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104TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 104–808

INDIAN CHILD WELFARE ACT AMENDMENTS OF 1996

SEPTEMBER 19, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 3828]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3828) to amend the Indian Child Welfare Act of 1978, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 3828 is to amend the Indian Child Welfare Act of 1978 to promote stability in native American custody proceedings and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

On April 6, 1995, Representative Deborah Pryce (R–OH) introduced H.R. 1448 which amended the Indian Child Welfare Act of 1978 (ICWA). ICWA was enacted to response to massive numbers of Indian children (in some States 25–35 percent of all Indian children born) were being put up for adoption. Unethical attorneys were locating children and arranging many adoptions without due process. Of great concern was a failure to recognize the cultural and social standards of Indian families and their communities. ICWA was based on the premise that an Indian child's tribe has primary authority, shared with the child's parents, over that child's relationship with his or her tribe. ICWA established minimum Fed-

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eral standards for the removal of Indian children from their families and their placement in foster or adoptive homes. ICWA gives tribal courts, rather than State courts, exclusive jurisdiction over Indian child custody proceedings.

H.R. 1448 was introduced to address problems with Native American adoptive placements illustrated by what is known as the *Rost* case (*In re Bridget R.,* 40 Cal. Rprt. 2d 507 (1996)). The case involved an adoptive placement of California Native American twins with an Ohio couple. This placement occurred after the attorney handling the adoption urged the birth parents to not disclose their Native American heritage, and altered records in the case to circumvent federal standards set out in ICWA. These types of cases have presented the courts with difficult choices between strict compliance with ICWA and preserving the established adoptive placement.

H.R. 1448's solution was to remove from tribal to State courts jurisdiction over whether ICWA applies to certain Indian children and their parents. It also placed restrictions on tribal enrollment for ICWA purposes and limited the time formal tribal enrollment could occur relative to the commencement of ICWA proceedings.

On May 10, 1995, the Subcommittee on Native American and Insular Affairs held hearings with sharp division in testimony between adoption attorneys' support for the proposal seeking certainty in adoption placements and tribal representatives opposing the proposal because it limited membership decisions by tribes in a manner contrary to historical principals of federal Indian policy and law. The hearings, however, demonstrated that avoidable and prolonged litigation over the application of ICWA needlessly destabilizes some Native American adoptions. This litigious environment discourages adoptive parents from adopting Native American children, and disrupts some adoptive placements to the detriment of the child. While tribal representatives and adoption attorneys agreed that problems existed, the testimony revealed disagreement over perceived causes of the problems.

Tribal representatives noted failure of the current law to require notice to tribes of proposed voluntary adoptions and widespread failure to place Native American children in available placements within the child's extended birth family or tribe. The problem is best illustrated in two Alaskan cases. In *In Re IRS* 690 P2d 10 (Alaska 1984) and *Catholic Social Services* v. *CAA* 783 P2d 1159 (Alaska, 1989), the court held that tribes could intervene in voluntary adoption proceedings, but were not entitled to notice of voluntary proceedings. Consequently, tribal interventions have been delayed until the tribe learns of the adoption by informal means, and the late interventions unnecessarily disrupt placements and prolong litigation.

A lack of any notice is also a problem. A recent study of an Alaska State agency revealed that in involuntary cases of relinquishment of Indian parental custody where notice to the tribe is required under ICWA, State social workers notified tribes in only 47.3 percent of cases reviewed. The State notified tribes in only 77.8 percent of cases prior to termination of parental rights. In cases where notice to the tribe was delayed, tribal intervention

often occurred in the latter stages of litigation and was disruptive of case plan development.

Adoption attorneys experienced similar frustrations. Testimony before the Subcommittee suggested that in some cases, late tribal interventions occurred despite timely notice to tribes. In other cases, unreasonably late withdrawal of parental consents to adoption occurred with equally disruptive effect to otherwise stable Native American adoptive placements.

Based upon the conflicting evidence before the Subcommittee, the Chairman of Committee on Resources requested representatives of the Tanana Chiefs Conference and the National Indian Child Welfare Association to meet with representatives of the American Academy of Adoption Attorneys and the Academy of California Adoption Attorneys to seek a common approach to avoid prolonged litigation over Native American adoptive placements and to promote stability in Native American adoptions. H.R. 3828 is the result of these discussions.

