Michigan State University College of Law

INDIGENOUS LAW & POLICY CENTER

OCCASIONAL PAPER SERIES

The Origins of the Indian Child Welfare Act: A Survey of the Legislative History

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Indigenous Law & Policy Center Occasional Paper 2009-04

April 10, 2009

A. The Origins and Key Provisions of the Indian Child Welfare Act

Congress enacted the Indian Child Welfare Act ("ICWA") in 1978, Pub L 95-608; 25 USC 1901-1963, after more than four years of hearings, deliberation, and debate, in order to alleviate a terrible crisis of national proportions – the "wholesale separation of Indian children from their families…." *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes*, H R Rep 95-1386, at 9 (July 24, 1978) ("1978 House Report")[1]; see also *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). Hundreds of pages of legislative testimony taken from Indian Country over the course of four years confirmed for Congress that many state and county social service agencies and workers, with the approval and backing of many state courts and some federal Bureau of Indian Affairs officials, had engaged in the systematic, automatic, and across-the-board removal of Indian children from Indian families and into non-Indian families and communities. 25 USC 1901(4)-(5); see also *Holyfield*, 490 US at 32-33. State governmental actors following this pattern and practice removed between 25 and 35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children in non-Indian homes. *Holyfield*, 490 US at 32-33 (citing *Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 3 (statement of William Byler) ("1974

[1] The text of ICWA, the legislative history, and any draft bills or Congressional materials dealing with ICWA cited in this brief are available at the website of the Native American Rights Fund, http://narf.org/icwa/federal/lh.htm.

Hearings")); see also American Indian Policy Review Commission Task Force Four, *Report on Federal, State, and Tribal Jurisdiction* 79 (July 1976) ("Task Force Four").

In Michigan, the story of Indian child removal was just as staggering and tragic. In a 1973 federal case involving children from the Hannahville Indian Community, a tribal expert witness, Dr. James Clifton, "testified that the assumption of jurisdiction in forced adoption by white courts is a matter of great bitterness among the Indian community." *Wisconsin Potawatomies v Houston*, 393 F Supp 719, 726 (WD Mich 1973). Michigan Indians grow up with oral traditions and stories about the day that a state or church authority figure would show up at the family's house to take away Indian children. E.g., Dunlop, *The Indians of Hungry Hollow* 131-40 (Ann Arbor: University of Michigan Press, 2004) (retelling the story about how Father Aubert from Holy Childhood of Jesus School in Harbor Springs removed the author and his older brother from their family); Grand Rapids Public Library Native American Oral History Project, *The Tree That Never Dies* 142 (Grand Rapids: Grand Rapids Public Library, 1978) ("For years these people [from state agencies] have tried to separate Indian orphans from their people. Move 'em in with white families.") (quoting unidentified Michigan Indian). In 1974, a representative of the Native American Child Protection Council, based in Detroit and serving urban Indians, alleged before Congress that state officials had engaged in a the "kidnapping" of urban Indian children. *1974 Hearings*, *supra*, at 161 (Statement of Esther Mays). By the 1970s, one out of 8.1 Indian children in Michigan were adopted out of their families and communities, a rate 370 percent higher than with non-Indians. *Indian Child Welfare Act of 1977*, Hearings before the Senate Select Committee on Indian Affairs, 95th Cong, 1st Sess, at 539 (Aug. 4, 1977) ("1977 Hearings"); *Task Force Four*, *supra*, at 82. One out of 90 Indian children in Michigan were in foster care, a rate 710 percent higher than with non-Indians. *Id*.

A critical aspect to the legislative history of ICWA is the "wholesale" and automatic character of Indian child removal by state actors nationally. As the Executive Director of the Association on American Indian Affairs, William Byler, testified, the "[r]emoval of Indian children is so often the most casual kind of operation…." *1974 Hearings*, *supra*, at 19-20; see also *id*. at 23. During the 1974 hearings, witness after witness would testify to the automatic removal of Indian children, often without a scintilla of due process. Byler testified that at the Rosebud Sioux Reservation, state social workers believed that the reservation was, by definition, an unacceptable environment for children and would remove Indian children without providing services or even the barest investigation whatsoever. *1974 Hearings*, *supra*, at 21-23. State actors made decisions to remove Indian children with "few standards and no systematic review of judgments" by impartial tribunals. *1974 Hearings*, *supra*, at 62 (Statement of Dr. Carl Mindell and Dr. Alan Gurwitt). A member of the Sisseton-Wahpeton Sioux Tribe in South Dakota testified that state actors had taken Indian children without even providing notice to Indian families, with state courts then placing the burden on the Indian parent to prove suitability to retain custody. *1974 Hearings*, *supra*, at 67-69 (Statement of Cheryl DeCoteau). The President of the National Congress of American Indians testified that a state caseworker came to an Indian woman's house without warning or notice and took custody of an Indian child by force. *1974 Hearings*, *supra*, at 224 (Statement of Mel Tonasket). Senator Abourezk, chairman of the Subcommittee on Indian Affairs, stated after hearing much of this testimony:

