

Should the Indian Child Welfare Act Be Repealed?

Elizabeth Morris
Prepared for the Helms School of Government
June 30, 2016

EXECUTIVE SUMMARY

Congress passed the Indian Child Welfare Act in 1978 to protect Indian children from removal from their tribes and assure tribal governments the opportunity to raise Indian children in a manner reflecting “the unique values of Indian culture” (25 U.S.C. § 1902). However, while some children and families faced with foster care, adoption or child custody disputes have felt protected by the law, others have felt forced into relationship with tribal governments. The national dilemma has become whether an individual’s right to privacy and choice is of less priority than tribal sovereignty and the future of the tribe.

In 2013, Supreme Court Justice Clarence Thomas noted, “In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident” (*Adoptive Couple v. Baby Girl* 2013).

Further, some tribal attorneys assert a right to claim any child deemed a member. Supporting a case involving a child of 1% heritage, Chrissi Nimmo, Attorney General for the Cherokee Nation has stated, “... we repeatedly explained that... tribes can choose members who don’t have any Indian blood” (Rowley 2015).

In light of the constitutional issues inherent in the law and its damaging overreach, the ICWA needs to be repealed.

PROBLEM STATEMENT

Between the early 1900s and late 1970s, the percentage of tribal members remaining on many reservations was shrinking. Tribal leaders said it was due to social services removing children at an alarming rate. The intent of Congress in passing the Indian Child Welfare Act in 1978 was to protect Indian children from removal from their tribes and assure tribal governments the opportunity to raise Indian children in a manner reflecting “the unique values of Indian culture” (25 U.S.C. § 1902).

However, opponents of the Act claim the true motivation behind the ICWA was the availability of federal funds, which are given to tribal leaders on a per-head basis. Opponents of ICWA argue that this financial motivation results in more children being hurt than helped. They also assert that the Act interferes with the constitutional rights of children and families who have distanced themselves from Indian Country and forces political membership onto individuals – specifically children – without parental consent, without the child’s consent, and in many cases against their wishes and best interest. The national dilemma, therefore, is whether an individual’s right to privacy, property and civil liberties is of lesser priority than tribal sovereignty and the future of the tribe.

The ICWA was enacted as a solution to the ‘child drain.’ However, while some children and families felt the law protected them and served them well, the ICWA also began causing immediate problems.

‘Sage’ was an abused infant when first placed off the reservation in the mid-1970’s by social services, and became one of the first to be hurt by the ICWA soon after it was enacted. She was taken back to the reservation and placed again with her birth mother, who she reported was abusive, but no one seemed to care. She fought to return to the home she felt loved in and

was eventually allowed to do so when she was about 14. She is now in her 40's and identifies with her foster/adoptive family. She states she has never had a desire to return to the reservation (CAICW 2004).

The case that caught the most media attention in 2012 was that of a little adopted girl of less than 3% heritage who was taken from the only home she had ever known and, without any transition period, placed with family members she had never met before (*Adoptive Couple v. Baby Girl* 2013). In the Spring of 2016, a 6-year-old girl of 1.5% heritage also received media attention when she was taken from the foster home she had lived in most of her life and placed with distant relatives she barely knew (Kant 2016).

These two cases drew attention partly due to the social media savvy of friends of the families and partly due to the shock it gave so many Americans to know that the Indian Child Welfare Act can intercede on children who are primarily non-Indian and have never been on a reservation.

Opponents of ICWA claim these cases are not isolated. Children and families who do not want to be involved with Indian Country are routinely forced into relationship with tribal governments. Many children are taken against their will from their homes and placed with strangers on the reservation. At times, homes they are placed in are harmful. This is because many tribal members have moved away from certain reservations to avoid the crime and corruption rampant there, leaving a higher percentage of troubled homes in the wake. On some reservations, there simply aren't enough safe homes to meet the need.

Thomas Sullivan, former Regional Administrator of the Administration of Children and Families in Denver, stated in his 12th Mandated Report concerning Spirit Lake to the ACF office in DC, February 2013:

In these 8 months I have filed detailed reports concerning all of the following:

- The almost 40 children returned to on-reservation placements in abusive homes, many headed by known sex offenders, at the direction of the Tribal Chair. These children remain in the full time care and custody of sexual predators available to be raped on a daily basis. Since I filed my first report noting this situation, nothing has been done by any of you to remove these children to safe placements.
- The 45 children who were placed, at the direction of Tribal Social Services (TSS), BIA social workers, BIA supervised TSS social workers and the BIA funded Tribal Court, in homes where parents were addicted to drugs and/or where they had been credibly accused of abuse or neglect. Since I filed my first report noting these placements, nothing has been done to remove these children to safe placements. I trust the Tribal Court, with the recent resignation of a judge who failed a drug test, will begin to be responsive to the children whose placements they oversee.
- The 25 cases of children most of whom were removed from physically and sexually abusive homes based on confirmed reports of abuse as well as some who still remain in those homes. Neither the BIA nor the FBI have taken any action to investigate or charge the adults in these homes for their criminally abusive acts. Many, of the adults in these homes are related to, or are close associates of, the Tribal Chair or other Council members.

