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UNIVERSITY OF CALIFORNIA

Los Angeles

Oversight and Compliance with the Indian Child Welfare Act of 1978:

A Policy Analysis

A thesis submitted in partial satisfaction
of the requirements for the degree Master of Arts
in American Indian Studies

by

Alisa Amy Lee

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ABSTRACT OF THE THESIS

Oversight and Compliance with the Indian Child Welfare Act of 1978:
A Policy Analysis

by

Alisa Amy Lee

Master of Arts in American Indian Studies

Professor Felicia Hodge, Chair

The purpose of this study is to provide an analysis of the Indian Child Welfare Act of 1978 (ICWA), a landmark piece of legislation recognizing the exclusive jurisdiction of Indian tribes over the welfare of their children. This study used primary and secondary data to examine the historical events preceding the Act, as well as the legislative history and implementation of the Act. The major problems with ICWA are twofold: there is no federal administrative body authorized to oversee ICWA implementation and compliance and there is no comprehensive and uniform collection of Indian child welfare data to measure the impact of ICWA. David Gil's social policy framework was used to analyze ICWA. The study found that although ICWA has been implemented for over 30 years, the lack of administrative oversight and compliance has impeded ICWA's objectives to reduce the overrepresentation of Indian children in child welfare systems and to place Indian children in Indian homes.

The thesis of Alisa Amy Lee is approved.

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University of California, Los Angeles

2015

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ACKNOWLEDGEMENTS

This journey has been a long road and I wouldn't be at this point without the overwhelming support of my family and friends. My mom, Aileen, one of the first people in our tribe to graduate from college, has been an invaluable example and support. Who else would volunteer to watch five children, clean the house and do laundry, so I could finish my thesis? Dad, thanks for the many times you read this draft and for your invaluable feedback! I love you both! And of course, my husband, Tyler, and boys, Jared, Nick, Jesse, Noah, Jacob, and Nathan! I love you all so much, even if I was distracted through much of this process!

I'm so grateful for the experiences and knowledge I gained from UCLA. Most of all, I value the support from my thesis committee, especially Professor Hodge, who didn't let me quit! Each of you has encouraged me for many years and I'm privileged to have worked with you.

I was first confronted with ICWA as a law student at BYU. Professor Larry Echohawk relayed his story of helping a young Indian mother regain custody of her children after they were removed, due to her meager living conditions. That story had a deep impact on me because I couldn't imagine having my children removed, separated, and placed into foster care in different states. If it wasn't for ICWA, this mother may never have regained custody of her children. Several years later, my husband and I were in the process of adopting three siblings with American Indian heritage. The California Court of Appeals overturned their biological father's termination order because proper ICWA notice wasn't followed. A mistake by the social worker (she didn't notice all the tribes on two occasions and also omitted known Indian heritage) delayed the adoption of our children for over a year, even though ICWA was later determined to be inapplicable. These experiences prompted my interest in ICWA. I hope readers gain an understanding of ICWA through this research and appreciate the need to continue to improve it.

literally sound the cry in your communities; the crime must be stopped; Indian children will not be de-Indianized, and smothered by white culture, stolen from their homes and divorced from their heritage. The fate of your Indian tribes may well hang in the balance – Jeffrey Newman, Assistant Director, Association on American Indian Affairs, 1972.

CHAPTER 1

INTRODUCTION

Statement of the Problem

American Indians are unique in that they have special protections for their children through the federal law, the Indian Child Welfare Act of 1978 (ICWA). ICWA was passed in response to data suggesting over 25 percent of all Indian children were living in foster homes, adoptive homes, and/or boarding schools (Indian Child Welfare Program, 1974, p.1). Indian children were removed from their homes because public and private welfare agencies “operated on the premise that most Indian children would really be better off growing up non-Indian” (Indian Child Welfare Program, 1974, pp. 1-2). These policies resulted in “unchecked, abusive, child-removal practices” as Indian children were often removed without notice, due process or justification of neglect or abuse (Indian Child Welfare Program, 1974, pp. 2).

The goal of ICWA was to reduce the disproportionate number of Indian children in the child welfare system and to ensure Indian children were placed in Indian homes. ICWA was intended to make sweeping reforms across the nation; but now, over thirty years later, it has not sufficiently reduced the number of Indian children in foster care. Summers and Wood (2014) document Indian children are still overrepresented in foster care at a rate of 2.4 times the rate of the general population (p. 9). In addition, there is a consistent problem with the implementation of ICWA’s placement preferences because there are not enough licensed Indian foster and adoptive homes for Indian children (Mills, 1998, p. 20). Many willing Indian families are not

eligible for federal funds to care for an Indian foster child because they often do not “meet state licensing standards or pass state background checks” (GAO, 1995, p. 21). National data on the number of Indian children placed in non-Indian homes is not available. Countywide data confirms placement is an ongoing problem due to the lack of licensed Indian homes. For example, data from Alameda County, California, indicate 38 percent of Indian foster children were placed with families, but 30 percent were placed in non-Indian homes and only 3 percent were placed with Indian families other than their own (Kwana, 2013).

ICWA is the culmination of over ten years of effort by Indian tribes, the Senate, and Indian advocacy groups, who conducted studies to document the problems in child welfare systems and helped draft the legislation for the Act. The Senate and House hearings are replete with testimony from experts, who offered recommendations on how to solve the Indian child welfare problems. Many recommendations for reform were not enacted due to controversy, timing and opposition from President Carter’s Administration, specifically, the Departments of Health, Education and Welfare (HEW) and Justice (DOJ) and the Department of the Interior’s (DOI) Bureau of Indian Affairs (BIA).

ICWA reformers suggested two major recommendations for compliance that were not implemented in the final bill. First, it was strongly recommended that ICWA create or authorize a federal administrative body to oversee implementation and compliance with the Act. The second major recommendation was for the creation of a universal federal reporting system of Indian Child Welfare (ICW) data that included tribal courts, and social services, state courts and the BIA. These recommendations were not included in the final draft of ICWA.

Purpose of the Study

This manuscript is a policy analysis of ICWA through a review of the legislative record of Indian child welfare from 1974-1978. The historical antecedent of ICWA were explored, in addition to the ICWA legislation itself and includes hearings, reports, and the draft and final

versions of ICWA. This analysis reviews the recommendations for Indian child welfare reform from these legislative records to assess why ICWA was enacted, as well as why ICWA did not include a formal administrative body to oversee implementation and compliance and a universal system to collect ongoing Indian child welfare data. The second part of this review is an analysis of whether the development of an alternative social policy could strengthen ICWA, thereby increasing the effectiveness of the law to reduce the disproportionate number of Indian children in child welfare and to keep Indian children in Indian communities when they are removed from their homes.

Scope and Limitations

There are two major limitations of this assessment. First, available data is confined to the written records of the federal government, historical and current data on Indian child welfare. The 1974, 1977, and 1978 Indian Child Welfare Hearings are the testimony of various entities and do not directly reflect the intent of Congress. Second, interviews with the individuals involved in the drafting of ICWA were not available; but congressional reports indicate the positions and/or opinions on ICWA of the various entities involved. Despite these limitations, the data collected are extensive and appropriate for the research question of this analysis.

CHAPTER 2

REVIEW OF THE LITERATURE

Early Indian Child Welfare History

American Indians have a long legislative and legal history regarding the involuntary and unjustified removal of children from their homes and tribal communities. There were many federal, state and philanthropic Indian child removal programs that facilitated out-of-home placements in boarding schools, foster, adoptive and institutional homes (Reyner & Eder, Churchill, and Adams). Historical accounts of early California are replete with similar inhumane treatment of American Indians and their children. Indian children were also captured, sold into slavery, forced into indentured servitude, or killed. California's first legislature passed the 1850 Act for the Government and Protection of Indians, which authorized white settlers to take control over Indian children. The kidnapping of Indian children was practiced by men who "do not hesitate, when they find a Rancheria well stocked with young Indians, to murder in cold blood all the old ones, in order that they may safely possess themselves of all the offspring" (Johnston-Dodds, 2002, p. 11). The Act facilitated "separating at least a generation of children and adults from their families, languages, and cultures" (Johnston-Dodds, 2002, p.1). In 1863, an Amendment to the 1850 Act repealed the indentured servitude of Indian children, but county records of indentured Indians from the ages of 2 to 50 continued (Johnston-Dodds, 2002, p. 10).

Indian Boarding Schools

As tribes were relocated from their ancestral homelands to the reservation systems with defined borders, their traditional ways of self-sufficiency were destroyed. The lifestyle and culture of Indians were rapidly changing. It was during this period of transition that the federal government began to focus on assimilating Indian children through the auspices of education. Reservation day schools were built initially, but as the government's policy of assimilation was

paramount, non-reservation boarding schools were seen as a more effective method of “civilizing” the Indians (Adams, 1995, p. 59). One of the more famous off-reservation Indian boarding schools was built in 1879 in Carlisle, Pennsylvania. Colonel Richard Henry Pratt, who was credited with the phrase “kill the Indian, save the man” ran the Carlisle Indian Industrial School (Churchill, 2004). Reyhner & Eder (2006) describe how the federal Indian boarding schools were fueled by the ideology that “it was cheaper to convince Indians in school that whites had their best interests in mind than to convince them on the battlefield” (p. 33). Reyhner & Eder (2006) and Adams (1995) detail how policymakers supported Indian boarding schools as an effective method of rendering the “savage” ways of the Indians into extinction.

