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NOTE

THE INDIAN CHILD WELFARE ACT IN THE FACE OF EXTINCTION

*Sloan Philips**

I. Introduction

In 1978, Congress passed the Indian Child Welfare Act (ICWA),¹ giving tribal courts exclusive jurisdiction over the adoption of Native American children.² It took Congress many years to promulgate this Act.³ Since passage, many have criticized the ICWA for failing to protect Indian children. In light of forty high-profile controversial adoptions,⁴ the House of Representatives in May 1996 passed the Adoption Promotion and Stability Act,⁵ which significantly affected the welfare of the ICWA. Since the House passed the Adoption Promotion and Stability Act without informing the Indian tribes or tribal court representatives, Rep. Don Young (R.-Alaska) proposed to strike Title III of the Adoption Promotion and Stability Act. Title III authorized interracial adoptions and significantly limited the tribal court's control over interracial adoptions by shortening the time period in which the tribe or a family member could contest the proceeding, and determined that the ICWA applied to a child based upon the child's percentage of Indian blood as a criteria.⁶ Before the House of Representatives sent the Adoption Promotion and Stability Act to the United States Senate, various tribal leaders met in Tulsa, Oklahoma, to discuss the dramatic effects this Act would have on Indian children. Most importantly, the tribal leaders drafted changes to the 1978 version of the ICWA in order to find

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1. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901 (1994)).

2. 26 U.S.C. § 1911 (1994). In some cases, State courts have concurrent jurisdiction with tribal courts over the adoption of Native American children. *Id.*

3. CRAIG J. DORSAY, INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES 34 (1984). The Association on American Indian Affairs first examined Indian child care custody problems in 1968. *Id.* In 1974, Congress began conducting hearings on custody problems among Native American children. *Id.*

4. There are about 40 controversial adoption cases in which either the tribal courts moved the adoption proceeding to the tribal courts or the custody order was vacated and determined invalid for failure to comply with the procedural requirements of the ICWA. These 40 cases have stirred the debate over whether tribes should have as much power and control over adoption proceedings involving children with Native American descendants. *See* discussion *infra* Part III.

5. H.R. 3286, 104th Cong. (1996). While the Adoption Promotion and Stability Act passed the House of Representatives, the Act died in the Senate at the end of the term.

6. 142 CONG. REC. H4807 (daily ed. May 10, 1996).

a compromise between the existing ICWA and the Adoption Promotion and Stability Act. The Indian leaders' compromise amendments will hopefully pacify those who seek to change the ICWA.

The purposes behind the ICWA are to protect Indian children from the long arm of the states and to promote stability and security of Indian tribes.⁷ If the ICWA fails to protect Indian children, then tribal leaders and tribal court officials, who understand the unique characteristics of Indian culture, should be the people to suggest amendments to the Act. Forcing the tribal leaders to amend the ICWA under the fear that the Senate would approve the Adoption Promotion and Stability Act was wrong.

II. History Behind the Indian Child Welfare Act

Extinction of any ethnic group is devastating; it is an idea which does not seem possible. In 1876, Sitting Bull, at the Battle of Little Big Horn, spoke these words: "Let us put our minds together and see what kind of future we can build for our children."⁸ Sitting Bull realized that the possibility of extinction faced his people.⁹ Therefore, protecting Native American children was the only way to protect his tribe.¹⁰ "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."¹¹ In the twentieth century, Sitting Bull's fear almost became a reality.

Interracial adoptions became increasingly popular between the 1940s and 1970s. This trend was reflected by the escalating adoptions between Indian children and non-Indian parents.¹² For example, in Minnesota between 1971 and 1972, one out of every four Indian children under the age of one was placed up for adoption. Over this same time period, Indian children adoptions were five times greater than that of non-Indian children, and in Minnesota approximately ninety percent of these Indian children were placed with non-Indian parents.¹³

State welfare agencies took Indian children from their tribes primarily for two reasons: the economic conditions under which Indian children had to live, and the lack of understanding of the cultural and social differences between Indians

7. 25 U.S.C. § 1902 (1994).

8. Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare In the United States*, 16 B.C. THIRD WORLD L.J. 17, 17 (1996).

9. *Id.* at 17, 18.

10. *Id.*

11. 124 CONG. REC. 38,101, 38,102 (1978). "[I]f Indian families continue to be disrespected and their parental capacities challenged by non-Indian social agencies as vigorously as they have in the past, then education, the tribe, and Indian culture have little meaning or value for the future." *Indian Child Welfare Act of 1977: Hearings Before United States Senate Select Committee on Indian Affairs*, 95th Cong. 152 (1977) (testimony of Chief Calvin Isaac of the Mississippi Band of Choctaw Indians).

12. RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* (1977).

13. H.R. 1386, 95th Cong. at 9 (1978).

and non-Indians.¹⁴ Under the guise of neglect, states removed an extraordinary number of Indian children from their homes; however, "these charges frequently were based on racist and discriminatory attitudes about Indian cultures and kinship practices."¹⁵ State welfare workers used the poverty of the tribes, and the diseases and chronic health problems associated with poverty, as grounds that Indian parents were unfit.¹⁶ States forced thousands of Indian children off reservations, never to see their families again.¹⁷ Rep. Morris Udall (D.-Wis.) expressed concern over the inordinately high number of childcare proceedings which placed Indian children into non-Indian homes, stating: "The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."¹⁸

"This practice of interracial adoption was criticized for cheating Indian children out of their cultural heritage."¹⁹ The devastating effect of removing Indian children from the reservations and placing them in non-Indian homes led to the near extinction of Indian culture and religion. Since the states were taking Indian children from the reservations, the children were unable to learn the culture, religion, and language of their tribes. Eventually, if no children remain to pass on the culture, religion and language, then an entire society will be extinguished.

Understanding these devastating effects, Congress passed the ICWA to protect the best interest of Indian children and promote stability and security of Indian tribes and families.²⁰

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture²¹

14. 124 CONG. REC. 38,101, 38,102 (1978).

15. Kunesh, *supra* note 8, at 23.

16. *Id.* at 24.

A survey of a North Dakota tribe indicated that, of all the children that were removed from that tribe, only one percent were removed for physical abuse. About 99 percent were taken on the basis of such vague standards as deprivation, neglect, taken because their homes were thought to be too poverty stricken to support the children.

Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Committee on Interior and Insular Affairs, 93rd Cong. 4 (1974).

17. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 41, 287-88 (1970).

18. H.R. 1386, 95th Cong. at 9 (1978) (quoting Rep. Udall).

19. Diane Allbaugh, Note, *Tribal Jurisdiction Over Indian Children: Mississippi Band of Choctaw Indians v. Holyfield*, 16 AM. INDIAN L. REV. 533, 535 (1991).

20. 25 U.S.C. § 1902 (1994).

21. *Id.*

The interests of Indian children are best protected by preventing the removal from their families or from their tribes. Furthermore, because of the unique culture and extended family ideologies, tribal courts are generally better than other forums to evaluate and consider questions of Indian tradition.²²

In passing the ICWA, Congress promulgated three separate policies: (1) establishment of and adherence to minimum standards in order to remove Indian children from their families; (2) placement of Indian children in homes that reflect the unique values of Indian culture; and (3) government assistance for child and family service programs.²³ Through the ICWA, Congress "has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children . . . within their own families or tribe."²⁴

The purposes of the ICWA were to promote stability and security of Indian tribes and families,²⁵ as well as to protect Indian sovereignty by explicitly giving Indian tribes exclusive jurisdiction over Indian child custody cases.²⁶ "Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences."²⁷ Congress was concerned that placing Indian children in non-Indian settings had both a detrimental effect on the long term survival of Indian tribes and on the social and psychological health of the children.²⁸ The ICWA's policy of protecting Indian children is best expressed by Congress' preference to keep Indian children with their families or their tribes.²⁹