While these discussions were occurring, on May 10, 1996, the House of Representatives passed H.R. 3286, a bill incorporating an amended version of H.R. 1448. H.R. 3286's amendments to ICWA again limited the ability of tribes to determine their tribal membership for ICWA purposes without addressing the tribal concerns respecting the lack of notice to tribes regarding voluntary adoptions or enforcement of the terms of ICWA. The bill is currently pending in the Senate after the Senate Committee on Indian Affairs struck the ICWA amendment language. See, Senate Report 104–288, 104th Cong. (1996).

COMMITTEE ACTION

H.R. 3828 was introduced by Congressman Don Young (R–AK) on July 16, 1996. The bill was referred to the Committee on Resources. The Committee held a markup of the bill on August 1, 1996, and ordered it reported without amendment by voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE; REFERENCES

Section 1 cites the short title of the bill as the "Indian Child Welfare Act Amendments of 1996" and clarifies references in the bill to the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

SECTION 2. EXCLUSIVE JURISDICTION

Section 2 amends ICWA Section 101(a) to clarify that an Indian tribe retains exclusive jurisdiction over any child otherwise made a ward of the tribal court when the child subsequently changes residence or domicile for treatment or other purposes.

SECTION 3. INTERVENTION IN STATE COURT PROCEEDINGS

Section 3 amends ICWA Section 101(c) to make a conforming technical amendment conditioning an Indian tribe's existing right of intervention under 25 U.S.C. 1911(c) to the time limitations added by Section 8 of the bill.

SECTION 4. VOLUNTARY TERMINATION OF PARENTAL RIGHTS

Section 4 amends ICWA Section 103(a) to clarify that ICWA applies to voluntary consent in adoptive, preadoptive and foster care placements. In addition, Section 4 adds a requirement that the presiding judge certify that any attorney or public or private agency facilitating the voluntary termination of parental rights or adoptive placement has informed the birth parents of the placement options available and of the applicable provisions of ICWA, and has certified that the birth parents will be notified within 10 days of any change in the adoptive placement. An Indian custodian vested with legal authority to consent to an adoptive placement is to be treated as a parent, including the requirements governing notice and consent.

SECTION 5. WITHDRAWAL OF CONSENT

Section 5 amends ICWA Section 103(b) by adding several new paragraphs. The additional paragraphs would set limits on when an Indian birth parent may withdraw his or her consent to an adoption. Paragraph (2) would permit revocation of parental consent in only two instances before a final decree of adoption is entered except as provided in paragraph (4). First, a birth parent could revoke his or her consent if the original placement specified by the birth parent terminates before a final decree of adoption has been entered. Second, a birth parent could revoke his or her consent if the revocation is made before the end of a 30 day period that begins on the day that parent received notice of the commencement of the adoption proceeding or before the end of a 180 day period that begins on the day the Indian tribe has received notice of the adoptive placement, whichever period ends first. Paragraph (3) provides that upon the effective revocation of consent by a birth parent under the terms of paragraph (2), the child shall be returned to that birth parent. Paragraph (4) requires that if a birth parent has not revoked his or her consent within the time frames set forth in paragraph (2), he or she may revoke consent only pursuant to applicable State law or upon a finding by a court that the consent was obtained through fraud or duress. Paragraph (5) provides that upon the effective revocation of consent obtained by duress or fraud by a birth parent, the child shall be returned to that birth parent and the decree vacated. Paragraph (6) provides that no adoption that has been in effect for at least two years can be invalidated under any of the conditions set forth in this section, including those related to a finding of duress or fraud.

SECTION 6. NOTICE TO TRIBES

Section 6 amends ICWA Section 103(c) to require notice to the Indian tribe by any person seeking to secure the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child. The notice must be provided no later that 100 days after a foster care placement occurs, no later than five days after preadoptive or adoptive placement occurs, no later than ten days after the commencement of a proceeding for the termination of parental rights, and no later than ten days after the commencement of an adoption proceeding. Notice

may be given prior to the birth of an Indian child if particular placement is contemplated. If an Indian birth parent is discovered after the applicable notice periods have otherwise expired despite a reasonable inquiry whether the child may be an Indian child, the time limitations placed by Section 8 of H.R. 3828 upon the rights of an Indian tribe to intervene apply only if the party discovering the Indian birth parents provides notice to the Indian tribe under this section no later than ten days after making the discovery.