According to Dlugokinski and Kramer (1974), the rationale behind boarding schools was to “eliminate Indian cultures” through patronizing control (p. 671). Adams (1996) details a two-step process of assaulting the Indian children’s identity; First, they were stripped of all identification of tribal life; clothing, language, birth names, and their traditional long hair was cut short (p. 100). Wallace explains all signs of “Indianness” were seen as symbols of “savagism” (p. 101). Second, Indian children were “instructed in ideas, values and behaviors of white civilization” (Churchill, 2004, pp. 100-101). The reinforcing theme of the boarding schools was Indian customs and cultures were worthless and needed to be replaced with the ideals and values of the dominant society. Dlugokinski and Kramer (1974) explained the negative psychological impact, “tribal traditions were ignored and downgraded, leaving the Indian child with little dignity and eroding his pride in his heritage” (p. 672). Churchill (2004) describes how most students endured the “resulting stew of fear, loneliness, and obliterated self-esteem” for periods of years (p. 22). “Spiritually and emotionally, the children were bereft of culturally integrated behaviors that led to positive self-esteem, a sense of belonging to family and community, and a solid American Indian identity” (Brave Heart & DeBruyn, 1998, pp. 63-64).

Although some participation in boarding schools was voluntary, Child (2000) describes

an “era of forced civilization” where Indian parents were coerced to send their children away through the withholding of annuities and rations (p. 13). Other methods of coercion included sending Indian parents to jail if they refused to send their children to boarding schools. In addition, Churchill (2004) documented examples of Indian children who were committed to boarding schools by the social worker, probation officer, local agent or judge (p. 20).

In the 1970’s, reports of the negative effects of boarding schools on the Indian children’s welfare were well documented. One area that received criticism was the limited number of staff in the boarding schools. Research by Colmant, et al., (2004), describes the grossly inadequate 80 to 1 ratio of Indian boarding school staff to children as one of the reasons Indian children experienced loneliness, as they had little opportunity to “develop meaningful relationships with caring-consistent adults” (p. 31). Kreisher (2002) theorizes that Indian students did not learn their culture and traditions or acquire parenting skills because dormitory matrons raised them (p. 7).

Archuletta, Child and Lomawaima (2000) explain how policy makers feared that their assimilation efforts would be impaired by the experiences of children returning home to their families and communities during holidays and summer vacation (p. 36). The outing program was developed, sending Indian children to white homes to labor during the summer as a strategic attempt to permanently separate the Indian children from their culture (Archuletta, et al., 2000, p. 36). Outing programs further severed the Indian child’s familial bonds but were ironically “praised” in Washington for “advocating family values” (Lomawaima et. al, 2000, p. 37). From the beginning of indentured servitude to the era of boarding schools, the assimilationist policies towards Indians continued until intense criticism was generated from a 1928 report called, “The Problem of Indian Administration” by Lewis Meriam.

Meriam Report

In 1926, the U.S. Secretary of the Interior commissioned the Institute for Government Research, an independent, non-partisan research body, to investigate conditions of Indian communities. The Meriam Report is a compilation of recommendations on education, economic development, and family life to improve federal Indian services (Meriam, 1928). Lewis Meriam and governmental officials visited 64 of the 78 boarding schools and “found great evidence of “malnutrition, poor healthcare, low sanitation, overcrowding, appalling teaching staff, and dependence on child labor in almost every school (Booth, 2006, p. 56). The Meriam Report specifically criticized the effects of the boarding school system on the Indian children:

Under normal conditions, the experience of family life is of itself a preparation of the children for future parenthood. Without this experience of the parent-child relationship throughout the developmental period, Indian young people must suffer under a serious disability in their relations with their own children. No kind of formal training can possibly make up for this lack, nor can the outing system, when the child is half grown, supplement what he has missed in his own family and with his own race in earlier years. (Meriam, 1928, p. 17)

The Meriam Report was cognizant of the ill effects of the boarding school system and its findings generated intense criticism of the federal Indian boarding schools. As a result, many boarding schools later closed. Kevin Gover, then Assistant Secretary of the BIA, apologized for the BIA’s actions:

After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian. This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs

committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. Even in this era of self-determination, when the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect, the legacy of these misdeeds haunts us. The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. (Gover, 2000, pp. 2-3)

Indian Adoption Project

Although the Indian boarding school experiences have been widely researched and documented for their negative effects on the mental and physical health of Indian children, another federal program proved to be just as disastrous. The BIA and the U.S. Children's Bureau, supported by federal funds, carried out the Indian Adoption Project (IAP) from 1958 to 1967. The Child Welfare League of America (CWLA) was awarded the contract to administer the IAP that placed 395 children from Indian families in Western states to white families in the East and Midwest (George, 1997, p. 169). Indian families were not sought for placement of these children. What is troubling about the adoption of these children is it effectuated a continuing policy of racism and assimilation, albeit more permanently (Howard, 1984, p. 520). The IAP has since been heavily criticized because it placed Indian children in non-Indian homes when the current policy was to race-match adoption placements. CWLA oversaw 395 adoptions of Indian children during this 10-year period. Shay Bilchik, Executive Director of CWLA, apologized for CWLA's role in Indian adoptions:

What we did may have been well intentioned, but it was wrong, it was biased, it was hurtful. It is time to tell the truth, that our actions presupposed that Indian children would be better off with white families as opposed to staying in their own communities and tribes, and be reconciled. (Jacobs, 2014, p. 267)

The Adoption Resource Exchange of North American (ARENA), founded in 1966, took over the IAP from CWLA. ARENA was focused on finding homes for hard-to-place children. It was the first national adoption resource exchange and it continued CWLA's "abysmal job of placing Indian children with Indian adoptive parents" (O'Sullivan, 2007, p. 124). David Fanshel (1972) studied one quarter of the IAP adoptees and their families, but concluded "It may be that Indian leaders would rather see their children share the fate of their fellow Indians than lose them in the white world. It is for the Indian people to decide" (p. 341-342). State and federal Indian child policies from 1850-1928 had different motivations; for example, Californian's 1850 Act claimed "protection of Indians" through indentured servitude, the Indian boarding schools from 1880's promised "education" through compulsory means and the Indian Adoption Project extolled permanent homes for Indian children far from their tribal communities. However, all these policies had the same underlying theme, to forcibly "civilize" Indian children through permanent removal from their families and culture without parental consent.

Devil's Lake Sioux Tribe

The Devils Lake Sioux Tribe is located in North Dakota and the legislative records reveal the events on this Reservation are what prompted the procedures that led to the passage of ICWA. Ivan Brown, an Indian child, was raised by his babysitter, Mrs. Fournier, since he was three weeks old (Indian Child Welfare, 1974, p. 95)., Mrs. Fournier kept Ivan when his mother died in an accident, as he did not have family that could care for him. The Benson County, North Dakota, child welfare workers visited Mrs. Fournier, who was living on the Reservation, and told her they were going to place Ivan in an adoptive home (Indian Child Welfare, 1974, p. 95). Two years later, a child welfare official and sheriff showed up and tried to take Ivan and place him in an adoptive placement, but Ivan was bonded to Mrs. Fournier and she refused to give up custody (Jacobs, 2014, p.97). The BIA staff took Mrs. Fournier and Benson County welfare workers to tribal court to attempt to resolve the issue. During the court proceedings, all

parties were inside the courtroom, while Ivan played outside by the entrance of the court. A county child welfare worker took Ivan and tried to walk away with him, but Ivan cried and fought back. Several people ran to get a camera to document the event and Mrs. Fournier was able to get Ivan back. Mrs. Fournier returned to the tribal courtroom and the judge ruled in Mrs. Fournier's favor to keep Ivan. This event motivated the tribe to make a stand and they subsequently adopted a resolution forbidding social workers from removing their children from the reservation (Indian Child Welfare, 1974, p. 95).

The Devil's Lake controversy, however, continued to escalate when Benson County Welfare responded to the tribal resolution by refusing to pay any child welfare payments to reservation residents (Indian Child Welfare, 1974, p. 95). In 1968, the Devils Lake Sioux tribe contacted the Association on American Indian Affairs (AAIA) in New York for assistance (Mannes, 1995, p. 2). AAIA was founded in 1923 to defend the rights of American Indians and Alaskan Natives to whom they agreed to provide assistance (Indian Child Welfare Project, 1974, p. 15).