Congress' preference to keep Indian children with Indian families and to protect Indian children is evidenced by certain procedural safeguards. The ICWA attempts to protect Indian families and children and to ensure adequate tribal involvement in adoption proceedings. The ICWA gives both state and tribal courts concurrent jurisdiction over adoptions involving Native Americans.³⁰ A child custody proceeding can occur in either a state court or in a tribal court if the child does not live on a reservation. If, however, the child resides or is domiciled within the reservation, then the tribal court has exclusive jurisdiction.³¹

22. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

23. DORSAY, *supra* note 3, at 35.

24. BIA Guidelines, § A, 44 Fed. Reg. 67,584, 67,585-86 (1979).

25. 25 U.S.C. § 1902 (1994).

26. Allbaugh, *supra* note 19, at 538.

27. BIA Guidelines, § A, 44 Fed. Reg. at 67,586.

28. S. REP. NO. 95-597, at 52 (1977).

29. Denise L. Stiffarm, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1155 (1995).

30. 25 U.S.C. § 1911 (1994).

31. *Id.* § 1911(a).

If the child custody proceeding is in a state court, the case is subject to transfer to a tribal court under the mandate of the ICWA unless: (1) there is good cause not to transfer the case; (2) one of the biological parents objects; and (3) the tribal court does not accept transfer of the case.³² "If the ICWA was raised, and should have been applied in a 'child custody proceeding' and was not, the custody order may be vacated and declared invalid."³³ Furthermore, there is no time limitation to invalidate a decree or foster care proceeding for any violation of any ICWA provision.³⁴ Most importantly, a parent may terminate the adoption proceeding any time before the adoption decree is final.³⁵ These procedural safeguards underlie some House of Representatives members' arguments against the ICWA. These House members argue that the ICWA fails to protect Indian children when a parent withdraws his or her consent for adoption late in the adoption proceeding, or when the tribal court either transfers the proceeding or vacates the decree for failure to comply with the ICWA.

III. Have the Purposes of the ICWA Been Realized?

For many, the purposes of the ICWA have not been realized; Indian children are not being protected. The number of children in substitute care has actually increased since the passage of the ICWA. "The Indian substitute care population has grown from about 7,200 children in the early 1980s to 9,005 in 1986 — an increase of 25 percent."³⁵ One author has suggested that this increase in substituted care has resulted from lack of funding to appropriately handle child welfare situations:³⁷

Tribes are expected to administer child welfare programs, protect the Indian child's best interests, serve the family's needs, and preserve tribal culture; and all with the extremely limited funds made available by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) under a very restricted grant system.³⁸

Other critics have suggested that the ICWA is inherently flawed. These critics support interracial adoptions because they believe it is the best interest of the children.

32. Paul Shunatona & Tricia A. Tingle, *Indian Child Welfare Act in Texas — An Overview*, 58 TEX. B.J. 352, 354 (1995).

33. *Id.* at 352.

34. *Id.*

35. *Id.*

36. MARGARET PLANTZ, PH.D., ET AL., INDIAN CHILD WELFARE: A STATUS REPORT, FINAL REPORT OF THE SURVEY OF INDIAN CHILD WELFARE AND IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT AND SECTION 428 OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980, at 3-2 (1988).

37. Kunes, *supra* note 8, at 31.

38. *Id.*

Since Congress passed the ICWA, there have been forty high-profile contested adoptions in the last eighteen years, which has created an intense debate as to whether the ICWA protects Indian children.³⁹ However, this figure is insignificant compared to the 50,000 American Indians that were taken from their homes without consent and adopted to non-Indian parents.⁴⁰

Probably the most notorious adoption case, which helped this debate gain political power, involved a non-Indian couple who attempted to adopt twins from California. These twins were one-thirty-second Indian. Rep. Deborah Pryce (R-Ohio) and many others were outraged when the father's tribe chose to move the proceeding to the tribal court pursuant to the exclusive jurisdiction provision of the ICWA.