> [W]elfare workers and social workers who are handling child welfare caseloads use any means available, whether legal or illegal, coercive or cajoling or whatever, to get the children away from mothers they think are not fit. In many

> cases they were lied to, they given documents to sign and they were deceived about the contents of the documents. [*1974 Hearings, supra,* at 463.]

To remedy the problem, Congress created a statute designed to guarantee minimum procedural safeguards for Indian tribes and Indian families in non-tribal adjudicative forums and to clarify jurisdictional gray areas between state and tribal courts. The statute provides that tribal courts have *exclusive* jurisdiction over custody proceedings involving Indian children domiciled in Indian Country. 25 USC 1911(a). Congress borrowed this concept from the Western District of Michigan, which had reached the same outcome in a 1973 common law decision in a case involving children who were members of the Hannahville Indian Community. *Wisconsin Potawatomies,* 393 F Supp at 734, cited in *Holyfield,* 490 US at 35 n4. ICWA provides that tribal courts have *concurrent* and *presumptive* jurisdiction over Indian child custody cases where the child is domiciled outside of Indian Country. 25 USC 1911(b); *Holyfield*, 490 US at 36. As in the case at bar, a state court may accept or retain jurisdiction over Indian child custody cases in this circumstance, or where a tribal court declines jurisdiction. 25 USC 1911(b), (c).

In cases where a state court has jurisdiction in an Indian child custody case, ICWA provides for minimum procedural guarantees with which each state court must comply. A state court must provide notice to both the Indian parents and the Indian tribe if a state agency is petitioning for foster care placement or termination of parent rights. 25 USC 1912(a). Additionally, in these state court actions, Indian parents have the right to court-appointed counsel. 25 USC 1912(b). If the state court does order a placement, it must give preference to the Indian child's extended family or, failing that, another tribal community placement. 25 USC 1915(a), (b); cf. *Wisconsin Potawatomies,* 393 F Supp at 726 (noting testimony of tribal expert about tribal family law).

Before the state court can order foster care placement or termination of Indian parental rights, the state agency must prove that it has provided "active efforts" to prevent the breakup of the Indian family:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [25 USC 1912(d)]

Of additional relevance to this matter, the state agency seeking termination of Indian parental rights must prove beyond a reasonable doubt the case for termination:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [25 USC 1912(f)]

And, for perhaps the first time in the history of federal Indian law and policy, Congress recognized that state law and policy affecting Indian children and families has an enormous impact on the future of Indian tribes as well. Congress found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe…." 25 USC 1901(3). The United States Supreme Court echoed that finding by relying upon the statements of Calvin Issac, the tribal chief of the Mississippi Band of Choctaw Indians, who stated:

> Culturally, the 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. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships. [*Holyfield*, 490 US at 34 (quoting *Indian Child Welfare Act of 1978*, Hearings before the Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong, 2d Sess, at 193 (Feb. 9 & Mar. 9, 1978) ("1978 Hearings"))].

Similarly, as Judge Engel noted in the *Wisconsin Potawatomies* case: "If tribal sovereignty is to have any meaning at all in this juncture of history, it must necessarily include the right … to provide for the care of its young, a *sine qua non* to the preservation of its identity." 393 F Supp at 730. The *Holyfield* Court also relied upon the testimony of experts and studies that demonstrated the destructive effects of placing Indian children in non-Indian families and communities. *Holyfield*, 490 US at 33 & n1 (citing *1974 Hearings*, *supra*, at 46).

The enactment of ICWA, the federal recognition of several Michigan Indian tribes since 1978, and the efforts of the State of Michigan have gone a long way to resolving many of the problems that compelled Congress to enact the statute 30 years ago, but there is a great deal more to be done. In 2006, Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare reported that children of color, especially American Indians, remain disproportionately overrepresented in foster care placements in Michigan. Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare, *Equity: Moving*

Toward Better Outcomes for All of Michigan's Children 12 (March 2006) ("2006 Report"); cf. The Center for the Study of Social Policy, *Race Equity Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan's Child Welfare System* at 1-2, 48 (Jan. 16, 2009). The advisory committee recommended that all people of color receive "culturally proficient services" and the expansion of "innovative prevention and family support programs." *2006 Report, supra*, at 5.