SECTION 7. CONTENT OF NOTICE

Section 7 amends ICWA Section 103(d) to require that the notice provided under ICWA Section 103(c) include the name of the Indian child involved and the actual or anticipated date and place of birth of the child, along with an identification, if known after reasonable inquiry, of the Indian parent, grandparent, and extended family members of the Indian child. The notice must also provide information on the parties and court proceedings pending in the State court. The notice must inform the identified Indian tribe that it may have the right to intervene in the court proceeding, and must inquire whether the Indian tribe intends to intervene or waive its right to intervene. Finally, the notice must state that if the Indian tribe fails to respond by the statutory deadline, the right of that tribe to intervene will be considered to have been waived.

SECTION 8. INTERVENTION BY INDIAN TRIBE

Section 8 adds four new subsections to ICWA Section 103.

Under new ICWA Section 103(e), an Indian tribe could intervene in a voluntary proceeding to terminate parental rights only if it has filed a notice of intent or a written objection no later than 30 days after receiving the notice required by ICWA Sections 103 (c) and (d). An Indian tribe could intervene in a voluntary adoption proceeding only if it has filed a notice of intent to intervene or a written objection no later than the later of 90 days after receiving notice of the adoptive placement or 30 days after receiving notice of the adoption proceeding. If these notice requirements are not complied with, the Indian tribe could intervene at any time. However, an Indian tribe may no longer intervene in a proceeding after it has provided written notice to a State court of its intention not to intervene or if it determines that neither the child nor any birth parent is a member of that Indian tribe. Finally, subsection (e) would require that an Indian tribe accompany a motion for intervention with a certification that documents the tribal membership or eligibility for membership of the Indian child under applicable tribal law.

New ICWA Section 103(f) would clarify that the act or failure to act of an Indian tribe to intervene under subsection (e) shall not affect any placement preferences or other rights accorded to individuals under ICWA, nor may this preclude an Indian tribe from intervening in a case in which a proposed adoptive placement is changed.

New ICWA Section 103(g) would prohibit any court proceeding involving the voluntary termination of parental rights or adoption of an Indian child from being conducted before 30 days after the

Indian tribe has received notice under ICWA Section 103 (c) and (d).

New ICWA Section 103(h) would authorize courts to approve, as part of the adoption decree of an Indian child, a voluntary agreement made by an adoptive family that a birth parent, a member of an extended family, or the Indian tribe will have an enforceable right of visitation or continued contact after entry of the adoption decree. However, failure to comply with the terms of such an agreement may not be considered grounds for setting aside the adoption decree.

SECTION 9. FRAUDULENT REPRESENTATION

Section 9 adds a new Section 114 to ICWA that would apply criminal sanctions to any person (other than a birth parent) who: (1) knowingly and willfully falsifies, conceals, or covers up a material fact concerning whether a child is an Indian child or a parent is an Indian; or (2) makes any false of fraudulent statement, omission, or representation, or falsifies a written document knowing that the document contains a false or fraudulent statement or entry relating to a material fact described in (1). Section 9 further provides penalties for violations of this section.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(l)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 3828 will have no significant inflationary impact on prices and costs in the operation of the national economy.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 3828. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 3828 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

2. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 3828.

3. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3828 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 16, 1996.

Hon. DON YOUNG,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3828, the Indian Child Welfare Act Amendments of 1996, as ordered reported by the House Committee on Resources on August 1, 1996.

H.R. 3828 would amend the Indian Child Welfare Act, including provisions relating to the voluntary termination of parental rights of Indian parents in adoption and foster care cases. CBO estimates that this bill would have no federal budgetary effects. Since enactment of H.R. 3828 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from the application of that act legislative provisions that enforce the constitutional rights individuals. CBO has determined that this bill fits within that exclusion because it enforces the due-process rights of parties involved in the adoption of a Native American child.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

COMPLIANCE WITH PUBLIC LAW 104–4

Public Law 104–4 does not apply to H.R. 3828.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INDIAN CHILD WELFARE ACT OF 1978

* * * * * * *

TITLE I—CHILD CUSTODY PROCEEDINGS

SEC. 101. (a)*(1)* An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. [Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.]

(2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the residence or domicile of the Indian child, in any case in which the Indian child—

(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or

(B) after a transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.