Representative Pryce believes the ICWA fails to protect Indian children because of three provisions within the ICWA. First, the tribes are given the power to determine who is a member of the tribe. Some tribes have limited their members according to a percentage of blood while others have chosen to use different standards in addition to the blood percentage in determining who is a member. "[S]elf-government and sovereignty allows each tribe to determine the blood quantum requirement for membership."⁴¹ Second, the ICWA applies to Indian children, and the child's prospective tribe may move the proceeding or vacate the decree whether or not the child's biological parents are members of the tribe. Finally, tribal courts can intervene and move proceedings to tribal courts at any time during the child custody proceeding before the final decree.

The determination of whether a tribe has jurisdiction over a child is determined by the tribal rules, not by Congress.⁴² In the California twins case, many people expressed outrage because the ICWA applied to these children even though the children were only one-thirty-second Indian. However, the amount of Indian blood is not the criteria upon which the ICWA applies.⁴³ Under the ICWA, the tribes determine who is a member and who is a potential member of their tribe.⁴⁴ If the child is a potential member then the ICWA applies, and the courts must follow certain procedural guidelines. This is a very controversial issue. Opponents of the ICWA argue that if the child has an insignificant amount of Indian blood and the child's parents are not members of the Indian tribe, then the child and the tribe will not benefit by interfering with the child custody proceedings.

39. 142 CONG. REC. H4807, H4810 (daily ed. May 10, 1996) (statement of Del. Faleomavaega, member of the Subcommittee on Indian Affairs) (stating that 40 controversial adoptions only amounts to one-tenth of one percent of Indian adoptions).

40. 142 CONG. REC. H4807, H8408 (daily ed. May 10, 1996).

41. Shunatona & Tingle, *supra* note 32, at 354.

42. 25 U.S.C. § 1903(4) (1994).

43. 142 CONG. REC. H4807, H4812 (daily ed. May 10, 1996) (statement of Del. Faleomavaega, member of the Subcommittee on Indian Affairs).

44. A potential member of a tribe is a person who meets the tribe's qualifications to be a member, but has not sought membership.

The debate over whether the ICWA protects children arises primarily from the fact that tribal courts possess exclusive jurisdiction over any Indian child, no matter whether that child is a full-blooded Indian, or whether that child is only one-sixty-fourth Indian. The other part of the debate deals with tribal courts exercising jurisdiction whether or not the parents are members of the tribe. These critics base their attack on the question that if the purpose of the ICWA is to promote stability within the tribe, to protect Indian children, and to prevent tribal extinction, then the tribes should require parental membership or at least active tribal participation.

As a basic premise, the critics of the ICWA have a strong argument that the ICWA should be amended to exclude Indian children who are so remotely removed from the tribe because such an adoption will not adversely affect the Indian child or the tribe.⁴⁵ Theoretically this proposition has merit. However, blood quantum does not determine whether one is a Native American. Tribes should be free to exercise authority over tribal membership rules. Allowing state courts to determine whether an Indian child has "enough ties" with a tribe severely restricts tribal sovereignty. Furthermore, when Congress limits tribal sovereignty, not only will it create more litigation than what currently exists to determine whether the ICWA applies,⁴⁶ but it will allow the state courts to determine who is a Native American. Tribal membership is an issue properly left to the tribes themselves.

According to many ICWA supporters, the forty adoption cases in which controversy has arisen occurred because the attorneys did not follow the ICWA procedural guidelines.⁴⁷ If an Indian child is up for adoption, then the attorneys and the courts must follow the ICWA procedures, which require notifying the tribe. Controversies arise, in such cases as the twins from California, when the adoptive parents and biological parents are told not to mention that the child is part-Native American.⁴⁸ If the participants follow the ICWA procedural guidelines, then the system will not subject Indian children to extended court battles while, first, it determines which court has jurisdiction and, second, it decides what is in the child's best interest. "The potential for disastrous consequences implores that the mandates of the ICWA be adhered to strictly."⁴⁹

45. 142 CONG. REC. H4807, H4808 (daily ed. May 10, 1996) (statement of Rep. Tiahrt).