Indian Child Welfare Act

The purpose of this research is to review the legislative history of ICWA and its antecedents to determine why administrative oversight and compliance measures such as data collection was not included in the bill. A more detailed description of ICWA is discussed further in Chapter 4. The 1970's saw an unprecedented effort by Indians and non-Indians, national advocacy agencies, and Congress, to address the Indian child adoption problems on a national level. In 1978, these efforts were finally realized when the Indian Child Welfare Act (ICWA) was passed on November 8, 1978.

A federal law, ICWA is designed to prevent the "unchecked" biased and abusive practices by state child welfare workers (Indian Child Welfare Program, 1974, p. 2). ICWA's protections were intended to reduce the alarmingly high number of Indian children removed

from their homes and placed in non-Indian substitute care. ICWA (1978) established minimum standards for state courts, while safeguards, such as placement preferences, would keep children in their native communities so they would benefit from their heritage and culture. Paramount in the many provisions in ICWA is the recognition that tribal communities have exclusive jurisdiction to determine the future of their most valuable resource – their children. ICWA intended to reduce the high percentage (25-35%) of wrongful removals of Indian children and to reduce the high number (85%) of adoptions of Indian children by non-Indian families (1978). Mannes (1993) describes the separation of Indian children from their heritage as the worst form of “cultural genocide” (p. 141-142).

GAO Report of 1995

In October of 2003, Congressman Tom Delay (Republican from Texas), the Majority Leader, requested a study of the implementation of ICWA by the Government Accountability Office (GAO). This was the first federal attempt to investigate ICWA compliance. There were two significant issues regarding the implementation of the ICWA. First, national implementation and compliance could not be measured. In 2005, the GAO surveyed all fifty states to collect empirical data regarding ICWA children, but found only that, “national data on children subject to ICWA are unavailable” (GAO Report, 2005, p. 3). This was the first national survey and data on children subject to ICWA was largely unavailable. Of the 50 states contacted using a web-based survey, only five states—Oklahoma, Oregon, Rhode Island, South Dakota, and Washington—were able to provide data on the children subject to ICWA, using their automated systems (GAO, 2005, p. 3).

GAO (2005) identified oversight as a major concern in the implementation of ICWA. The GAO (2005) determined that “ICWA did not give any federal agency direct oversight responsibility for states’ implementation of the law” (p.4). The BIA could administer grants to tribes for child welfare, but had no oversight authority in ICWA (p. 11). Although ICWA is a

federal law, the states are responsible for implementation of the law. How well states have implemented and complied with ICWA is not known on a national basis, because there is only voluntary reporting of ICWA compliance. The GAO (2005) also identified the Administration for Children and Families (ACF) within the Department of Health and Human Services (HHS) as the federal agency with “general oversight over state welfare systems” (p. 4-5). GAO recommended the HHS direct ACF to use their Child and Family Services Reviews (CFSR) (periodic reviews of state child welfare systems) and annual reports and program improvement plans (PIP) “to target guidance and assistance to states” for ICWA issues (p. 5). HHS disagreed with the GAO recommendation and their position was they did not have the “authority, resources, or expertise” to address GAO’s recommendation (1995, p. 5).

At the ACF Tribal Consultation Conference in June 2014, tribes recommended federal oversight to ensure all states were complying with ICWA and to incorporate ICWA into the CFSR process. ACF responded:

The Department of Health and Human Services (HHS) does not have authority to enforce compliance with ICWA. However, states are required to describe the measures they are taking to comply with ICWA and the ways in which they have consulted with tribes as part of their 5-year Child and Family Services Plan and Annual Progress and Services Reports. Likewise, tribes, as part of their annual submissions, are asked to provide an update regarding the consultation between the state and the tribe with respect to state compliance with ICWA, and to describe any concerns with respect to ICWA consultation and compliance (ACF, 2014, p. 1).

ICWA does not compel the states to act, nor require documentation of effectiveness, nor does it convey authority to level penalties on states for non-compliance. Patchwork implementation of ICWA is further complicated by a lack of enforcement of its objectives. Furthermore, the only remedies for failure to comply with ICWA are transfer of jurisdiction to the tribe and/or reversal

of the state court decision if the provisions of ICWA were violated. Though ICWA is represented as a major factor in the preservation of Indian families, research confirms Indian children continue to be overrepresented in the child welfare system at two to four times the rate of non-Indians (NICWA & Pew, 2006, p. 1). The lack of administrative oversight and compliance in ICWA created a fatal flaw by limiting the states' accountability, thus diminishing the Act's ability to make the sweeping reforms that were intended.

Overrepresentation in the Child Welfare System

Child Protective Services (CPS) is the central agency in each community that receives reports of suspected child abuse and neglect, assesses the risk to children, and provides for services to achieve permanent families for children who have been abused or neglected (DePanfilis, D. and Salas, M. K., 1994, p. 7). There are seven stages of the CPS process: 1) Referral/Intake, 2) Investigation/Substantiation, 3) Family Assessment, 4) Case Planning, 5) Service, 6) Family Progress, and 7) Case Closure (DePanfilis, D. and Salas, M. K., 1994, p. 7).

National and regional statistics reveal that Indians are consistently overrepresented in the child welfare system. Hill (2006) describes disproportionality as the level at which groups of children are present in CPS at higher or lower percentages or rates than in the general population (2007). An index of 1.0 reflects no disproportionality, while an index of greater than 1.0 reflects overrepresentation (Wood & Summers, 2014 p. 3). Disparity describes the unequal treatment of children with respect to their level of contact with child welfare systems (Osterling, et. al 2008, p. 10). Disproportionality and disparities for Indian children in outcomes exist throughout the child welfare system and a substantial portion is introduced through front-end processes, such as referral, investigation, substantiation and placement into care (Osterling, et al., 2008, p. 10). Similarly, the Annie E. Casey report (Hill, 2006) explains as an Indian child moves further into the child welfare system, the disproportionality increases (Simmons, 2014, p. 7).

Of concern is that Native American disproportionality has increased over the last twelve years from 1.5 to 2.4. Wood & Summers (2014) research using Adoption and Foster Care Analysis and Reporting System (AFCARS) data from 2012 indicates Indians are 1% of the population, but represent 2.4% of the children with CPS contact. In particular, 21 states do have overrepresentation of Indian children in child welfare (Wood & Summers, 2014, p. 9). Five of these 21 states (24%) have a disproportionality index of 4.1 or greater: Minnesota (13.9), Nebraska (7.7) Iowa (4.5) Washington (4.3), and Wisconsin (4.1) (Wood & Summers, 2014, p.9).

The overrepresentation of Indian children in CPS is not due to increased abuse or neglect. Simmons (2014) confirms abuse or neglect of Indian children is “consistent or proportionate with their population numbers” (p. 7) For example, U.S. Department of Health and Human Services (HHS) data indicates the rate of child abuse and neglect for Indian children is 16.5 per 1,000 children, while this rate is comparable to African Americans (19.5), Pacific islanders (16.1) White (10.8) and Hispanic (10.7) (Pew & National Indian Child Welfare Association, 2007, p. 4). As Osterling (2008) confirms, the disparity of Indian children occurs in the CPS processes. The Pew and National Indian Child Welfare Association (NICWA) 2007 report, *Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children*, found nationally “American Indian and Alaskan Native children were more likely than children of other races/ethnicities to be identified as victims of neglect (65.5%), and they are least likely to be identified as victims of physical abuse (7.3%) (p. 4). Pew & NICWA (2006) concluded a limitation is data is drawn from case-level information from state agencies on all children in foster care (AFCARS). States are required to submit AFCARS data twice a year and this only includes information on those who self-identify and does not include data of Indian children in tribal foster care (Pew & NICWA, 2007, p. 14). Estimates are that approximately two-thirds of the American Indians are in placement by state child welfare and “one-third to 40 percent are

placed in foster care by tribal authorities” (Pew & NICWA, 2007, p. 5). However, in 2012, tribal title IV-E programs were also required to provide this information to AFCARS.

Simmons (2014) explains, the American Indian children disproportionality is a “result of systemic bias” and is a “primary factor” in understanding why these children are “disproportionately represented in many state foster care systems” (p. 7). Current research indicates Indian children are disproportionately represented in the child welfare system and that disparate treatment of Indian children increases as they move further into the CPS system. Research identified bias is a factor in Indian disproportionality and thus changes to the CPS system are necessary to remedy the problem.

There are no resources or recent scholarship that delve into a national accounting of statewide compliance with ICWA. In California’s county-based child welfare system, tribes work directly with the county government, rather than the state (Risling, 2000, p. 65). However, lack of compliance or improper implementation of ICWA can be litigious. Risling, (2000) confirms that California has the most appealed ICWA cases in the nation because state and county agencies continue to violate the spirit and intent of ICWA. Appeals and subsequent invalidation of ICWA proceedings have had a significant impact on the Indian child as they further delay permanent planning, while the parties litigate a solution in court. An example of this delay is the 2013 contentious legal battle that escalated to the Supreme Court, *Adoptive Couple v. Baby Girl*. Baby Veronica was born in 2009 and spent her first two years with her adoptive parents, even though her father, an enrolled Cherokee Indian, fought for her custody shortly after she was born. In 2011, her biological father regained custody of her due to the application of ICWA. In 2013, Baby Veronica’s father was ordered to give his daughter back into the custody of the adoptive couple. If Veronica had been identified as an Indian child from the onset of the adoption proceedings and ICWA protections followed, the case might well have ended differently and the turmoil and uncertainty of her first four years of life may have been avoided.