* * * * * * *

(c) [In any State court proceeding] *Except as provided in section 103(e), in any State court proceeding* for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

* * * * * * *

SEC. 103. (a)*(1)* Where any parent or Indian custodian voluntarily consents to a [foster care placement] *foster care or preadoptive or adoptive placement* or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding [judge's certificate that the terms] *judge's certificate that—*

(A) the terms and consequences of the consent were fully explained in detail and were fully understood by the parent [or Indian custodian.] *or Indian custodian; and*

(B) any attorney or public or private agency that facilitates the voluntary termination of parental rights or preadoptive or adoptive placement has informed the natural parents of the placement options with respect to the child involved, has informed those parents of the applicable provisions of this Act, and has certified that the natural parents will be notified within 10 days of any change in the adoptive placement.

[The court shall also certify] *(2) The court shall also certify* that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. [Any consent given prior to,]

(3) Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(4) An Indian custodian who has the legal authority to consent to an adoptive placement shall be treated as a parent for the purposes of the notice and consent to adoption provisions of this Act.

(b)*(1)* Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(2) Except as provided in paragraph (4), a consent to adoption of an Indian child or voluntary termination of parental rights to an Indian child may be revoked, only if—

(A) no final decree of adoption has been entered; and

(B)(i) the adoptive placement specified by the parent terminates; or

(ii) the revocation occurs before the later of the end of—

(I) the 180-day period beginning on the date on which the Indian child's tribe receives written notice of the adoptive placement provided in accordance with the requirements of subsections (c) and (d); or

(II) the 30-day period beginning on the date on which the parent who revokes consent receives notice of the commencement of the adoption proceeding that includes an explanation of the revocation period specified in this subclause.

(3) The Indian child with respect to whom a revocation under paragraph (2) is made shall be returned to the parent who revokes consent immediately upon an effective revocation under that paragraph.

(4) Subject to paragraph (6), if, by the end of the applicable period determined under subclause (I) or (II) of paragraph (2)(B)(ii), a consent to adoption or voluntary termination of parental rights has not been revoked, beginning after that date, a parent may revoke such a consent only—

(A) pursuant to applicable State law; or

(B) if the parent of the Indian child involved petitions a court of competent jurisdiction, and the court finds that the consent to adoption or voluntary termination of parental rights was obtained through fraud or duress.

(5)(A) Subject to paragraph (6), if a consent to adoption or voluntary termination of parental rights is revoked under paragraph (4)(B), with respect to the Indian child involved—

(i) in a manner consistent with paragraph (3), the child shall be returned immediately to the parent who revokes consent; and

(ii) if a final decree of adoption has been entered, that final decree shall be vacated.

(6) Except as otherwise provided under applicable State law, no adoption that has been in effect for a period longer than or equal to 2 years may be invalidated under this subsection.

[(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

[(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent.

No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.]

(c)(1) A party that seeks the voluntary placement of an Indian child or the voluntary termination of the parental rights of a parent of an Indian child shall provide written notice of the placement or proceeding to the Indian child's tribe. A notice under this subsection shall be sent by registered mail (return receipt requested) to the Indian child's tribe, not later than the applicable date specified in paragraph (2) or (3).

(2)(A) Except as provided in paragraph (3), notice shall be provided under paragraph (1) in each of the following cases:

(i) Not later than 100 days after any foster care placement of an Indian child occurs.

(ii) Not later than 5 days after any preadoptive or adoptive placement of an Indian child.

(iii) Not later than 10 days after the commencement of any proceeding for a termination of parental rights to an Indian child.

(iv) Not later than 10 days after the commencement of any adoption proceeding concerning an Indian child.

(B) A notice described in subparagraph (A)(ii) may be provided before the birth of an Indian child if a party referred to in paragraph (1) contemplates a specific adoptive or preadoptive placement.

(3) If, after the expiration of the applicable period specified in paragraph (2), a party referred to in paragraph (1) discovers that the child involved may be an Indian child—

(A) the party shall provide notice under paragraph (1) not later than 10 days after the discovery; and

(B) any applicable time limit specified in subsection (e) shall apply to the notice provided under subparagraph (A) only if the party referred to in paragraph (1) has, on or before commencement of the placement made reasonable inquiry concerning whether the child involved may be an Indian child.

(d) Each written notice provided under subsection (c) shall contain the following:

(1) The name of the Indian child involved, and the actual or anticipated date and place of birth of the Indian child.

(2) A list containing the name, address, date of birth, and (if applicable) the maiden name of each Indian parent and grandparent of the Indian child, if—

(A) known after inquiry of—

(i) the birth parent placing the child or relinquishing parental rights; and

(ii) the other birth parent (if available); or

(B) otherwise ascertainable through other reasonable inquiry.

