, almost ten years ago.

- Furthermore, nothing in Section 301 will prevent tribes from providing courts with all information they deem relevant in establishing tribal affiliation. In addition, Section 301 provides a constitutionally sound basis for determining jurisdiction as opposed to subjecting children to coverage under ICWA solely because of their lineal descent, or race.

- With respect to Section 302 of Title III and the issue of tribal membership, Congress could not have envisioned the possibility of adoptions being disrupted or overturned as the result of birthparents joining or being enrolled in a tribe after the voluntary relinquishment of parental rights, placement of children in loving homes, and commencement of adoption proceedings. **Application of ICWA under these circumstances creates substantial risks for adoptive parents facing the possibility of losing their children as the result of tribal intervention and has a chilling effect on all adoptions.**

- Although tribes maintain the right to determine membership for the purpose of tribal self-government, **only Congress can determine the scope of ICWA's application as a federal law.** A prohibition against the retroactive application and recognition of membership for purposes of ICWA is most certainly within the authority of the U.S. Congress.

Parents of Native American descent are no less capable of deciding who should raise their children than any other parent. Where there exists no affiliation with a tribe, Indian culture or community, and where a child's Indian blood relationship is attenuated at best, the European-American, African-American, Asian-American, and Hispanic-American heritage of that child can no longer be considered less significant and meaningful than his or her Native-American lineage.

Finally, consideration of the best interests of children, both Indian and non-Indian, must be paramount in all child custody proceedings.

We hope you will consider these points when the Senate debates the important issues of stability and security for children and adoptive families that H.R. 3286 seeks to achieve.

Sincerely,

DEBORAH PRYCE
Member of Congress

GERALD SOLOMON
Member of Congress

PETE GEREN
Member of Congress

TODD TIAHRT
Member of Congress

Congress of the United States
House of Representatives

June 20, 1996

DEBORAH PRYCE
OHIO
15th DISTRICT

Senator John McCain
Chairman
Senate Indian Affairs Committee
111 Russell Building
Washington, D.C. 20510

Dear Chairman McCain:

I understand the Senate Committee on Indian Affairs will conduct a hearing on Wednesday, June 26, 1996, at which time consideration will be given to Resolution TLS-96-007A and proposed legislation adopted at the 1996 Mid-Year Congress of the National Congress of American Indians.

I continue to have serious concerns that this proposal is inaccurately being considered as a compromise to Title III of H.R. 3286, which was stricken by the Committee during markup on Wednesday, June 19. This proposal fails to address any of the current problems with the ICWA which led to the introduction and passage of Title III in the House of Representatives. In addition, I respectfully offer the following observations regarding this proposal for your consideration:

- **Requiring notice to tribes in voluntary child custody proceedings would serve to broaden the application of ICWA beyond its current and intended purpose, virtually denying biological parents of Native American descent the ability to control to any degree the voluntary placement of their children for adoption.**

The ICWA was never intended to allow tribes to interfere in voluntary adoptions of children whose parents have virtually no ties to Native American culture or heritage. Birthparents of Native American descent domiciled and residing off the reservation, who are not enrolled members and maintain no ties to an Indian tribe or culture, should not have to notify a tribe before voluntarily placing their children for adoption. They should have the same right to determine who will raise their children in the event they cannot, as would any other citizen.

Furthermore, in those instances where a birthparent fails to disclose his or her Indian lineage because of feared tribal intervention in an adoption plan, adoptive parents and adoption agencies can have no way of knowing whether or not an Indian child or tribe is involved. One cannot fulfill the requirement of notification of a fact not known to him.

- **Notification requirements in voluntary adoptions will create an even greater risk for disruption in the permanent and timely placement of children in loving, stable homes. Such requirements will have a chilling effect on all adoptions, as adoptive parents will face the possibility of losing their children as the result of tribal intervention.**

Senator John McCain
June 20, 1996

This proposal would greatly broaden the likelihood of disrupted adoptions by permitting not only a biological parent, but also the tribe, to petition the court for nullification of an adoptive placement in the event the above-mentioned notification requirements were not complied with in every detail.

Adoptions that have been final for as long as two years would be vacated, and the placement wishes of birthparents thereby ignored, without regard for the best interests of the child. This goes far beyond the current language of section 1913(d) that allows for the withdrawal of consent, by a parent, after a final decree of adoption only upon a finding that such consent was obtained through fraud or duress. In addition, it adds an entire new tier of bureaucracy to the adoptive process.

Prior to the 1996 Mid-Year Conference, I delineated numerous concerns for consideration by all participating tribes. Among these were that 1) children are being denied placement and adoption in permanent, loving homes, as their rights and those of their parents are made subordinate to tribal claims; 2) the European-American, African-American, Asian-American, and Hispanic-American heritages of children are somehow considered less significant and meaningful than any Native-American heritage, even under circumstances where there exists no affiliation with a tribe and the child's Indian blood relationship is attenuated at best; and 3) consideration for the best interests of children must be paramount in all child custody proceedings.