Since I filed my first report detailing these failures to investigate, charge, indict, prosecute those adults, my sources and I have observed nothing to suggest this has changed. Those adults remain protected by the law enforcement which by its inaction is encouraging the predators to keep on hunting for and raping children at Spirit Lake. (Sullivan 2013)

While federal government has focused on how the ‘child drain’ has affected tribal governments and the future of the tribe, little attention has been paid the diverse individuals affected by the law. Every child of heritage presented to court in need of care is potentially affected. This includes all foster care and adoption cases. It also affects grandparents, siblings, aunts and uncles - of all heritages - who find themselves in court fighting to keep, regain, or transfer custody of their children. While it is often times assumed the law affects only children of tribal heritage, the ICWA affects families of every heritage because the question as to whether a child falls under jurisdiction of the ICWA is left to tribal government alone to decide. Some

tribal governments have decided not to use blood quantum, but to use lineage instead – resulting in membership opportunities for children of less than 1% heritage. This then affects the large number of non-tribal family members related through the child’s primary heritage [See appendix for additional case examples].

Low income families who cannot afford good attorneys are most often affected, but affluent families have been hurt as well, as many cannot match the funding received by tribal legal departments. Finally, all U.S. taxpayer are affected by the law, as they provide tribal governments with additional funds as tribal membership increases.

Lastly, the BIA published new rules in June, 2016, for the implementation of ICWA (BIA 2016). These rules mandate every court in the United States do ancestry checks on every child presented in need of care to see if he or she has any tribal heritage. This will be followed by notification to each and every tribal government (should there be more than one) that has potential interest in the child. This process could slow down permanent placement for every single child – whether he or she is of heritage or not, and then intrude on the constitutional rights of many who have heritage but do not want tribal government involvement.

The long term ramifications include an increase in children disrupted by the law and increased burden on taxpayers with questionable benefit to families.

LEGISLATIVE HISTORY

As far back as 1968, the American Indian Movement identified control of children as a primary objective, stating, "A major objective of the movement is to regain the young. Once the BIA is eliminated and individual tribal states are created schools will not be a major problem" (AIM 1968).

According to Steve Moore, a senior staff attorney with the Native American Rights Fund of Boulder, Colorado, "The bottom line is, Indian children are the lifeblood of Indian tribes...The very vitality of tribes are threatened" (Breed 1994).

On November 8, 1978, Congress passed the Indian Child Welfare Act (ICWA) in response to the "rising concern...over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placement" (Mississippi Choctaw Indians v. Holyfield 1989).

ICWA was first introduced by Senator James Abourezk in 1976 as Senate bill number 3777 (S. 3777). When that failed, he introduced it again in 1977 as S. 1214. It was considered by the Senate Select Committee on Indian Affairs, then debated on the floor of the Senate, amended and passed in 1977. The bill was then transferred to the House of Representatives in the spring of 1978, where it was sponsored as R. 12533 by Representative Morris Udall. The House Interior Committee's subcommittee on Indian Affairs and Public Lands approved it, then sent it to the House floor, where it was debated, amended, and passed on October 14, 1978

Wording of § 1911(a) was amended at this point after Congress received letters from both the Department of Interior and the Department of Justice concerning jurisdictional conflicts if

wording was left as it was. The wording in question was “*Sec. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any placement of an Indian child who resides on or is domiciled within the reservation of such tribe.*”

Assistant Secretary of Interior Forrest J. Gerard explained in his letter: “We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a) . . .” (Gerard 1978).

Assistant Attorney General Patricia Wald, of the Department of Justice agreed:

. . . [S]ection 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision. (Wald 1978)

After these letters were received, Congress amended the legislation to include the “*existing Federal law*” proviso that became law.

H.R. 12533 was debated in the House and passed on October 14, 1978. On that same day the House substituted the text of H.R. 12533 for the text of S. 1214 and passed S. 1214, with the Senate concurring with the House amendments to S.1214 the following day, October 15 (US Congress 1978). The bill was then sent to President Carter for his signature.

In 1996, Representatives Molinari, Archer, Bunning, Pryce, Solomon, Shaw and Tiahrt introduced "The Adoption Promotion and Stability Act," attaching it to the Small Business Protection and Minimum Wage Increase Act. The purpose of the bill was to help families defray adoption costs and promote adoption of minority children. Title I and II dealt with the Adoption Tax Credit and removal of racial barriers to adoption. All this passed in August of 1996.

Another bill amending ICWA was also heard that year – this one containing language primarily written by the National Congress of American Indians, including a provision to

criminally charge anyone who hid the fact a child had tribal heritage. This could include grandparents who chose to keep their heritage private. The bill, S. 1962, and sponsored by Senator John McCain, had its first hearing before the Senate Indian Affairs Committee on June 26th, 1996 (US Congress. House 1996, 104-335) and passed the Senate on September 27. However, the House companion Bill, H.R 3828, introduced by Rep. Don Young of Alaska, was never considered prior to Congress' adjournment. Although written by the NCAI, S. 1962 did not have full support of many tribal governments because it lacked language prohibiting the "Existing Indian Family Doctrine," a doctrine finding favor in many courts as it protected the rights of children and families not connected to Indian Country (US Congress. House 1996, 104-808). The EIF Doctrine was and continues to be a major point of contention between the opposing sides. Again, the issue is whether the rights of children and families take precedence over the rights of a tribal government. Can an individual's right to privacy, freedom of association, and freedom of religion be of greater importance than that of tribal sovereignty and the future of the tribe?

In 1997, Senator McCain tried again. Companion bills S. 569 and H. 1082 were introduced and had wide support of tribal governments. They strengthened ICWA – making it harder for children to slip through the cracks – including criminalizing attempts to hide a child's heritage – but were strongly opposed by Senator Slade Gorton and the National Council for Adoption out of concern for children and families who did not choose to be part of the reservation system. They never made it out of Committee (US Congress. Senate 1997, 105-156).