(3) A list containing the name and address of each known extended family member (if any), that has priority in placement under section 105.

(4) A statement of the reasons why the child involved may be an Indian child.

(5) The names and addresses of the parties involved in any applicable proceeding in a State court.

(6)(A) The name and address of the State court in which a proceeding referred to in paragraph (5) is pending, or will be filed; and

(B) the date and time of any related court proceeding that is scheduled as of the date on which the notice is provided under this subsection.

(7) If any, the tribal affiliation of the prospective adoptive parents.

(8) The name and address of any public or private social service agency or adoption agency involved.

(9) An identification of any Indian tribe with respect to which the Indian child or parent may be a member.

(10) A statement that each Indian tribe identified under paragraph (9) may have the right to intervene in the proceeding referred to in paragraph (5).

(11) An inquiry concerning whether the Indian tribe that receives notice under subsection (c) intends to intervene under subsection (e) or waive any such right to intervention.

(12) A statement that, if the Indian tribe that receives notice under subsection (c) fails to respond in accordance with subsection (e) by the applicable date specified in that subsection, the right of that Indian tribe to intervene in the proceeding involved shall be considered to have been waived by that Indian tribe.

(e)(1) The Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court only if—

(A) in the case of a voluntary proceeding to terminate parental rights, the Indian tribe filed a notice of intent to intervene or a written objection to the termination, not later than 30 days after receiving notice that was provided in accordance with the requirements of subsections (c) and (d); or

(B) in the case of a voluntary adoption proceeding, the Indian tribe filed a notice of intent to intervene or a written objection to the adoptive placement, not later than the later of—

(i) 90 days after receiving notice of the adoptive placement that was provided in accordance with the requirements of subsections (c) and (d); or

(ii) 30 days after receiving a notice of the voluntary adoption proceeding that was provided in accordance with the requirements of subsections (c) and (d).

(2)(A) Except as provided in subparagraph (B), the Indian child's tribe shall have the right to intervene at any time in a voluntary child custody proceeding in a State court in any case in which the Indian tribe did not receive written notice provided in accordance with the requirements of subsections (c) and (d).

(B) An Indian tribe may not intervene in any voluntary child custody proceeding in a State court if the Indian tribe gives written notice to the State court or any party involved of—

(i) the intent of the Indian tribe not to intervene in the proceeding; or

(ii) the determination by the Indian tribe that—

(I) the child involved is not a member of, or is not eligible for membership in, the Indian tribe; or

(II) neither parent of the child is a member of the Indian tribe.

(3) If an Indian tribe files a motion for intervention in a State court under this subsection, the Indian tribe shall submit to the court, at the same time as the Indian tribe files that motion, a certification that includes a statement that documents, with respect to the Indian child involved, the membership or eligibility for membership of that Indian child in the Indian tribe under applicable tribal law.

(f) Any act or failure to act of an Indian tribe under subsection (e) shall not—

(1) affect any placement preference or other right of any individual under this Act;

(2) preclude the Indian tribe of the Indian child that is the subject of an action taken by the Indian tribe under subsection (e) from intervening in a proceeding concerning that Indian child if a proposed adoptive placement of that Indian child is changed after that action is taken; or

(3) except as specifically provided in subsection (e), affect the applicability of this Act.

(g) Notwithstanding any other provision of law, no proceeding for a voluntary termination of parental rights or adoption of an Indian child may be conducted under applicable State law before the date that is 30 days after the Indian child's tribe receives notice of that proceeding that was provided in accordance with the requirements of subsections (c) and (d).

(h) Notwithstanding any other provision of law (including any State law)—

(1) a court may approve, as part of an adoption decree of an Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child's tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and

(2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.

* * * * * * *

SEC. 114. FRAUDULENT REPRESENTATION.

(a) IN GENERAL.—With respect to any proceeding subject to this Act involving an Indian child or a child who may be considered to be an Indian child for purposes of this Act, a person, other than a birth parent of the child, shall, upon conviction, be subject to a criminal sanction under subsection (b) if that person—

(1) knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether, for purposes of this Act—

(A) a child is an Indian child; or

(B) a parent is an Indian; or

(2)(A) makes any false, fictitious, or fraudulent statement, omission, or representation; or

(B) falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact described in paragraph (1).