46. Proponents of the Adoption Promotion and Stability Act argue that the Supreme Court has only granted certiorari once to discuss the ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), so amendments will not lead to an increase in litigation.

47. 142 CONG. REC. H4807, H4811 (daily ed. May 10, 1996).

48. *Id.* at H4812 (statement of Del. Faleonavaega, member of the Subcommittee on Indian Affairs).

49. Shunatona & Tingle, *supra* note 32, at 352.

IV. Adoption Promotion and Stability Act

Title III of the Adoption Promotion and Stability Act severely limits the ICWA. In support of the Adoption Promotion and Stability Act, Rep. Charles Canady (R.-Fla.) stated:

[I] must note that many American Indian children are suffering in the current foster care and adoption system. Currently, tribes can delay the adoption of a child of American Indian descent because of the Indian Child Welfare Act. This law was intended to protect the integrity and heritage of American Indian tribes. Yet the law allows tribes to interfere with adoption decisions due to its ambiguity and broad application. As a result, litigations [sic] out of control, and Indian children are not being adopted. . . . [H.R. 3286] would have established safeguards against the arbitrary, retroactive designation of children as members of a tribe. This would prevent a tribe from invoking the Indian Child Welfare Act to interfere with legitimate, voluntary adoptions.⁵⁰

Title III "would limit the application of the [Indian Child Welfare] Act to off-reservation Indian children with at least one parent who maintains a 'significant' social, cultural, or political affiliation with an Indian tribe. A determination of such an affiliation is final."⁵¹ This bill, besides severely narrowing the ICWA, would extremely hinder the purpose behind the ICWA and limit tribal sovereignty. The most significant problem with this act is that the state courts would have the primary role in determining whether or not the tribal courts have jurisdiction over the Indian child.⁵²

The second problem is that Title III "focus[es] solely on the relationship of the child's parents to the tribe, the bill ignores the entire role of the extended family in Indian country."⁵³ In 1978, Congress chose to give tribal courts jurisdiction over Indian children because state courts could not adequately understand the extended family concept and the unique Indian cultures. "[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family."⁵⁴ By focusing solely on a child's parents, the relationship of the child's grandparents, aunts, cousins, and other family members within the tribe is ignored. In addition, "[t]his section would also extend to involuntary proceedings and allow state agencies to remove Indian children

50. 142 CONG. REC. H4433, H4433 (daily ed. May 7, 1996) (statement of Rep. Canady).

51. 142 CONG. REC. H4808, H4811 (daily ed. May 10, 1996).

52. *Id.*

53. *Id.*

54. *Id.* at H4811 n.10 (quoting H.R. REP. NO. 95-1386, at 10 (1978)).

from on-reservation homes where neither parent has enrolled in a tribe. Obviously, this is one of the very problems that led to the creation of the act."⁵⁵

Title III also provides that "an Indian who is eighteen years of age or older can only become a member of a tribe upon his or her written consent and that membership in a tribe is effective from the actual date of admission and shall not be given retroactive effect."⁵⁶ This section of the Adoption Promotion and Stability Act tramples upon the core of the tribes' inherent sovereign powers, the right to determine tribal membership. This provision of the proposed Amendments excludes Native Americans who are eligible for enrollment but simply have not taken the formal steps to enroll.⁵⁷ Furthermore, this provision would allow state agencies to remove Native American children if neither parent has enrolled in a tribe because the ICWA would not apply, since the date of membership is not retroactively applied.⁵⁸ Congress should not decide who is eligible for tribal membership. Determining who is a member of a tribe is a decision which is properly left to the individual tribe.