Failing to get stronger versions of ICWA through Congress, the National Indian Child Welfare Association, NCAI and other organizations have turned to state legislatures as well as state executive branches to get stronger legislation passed. On February 22, 2007, the State of

Minnesota signed a tribal/state agreement with representatives of the seven Minnesota reservations, giving them increased jurisdiction over children of heritage who come before Minnesota courts (MN Dept Human Serv. 2007).

Some State courts, searching for an alternative, have ruled that children with no genuine connection to Indian Country shouldn't be forced under jurisdiction of a tribal government. The courts viewed this new doctrine as a reasoned ruling in favor of the rights of individuals over those of tribal governments. The initial case explaining this doctrine - which came to be known as the "Existing Indian Family Doctrine" - involved the out-of-wedlock child of a non-Indian mother and an Indian father (Adoption Baby Boy L. 1982). The Kansas Supreme Court stated,

A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother. (Adoption Baby Boy L. 1982, 175)

A 1996 case agreed, stating, "It is almost too obvious to require articulation that the unique values of Indian culture will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture" (In re Bridget R. 1996, 1507).

While other courts disagreed with this alternative, the 104th Congress had the opportunity in 1996 to amend the ICWA to prohibit the application of the Existing Indian Family Doctrine, but did not. At one point, as many as 10 states went on to adopt the EIF. At another point as many as 19 rejected it. The states rejecting the doctrine cited the limited focus on the best interest of one child or family, which usurped the greater interest of preserving tribal culture and the Indian Tribe itself.

POLICY ALTERNATIVES

Few want to leave the law just as it is.

Some opponents of the ICWA say its sweeping interference with all foster and adoption case is unconstitutional, racist, and corrupt; prioritizing ties to tribal government over ties to a child's heart and family for what appears to be primarily a financial incentive. They believe the Act is hopelessly flawed and can only be repealed. Other opponents believe the ICWA has basis in law, but simply needs amending to more adequately protect individual rights within adoption, foster care and relative custody cases.

Most proponents of the ICWA say the Act not only needs to be powerfully enforced, but it needs to be made even stronger to better protect the rights of tribal governments, children and families. Despite professing to protect the rights of children and families, proponents of ICWA have been strongly against the EIF and its recognition of the diversity of families. Most alternatives recommended by proponents are those that strengthen the rights of tribal governments, not families.

In 2012, Minneapolis attorney Mark Fiddler, founder and former Executive Director of the *Indian Child Welfare Law Center*, proposed compromise amendments which would uphold the ICWA while at the same time protect the best interest of children (Fiddler 2012).

The alternative he recommended included definition changes. Many times, eligible persons of heritage make a conscious choice not to enroll in the tribe and to instead raise their children in lifestyles alternate to that supported by tribal governments. Despite this, some tribal governments have unilaterally enrolled these same children of unassociated parents while seeking jurisdiction over them under the ICWA. An "Indian Child," Fiddler suggested, should be defined as a person under 18 who was either already a member at the time of the filing of

child custody proceeding for foster care or adoption, or, if eligible for membership, was the biological child of a parent who was already a member of an Indian tribe the time of the filing.

Fiddler further suggested:

- The definition of “parent” not include an unwed father where paternity has not been mutually acknowledged or otherwise adjudicated under state law.
- Tribal governments shall have a limit of 30 days to file a conclusive determination as to whether a child is an Indian Child.
- Petitions for transfer to tribal court must be filed within 30 days of the initial commencement of out-of-home placement.
- Transfer should only occur under agreement of all parties.
- A parent shall have a limit of 30 days to withdraw consent for an adoption, and
- The placement preferences of an Indian child or parent shall be considered where appropriate.

However, tribal government supporters felt those amendments would diminish a tribe’s sovereign right to jurisdiction over their membership. So instead, in the spring of 2015 the Bureau of Indian Affairs issued its own alternative in the form of new ICWA guidelines. These guidelines were followed by new rules published in the federal register on June 8, 2016 (BIA 2016).

Under the new rules, application of the EIF is blocked:

...the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of “Indian child,” then the court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his

or her Indian parents, whether the parent ever had custody of the child, or the Indian child's blood quantum. (BIA 2016, 90-94)

According to the Indigenous Law and Policy Center Blog Michigan State University College of Law (Fort 2016), the new ICWA rules stipulate,

- State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know the child is an Indian child. 23.107(a).
- A parental request for confidentiality in a voluntary proceeding does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an Indian child. 23.107(d).
- Only tribes can determine if a child is an Indian child under the law, that is a final determination that cannot be substituted by the state, and the state can use tribal enrollment documentation (for example) to make the judicial determination a child is an Indian child. 23.108.
- Evidence with no causal relationship of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not on its own constitute evidence that continued custody is likely to result in serious emotional or physical damage to the child. 23.121
- Good cause to not follow the placement preferences must be made on the record, the party seeking to deviate bears the burden of proving good cause by clear and convincing evidence, and may not be based "solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 23.132

According to the new ICWA rules, if there is any uncertainty as to whether a child is an Indian Child, courts are to "proceed in applying ICWA until they have confirmation that the child is not an Indian child. The tribe believed to be the child's tribe is the only entity that can make a determination of whether a child is an Indian child or not" (BIA 2016).

In deciding whether good cause exists to decline transfer to a tribal court, courts cannot consider:

1. Whether transfer could affect the placement of the Indian child.
2. The Indian child's cultural connections to the tribe or reservation.