CHAPTER 3

METHOD

Design

ICWA is a policy aimed at recognizing Indian tribes' exclusive jurisdiction in child welfare and a set of special protections and procedures that must be followed to ensure that Indian children in child welfare receive equitable treatment. The purpose of this study was to analyze recommendations that were left out in the drafting process of the bill, federal oversight of the Act and the national collection of Indian child welfare data. Specifically, what factors prevented these measures from being enacted? The overrepresentation of Indian children in child welfare is a current problem. Finally, this analysis looks at future implementation of these recommendations as a method to address and reduce the disparity in Indian child welfare.

This policy analysis used David Gil's (1992) framework described in *Unraveling Social Policy* (1992) to analyze ICWA, Public Law 95-608 (pp. 71-74). Historical and content analysis of primary and secondary sources addressing ICWA were analyzed. The primary sources consisted of a review of the historical antecedents of ICWA, congressional hearings, Senate and House reports, Debates, the Congressional Record, and other government documents addressing Indian child welfare. Secondary sources consisted of books, journal articles, technical reports and websites.

An abridged format of Gil's framework of policy analysis was used to analyze ICWA. Gil recommends that the framework be used in part or in its entirety, depending on the content, scope and objectives of the policy. Based on this recommendation and on the relevance of the framework to the ICWA policy analysis, this analysis focused on the following sections of Gil's framework:

SECTION A: ISSUES DEALT WITH BY THE POLICY

1. Nature, scope, and distribution of the issues.
2. Causal theories and or hypothesis concerning the issues.

SECTION D: INTERACTIONS OF THE POLICY WITH FORCES AFFECTING SOCIAL EVOLUTION

1. History of the policy's development and implementation, including legislative, administrative and judicial aspects.
2. Political groups in society promoting or resisting the policy prior to, and following its enactment: their type, size, organizational structure, and resources.
3. (Not Utilized)
4. (Not Utilized)
5. Summary and conclusions concerning the policy's interaction with the forces affecting its development and implementation.

SECTION E: DEVELOPMENT OF ALTERNATIVE SOCIAL POLICIES

1. Aimed at the same policy objective but involving alternative measures.
2. Aimed at a different social policy objective concerning the same policy issues.
3. Comparison and evaluation: each alternative policy is to be analyzed in accordance with relevant sections of the framework and compared the original policy and compared with alternative policies.

CHAPTER 4

ANALYSIS OF ICWA

SECTION A ISSUES DEALT WITH BY THE POLICY

Nature, Scope, Distribution of the Issues

The Association on American Indian Affairs (AAIA) was involved in Indian child welfare, specifically providing legal assistance and relief to Indian families since 1968. In 1969, AAIA was concerned about the Indian child welfare abuses and conducted one survey of states with large Indian populations as part of their advocacy to seek a congressional inquiry into Indian child welfare. Another survey was conducted at the behest of a congressional commission in 1974 (Indian Child Welfare Program, 1974, p. 15). The surveys revealed a widespread problem: approximately 25-35% of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions (Indian Child Welfare Program, 1974, p. 15). William Bylar, Executive Director, AAIA, compared non-Indian communities which “can expect to have children out of their natural home in foster and adoptive homes at the rate of 1 per 51 children (1.96%)” to Indian communities that experience their children “removed at rates varying from 5 to 25 times higher than that (Indian Child Welfare Program, 1974, p. 1). In AAIA’s survey of 16 states in 1969, 85% of all Indian foster children were living in non-Indian homes (Indian Child Welfare Program, 1974, p. 17). Bylar confirmed the disparity in placement rates for states with large Indian populations:

1. In Montana, the ratio of Indian foster-care placement is at least thirteen times (1300%) greater.
2. In South Dakota, 40 percent of all adoptions made by the State’s Department of Public Welfare since 1967-68 were Indian children; yet Indians made up only 7 percent of the juvenile population. The number of South Dakota Indian children in foster homes was,

nearly 16 times (1600%) greater than the non-Indian rate.

3. In the State of Washington, the Indian adoption rate was 19 times (1900%) greater and the foster care rate 10 times (1000%) greater. (Indian Child Welfare Program, 1974, p. 16)

In the 1974 Congressional Indian Child Welfare Program Hearing, Dr. Gurwitt stated, American Indian children were being placed outside the home at rates that were alarming; and secondly, that American Indian children are being placed in non-Indian homes at a rate that was “equally alarming” (Indian Child Welfare Program, 1974, p. 55). For example, in the state of Minnesota, one in every eight Indian children under 18 years of age was in an adoptive home; and, in 1971-1972, nearly one in four Indian children under 1 year of age was adopted (Indian Child Welfare Program, 1974, p. 15).

Causal Theories or Hypothesis Concerning the Issues

The 1974 Indian Child Welfare hearings identified several key problem areas in Indian child welfare. First, Indian children were removed by state welfare departments because Indian parents were judged as unfit, using white, middle class standards. Parental neglect of Indian children was often attributed to poverty, poor housing, lack of modern plumbing, and overcrowding, rather than actual neglect (Indian Child Welfare Program, 1974, p. 19). For example, state welfare departments frequently discovered “neglect and abandonment” where none existed (Indian Child Welfare, 1974, p. 18). In North Dakota, the study found that Indian children were removed on the grounds of physical neglect in only 1% of the cases, while the remaining 99% of the cases were for neglect, social deprivation, or emotional damage (Indian Child Welfare Program, 1974, p. 18). Mrs. DeCoteau, an Indian mother, was told by the welfare worker that her children were better off in a white home because the adoptive parents could provide all the stuff she could not buy them (Indian Child Welfare Program, 1974, p. 66). Mrs. DeCoteau’s two children were removed, even though the court did not prove that she was unfit

(Indian Child Welfare Program, 1974, p. 66).

Second, social worker bias contributed to substantiation of the claim of parental neglect. In one case, a Rosebud Sioux mother let her daughter travel from the Rosebud Sioux Reservation to California with her aunt. When the mother arrived, one week later, she found California social workers had removed her child and placed her in a pre-adoptive home. Instead of claiming the mother was unfit, the California social workers argued that the Rosebud Reservation in South Dakota was an unsuitable environment for the child (Indian Child Welfare Program, 1974, pp. 19-20).

The third area of concern was the lack of due process afforded Indian parents. In many cases, Indian children were removed without notice or even a hearing. Parents were not afforded due process of law and it was “rare for either Indian children or their parents to be represented by counsel or to have the supporting testimony of expert witnesses (Indian Child Welfare Program, 1974, p. 21).

The fourth area of concern was the intimidation and abuse of power wielded over Indian families. In the 1974 Indian Child Welfare Program hearing, testimony consistently revealed that many Indian women and families felt powerless to protect their children from child welfare officials. Mrs. Townsend, an Indian mother who had her children removed from her, remarked: “I think that most Indian women are usually overwhelmed by people who think their children should be taken away from them and they really don’t stand up to anybody and they don’t have anybody to tell” (Indian Child Welfare Program, 1974, p. 44). Indian women were scared that if they protested the removal of their children, they would be taken to jail or otherwise punished (Indian Child Welfare Program, 1974, p. 26).

Fifth, many tribes did not know they had the power to rebuff county child welfare employees’ actions. For example, a Great Plains Indian judge and BIA employee was unaware that she had the authority to reject custody petitions (instead of just certifying them) presented

by the county welfare department (Indian Child Welfare Program, 1974, p. 26). As a result of this ignorance, she quit her job because she innocently made decisions that inherently harmed the children (Indian Child Welfare Program, 1974, p. 26). Even when tribes protested, tribes were “unable to fight the State in terms of political power, and the State courts and the State judicial processes often overwhelm the Tribe” (Indian Child Welfare Program, 1974, p. 35). Fear of harsh consequences and retaliation were not unfounded.

Sixth, there was a lack of cultural competency by non-Indian child welfare workers. Dr. Shore and Dr. Nichols testified at the 1974 Indian Child Welfare hearings:

Through clinical experience on this and other Indian reservations, the authors have encountered a sense of hopelessness and despair in working with Indian parents about problems of alcohol misuse and child neglect. Once placement of the children is initiated, Indian parents often withdraw, become depressed and begin or resume intensive drinking. This process is often interpreted by the non-Indian outsider as further lack of concern for Indian children as additional evidence of instability. (1974, p. 111)

Social workers were often unfamiliar with Indian child welfare practices and “misinterpret the child’s behavior and parental concern” (Indian Child Welfare Program, 1974, 19). In South Dakota, the State court terminated the parental rights of Mrs. DeCoteau, a Sisseton-Wahpeton Sioux mother, to one of her children “on the grounds that he was sometimes left with his sixty-nine-year-old great-grandmother” (Indian Child Welfare Program, 1974, pp. 18-19). The social worker admitted Mrs. DeCoteau’s son, John, “was well cared for” but “added that the great-grandmother is worried at times” (Indian Child Welfare Program, 1974. p. 19).