Finally, Title III states that the ICWA would not apply to children who are one-tenth, one-sixteenth, one-thirty-second, or some other degree of Indian blood.⁵⁹ Again, the House of Representatives is determining who is an Indian under the ICWA. "Congress has no business intruding upon such central matters as tribal sovereignty."⁶⁰ This would quickly destroy the tribes. As Sitting Bull stated, extinction is done most quickly by eliminating Indian children.⁶¹

The Adoption Promotion and Stability Act would destroy the ICWA. The ICWA's purpose is to promote stability within the tribes and protect Indian children. However, under the House Bill, tribal courts could no longer protect many Native American children from the long arm of state courts. State courts would determine whether a child is a Native American, subjecting the child to interracial adoptions. Congress' bill allows states to take an Indian child from his or her culture. The Indian child will be left to live within a strange cultural environment which usually is emotionally traumatic for the Indian child in a non-Indian environment.

Removing children from their families and placing them in substitute care often triggers destructive behavior that subsequently exacerbates the problem. A parent or family from whose care a child

55. *Id.* at H4811-12.

56. *Id.* at H4811.

57. *Id.*

58. *Id.* at H4812.

59. *Id.* "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means by establishing Indian status, but it is not the only means nor is it necessarily determinative." BIA Guidelines, § A, 44 Fed. Reg. 67,584, 67,586 (1979).

60. *Id.*

61. Kunesh, *supra* note 8, at 17.

has been removed frequently reacts with either extreme aggressiveness or passivity. This, in turn, leads to several other serious problems such as: confrontations with the court system, avoidance of the child protection team, leaving the area, and even abandonment of their children. Such "fight or flight" reactions do not comport with traditional Native American values which honor children and families. Thus it is important to understand and reevaluate the factors underlying this vicious circle from the Indian person's perspective.⁶²

Ripping a child from his or her family has devastating effects as discussed above, but removing a child from their culture as well as their family is disastrous.

Furthermore, Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, testified on the effect of Indian children growing up in a white community. When Indian children are raised in a white culture and given a white identity, society does not grant these children a white identity.⁶³ Parents of white children did not want their children dating Indian children and Indian children found that "society was putting on them an identity which they didn't possess and taking from them an identity that they did possess."⁶⁴

The Adoption Promotion and Stability Act seeks to destroy Indian culture by only protecting children who have at least one parent as an active member of the child's prospective tribe and in that case, only if the child has more than one-tenth Indian blood. This Act, in essence, allows states to enter a reservation and take Indian children from their parents, under the guise that the parents are neglecting their children. This is the exact scenario which Congress attempted to prevent by enacting the ICWA.

In support of the Adoption Promotion and Stability Act, Representative Canady stated:

[A] barrier to adoption is the Federal law that permits States to use race in the placement of children in foster care and adoption. This law has clearly backfired. . . . Is it fair to these innocent children to trap them in the foster care system simply because of the color of their skin? The love of a family knows no race. It is unconscionable that any child needing the love and care of a family he can call his own would be denied that love and care simply because the prospective adoptive family is of a different race. That is a grave injustice to the child who needs a home and to the family who waits with open arms.⁶⁵

62. *Id.* at 27.

63. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Committee on Interior and Insular Affairs*, 93rd Cong. 45 (1974).

64. *Id.* at 46.

65. 142 CONG. REC. H4433, H4433 (daily ed. May 7, 1996) (statement of Rep. Canady).

The ICWA's dual purpose structure protects children and the tribes. This Act allows tribes to determine the welfare of their children. Representative Canady raises a valid point. However, tribal courts are still in the best position to determine what is best for their children. Even though an Indian adoptee might live in a non-Indian home surrounded by loving parents, these same non-Indian adoptive parents more likely than not will fail to realize the devastating effects the interracial adoption will have on an adolescent Indian child. Furthermore, tribal courts are better equipped to deal with the unique cultural questions, customs, and social values to determine what is best for the child. "[T]he chances 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."⁶⁶

Secretary of the Interior Bruce Babbitt has clearly stated the effects of Title III of the Adoption Promotion and Stability Act:

Title III of H.R. 3286 . . . would effectively dismantle this carefully crafted system by allowing state courts, instead of tribal courts with their specialized expertise, to make final judgments on behalf of tribal members. Such decisions would adversely affect tribal sovereignty over tribal members as envisioned by the ICWA and successfully implements [sic] for the past 18 years.⁶⁷