(b) CRIMINAL SANCTIONS.—The criminal sanctions for a violation referred to in subsection (a) are as follows:

(1) For an initial violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 1 year, or both.

(2) For any subsequent violation, a person shall be fined in accordance with section 3571 of title 18, United States Code, or imprisoned not more than 5 years, or both.

* * * * * * *

DEMOCRATIC SUPPLEMENTAL VIEWS

We report these supplemental views on H.R. 3828, the Indian Child Welfare Act Amendments of 1996, a bill that reflects a carefully crafted compromise between the interests of Indian tribes seeking to protect their culture and heritage and the interests of non-Indians seeking greater clarity and security in the implementation of the Indian Child Welfare Act of 1978.

This legislation is the result of heightened activity in this Congress catalyzed by several high-profile adoption cases involving the adoption of Indian children. These cases, involving lengthy disputes under the Indian Child Welfare Act, focused our attention on whether the Act fairly, and to the greatest degree possible, took into account the best interests of the children, the parents, and the tribes.

Spurred on by these cases, Congress first took up H.R. 1448, then H.R. 3275, and finally Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, each of which would have amended the Indian Child Welfare Act to severely limit its scope and the protections it affords Indian children, parents and tribes. These provisions, we note, were drafted without any input whatsoever by any of the affected American Indian and Alaska Native tribes or by members of this Committee which has considerable experience and expertise in Indian affairs. Although this Committee on a bipartisan basis voted overwhelmingly to reject the provisions in Title III of H.R. 3286, the Title's sponsors successfully incorporated these amendments back into H.R. 3286 in the Rules Committee and efforts to redelete Title III failed by a narrow margin (195–212) on the House floor in May of this year.

Following this narrow and highly contested vote, the Chairman and Senior Democratic Member of this Committee immediately initiated discussions with Indian tribes to lay the foundation for compromise legislation. These discussions, in turn, were helpful to the tribes who met in Tulsa, Oklahoma in June of this year to prepare a consensus draft of legislation that would not only protect the interests of Indian children, parents, and tribes but squarely address the legitimate concerns of non-Indian parents, adoption organizations, and the authors of Title III of H.R. 3286.

The consensus tribal draft, in turn, served as the basis for this bill. This bill is intended to strengthen the Act, to protect the lives and future of Indian children first and foremost. This bill was crafted not only with the input of the tribes but also with the input of the attorney for the Rost family, whose well-publicized case was one of the adoption cases that sparked this debate. We understand that to a few parties on either side of the debate this bill may not seem perfect. Few compromises are. But what this bill does is truly important. This bill helps Indian children by providing allowing adoptions to move forward quickly and with greater certainty. This

bill places limitations on when Indian tribes and families may intervene in the adoption process. Yet at the same time, this bill protects the fundamental rights of tribal sovereignty. Tribes, for the first time, will be entitled to receive notice when a voluntary child custody proceeding is underway. The point is that this bill places the interests of Indian children above all else, first by ensuring that they will have as equal a chance as any other children at having a loving family and a home and second, by protecting their interests in their own culture and heritage.

In order to better understand the nature of this bill and the underlying Act, we set forth the following background.[1]

Indian children and Federal policy

In 1819, the United States Government established the Civilization Fund, the first federal policy to directly affect Indian children. It provided grants to private agencies, primarily churches, to establish programs to "civilize the Indian." In a report to Congress in 1867, the commissioner of Indian services declared that the only successful way to deal with the "Indian problem" was to separate the Indian children completely from their tribes. In support of this policy, both the government and private institutions developed large mission boarding schools for Indian children that were characterized by military type discipline. Many of these institutions housed more than a thousand students ranging in age from three to thirteen. Throughout the remainder of the nineteenth century, boarding schools became more oppressive; in 1880, for instance, a written federal policy made it illegal to use any native language in a federal boarding school. In 1910, bonuses were used to encourage boarding school workers to take leave of absence and secure as many students as possible from surrounding reservations. These "kids snatchers" received no guidelines regarding the means they could use.

Congress attempted to address this situation by declaring: "And it shall be unlawful for any Indian agent or other employee to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian child to consent to the removal of any Indian child beyond the limits of any reservation." (Robert H. Bremmer, "Children and Youth in America: A Documentary History," Vol. 1, Cambridge, Massachusetts: Harvard University Press, 1970). Despite this Congressional directive, the Indian boarding schools continued to flourish. In addition to boarding schools, other federal practices encouraged moving Indian children away from their families and communities. In 1884, the "placing out" system placed numerous Indian children on farms in the East and Midwest in order to learn the "values of work and the benefits of civilization."