Mel Tonasket, President of NCAI, from Colville, Washington, testified to multiple examples of child welfare abuses that he was personally involved in. In one example, an Indian mother of six children died and the six children were made wards of the court, even though the father had a job, provided for the children’s needs and was involved in many athletic activities.

There was no plausible reason why the father could not retain custody of his children. However, the father had to fight for over two years to get his children placed back in their home (Indian Child Welfare, 1974, p. 224).

Finally, economic incentives were seen as a contributing factor. For example, in 1969 in Wyoming, Indian children accounted for 70% of the foster care placements in what was termed “baby farms” because meager non-Indian farmers could collect foster care payments and extra workers for the farm (Indian Child Welfare, 1974, p. 24). As foster care payments ceased upon adoption, only 8% of Wyoming’s Indian children were in adoptive placements (Indian Child Welfare Program, 1974, p. 24).

The Indian Youth Program of Minnesota was designed to alleviate the disproportionate number of Indian youth in juvenile institutions (Indian Child Welfare, 1974, p. 373). Director Thomas Peacock related that over \$1,040,000 BIA funds were paid to the State of Minnesota and that 34% of all Indian children were in foster care. One of 3 Indian children under the age of one, were adopted. Peacock called the Indian removals to white homes “big business” and urged an audit of the BIA funds received by the state (Indian Child Welfare, 1974, p. 373).

Indian mothers, psychiatrists, Indian leaders and AAIA documented the widespread accounts of Indian child welfare abuses. The high rate of Indian children removed from their homes occurred in Indian communities all over the country. Poverty, bias, lack of due process, intimidation, lack of cultural competency, and financial incentives were all factors that attributed to the disproportionate number of Indian child in child welfare.

SECTION D: INTERACTIONS OF THE POLICY WITH FORCES AFFECTING SOCIAL EVOLUTION

History of the Policy Development and Implementation including Legislative Administrative and Judicial Aspects.

Mr. Byler, Executive Director of AAIA, tried to address the problems in Indian child

welfare with federal agencies, such as the Department of the Interior's Bureau of Indian Affairs (BIA) and the Department of Health, Education and Welfare (HEW), because he believed they were complicit in effectuating these removals. After failing to receive any attention or action from the federal agencies, AAIA tried to increase public awareness to put pressure on federal officials to make changes. AAIA raised funds to assist the Devil's Lake Tribal Chairman, Luis Goodhouse, and a delegation of five Indian mothers, with personal experiences, to travel to New York to speak at the Overseas Press Club. During the press conference, all delegates recounted personal experiences of "child-snatching" and threats of intimidation by Benson County Child Welfare (Indian Child Welfare Program, 1974, p. 95). Mrs. Elsie Greywind was taken to jail for refusing to give up her grandchildren. Faced with the threats of loss of welfare payments, Mrs. Greywind passionately stated, "I'll starve before I'll give up my grandchildren" (Indian Child Welfare Program, 1974, p. 95). Mrs. Fournier recalled when welfare workers tried to take Ivan from her, "I told them they would take that child over my dead body" (Indian Child Welfare Program, 1974, p. 95). Mrs. Alvina Alberts, mother of eight, attributed the removals to efforts to assimilate Indian children. She stated "they want to make white people out of the Indians...they are starting with the kids because they couldn't do it to us" (Indian Child Welfare Program, 1974, p. 95). Another mother present had five of her children removed and placed in non-Indian foster care. Mr. Byler declared, "The Devil's Lake Sioux People and American Indian tribes have been unjustly deprived of their lands and their livelihood and now they are being dispossessed of their children" (Indian Child Welfare Program, 1974, p. 95).

During the press conference, Byler shared statistics on thousands of Indian children who were placed in BIA boarding schools, "either because of lack of day-school facilities or because of the alleged unsuitability of their home environment" (Indian Child Welfare Program, 1974, p. 95). AAIA had provided legal support for Indian parents to regain custody of their children who were unjustly removed since the previous year. AAIA's research indicated 25% of the children

born on the Devil's Lake Sioux Reservation would eventually be placed in foster, adoptive or institutional placements (Indian Child Welfare Program, 1974, p. 95). The widespread poverty seemed to account for a majority of the Indian removals. At the press conference, Mrs. Alberts asked, "What is the difference if an Indian home is poor but there is plenty of love?" (Indian Child Welfare Program, 1974, p. 95). The delegation made the case of "acute welfare abuses victimizing American Indian children" and American citizens began to take notice (Indian Child Welfare, 1974, p. 95).

When Benson County denied the child welfare payments (subsidized by the BIA) to the reservation foster families, there was no food in the community. The Fort Totten Reservation, home to the Devil's Lake community, experienced abject poverty as the community had over 90% unemployment over the major part of the year (Indian Child Welfare Program, 1974, p. 95). Benson County attempted to "starve the tribe in submission" until they repealed the legislation preventing social workers from removing Indian children from the reservation (O'Sullivan, 2007, p.145). After the press conference, the delegation travelled to Washington D.C. to plead for a return of foster care subsidies that were terminated by Benson County welfare. The delegation asked the BIA social services for the return of the child welfare payments so the families could have enough to eat. They were refused help and told, "That would embarrass Benson County welfare. We cannot do it" (Indian Child Welfare Program, 1974, p. 95). The delegates did not quit; they appealed to the Commissioner of Indian Affairs and the order was sent down to "let the children eat" (Indian Child Welfare Program, 1974, p. 38).

The social forces demonstrated in this narrative indicate that Indian people who were victims of child welfare abuses fought against the intolerable child welfare abuses because they were concerned about the future vitality of their tribal communities. Indian mothers and tribes requested assistance from AAIA; they spoke publically to increase awareness and addressed federal agencies in efforts to correct the abuses. This social environment set in motion the need

for political change to ensure recognition that tribes had exclusive jurisdiction over child welfare issues.

Political groups in society promoting or resisting the policy prior to, and following its enactment: their type, size, organizational structure, and resources.

AAIA Advocacy

AAIA's involvement and provision of legal assistance increased awareness and therefore public scrutiny regarding the problems of Indian child welfare. When the personal tragedies of Indian mothers garnered national attention, it was revealed that many American Indian children were removed from their homes without notice and that the children were removed due to bias and coercion, rather than claims of abuse or neglect.

Through AAIA's advocacy, concerned citizens signed petitions supporting Indian child welfare oversight hearings (Indian Child Welfare Program, 1974, p. 8). Awareness and outrage over the disparity of treatment of Indian children were growing, and in one New York community alone, 20,000 people signed the petitions for congressional action (Indian Child Welfare Program, 1974, p. 8). AAIA assisted Indian parents in regaining custody of their children, but they most likely had no idea how widespread the problem had become, nor the long-term effects of these removals.

AAIA's initial study, conducted in 1969, revealed Indian parents were not informed of their rights, children were removed from their homes without notice and were not represented by attorneys at termination procedures. In addition, the disparity in placement rates between Indian and non-Indians was indicative of the pervasiveness of the problem. For example, in the state of Washington, the Indian adoption rate was 19 times greater for Indians than non-Indians (Unger, 1977, p.1). With this knowledge, AAIA intensified its outreach efforts, to generate interest in Indian child welfare. AAIA began to publish a newsletter, the Indian Family Defense, to disseminate information regarding Indian child welfare to public policy and professional

organizations (Mannes, 1993, p. 3). AAIA also addressed internal capacity building so tribes could oversee their own child welfare issues and assisted the Devils Lake Sioux community in establishing a tribal child welfare board (Mannes, 1995, p. 3).

Indian Child Welfare Program – Hearings of 1974

After six years of combined efforts of tribes, AAIA, and concerned citizens who had signed petitions, Congress finally took notice and planned hearings to investigate the status of Indian child welfare. Congress held two days of hearings before the Committee on Interior and Insular Affairs' Subcommittee on Indian Affairs, on April 8 and 9 of 1974. The Indian Child Welfare Program hearings provided testimony of experts from various geographic regions of the country. The 1974 hearings included the following witnesses who helped initiate the congressional inquiry: James Abourezk, U.S. Senator from the State of South Dakota (Chairman of the Subcommittee on Indian Affairs), William Bylar, Executive Director, Association on American Indian Affairs, and Bert Hirsch, Staff Attorney, Association on American Indian Affairs.