B. Congressional Intent in Requiring "Active Efforts"

Congress's intent in requiring that state agencies provide "active efforts" before the termination of the rights of Indian parents to their children arose out of substantial testimony that state agencies rarely, if ever, provided competent services to Indian parents before state officials took away Indian children. The phrase "active efforts" in the context of preventive and rehabilitative governmental services to families and children in need is "unique in American law." Davis, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 Mich J Race & L 433, 442 (2008). As a result of its origins and its function in ICWA, "active efforts" has a "distinctly Indian character." Andrews, *"Active" Versus "Reasonable" Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes*, 19 Alaska L Rev 85, 87 (2002). However, and unfortunately, ICWA does not define the term "active efforts." As a result, the Bureau of Indian Affairs, which drafted and published extensive guidelines shortly after the enactment of ICWA to assist state courts, offered a definition of the term to include efforts that "take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and

individual Indian care givers." Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* D.2, 44 Fed Reg 67584, 67592 (Nov. 26, 1979) ("BIA Guidelines").[2] Consistent with ICWA, the BIA Guidelines recommend that state courts place the burden of proof that active efforts were made on the party "petitioning in a state court for foster care placement or termination of parental rights." *Id*. In short, not only does "active efforts" require more than merely "passive efforts," but efforts that specifically include tribal services and other culturally appropriate services. *In re Roe*, 281 Mich App 88; __ NW2d __ (2008) (citing *Foreman v. Heineman*, 240 FRD 456, 474, 500 (D Neb 2006); *In re Walter W*, 274 Neb. 859; 744 N.W.2d 55 (2008); *In re Children of SW*, 727 NW2d 144, 149 (Minn App 2007)).

The legislative history of the "active efforts" provision demonstrates that Congress intended to require state courts to affirmatively provide Indian families with substantive services, not merely to make those services available. A comparison of the two versions of what would become 25 USC 1912(d) is instructive. The Senate passed the first version of the statute that would become the Indian Child Welfare Act in 1977. *Indian Child Welfare Act of 1977*, 123 Cong Rec 37,226 (Nov. 7, 1977). The provision in that bill did not use the phrase "active efforts." Instead, it used the phrase "made available." Section 101(a)(2), S 1212, 95th Cong (1st Sess 1977), *reprinted in* 123 Cong Rec 32,224 (Nov. 7, 1977). The entire subsection read:

> No placement of an Indian child, except as provided in the Act shall be valid or given any legal force or effect … unless … the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family *have been made available* and proved unsuccessful. [Id. (emphasis added)]

[2] The Guidelines, while nonbinding, have been considered persuasive by Michigan courts. E.g., *In re IEM*, 233 Mich App 438, 445 fn2; 592 NW2d 751 (1999).

In contrast, the final version of the bill, passed on October 14, 1978, reads:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts have been made* to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [*Indian Child Welfare Act,* 124 Cong Rec 38,110 (Oct. 14, 1978); 25 USC 1912(d) (emphasis added)]

The change is subtle, but significant. Congress moved away from requiring that services be made "available," to requiring that state agencies make "active efforts." In 1997, Congress stated that the "active efforts" language was specifically intended to remedy the "wholesale separation of Indian children from their families." *Amending the Indian Child Welfare Act of 1978, and for Other Purposes*, S Rep 105-156, at 9 (Nov. 13, 1997) (quoting *1978 House Report*, *supra*, at 9). This is consistent with conclusions reached by commentators and courts on the distinction between "passive" and "active" efforts, discussed *infra*. *In re CJ*, 18 P3d 1214, 1219 (Alas 2001) (citing Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual* 157-58 (1984)).

The testimony Congress heard in the years prior to the passage of ICWA sheds light on the significance of this change, as well as the intent of Congress in enacting the provision at all. There are several threads of testimony running through the hearings on Congress's intent in requiring "active efforts" – namely, findings that state agencies rarely provided any services to Indian families at all and, when state agencies did provide services, they did so without respect to tribal cultures, undermining any chance that the services would be effective.