V. Compromise Amendments to the ICWA

The amendments to the ICWA are a compromise underlying both Congress' and Indians' concerns. In the summer of 1996, various tribal delegates and representatives at the midyear convention of the National Congress of American Indians met in Tulsa, Oklahoma, to propose changes to the ICWA which would provide an alternative to the House-passed amendments. The tribal representatives worked for many days to come up with the "compromise amendments" in order to prevent nullifying the ICWA. The tribal representatives' amendments will be referred to as the "compromise amendments," and the House bill which amended the ICWA will be referred to as the House bill amendments, and the 1978 ICWA will be referred to as the ICWA. The Senate recommended these changes in Senate Bill 1962.⁶⁸

The Purpose of S. 1962 is to amend the Indian Child Welfare Act to make the process that applies to voluntary Indian child custody

66. *Indian Child Welfare Act of 1977: Hearings Before the U.S. Senate Select Committee on Indian Affairs*, 95th Cong. 157 (1977) (statement of Chief Calvin Isaac of the Mississippi Band of Choctaw Indians).

67. Letter from Bruce Babbitt, Secretary of the Interior, to Sen. John McCain, Chairman, Committee on Indian Affairs (June 18, 1996), in S. REP. NO. 104-288, at 8 (1996).

68. S. 1962, 104th Cong. (1996).

and adoption proceedings more fair, consistent and certain, in order to further advance the best interests of Indian children without eroding tribal sovereignty and the fundamental principles of Federal-Indian law.⁶⁹

Under the current (1978) version of the ICWA, the party seeking custody of a child in an involuntary proceeding has to give notice to the tribe. In a voluntary parental termination proceeding, parental consent to the adoption must be given in writing and recorder before a judge ten days or more after the birth. If the parents consent before the child is ten days old, the consent is invalid.⁷⁰ A parent may withdraw this adoption consent anytime prior to the final decree.⁷¹ Furthermore, a court may set aside a final decree if consent was obtained by fraud or duress.⁷²

Tribal leaders have proposed certain changes to the ICWA that primarily affect the notice provisions, but also affect when a tribal court can intervene. First, the compromise amendments guarantee early and effective notice to a tribal court with strict time restrictions on the rights of Indian tribes and families to intervene.⁷³ The compromise amendments would allow intervention within thirty days after the tribe is notified that the biological parent terminated his or her parental rights, or given notice of a voluntary adoption proceeding. If the child is subject to an adoptive placement, the child's prospective tribe or parents may intervene within ninety days after receiving notice.⁷⁴

This amendment gives adoptive parents more security that a tribal court or parent can only intervene in the beginning of the child custody proceeding. However, if the parties delay in giving the tribal court notice, then the tribe may intervene later in the proceeding. It is important to clarify that neither the ICWA nor the House bill amendments protect parties who fail to comply with the notice provisions.

If the ICWA was raised and should have been applied in a child custody proceeding and was not, the custody order may be vacated and declared invalid. This tragedy causes harm to the children and threatens the bond that the child had established with his or her caretakers. . . . Unfortunately, the potential for such a situation exists in every involuntary [and voluntary proceedings] when the court knows or should know that an Indian child is involved in a child custody proceeding.⁷⁵

69. S. REP. NO. 104-335, at 7 (1996).

70. 25 U.S.C. § 1913(a) (1994).

71. *Id.* § 1913(c).

72. *Id.* § 1913(d).

73. 142 CONG. REC. S7900, S7901 (daily ed. July 16, 1996).

74. *Id.*

75. Shunatona & Tingle, *supra* note 32, at 352.

Under the compromise, a tribe must provide documentation that the child is a member or is eligible for membership in the tribe before the tribe may intervene.⁷⁶ This would give state courts assurance that the tribal courts would possess jurisdiction over the Indian child and prevent the tribal courts from first interfering and *later* determining whether the child is eligible for membership.