Psychiatrists were in attendance to testify as to the effects of the removals. Witnesses included; Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota, Dr. Carl Mindell, Child Psychiatrist, Albany Medical College, Dr. Alan Gurwitt, unofficial representatives of American Academy of Child Psychiatrists (AACP), Dr. James H. Shore, Associate Professor, University of Oregon Medical School and Director of the Community Psychiatry Training Program, Dr. Carl Hammerschlag, Psychiatrist, mental health consultant with Indian Health Services (Arizona, Nevada, California, and Utah) and physicians Dr. Robert Bergman and Dr. George Goldstein, Indian Health Services of Gallup, New Mexico.

Indian mothers who were victims of child welfare abuses also testified: Mrs. Kim Townsend, Indian mother from Fallon, NV, Mrs. Alex Fournier (member of the Mandan Tribe) living on the Fort Totten Reservation, and Mrs. DeCoteau, Indian mother from Sisseton, South

Dakota. Indian program directors with personal experiences with Indian child welfare testified, such as, Leon F. Cook, Department of Indian Work (Adoption and Foster Programs), Minneapolis, Minnesota, Mary Ann Lawrence, Director, Indian Family Defense Project, Pine Ridge, South Dakota and Richard Lone Dog, Director, Rosebud Detention Center, and member of the Rosebud Sioux Tribe.

There was testimony from two federal employees: Jere Brennan, Superintendent, Bureau of Indian Affairs, Fort Totten, North Dakota and Raymond Butler, Acting Director, Office of Indian Services, Chief of Division of Social Services, Washington, D.C. In addition to the statements provided by witnesses, surveys and statistics were provided for the record to further document the widespread problems with Indian child welfare.

At first, it did not seem that there was much congressional interest in the hearings. Only two senators and two staff members were present, along with the various witnesses. The objectives of the hearings were to define the specific problems that American Indian families faced in raising their children and how these problems were affected by Federal action or inaction (Indian Child Welfare Program, 1974, p.1). The Committee on Indian Affairs hoped for a solution by proposing federal action that would provide Indian communities and parents with the tools and the legal means to protect and develop their families (Indian Child Welfare Program, 1974, p.2). Senator James Abourezk stated there were at least three “urgent questions” such as (1) what were the facts concerning the governmental and nongovernmental child welfare practices in Indian communities, (2) what have Indian communities been doing about the problem, and (3) how could Congress support Indian communities’ efforts to change the situation (Indian Child Welfare Program, 1974, p. 2).

Senator Abourezk opened the hearings, expressing his concern that Indian children “were at the mercy of arbitrary or abusive action of local, State and Federal, and private agency officials” (Indian Child Welfare Program, 1974, p.1). Abourezk cited that the unwarranted

removal of Indians accounted for a minimum of 25% of all Indian children being either in foster or adoptive homes, and/or boarding schools, which was against the best interest of families, tribes, and Indian communities (Indian Child Welfare Program, 1974, p. 1). Senator Abourezk condemned the beliefs that most Indian children would really be better off growing up non-Indian (Indian Child Welfare Program, 1974, p. 1). Abourezk stated, "Officials would seemingly rather place Indian children in non-Indian settings where their culture, their Indian traditions and, in general their entire Indian way of life is smothered" (Indian Child Welfare Program, 1974, p. 2) Mr. William Bylar, Executive Director of AAIA, testified of the "detrimental and deculturation" of federal and state entities in their efforts to make Indians white (Indian Child Welfare, 1974, p. 7). Mr. Bylar testified, "It is clear then that the Indian child-welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole (Indian Child Welfare Program, 1974, p. 17). AAIA's advocacy was a strong political force that increased public awareness and quantified the scope of Indian child welfare abuses. However, AAIA's consistent political pressure set in motion the need for change and a process to develop a new federal policy to redress Indian child welfare abuses.

Criticism of BIA and HEW

The most interesting factor that emerged from the ICWP hearings is the lack of support from the two primary federal agencies that were responsible for Indian affairs and child welfare. The Departments of HEW and Department of the Interior's BIA were under considerable scrutiny during the hearings. Witnesses accused HEW and BIA as negligent in their duties. The controversial role that these federal departments played in the financing of the removals was repeatedly brought into question by Senator Abourezk:

First, why has the Federal Government, under the auspices of the Bureau of Indian Affairs and the Department of Health, Education, and Welfare not been active, or not been active enough, in supporting and protecting Indian families? Why do state welfare

departments, which receive substantial amounts of federal moneys for the welfare of Indian children, continue to take actions which appear to be against the best interests of those children and families that the funds are intended to support? Why do the Bureau of Indian Affairs and the Department of Health, Education, and Welfare have no adequate family rehabilitation and protection programs in Indian communities? (Indian Child Welfare Program, 1974, p. 2)

The BIA and HEW were major federal institutions that provided federal moneys to the organizations that routinely removed Indian children, but there were no accountability measures employed for the protection of Indian families. There were no statistics or studies on the total number of Indian children who were in boarding schools, foster and adoptive homes or similar out of home placements. There were no federal reports on how the children fared in out-of-home placements. Finally, there were no sanctions for abuse of Indian child welfare.

Bertram Hirsh, a staff attorney representing AAIA, who was involved in many Indian child welfare court cases testified that state agencies “in our experience have frequently violated HEW regulations designed to protect Indian families, and HEW has not had the enforcement capabilities to enforce their regulations against the States, nor have they withheld funds when such violations have occurred” (Indian Child Welfare Program, 1974, p. 36). Leon Cook, from the Department of Indian Work in Minneapolis, Minnesota, who worked with many Indian foster and adopted youth that were removed from the reservation, stated:

I think the BIA and State welfare workers have been carrying on like at Auschwitz and I don't think they are going to change overnight. I think that the only way you're going to change is to establish law and legislation to forbid and prohibit that kind of mass adoption and theft and placement of Indian children. I don't think that anybody in the county government, or BIA is going to do that voluntarily. If they were going to do that they would have done that a long time ago. (Indian Child Welfare, 1974 p. 150).

Mr. Tonasket, President of NCAI, recommended:

...the Bureau of Indian Affairs should take a more active role to take over the responsibility and jurisdiction of Indian children on welfare, for welfare purposes, and more appropriations must be given to the Bureau of Indian Affairs to a total social services program. Right now the social services branch of the Bureau of Indian Affairs is just a token office as far as we're concerned in Colville. We have no money to operate anything. They can't even assist us in getting Indian group foster homes developed. (Indian Child Welfare, 1974, p. 226)

A reoccurring theme was that the BIA, HEW and State Welfare refused to take an active role in assisting Indian communities to meet the needs of their tribal members. Dr. James H. Shore, former Chief of the Portland Indian Health Services Mental Health Office, and Professor of Psychiatry, University of Oregon Medical School, was Chief of Mental Health Programs in the Pacific Northwest area from 1969 to 1973. Dr. Shore helped establish one of the few tribally run child welfare programs in the country. This tribe implemented extensive child care services that included family counseling and a group home that provided short-term, long-term and placements, counseling and medical treatment. In 1973, due to the opening of the children's group home, "only one Indian child has been placed off reservation in a non-Indian foster home (Indian Child Welfare, 1974, 112). Dr. Shore testified that successful child welfare programs run by the Tribes in the Northwest were not able to get federal funding, and neither HEW nor the State were contributing federal funds to support Indian child welfare programs. (Indian Child Welfare, 1974, p. 112).

The BIA's hands off stance on child welfare was criticized by Mr. Richard Lone Dog, member of the Rosebud Sioux Tribe and Director of a detention center that handles foster children. He believed the states and the BIA's failure to establish Indian foster homes was out

of a lack of concern for the Indian people, “there is no communication between the home and the BIA as far as child guidance, home care, counseling, medical and dental” (Indian Child Welfare, 1974, p.156). Mr. Lone Dog described the financial discrepancy in funding the Indian Detention Center which is on the reservation and the non-Indian off-reservation Lutheran Social Services (LSS):

The Detention Center provides the identical, same type of services as LSS and I know that not all of you are familiar with LSS, Lutheran Social Services. We get \$8.36 a day for the children we have there in the center from the State and the BIA. The Lutheran Social Services gets \$30 a day per child for the same type of services that we supply. We probably provide more services as far as moral services because we maintain these children there on the reservation, but this is the dilemma that we’re in. (Indian Child Welfare, 1974, p.156).

Recommendations of the Indian Child Welfare Program

AAIA’s recommendations in the 1974 Indian Child Welfare hearings were submitted for the legislative records. One of the many recommendations was the creation of administrative oversight of Indian Child Welfare. AAIA recommended the authorization of position of Chief of the Division of Child Welfare and Family Protection Services within the BIA (Indian Child Welfare Program, 1974, pp. 33-34). This position was an integral component in reform as AAIA stated in its legislative recommendations:

The BIA has more than 15,000 employees. Although the Bureau retains a consultant for child-welfare matters, it has no full-time administrator to revise BIA policy, to develop a comprehensive program of services, and to oversee and coordinate the services that do exist. This recommendation is intended to remedy this defect” (Indian Child Welfare Program, 1974, p. 34).