Finally, Congress could not have intended that legitimate, voluntary adoptions be reversed as the result of birthparents joining or being enrolled by another in a tribe after the relinquishment of parental rights, placement of children in loving homes, and commencement of adoption proceedings.

I deeply regret that none of these issues or concerns have been remedied or even addressed in the proposal submitted by the National Congress of American Indians. For this reason, it is clear that this is no compromise or consensus legislation, and I respectfully ask the Committee to focus on language that will truly address the problems at hand.

Very truly yours,

DEBORAH PRYCE
Member of Congress

July 16, 1996

The Honorable John McCain
Chairman
Senate Indian Affairs Committee
838 Hart Senate Office Building
Washington, D.C. 20510

Congress
of the
United States
House of Representatives

DEBORAH PRYCE
OHIO
15th DISTRICT

Dear Chairman McCain:

Thank you for your swift attention and hard work on the issue of the Indian Child Welfare Act (ICWA) as it relates to adoption.

I have reviewed a draft of the legislation you plan to introduce to amend the ICWA and, after careful consideration, have decided that I can lend the bill my qualified support. As you know, your legislation offers a much different approach to reform of the ICWA than what I prefer and what was passed by the House, your changes being procedural and mine substantive. I believe, however, that procedural reforms will help to facilitate compliance with the ICWA and prevent some of the adoption tragedies that have occurred under the current Act.

Further, I appreciate your willingness to address some of my concerns by incorporating protections for adoptive parents in cases where there is no disclosure or knowledge of a child's Native American heritage. These provisions are necessary in situations like that of the Rost family of Columbus, Ohio. The Rosts were unaware of the Native American ancestry of their twin adoptive daughters because that information was withheld by the birth parents.

While I believe the reforms in your bill are useful, I still feel that additional reforms are necessary to address the underlying and fundamental problems with the ICWA as it relates to adoption. The definition and jurisdictional problems involved in the application of the ICWA remain unsolved, as it is still unclear to whom this Act should apply. More and more frequently, the courts are deciding that application of the ICWA based on race alone is unconstitutional. I believe it would be desirable for your committee to address this issue at some point, or the legitimate purpose of the ICWA -- to preserve the Indian family and culture -- may be lost with the Act's eventual demise.

However, at this point, I support your legislation, recognizing that it has the support of Native Americans, adoption attorneys, and the Rost family. In my view, this legislation represents a step toward ICWA reform that will provide stability and security to the adoption process and more importantly decrease the likelihood of adoption tragedies.

Thank you for your consideration of my views and for your hard work to develop a solution to some of the problems that the ICWA poses as currently applied. I look forward to continuing to work with you on this issue as we monitor the implementation of the changes purposed by your legislation.

Very truly yours,

DEBORAH PRYCE
Member of Congress

DP:lat

STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, AT THE HEARING BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS, ON AMENDMENTS TO THE INDIAN CHILD WELFARE ACT OF 1978.

June 26, 1996

Good morning, Mr. Chairman, Mr. Vice-Chairman, and Members of the Committee. I am pleased to be here to present the Department of the Interior's views on proposed amendments to the Indian Child Welfare Act of 1978. I will submit my written testimony for the record. The Department of the Interior does not support Title III of the House passed version of H.R. 3286, however, we do support the efforts of tribal governments and the National Congress of American Indians (NCAI) to improve the ICWA.

Background Information

Congress passed the Indian Child Welfare Act in 1978 (ICWA), after ten years of study on Indian child custody and placements revealed a high rate of out of home placements and adoptions. The strongest attribute of the ICWA is the premise that an Indian child's tribe is in a better position than a State or Federal court to make decisions or judgments on matters involving the relationship of an Indian child to his or her tribe. The clear intent of Congress was to defer to Indian tribes on issues of cultural and social values as they relate to child rearing.

In addition to protecting the best interests of Indian children, the ICWA has also preserved the cultural integrity of Indian tribes because it re-established tribal authority over Indian child custody matters. As a result the long term benefit is, and will be, the continued existence of Indian tribes.

Implementation of the ICWA

Admittedly there have been problems with certain aspects of the ICWA and ICWA should be revised to address these problems to ensure

that the best interests of Indian children are ultimately considered, particularly since interventions are rare. On the whole, however, the ICWA has fulfilled the objective of giving Indian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.[1]

Implications of Proposed Amendments to the ICWA

We share the expressed concerns of tribal leaders and a majority of your Committee members about the proposed amendments to ICWA contained in H. R. 3286, Title III, which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings. Although several problematic cases have been cited to support the introduction of the amendments, these cases do not warrant a unilateral and unfettered intrusion on tribal government authority.

We have grave concerns that the amendment language regarding tribal membership of Indian children will intrude on tribal sovereignty. If passed, Title III would authorize State court judges to delve into the sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes.

Tribes have the right to determine their own membership. The right stems from the nature of tribes as political entities with some 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. The proposed amendments, however, fail to recognize the diversity with which the more than 550 tribal governments have chosen to determine their

[1] Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Office of the Inspector General, Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Department of the Interior (1988).