3. Socio-economic conditions or any negative perception of tribal or BIA social services or judicial systems.

However, the new BIA rules (BIA 2016) stipulate the courts can consider for good cause,

1. The request of one or both of the Indian child's parents after they have reviewed the ICWA preferred placement options, if any, that are available
2. The request of the child if the child is of sufficient age and has the capacity to understand the decision
3. The presence of a sibling attachment that can only be maintained through a particular placement
4. The extraordinary physical, mental, or emotional needs of the Indian child
5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements that meet the placement preferences, but none has been located. The standards for determining if a suitable placement is unavailable must conform to the prevailing social and cultural standards of the Indian community of the Indian child's parents.

The new rules state a qualified expert witness should be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe, whether or not the child and his family have practiced the prevailing social and cultural standards of the tribe. Further, an Indian tribe is allowed to petition to invalidate a ruling based on violations of sections of the ICWA law, whether or not the child or family wants the ruling to be invalidated (BIA 2016).

Many tribal government leaders highly favor the new BIA rules as a positive alternative to the ICWA law as written. Some of the stipulations within the new rules are not entirely new alternatives. They resemble stipulations within "The Indian Child Welfare Act of 1977," one of the earliest versions of the ICWA, that after much debate and input from the public, Congress had purposefully left out. [See Definitions: Sec. 4(H) in the Nov 1, 1997 'Report to accompany S. 1214,' and Sec. 4(1) of Public Law 95-608, 'Indian Child Welfare Act Proceedings']. The ethics, if not the legality, of establishing rules in lieu of law after wording similar to that within the rules had been rejected by Congress is debatable.

POLICY SOLUTION

While not protective of the rights of individuals, the BIA's new rules are policy alternatives long desired and advocated for by tribal leaders.

It has been tragic enough that free citizens of the United States who have made a purposeful choice to distance themselves and family from the reservation system have had that choice annulled by Congress, the BIA, and tribal governments. But the BIA's June 8, 2016 publication of new rules that 1) affect every single child across the United States who presents to a court in a custody or adoption proceeding, and 2) interfere with custody decisions of not only every child of significant heritage, but children whose heritage is of such insignificance that they weren't even aware of it or who do not choose to be connected to the reservation system, could in some cases be catastrophic.

As a society, protecting the genuine needs and rights of our most vulnerable members is paramount. The violation of individual rights as well as the financial incentive to violate individual rights through ICWA must be removed. To date, no suggested alteration of ICWA or the guidelines and rules accompanying it appear to protect the rights guaranteed individuals under the United States Constitution. While the repeal of ICWA would be met with strong opposition, no treaty between the United States and a Native American tribe has given authority over future human beings - and most certainly not the children of non-members - to tribal governments. Further, no treaty guarantees federal funding on a per-head basis for eternity. In fact, the vast majority of treaties guaranteed funding for only 20 - 40 years (Avalon Project 2008). Lastly, it is not government's responsibility to ensure a group of citizens stay connected, stay in a certain geographical area, support a particular political viewpoint, or raise their children in a prescribed culture or religion.

Constitutionality of ICWA

All these concerns aside, ICWA is unconstitutional at its root and can only be repealed. In 2007, law professor Rob Natelson published a white paper concerning the original understanding of the Indian Commerce Clause, which clarified that “[The Indian Commerce Clause] did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs” (Natelson 2007). Natelson later stated, “There is not much doubt on the question. At least according the Founding Fathers, Congress had absolutely no authority to adopt the ICWA. Eventually, the courts may see their error and strike it down as unconstitutional” (Natelson 2007).

In 2013, Supreme Court Justice Clarence Thomas agreed. Citing Rob Natelson’s white paper in his concurrence in the case of *Adoptive Couple v. Baby Girl*, Justice Thomas explained he was construing the statute narrowly to avoid opening the door to rule the ICWA unconstitutional. He noted, “In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident. First, the statute deals with “child custody proceedings,” §1903(1), not ‘commerce’” (*Adoptive Couple v. Baby Girl* 2013).

On July 7, 2015, the Goldwater Institute of Arizona filed suit also citing the unconstitutionality of the ICWA. Their press release stated,

The Goldwater Institute’s class action lawsuit challenges the constitutionality of Indian Child Welfare Act requirements that make the best interest of an Indian child less important than the desires of an Indian tribe when deciding foster care or adoption placements. For every other American child, decisions are based on their best interest, not their race; this leaves Native American children with fewer legal protections. (Goldwater Institute 2015)

From its foundation, the ICWA has been unconstitutional and must be repealed.

ICWA's Relationship to Tribal Sovereignty and Genocide

Be that as it may, even if constitutionality were not an issue, any attempt to merely alter ICWA or set up a compromise for the sake of dissidents and affected non-members has been and will continue to be rejected by most tribal governments as a threat to tribal sovereignty. With that understanding, the unwillingness to address and rectify substantial, inherent civil rights issues and abuses within the ICWA and its rules – along with the unconstitutionality - leave repeal the only option.

Tribal entities will put up strong opposition. Tribal governments perceive any weakening of the ICWA as not only a threat to tribal sovereignty, but the very existence of the tribe. Tribal leaders have been clear in this regard. In a letter to Senator John McCain on July 23, 1996, Robert Joe, Sr., Chair of the Swinomish Tribal Community of Washington, addressed a potential compromise meant to protect the civil rights of certain families. He stated, “Tribal families and ultimately Tribal cultures are facing a serious threat of extinction. The "existing Indian family" doctrine being used by certain state courts in adoption proceedings of Indian children will undo the excellent work you and the Committee have done thus far” (Robert Joe 1996).