Federal policy continued throughout the twentieth century with assimilation being the key focus in the boarding schools up until the 1950s. The passage of Public Law 83–280 in 1953 represented the culmination of almost a century old federal policy of assimilation. Its ultimate goal was to terminate the very existence of all In-

[1] We would like to acknowledge the invaluable information forwarded to this Committee by Indian tribes and tribal organizations, including the National Indian Child Welfare Association.

dian tribes. This ultimate assimilation policy was reflected in the child welfare policies of this period.

Throughout the 1950 and 1960s, the adoption of Indian children into non-Indian homes, primarily within the private sector, was widespread. In 1959, the Child Welfare League of America, the standard-setting body for child welfare agencies, in cooperation with the Bureau of Indian Affairs, initiated the Indian Adoption Project. The Indian Adoption Project was premised on the view that Indian children were better cared for in non-Indian homes. In the first year of this project, 395 Indian children were placed for adoption with non-Indian families in eastern metropolitan areas.

Little attention was paid, either by the Bureau of Indian Affairs or the states, to providing services on reservations that would strengthen and maintain Indian families. As late as 1972, David Fanshel wrote in "Far From the Reservation: The Transracial Adoption of American Indian Children" (Metchen, New Jersey: The Scarecrow Press, 1972) that the practice of removing Indian children from their homes and placing them in non-Indian homes for adoption was a desirable option. Fanshel points out in the same book, however, that the removal of Indian children from their families and communities may well be seen as the "ultimate indignity to endure."

In a response to the overwhelming evidence from Indian communities that the loss of their children meant the destruction of Indian culture, Congress passed the Indian Child Welfare Act of 1978.

The Indian Child Welfare Act

The Indian Child Welfare Act was enacted in 1978 in response to the wide-spread removal of Indian children from Indian families and placement with non-Indian families or institutions. Prior to ICWA, Committee hearings yielded information which demonstrated that between 1969 and 1974, 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 (hereinafter 1978 House Report); see also *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). This Committee's 1978 report acknowledged that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." 1978 House Report at 9.

In 1978, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified at hearings before the Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands about the cause for the large removal of Indian children:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced

> that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Hearing on S. 1214, 95th Congress, 2d. Sess. (1978), at 191–92. Removal of Indian children from Indian families led not only to social harm to the Indian parents and adopted, but also to harm to the tribes who were essentially losing their own members. Again, Chief Isaac testified that:

> Culturally, the changes of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities.—Id. at 193.

Congress after careful contemplation enacted the Act to address these concerns, declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families * * *." 25 U.S.C. § 1902. As stated in the Act itself, Congress "has assumed the responsibility for the protection and preservation of Indian tribes and their resources" and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children * * *." 25 U.S.C. § 1901(2), (3).

We emphasize that Congress enacted the Act in recognition of two important interests—that of the Indian child, and that of the Indian tribe in the child. In a landmark ruling, the Supreme Court in the *Holyfield* case expounded on the nature of these interests, quoting a lower court:

> The protection of this tribal interest is at the core ICWA, which recognizes that the tribe has an interest in the child which is distinct by on a parity with the interest of the parents.—*Holyfield,* 490 U.S. at 52 (quoting *In re Adoption of Holloway,* 732 P.2d 962, 969–70 (Utah 1986)).

The Act, designed to protect Indian families, and thus the integrity of Indian tribes and culture, has two primary provisions:

(1) It sets up requirements and standards for child-placing agencies to follow in the placement of Indian children, and requires, among other things:

> Provision of remedial, culturally appropriate services for Indian families before a placement occurs;
>
> Notification of tribes regarding the placement of Indian children;
>
> When placement must occur, it requires that children be preferentially placed in Indian homes.

(2) The Act also provides tribes with the ability to intervene in child custody proceedings. It recognized existing Indian tribal authority on the reservation and extended that authority to non-reservation Indian children through transfer of jurisdiction provisions.

A result of the Act has been the development and implementation of tribal juvenile codes, juvenile courts tribal standards, and

child welfare services. Today, almost every Indian tribe provides child welfare services to their own children.