Dr. Carl Mindell, child psychiatrist and faculty at Albany Medical College, testified at the

hearings as the unofficial representatives for the American Academy of Child Psychiatry (AACCP). He testified jointly with Dr. Alan Gurwitt, Associate Clinical Professor in Child Psychology. They recognized that “there is no office, at any level, charged with focusing on the needs of Indian children” and “children’s rights” cannot be secured until some particular institution has assumed responsibility for them (Indian Child Welfare Program, 1974, p. 64).

Dr. Mindell testified that he supported all of AAIA’s recommendations except for the location of the office that focused on the needs of Indian children. Dr. Mindell stated he was “unsure of the Department of the Interior’s abilities in terms of human services, so it might well be best in HEW and Indian Health Services” (Indian Child Welfare, 1974, 59). While Dr. Mindell did not have much confidence in the Department of the Interior’s abilities to provide social services, he believed HEW’s Indian Health Service would be more appropriate. Mr. Peacock, Director of Minnesota Youth Programs, consulted with the Indian community to make recommendations, one of which was to make funds available for an Indian welfare position within the Division of Child Welfare and Family Protection Services in HEW.

Perhaps more revealing was the belief that the BIA did not perceive itself as the appropriate entity to handle Indian child welfare issues and did not take responsibility for reform. The BIA was involved in child welfare. The BIA made supplementary payments to county child welfare agencies, provided financial support to Indian Boarding Schools and had in the past financially supported Indian Adoption programs. However, Mr. Brennan clarified the BIA’s position:

There must be a clarification of the role of various Federal agencies in the administration of these programs. Many times Indian people view the Bureau of Indian Affairs as the primary service agency, when in fact in the case of child welfare services, the state is the primary service agency through block grants provided by the Department of Health, Education and Welfare. (Indian Child Welfare, 1974, pp. 143-144)

The recommendation of a federal administrative oversight body was clearly supported by the testimony offered during the 1974 hearings. The main disagreement was whether such an office should be located within the Department of the Interior's BIA or HEW. AAIA's concern was there was no office within the BIA to oversee child welfare policy, so they supported the creation of a new department within BIA, the Chief of the Division of Child Welfare and Family Protection Services. However, BIA's opinion was HEW was the primary service agency for child welfare services. Other testimony proffered distrusted the BIA to appropriately administer child welfare programs, so they preferred a department within HEW to perform the oversight. The matter of which agency was the best to conduct oversight was not determined at this time.

A second recommendation during the 1974 hearing was the beginning of coordination between the DOI and HEW so they would submit statistics on the placement of Indian children. Mr. Butler, described the BIA's program in child welfare as supplementary:

It is this nature of the Bureau's programs of services in the broad field of child welfare that makes it extremely difficult, if not impossible in some instances, for us to obtain a complete and total picture of child welfare services for Indian people. (Indian Child Welfare Program, 1974, p. 447)

AAIA recommendations for the 1974 hearing also included a request that the Department of the Interior and HEW, "regularly submit statistics on the placement of Indian children and an evaluation of the application of existing Federal laws and regulations in reducing unwarranted and unnecessary placements of Indian children" (Indian Child Welfare Program, 1974, p. 34). The lack of available data regarding Indian child welfare was an obvious problem, as many witnesses attested. It was recommended that the submission of statistics would be mandatory and encompass all agencies involved with Indian child welfare. The objective was to continue to monitor Indian child welfare data so that later federal policies could be addressed.

As the Indian Child Welfare Hearings of 1974 concluded, it was woefully apparent that

Indian child welfare was in crisis and needed immediate changes. The findings were that the percentage of Indian children who were in foster and adoptive placements was disproportionately high compared to white children. In addition, Indian children were placed in non-Indian homes, depriving them of their culture. The removals were often performed with coercion without due process. Indian children removed by social workers were overwhelmingly performed due to unsubstantiated allegations of neglect and were based on subjective standards that did not take into account the child raising customs of the tribes. Indian parents were often not aware of how they could regain custody of their children and exhibited little resistance to the social workers' removals. Indian children were adversely affected by the removal from their homes and culture. State social services received large amounts of money from the BIA to place Indian children in substitute care. States often had contentious relationships with the tribes within their borders and refused to license or share federal funds for on-reservation foster homes. The BIA did not take an active or administrative role to support tribal efforts to assume jurisdiction over their children. HEW likewise did not provide funding or assistance to tribes that wished to set up their own tribal social services programs.

The testimony from the 1974 Indian Child Welfare hearing proffered the consistent recommendation that tribes need to have authority over their own child welfare programs and authorization to directly contract for federal funding. The statistics shared in the hearings were limited to states with large Indian populations and witnesses urged the collection of Indian child welfare statistics from federal, state and tribal agencies, as this data did not exist on a national level. Finally, it was recommended that a Child Welfare and Family Protection position be created within HEW, although the BIA was also seen as an appropriate body to oversee the administration of Indian child welfare. In the event of state or agency non-compliance, HEW or the agency charged with oversight and administration authority for Indian child welfare would have authority to withhold federal funds.

American Indian Policy Review Commission

The following year, in 1975, Congress created the Joint Resolution 133 that established the American Indian Policy Review Commission (AIPRC), which became Public Law 93-580 in January of 1975. The scope of the AIPRC was an investigation of the legal relationship that encompassed all areas of federal tribal relationship. AIPRC was appropriated \$2,500,000, which funded eleven different task forces. Task Force IV conducted a comprehensive review of the historical and legal developments underlying the unique federal relationships with Indians. Task Force IV asked AAIA to gather statistical information to quantify the pervasiveness of the Indian child welfare problem. The initial AAIA survey had documented the difficulties in collecting statistics on Indian children. Task Force IV also echoed this concern of the lack of any systematic and comprehensive recordkeeping from the non-Indian agencies, concluding that no one knew the “full dimensions of this problem” in Indian child welfare (Task Force IV, 1976, p. 81). Data collected from 1973 to 1976 by AAIA documented the high number of Indian removals, when compared to non-Indian children (Task Force IV, 1976, p. 81). Task Force IV’s final report documented adopted Indian children were placed in non-Indian homes at a rate of 92.5%; these were minimum figures and did not include other placements, such as boarding schools (AIPRC, 1976, pp. 189-190).

For example, in North Dakota, by proportion there were 280 percent as many native children in adoptive homes and 2,010 percent in foster homes, as there were non-Indian children. The report presented a comprehensive picture of the extent of the problem with the caveat that “the current systems of data collection concerning the removal and placement of Indian children are woefully inadequate” (Task Force IV, 1976, p. 87). For example, due to “the lack of any systematic and comprehensive recordkeeping,” even the non-Indian agencies removing Indian children did not “know the full dimensions of the problem” (Task Force IV,

1976, p. 80). “Several State social service agency officials who were contacted as part of the data collection process expressed surprise at the statistics they gathered” (Task Force IV, 1976, p. 80 fn. 8). There is consistent evidence that the lack of knowledge about the extent of the Indian child welfare problems was universal. The high levels of disproportionate numbers in Indian child welfare was not known, even though the states were the primary agencies responsible for the removals and they had the data collection ability to monitor placements.

Task Force IV identified two levels of abuse that occurred towards Indian families in child welfare. First, “In the initial determination of parental neglect the conceptual basis removing a child from the custody of his/her parents is widely discretionary and the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family” (Task Force IV, 1976, p. 80). “Second, assuming that there is a real need to remove the child from his natural parents, children are all too frequently placed in non-Indian homes, thereby depriving the child of his or her tribal and cultural heritage” (Task Force IV, 1976, p. 80).

Task Force IV’s findings in regard to the federal trust responsibilities were that the government “failed to protect the most valuable resource of any tribe – its children” (Task Force IV, 1976, p. 87). The Task Force urged the United States must “do all within its power” to keep Indian children in Indian homes. The Task Force IV’s recommendation was that Congress should pass comprehensive legislation to address the problems of Indian child placement. This included authorizing the Secretary of the Interior to 1) undertake a detailed study of Indian child placement records, 2) determine the full statistical picture of child placement, 3) a mandatory standardized system for child placement records of all agencies who were recipients of federal moneys, 4) a requirement of annual reports from such agencies, 5) authority to review federal government’s rules and regulations regarding child placement and with tribal consultation and social service agencies, revise such policies to support the Federal policy of retaining Indian

children in Indian homes (Task Force IV, 1976, p. 88). These recommendations enlarged upon, but were consistent with the recommendation of the witnesses in the 1974 ICWP Hearings.

Now, almost two years after the poignant testimony in 1974 of parents and tribal leaders who bravely shared their personal experiences with regard to Indian child welfare, the Task Force IV Report irrefutably confirmed just how widespread the problem had become. The Task Force IV's findings and recommendations were submitted to AIRPC in July 1976, and the AIRPC's final report was completed and submitted to Congress until May 17, 1977.