Minneapolis Attorney Mark Fiddler agreed in 2004. As founder and Executive Director of the Indian Child Welfare Law Center in Minneapolis, MN, Fiddler wrote in a letter to supporters,

...This legal doctrine, called the "existing Indian family" doctrine, will be tested in Georgia in this case. This doctrine is the most effective means of attacking Indian families and tribes ever dreamed up by adoption attorneys. There is a national campaign of adoption attorneys to push this phony doctrine. It has been adopted in at least four states so far. It must be stopped. (Fiddler, Attorney 2004)

Professor Frank Pommersheim, of the University of South Dakota School of Law, took issue with the section within Senator McCain's 1996 amendment that would have limited the

children a tribal government could claim as members while potentially protecting the rights of citizens. Pommersheim noted,

Equally problematical is the attempt in proposed Sec. 302 to limit and set restrictions on a tribe's ability to determine membership requirements (e.g., children 18 or older must consent, tribal membership is strictly prospective in nature). The right to determine membership is essential to tribal sovereignty and ought not be displaced by Congress. As noted by the U. S. Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978): "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." These proposed amendments, whether advertently or inadvertently, seek to improperly invade tribal sovereignty. (Pommersheim 1996)

Terry Cross, founder of the National Indian Child Welfare Association in Portland, Ore., expressed similar thoughts when he called the initial lower court decisions in *Adoptive Couple v. Baby Girl* a victory for the tribe. He remarked, "Tribes cannot continue to exist if children are removed at such rates as were being done in the past." Cross adds, "When you lose someone in that network, it is a trauma to the entire network. Protecting our children and being able to bring them home is part of our healing and recovery" (Bird 2012).

Many tribal entities perceived the final 2013 Supreme Court ruling in *Adoptive Couple v. Baby Girl* to be an attack on tribal sovereignty. Following the Court's affirmation that a non-Indian, unwed mother has a right to decide the best interest of her child without interference from tribal governments, former Senator James Abourezk responded, "It's an attack on tribal sovereignty through the children. I can't believe they did this." "The ICWA is in line with similar laws to bolster tribal sovereignty. That was our aim. We did everything we could to increase tribal sovereignty. That includes the Indian Child Welfare Act..." (Harriman, 2013).

AIM Leader Clyde Bellecourt agreed, saying the Supreme Court decision "is legalizing the kidnapping, theft of children and division of Indian families once again by states and churches" (Harriman, 2013).

More recently, the Native American Rights Foundation published an article by tribal attorney and author Albert Bender which again touched on the perception of harm to the Native American community if state officials continue to enforce the same child protection laws on the reservation as they do off the reservation (Schumacher-Matos 2013):

Genocide is not too strong a term for what is now happening in South Dakota. The huge, shocking violation of legal and human rights being carried out by the state is tantamount to genocide against the Native American nations... It is the abduction and kidnapping by state officials, under the cover of law, of American Indian children.... (Bender 2015)

Denying Choice: ICWA's Inherent Racism

Independent political communities have a legitimate right to determine their own membership. However, basing that determination on an individual's heritage and then forcing the individual into political affiliation on the basis of that heritage is the epitome of racism. With such a glaring and inherent flaw at its core, ICWA, again, can only be repealed.

An element of racism is unfortunately a core tenet of the ICWA. Most of the comments made in support of a strong ICWA stress the effect the loss of children has on tribal sovereignty rather than the individual child. However, one crafted justification for forced affiliation of children is the assertion that all children of even the smallest heritage have an emotional or spiritual affiliation with the tribe and will suffer emotional consequences if not raised within an Indian home. Sandy White Hawk, a woman of Sioux heritage who was adopted by a non-tribal family in the 1950s, voiced a commonly accepted belief when she said, "We know that the children who grow up outside of their culture suffer greatly... Non-native homes cannot give an adopted Indian child their culture" (Kaplan 2015).

What these claims communicate is a belief there is something inherently different about children of Native American heritage as opposed to other children. Recognition that children of

every heritage are individuals with their own wants, needs and goals is downplayed. While it is unarguable that a certain amount of strain occurs when traversing disparate cultures, children from around the world are successfully and happily adopted into American homes on a daily basis. Yet, it has become accepted belief that children of Native American heritage are, as a rule, unable to thrive outside of Indian Country. While it hasn't been fully explained whether this inability is physical, emotional or spiritual, the apparently inherited affliction – assumed to be present in children of even the smallest heritage - has become known as the “Split-feather Syndrome.”

The term ‘Split-feather syndrome’ came into parlance in the late 90’s with a pilot study under the direction of Carol Locust, a training director at the Native American Research and Training Center at the University of Arizona College of Medicine. According to Locust, “The pilot study conducted by this investigator indicated that every Indian child placed in a non-Indian home for either foster care or adoption is placed at great risk of long-term psychological damage as an adult” (Locust 1998).

Locust is said to have identified “unique factors of Indian children placed in non-Indian homes that created damaging effects in these children’s lives.” The Minnesota Department of Human Services noted “an astonishing 19 out of 20 Native adult adoptees showed signs of “split feather syndrome” during Locust’s 1998 study (DHS 2005).