Recent studies indicate that the Act has had a positive effect in redressing the wrongs caused by the removal of Indian children from their families. 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 less than sixty percent are adopted by non-Indians. *Note, When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the Good Cause Exception in Indian Child Welfare Act Adoptive Placements,* 79 Minn. L. Rev. 1167, 1167–68 (1995). A 1987 report revealed an overall reduction in foster care placement in the early 1980s after enactment of the Act. See *Note, The Best Interests of Indian Children in Minnesota,* 17 American Indian L. Rev. 237, 246–47 (1992). A 1988 report indicated that the Act had motivated courts and agencies to place greater numbers of Indian children into Indian homes. Id.

In other words, the Act is starting to work well. Indian children have been placed in loving homes and the removal of children from their culture has diminished. Unlike other minority cases, there is no shortage of families willing to adopt Indian children. Less than one-half of one-tenth of all Indian adoption cases since passage of the Act have caused problems.

Recognizing the precious resource that Indian children are, the Act 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.

The bill that we have introduced corrects these problems.

Short description of H.R. 3828

The bill's has a number of major provisions intended to provide greater certainty and clarity in Indian child custody cases.

The bill would provide Indian tribes with notice of voluntary adoption proceedings. Currently, the Act requires that tribes receive notice of involuntary proceedings but not voluntary proceedings. The bill would also limit when and how Indian tribes and families can intervene in Indian adoption cases. Tribes would

only be permitted to intervene (1) within 30 days of notification of a termination of parental rights proceeding, (2) within 90 days of notification of an adoptive placement, or (3) within 30 days of notification of an adoptive proceeding. A tribal waiver of its right to intervene will be considered final. Furthermore, a tribe seeking to intervene must provide a certification that the Indian child is, or is eligible to become, a member of the tribe. The bill would also limit the period of time within which Indian birth parents can withdraw their consent to adoption or termination of parental rights. A birth parent can only withdraw consent to adoption up to 30 days after commencement of adoption proceedings, up to six months after notification to the tribe if no proceedings have begun, or up to the entry of a final adoption order, whichever comes first. The bill also encourages tribes and adoptive families to enter into voluntary open adoptions and visitation arrangements and authorizes such arrangements in states that prohibit such arrangements. Finally, the bill applies penalties for fraud and misrepresentation by applying criminal sanctions to persons, other than birth parents, who attempt to hide the fact that an Indian child is the subject of a child custody proceeding or that one of the child's parents is an Indian.

We believe that these provisions are fair and will encourage, not prevent, the placement of Indians in caring homes and families.

Conclusion

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 miscarriages 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. We 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.

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. We have listened to the tribes and to the families this time and we believe that H.R. 3828 is a fair and balanced approach that can bring peoples and cultures together, not divide them apart.

GEORGE MILLER.
TIM JOHNSON.
DALE E. KILDEE.
PATRICK J. KENNEDY.
ENI FALEOMAVAEGA.
BILL RICHARDSON.
NEIL ABERCROMBIE.

APPENDIX

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, September 18, 1996.

Hon. NEWT GINGRICH,
The Speaker,
House of Representatives, Washington, DC.

DEAR MR. SPEAKER: I am writing to you regarding the "Indian Child Welfare Act Amendments of 1996" (H.R. 3828) which has already been reported by the Committee on Resources.

As reported, H.R. 3828 contains language with Rule X jurisdiction of the Committee on the Judiciary. Specifically, the bill contains provisions that apply criminal penalties for fraudulent representations in adoption/child custody proceedings involving Indian children.

The Committee does not intend to mark up H.R. 3828, and will forego its right to a sequential referral in this instance. However, this does not in any way waive jurisdiction over any subject matter contained in H.R. 3828 impacting our jurisdiction. Furthermore, I request that should a conference with the Senate be necessary on H.R. 3828, that members of the House Committee on the Judiciary be appointed to the conference committee.

Your courtesy and consideration on this matter is appreciated.

Sincerely,

HENRY J. HYDE, *Chairman.*

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, September 19, 1996.

Hon. HENRY HYDE,
Chairman, Committee on the Judiciary, Rayburn House Office Building, Washington, DC.

DEAR HENRY: Thank you for agreeing to waive your Committee's sequential referral of H.R. 3828, the Indian Child Welfare Act Amendments of 1996. This bill is personally very important to me and I deeply appreciate your cooperation.

I hope to bring this measure to the Floor under suspension of the rules next week and would be happy to yield time to you or any of your members during debate.

Thank you again for your assistance.

Sincerely,

DON YOUNG, *Chairman.*

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