Furthermore, the compromise amendments would limit when the biological parents could withdraw their consent to adoption. This gives greater certainty to potential adoptive parents since a biological parent would have a strict time frame in which to withdraw consent. However, in the case of fraud or duress, an Indian parent would have up to two years after the adoption to invalidate the decree.⁷⁷ Under the ICWA, a biological parent could intervene up to the point of the adoption decree. Now, the biological parent must intervene within a specific time frame or lose his or her right.

Finally, the compromise amendments would provide penalties for fraud and misrepresentation. If there is any effort to encourage or assist fraudulent representations, then the bill allows for criminal penalties.⁷⁸ The compromise amendments seek to facilitate adoption proceedings, to encourage open adoptions by having enforceable visitation rights and to limit the time in which a tribal court may remove the case to the tribal courts so long as the tribe has notice.⁷⁹

VI. Conclusion

The compromise amendments to the ICWA provide adoptive parents more assurance that the child's tribe will not intervene in the adoption proceeding. Throughout the past eighteen years there have been forty high-profile cases which undermine the purpose of the ICWA, which protects Indian children and promotes the tribal social values. Usually, tribal courts are not notified that the state court adoption proceeding concerns a Native American child. This lack of notice usually stems from either the parents not realizing the implications of their hereditary background or from the adoptive agent or lawyer specifically telling the biological parents not to mention their Indian heritage.

Under the compromise amendments to the ICWA, the procedural guidelines still require the courts to notify a tribe when a Native American child is up for adoption. If the tribes are not notified, then the statute of limitations would not start to run and the tribe could intervene.⁸⁰ These compromise amendments

76. 142 CONG. REC. S7900, S7901 (daily ed. July 16, 1996).

77. *Id.*

78. *Id.* at S7902.

79. *Id.*

80. Under the ICWA, tribal courts have concurrent jurisdiction and can move the proceeding to the tribal court. Even if the proceeding is heard in the tribal courts, the tribal judge may still award adoption for the non-Indian parents. However, historically the tribal courts are less willing to find for the adoptive parents when there is a family member of one of the biological parents who is willing to take the child.

would provide the adoptive parents more of a guarantee that a tribe or biological parent would not terminate the adoption late in the proceeding. These compromise amendments would add to the protection and would possibly prevent late intervention; however, adoptive parents would still need to provide notice to the tribes, thus enabling the tribes to transfer such cases to the tribal courts.

Because of these forty high-profile cases, Congress pressured tribal leaders to amend the ICWA by threatening to pass the Adoption Promotion and Stability Act. However, most tribal leaders and tribal court officials believe that the ICWA protects Indian children. Sen. Jim McCain (R.-Ariz.) stated, while introducing the compromise amendments:

More than one year ago, several high-profile adoption cases captured national attention because they involved Indian children caught in protracted legal disputes under the Indian Child Welfare Act. Adoption advocates believed these cases would provide political support for amendments they had long sought to the act. Indian tribes felt like they were under siege, battling distorted news stories about what the ICWA does and does not do while simultaneously having to fend off overly broad amendments to the ICWA.⁸¹

Many tribal leaders oppose amending the ICWA. Senator McCain said, "I am told many Indian tribes would rather not have any amendment at all"⁸² It is obvious that political pressure forced tribal leaders to consider amending the ICWA. The ICWA protects Native Americans and their children, and as sovereign nations, tribes should not be forced to amend. The tribal leaders should only propose amendments when the leaders believe that the ICWA stops protecting Native American children.

Even though the compromise amendments and House Bill 3286 died in the Senate, the debate over amending the ICWA continues. Representative Miller cosponsored, with Representative Young, the Indian Child Welfare Act Amendments of 1997 on February 13, 1997, which in essence is the same bill as the compromise amendments discussed *infra*.⁸³ Therefore, Congress continues to debate this issue and will eventually more than likely amend the 1978 ICWA.

81. 142 CONG. REC. S7900, S7900 (daily ed. July 16, 1996).

82. *Id.* at S7901.

83. H.R. 1082, 105th Cong. (1997).