“Unfortunately,” according to Bonnie Cleaveland, PhD ABPP, “the study was implemented so poorly that we cannot draw conclusions from it.” Only twenty Native American adoptees - total - were interviewed. All were removed from their biological families and placed with non-native families. There was no control group of adoptees into Native American homes to ascertain if the same symptoms were found in that group of individuals as adults. Finally, groups of non-

native children, from troubled and untroubled homes, would have completed the control and answered important questions. These questions include whether the issues the twenty interviewees suffered could have been related to abuse or neglect experienced prior to placement in a foster home, or to natal issues such as Fetal Alcohol Syndrome. According to Cleaveland,

Locust asserts that out of culture removal causes substance abuse and psychiatric problems. However, she uses no control group. She doesn't acknowledge the high rates of trauma, psychiatric and substance abuse among AI/AN people who remain in their culture and among the population of foster children. These high rates of psychosocial problems could easily account for all of the symptoms Locust found in her subjects. (Cleaveland 2015)

Cleaveland concluded, "Sadly, because many judges and attorneys, and even some caseworkers and other professionals, are not familiar with the research, results that may be very wrong are leading to the wrong outcomes for children" (Cleaveland 2015).

Equally disturbing, if not more so, is using the claim of Split-feather as justification for interfering in the home lives of children of primarily Caucasian heritage who have never had connection to Indian Country - children who to this point have been raised in city, suburban or farm homes far from Indian Country. Broad sweeping claims of inherent psychological connection to Indian Country, based on interviews with twenty young adults, beg the question of motive.

Motive is further in question when psychological assertions are made to justify the removal of children, while at the same time, many children taken by tribal social services under the auspices of ICWA are placed in homes where no tribal culture is practiced and family connection is questionable. When this is done under the direction of tribal government, it is deemed acceptable and potential psychological damage isn't an issue (Kant 2016).

ICWA Overreach: Our Children were never a Treaty Promise

Regardless of obvious holes in the argument, there remains a belief within a subset of America that children of even tenuous heritage should be classified as “Indian” for the purposes of the ICWA – while their primary and predominate heritage and culture as well as personal preference as an individual are overlooked.

Some tribal attorneys have even stated a right to claim any child, whether the child has heritage or not. According to Chrissi Nimmo, Attorney General for the Cherokee Nation,

... we repeatedly explained that the Cherokees have no blood [requirement]. It rubbed them the wrong way that the Cherokee Nation wanted to claim [a child] as a Cherokee and she was only one percent Indian. My personal opinion is that’s why we lost this case. These are the greatest legal minds in the nation, but they don’t know anything about Indian country, tribes, citizenship, community – tribes can choose members who don’t have any Indian blood. (Rowley 2015)

Keven Campbell, a tribal member responding to an opinion piece concerning the ICWA inclusion of children who have no connection to Indian Country, commented,

...The statements in the piece that defines the opportunity to be a member of a tribe as insignificant because it happened “32 years ago...”, and minimizes native heritage as being nothing more than “a few drops of blood...” This kind of self-serving belief system is the reason we need a strengthened ICWA law and policy... legal cases enforcing treaties with tribes will become more common. (Moore 2015)

It is an unarguable that children of slight heritage have many more non-tribal relatives than they do tribal relatives. Even if treaties had promised tribal governments the right to claim jurisdiction over children of their choosing, it is a legitimate function of federal government to revisit and address matters that prove to violate the inherent rights of United States citizens.

While making the case for an amendment process for the U.S. Constitution, Thomas Jefferson wrote, “Can one generation bind another and all others in succession forever? I think

not...Rights and powers can only belong to persons, not to things, not to mere matter unendowed

with will...Nothing then is unchangeable but the inherent and unalienable rights of man.”
(Jefferson 1824).

But one need not worry about changing treaties. Arbitrary tribal jurisdiction over children of non-tribal members is not found in any treaty promise. Further, few – if any – of the treaties between the United States Government and American Indian Tribes promised to fund tribal members on a per-head basis through eternity. What most treaties promised was initial assistance in setting up a means to care for the membership as well as create an economy. In most cases, there was stipulation that these funds would be given for only ten to forty years, depending on the treaty (Avalon Project 2008). Therefore, concern for broken treaties should not hinder the protection of individual rights for United States citizens.

Nevertheless, while incorrect that children of others are a treaty promise, Mr. Campbell was correct in his belief that cases involving children unconnected to Indian Country will become more common.

While the ICWA law itself states it is not to be used in custody battles between birth parents and that non-tribal relatives have the same rights as tribally enrolled relatives, what has played out in various state and tribal courts has not always reflected the wording of the law. Wording in a law is of no help if one does not have the money to hire a good attorney who knows Indian law. Many times, families fighting ICWA are low income and easily taken advantage of. The ICWA has given some tribal leaders, social services and tribal courts a sense of entitlement when it comes to children of heritage. Further, many non-tribal courts do not understand the law and defer to the tribal court in full faith and credit. Birth families across the United States have been affected.

Demographics have Changed

Why have so many children been placed in dangerous situations? The demographics on many reservations have changed over the last 50 years. As crime has increased, many individuals have taken their families and moved away. In the five state region of Minnesota, the Dakotas, Iowa and Wisconsin, a drug gang called the “Native Mob” operates with impudence (Karnowski 2013). State and county law enforcement can’t reach them as easily within reservation boundaries, and federal officials do so on increasingly rare occasions.

This dynamic has become a growing reality on many reservations. According to the last two U.S. censuses, 75% of tribal members do not live in Indian Country. “Many have deliberately taken their children and left in order to protect their families from the rampant crime and corruption of the reservation system” (CAICW 2014).

As a result, it isn’t just the lack of licensed foster homes that plague some reservations – it is the inability to meet the directives of the ICWA in the form of safe, willing, relative homes. The lack of safe homes of relatives is what brings tribal governments to make placement in the homes of unsafe relatives. We need to stop asking why a disproportionate percentage of Native American children are in foster care, and start asking why a disproportionate percentage of families that remain on the reservation live unsafe lifestyles. It is not merely a matter of a difference in culture, as the high number who have left the reservation system seem to attest.