Congress took substantial testimony that state agencies simply did not provide preventive and rehabilitative services to Indian families in the vast majority of cases. In the House Report accompanying the final version of ICWA, Congress stated that it had been "advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services rarely are provided." *1978 House Report, supra,* at 22. Senator Abourezk stated in support of the Senate bill that the "lack of preventive and supportive services on reservations and in urban Indian communities contributes to higher placement rates." 123 Cong Rec 21,043 (June 27, 1977). The Association on American Indian Affairs, which had studied the removal of Indian children intensively, testified: "The need has long been recognized for greatly expanded services to Indian children and their families to help prevent family breakdown and to help parents who have lost their children rehabilitate themselves and regain custody of their children." *1974 Hearings, supra,* at 502; see also *1977 Hearings, supra,* at 318 (Statement of National Indian Health Board) (noting an "absence of adequate preventive and rehabilitative services for families in trouble"). Most startlingly, one witness testified that in 80 percent of cases in Minnesota, the state had provided no services whatsoever. *1978 Hearings, supra,* at 133 (Statement of William Gurneau).

Congress heard several other witnesses testify about the failure of specific state actors to provide any services whatsoever to Indian families. An Albuquerque area social worker employed by the Bureau of Indian Affairs testified that "State and local governments sluff off [*sic*] their responsibilities to Indians, often by bureaucratic technicalities and thereby avoid providing meaningful services." *1974 Hearings, supra,* at 214 (Prepared Statement of Evelyn Blanchard); see also *1978 Hearings, supra,* at 140 (Statement of Omie Brown) ("Indian children

fall through the cracks….”). In many areas in Indian Country, Indian families would consent to the mass enrollment of their children in distant boarding schools – all because state agencies would not provide preventive or rehabilitative services to Indian families. *1974 Hearings*, *supra*, at 482-83 (Statement of Dr. Carolyn L. Attneave) (“Indian children have been literally herded off to school in the past like sheep or cattle.”).

Congress also heard testimony about the passivity of state agencies, in which they would wait for Indian families to reach a crisis point before intervening, and only then to initiate termination proceedings. The National Congress of American Indians testified that state agencies watched and waited as Indian families struggled and declined, only intervening when state workers had determined it was time to remove the Indian children:

> Generally, non tribal government agencies practice crisis intervention. Aware in the incipiency of the presence of factors that frequently lead to family breakup, the agencies often passively observe the corrosive effect of these factors and intervene only when disintegration has reached the point of crisis to seek the legal separation of children from their families. Remedial and rehabilitative services are generally not made available to the Indian family in distress…. [*1977 Hearings, supra*, at 137-38]

Calvin Issac testified that active state efforts to prevent the breakup of Indian families could have been successful, if they had been offered in time, or at all: “Often the situation which ultimately leads to the separation of the child from his family … is one which could be remedies without breaking up the family. Unfortunately, removal from parental custody is seems as a simple solution.” *1977 Hearings*, *supra*, at 156; see also *id*. at 187 (Statement of the American Civil

Liberties Union) ("The untoward number of extra-tribal placements results from a failure to provide poor Indian families with the means to raise their children….").

And where state agencies did offer services, they were ineffective due to a lack of recognition of the specific cultural needs of Indian people. Task Force Four, covering jurisdictional issues in its report, concluded in its 1976 report to the American Indian Policy Review Commission that "[n]on-Indian public and private agencies … show almost no sensitivity to Indian culture and society." *Task Force Four*, *supra*, at 87.[3] Blandina Cardenas from the United States Department of Health, Education, and Welfare testified that a 21-state study conducted by her department found a "need to encourage States to deliver services to Indians without discrimination and with respect to tribal custom." *1978 Hearings*, *supra*, at 57; see also *Indian Child Welfare Act of 1977*, S Rep 95-597, at 23 (Nov. 3, 1977). The Quinault Tribe's statement indicated that Washington state agencies offered "impractical, unrealistic services … by non-Indian caseworkers." *1977 Hearings*, *supra*, at 102. Even state officials admitted that their efforts had been unsuccessful: "The social workers in [Cass County, Minnesota] have been trying to deliver social services to Indian families for years with very little success." *1978 Hearings*, *supra*, at 237 (Statement of William Caddy). In the *Wisconsin Potawatomies* case, the Michigan Department of Social Services ignored or rebuffed the repeated efforts of close family members of two Indian children who had been orphaned to keep them in the community. 393 F Supp at 733 ("[T]he court concludes that tribal custom existed, was followed in spirit and largely in practice until frustrated by the actions of the Michigan Department of Social Services….").

[3] Task Force Four may have been the first entity to publicly recommend to Congress that it require an "affirmative obligation" to state actors to "change all economically and culturally inappropriate placement criteria." *Task Force Four*, *supra*, at 88.

Congress's intent in enacting the "active efforts" provision in the Indian Child Welfare Act is clear – before a state court can order the breakup of an Indian family, the party asking for the court's order must demonstrate that the state actually provided preventive and rehabilitative services to the Indian family.