The best way to ensure survival of the community isn’t to force people into membership. It is to address and deal with the crime and corruption that is not only hurting the children, but causing healthier families to take their children and leave.

There is a tension between tribal leaders and those who do not want to raise their children within the reservation system or allow tribal government jurisdiction over their families. While many tribal leaders have genuine interest in the well-being of children and families, the ICWA

by practice does not always protect and facilitate the well-being of individuals. It doesn't appear to have been designed to do so. It appears to have been designed to protect tribal sovereignty and consequently the reservation system. This could be why it has core problems.

According to Chrissi Nimmo, in 2012 the Cherokee Nation alone had over 100 attorneys targeting about 1,100 active ICWA cases involving some 1,500 children across the nation. Most of those children were primarily another heritage and had never lived in Oklahoma, let alone within Indian Country. Nimmo clarified at another point that she had 14 Indian Child Welfare cases assigned to her alone, and "to say one tribe has 1,100 of these cases means there is a lot more going on. In Oklahoma, we are one of 38 tribes. I think the reason people don't know about the ICWA or hear about child welfare cases is because they are private" (Bird 2012).

Tribal governments and organizations have worked with all three branches of Government on both state and federal levels to ensure their jurisdiction over every child a tribal government deems eligible for membership. The BIA reported in 2015 "Last year Cherokee Nation was involved in cases in all 50 states and we saw firsthand the (disproportionate) treatment from state-to-state involving Indian children (BIA 2015, 52). With disproportionate treatment from state-to-state in mind, tribal governments have begun lobbying state governments for increased jurisdiction. However, that's not the only reason they have begun lobbying state legislatures and Governor's offices. According to Nimmo,

Because of [*Adoptive Couple v. Baby Girl*] and because the ICWA is enforced with such erraticism, there has been talk of amending the act ... The big legislative fix would be for Congress to amend the ICWA, [but] Tribes are really opposed to that, because if we open it up for amendment, the opposition will come in and demand their changes be addressed as well. (Rowley 2015)

The National Indian Child Welfare Association and the Association on American Indian Affairs encourage "Analysis of the potential for state law to address the issues raised by the

United States Supreme Court decision [*Adoptive Couple v. Baby Girl*], and minimize its negative impact upon tribes and Indian families and children,” and “Information about tribal-state ICWA agreements and the role of such agreements in mitigating the effects of the Court’s decision.’ (NICWA/AAIA 2013)

ICWA and Head Counts for Funding

Finally, for those whom the harm to humanity and unconstitutionality of the law isn't enough to change it, perhaps the federal budget is. If Tribal governments have financial incentive to claim children as well as an inherent right to determine their own membership using whatever criteria they deem necessary, taxpayer’s might not be able to afford an increasing demand. The nation cannot continue to fill tribal coffers on a per-head basis with funds that were never promised in the treaties. The push for complete and uncompromising control over the children has been incessant and will remain so as long as federal funds are a carrot. Therefore, what is necessary for the protection of individual civil rights, along with repealing the ICWA, is to do away with the financial incentive to pursue jurisdiction over children.

Currently, federal funds to tribal governments are tied to the U.S. Census, tribal membership rolls, and child counts. This has created the circumstance where individuals have financial value to others. For example, “Title IV-B 1 funding is a per-capita formula based on Tribal population under 21. Tribal allotments are deducted from the State's total IV-B 1 allotment for that fiscal year. Title IV-B 2 funding is a 3% set-aside of the total Title IV-B 2 budget for State and Tribes. The formula is based on a ratio of the number of children (under age 21) in the Tribe to the total number of children in all Tribes with approved plans.”

Child welfare funding sources include the Indian Child Welfare Act (which can be used as matching funds for some of the other federal programs); Services to Children, Elderly and

Families; Indian Social Services Welfare Assistance; Child Welfare Services; Social Security Act (SSA) - Title IV-B, Subpart 1, Title IV-B, Subpart 2, and Title IV-E; Promoting Safe and Stable Families; Omnibus Budget Reconciliation Act of 1993; Social Security Amendments of 1994; Adoption and Safe Families Act of 1997; Foster Care Section 470; and Temporary Assistance for Needy Families and Medicaid (James Bell Associates, Inc. 2004).

Conclusion

Every child of heritage presented to court in need of care can be affected by the Indian Child Welfare act. This includes all foster care and adoption cases, no matter if the child or his family has ever had a relationship with the tribal government. Yet, there is nothing within the Commerce Clause nor any Indian treaty that gives Congress the authority to mandate individuals stay connected to a group, stay in a certain geographical area, support a particular political viewpoint, or raise their children in a prescribed culture or religion. Tribal governments have a legitimate right to determine their own membership, but basing that determination on an individual's heritage and then forcing that individual into political affiliation on the basis of his or her heritage is the epitome of racism.

The new ICWA rules, recently published in the federal register by the BIA, have made the situation even more difficult for families who have purposefully chosen to distance themselves from Indian Country. The ethics, if not legality, of establishing rules in lieu of law after similar wording had been rejected by Congress is debatable.

In light of the unconstitutionality of the law, its inherent moral flaws, financial recklessness, and the responsibility we have as a society to love and value the lives and needs of children over and above that of political expedience, the ICWA needs to be repealed.

Appendix

Additional Case Studies

- (1992) Sierra Campbell was 9-years-old when she was taken from a non-tribal home she loved in Bemidji, MN, and placed in the home of an uncle in Cass Lake who made her his bed partner from that night on. She tried running away several times - back to the home where she felt safe - but was time and again caught and returned to her uncle. She finally attempted suicide by hanging when she was 16, and it was only then that the tribal government conceded and allowed her to return to the home in Bemidji. The couple adopted her after it was safe to do so – after she turned 18 - and she continues to identify as their daughter. (Tevlin 2013).
- (2004) Three children were taken from their paternal Latino grandparents by California Social Services for no other reason than an assumption that they belonged on the Ute reservation with maternal family. Within three weeks, the two boys presented to the hospital, the oldest with traumatic injuries. They had been beaten by their maternal grandmother for speaking Spanish. All three were returned to their paternal grandparents, but the damage was done, the oldest is now permanently disabled. The maternal grandmother was jailed, and the paternal family rightfully and successfully sued the State of California (Smart 2004).
- (2004) Two children were taken from the home of their non-Indian paternal grandparents on the basis of accusations made by members of the maternal family against the birth parents. The children were not in need of foster care or adoption. Neither he nor his wife were ever accused of abuse or neglect. The grandfather

initially contacted the Christian Alliance for Indian Child Welfare wanting advice and writing in the shocked manner representative of these situations:

... The kids have fallen under ICWA (?!). The judge, DA, and children's public defender did an about face at the hearing last Thursday -- because of the tribal involvement. our [son's wife is 1/8 Wichita] . . . So we have had to focus all our efforts . . . to gather enough money to hire an attorney. . . ICWA is being used for legalized kidnapping in this great nation of ours---and we are glad that you have been there for us . . . Never in our wildest dreams would we think that our precious little granddaughter (one-year-old in a few weeks) could be snatched from those closest to her! (CAICW 2004)

After mortgaging their home in effort to protect the family, the grandfather later wrote, "Our granddaughter is only 1/16 Indian--94% no Indian; this does not meet the Tribe's blood quantum of 1/8. Yet, she is gone from us forever" The grieving man then signed his name, "former grandfather of..." (CAICW 2004).

- (2006) Feather was about two years old when her grandmother first contacted CAICW. The grandmother, a non-tribal member, claimed that the Warm Springs tribal government had altered Feather's birth certificate to make her eligible for enrollment. She also said that her daughter – Feather's mother, who is also a non-member - went to tribal court thinking it was just a preliminary custody hearing between herself and her child's father, but once there, found herself fighting to hang onto her baby as the bailiff worked to take the child from her arms and give her to the father. She has not had custody of her daughter since (Matheny 2006).
- (2008) A little girl was abruptly taken from her non-tribal birth father at their home hundreds of miles from the reservation. On that date, her mother - accompanied by city police officers - took the child after giving the father a packet of pleadings and orders issued by Chinle Family Tribal Court. The father,

who had custody for several years, had never seen the papers before and wasn't even aware proceedings had taken place. The Navajo Nation did not have jurisdiction over child custody issues for this family. Texas courts had continuing, exclusive jurisdiction under Texas UCCJEA. Further, the enclosed Writ of Habeas Corpus had not been domesticated (Germer 2008). But the city police, seeing papers from the tribal court, assumed the orders needed to be followed. Once his daughter was on the reservation, the father attempted to plead his case in tribal court, but had trouble finding an attorney to help and felt the ruling was determined before he was ever heard.

- (2013) Just prior to the disbursement of settlement per capita, a grandmother petitioned her nephew on the tribal council for custody of her grandchildren, who had been in a stable foster home chosen by the birth mother for several years. Despite protests from the entire maternal family, who were also enrolled members, and strong evidence of past abuse by the paternal grandmother, she was awarded custody. Over the next few months, the children were reported for neglect as well as presented to the hospital with injuries. Due to increasing reports, the grandmother left South Dakota with the children. After not knowing their whereabouts or condition for months, the children were picked up by California social services in 2015. But again, despite protests from extended family, California returned the children to the grandmother because she had custody through ICWA, only to disappear again. (CAICW 2014)
- (2014) Two different fathers in Cass County, North Dakota, were awarded custody of their respective daughters by a district court, only to have the birth

mother take the girls away at night to the Cheyenne River Reservation. The two fathers have not seen their girls since. Despite clear orders from the court of jurisdiction in N.D. and the arrest of the mother for kidnapping, the Cheyenne River Tribal Court awarded the girls to a relative the girls barely knew on the reservation. The federal government has not attempted to enter the boundaries of the reservation and retrieve the girls (Amundson 2015)

- (2013) 3-year-old Lauryn Whiteshield was murdered within a month of her arrival after she and her twin sister were taken from a safe home in Bismarck and placed with their grandfather, who was living with a woman known to have been abusive to children in the past. This happened during a period when both the BIA and US Attorney's office had taken over law enforcement and social services on the Spirit Lake Reservation due to a rash of uninvestigated child homicides and were supposed to monitor placements to prevent further murders. (Flatten 2015).

This case did get media attention in North Dakota, and as a result, the perpetrator was quickly arrested, tried, convicted and imprisoned all within five months. However, none of the officials who were responsible for placing her in the home were held accountable. Jeanine Russell, the non-native foster mom the girls were taken from, read a victim's impact statement for the sentencing of the murderer of Lauryn. She asked the judge to hold the perpetrator accountable, but also hold the broken system accountable. The federal government, she said, allowed it to happen, and "ICWA can be an evil law when twisted to fit the tribes wants or needs" (CAICW 2014).

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