Although it must have been frustrating to the proponents of Indian child welfare reform that no action occurred for two years, coordinating with AIRPC ensured a responsive legislative body would have the capability to take action on Indian child welfare in the future. The Senate had a reorganization plan to abolish the Committee on Interior and Insular Affairs, which housed the Subcommittee on Indian Affairs. However, one of AIRPC's recommendations was that a full-fledged Indian Affairs Committee be established in the Senate. Therefore, the Senate's final reorganization proposal was modified. On February 4, 1977, the establishment of a temporary Select Committee on Indian Affairs was passed by Congress to receive the AIRPC's final report and to act upon its stated recommendations. Senator Abourezk was appointed as Chairman to the newly formed Senate Select Committee on Indian Affairs.

Several months after the Select Senate Committee on Indian Affairs was formed, AIRPC's Final Report was submitted to Congress on May 17, 1977. The Final Report contained similar language for placement, jurisdiction, and funding as the Task Force IV Report, with one significant departure from final recommendations. The Task Force IV's final recommendation that the Secretary of the Interior be authorized to oversee compliance of Indian child placements, including the collection of statistics and annual reports from all agencies receiving federal moneys was omitted. There is no documented justification for the AIRPC's Final Report to have deleted this recommendation. In its place, a recommendation was inserted that

“Congress hold oversight hearings to clarify the division of responsibility between federal and state agencies involved with Indian affairs; including BIA, HEW, IHS, Office of Civil Rights, and Social and Rehabilitative Services. These consultations were to identify the causes of breakdown in the delivery of services to Indians by the states (AIPRC, 1977, pp. 422-423).

Indian Child Welfare Bill of 1976 –S. 3777

With the AIPRC’s Final Report nearing completion, Congressional attempts toward child welfare reform were renewed. Senator Abourezk and the Senate Interior Committee asked the AAIA to prepare a document for the protection of Indian children (O’Sullivan, 2009, p. 157). AAIA’s bill, Indian Child Welfare, S. 3777, was introduced by Senator Abourezk on August 27, 1976. The bill, entitled, "To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families" was the beginning step to correct the inequities in Indian child welfare (Indian Child Welfare, 1976, p. 1). There were no co-sponsors to S.3777 and it was referred to the Senate Committee on Interior and Insular Affairs and subsequently died. Key provisions of S.3777 included notice to the tribes of child welfare proceedings, placement preference with Indian extended families, grants to tribal Indian development programs, and training programs to judges and tribal staff. Housing grants were also included to improve living conditions of Indian foster and adoptive parents in order to increase the number of licensed Indian homes.

It is unclear why much of the strong language employed by Senator Abourezk, in the Child Welfare Hearings of 1974, suggesting federal agencies of HEW and IHS had the authority to employ financial sanctions upon states that continued abusive Indian child welfare practices were absent. So, too, was the effort to establish an Indian office to coordinate Indian child welfare activities. Instead, it authorized the Secretary of the Interior to make grants to individual tribes for the establishment of Indian family development programs. Greater control to tribes to administer their own programs was reflective of the federal policy of Indian Self-Determination

that was passed the year before. It was intended that these programs could license Indian foster and adoptive homes, and construct facilities for interim placement of Indian children, in addition to providing education to judges and tribal staff.

S. 3777 also directed the Secretary of the Interior to study all child placements that occurred 16 years prior to the Act, in order to bring a habeas corpus in U.S. District Court to challenge the legality of child placement on behalf of the parents or relatives. Such action was to be brought in the United States District Court for the district in which the child resided and that if the United States Attorney for such district failed or refused to initiate and prosecute a legal proceeding, the Secretary would be authorized to employ private counsel. This review of child placements was questionable as it had the potential to disrupt established families, which may not be in the best interests of the child.

The Indian Child Welfare Hearings of 1974 were the start of a journey that resulted in the introduction of the first Indian Child Welfare Bill, S.3777, in 1977. Although S.3777 did not pass Congress, several important developments helped pave the way for later child welfare reform. During this same year, a temporary Select Committee on Indian Affairs was formed in the Senate and finally AIPRC's Final Report was published in 1977. These events started a legislative path that ultimately would result in legislative reform for Indian child welfare.

Indian Child Welfare Bill of 1977

On April 4, 1977, Senator Abourezk introduced S. 1214, the Indian Child Welfare Bill of 1977 (S.1214). On June 27, 1977, Senator Abourezk, along with co-sponsors from Colorado, Minnesota and South Dakota, addressed the Senate to garner more support for the bill (Introduction of ICWA, 1977). Consequently, senators from Arizona and North Dakota also joined as co-sponsors. S. 1214 was referred to the newly formed Senate Select Committee on Indian Affairs. AIPRC's Final Report contained recommendations that were addressed in S.1214, such as a Tribe's exclusive jurisdiction over children who were domiciled on the

reservation and the Tribe's right to notice and intervention in a non-tribal placement (Report No. 95-597, 1977, p. 12). Armed with the support of multiple senators from states with large Indian populations, the Senate Select Committee on Indian Affairs held hearings on S.1214 on August 4, 1977.

Senator Abourezk set the tone of the Hearings when he stated, "The federal government for its part has been conspicuous by its lack of action" (Indian Child Welfare Act, 1977, p. 2). He continued to accuse the government of allowing state and federal agencies to, "strike at the heart of Indian communities by literally stealing Indian children" (Indian Child Welfare Act, 1977, p. 2). While the Indian child welfare Hearings of 1974 were replete with personal stories and statistics regarding the effects of the removals, the 1977 Hearings were focused on a legislative solution to achieve Indian child welfare reform. Tribes and nonprofit Indian agencies had mobilized and become active in making their recommendations in drafting the bill.

The National Congress of American Indians, the National Tribal Chairman's Association, the American Civil Liberties Union, the American Academy of Child Psychiatry, and the Friends Committee on National Legislation delivered testimony to support S.1214, in addition to many tribes (H.R. No. 95-597, 1977, p. 12).

There were political groups resisting the safeguard measures such as tribal notice requirement in the draft version of the bill. The Church of Jesus Christ of Latter-Day Saints provided testimony of the successfulness of their Indian Placement Program. They did not oppose the objectives of the bill, but rather wanted an amendment to allow their voluntary Indian Placement Program for their church members to continue. The DOI and HEW did not support S.1214, as the official position of President Carter's Administration was their national child welfare bill, S.1929, "obviated the need for separate legislation" (Report No. 95-597, 1977, p. 13).

The question of habeas corpus 16-year review of Indian child placements contained in

Section 204(a) of the defunct S.3777 bill was revisited. In prior communication with the Office of Management and Budget (OMB), Section 204(a) the 16-year study of Indian child placements raised the following concerns:

This provision raises serious legal and policy questions, and in most cases would not be in the best interest of the child, particularly when adopted, and could seriously disrupt a child's life. Legally, section 204(a) conflicts, with tribal and state placement laws and procedures, and raises the issue of invasion of privacy by the Federal government as well as that of Federal interference in State placement proceedings. Further, the conferring of jurisdiction on the U.S. District Court for the actions by the Secretary of the Interior to overturn such placements is an inappropriate forum since child placement is a Tribal and State court matter. (ICWA, 1977, p. 99)

Virginia Bausch, of the AACP, had similar concerns with section 204(a):

There is the potential questioning and possible disruption of long established relationships with adoptive or foster parents when the Secretary is in power to review all placements made up to 16 years prior to the effective date of this act. Considerable clinical discretion is needed in such reviews so that a second wrong is not brought about. For example, the original grounds for placement may have been inadequate or even unlawfully carried out. But any further change must consider what is to the best interest of the child. (ICWA, 1974, p. 107)

ARENA submitted a statement in regard to section 204(a) statement that echoed OMB's and AACP's criticisms that "overturning the final decrees of adoption, could in effect cause insecurity to thousands of children who have been living for years in what they determined was a secure and permanent relationship" (ICWA, 1977, p. 393). However, the NCAI was in full support of this review of placements. The Committee's revised bill S.1214 did not include habeas corpus 16-year review of Indian child placements. Ultimately this section was deleted without

discussion in the Committee Report. Although one financial benefit of the Committee's substitute bill resulted in a reduction of approximately \$12 million for first year authorizations (Report No. 95-597, 1977, p. 15).

A critical component to reform was the consistent recommendation by proponents of S.1214 to include a federal administrative body for Indian child welfare. However, conflicting ideas about the proper administrative body may have impeded this recommendation from its inclusion in the bill. There was not a consensus as to what entity would oversee the implementation and compliance with ICWA, and this critical recommendation also was not added to the bill.

HEW's Opposition to S.1214

HEW supported their bill, S.1928, the Child Welfare Amendments of 1977, which was introduced on July 26, 1977, one week before the ICWA 1977 Hearings. S.1928 amended the Social Security Act by establishing standards for foster and adoptive placements and reorganized child welfare programs (ICWA, 1977, p. 50). S.1929 did not include any corrective measures to specific to American Indian children and families. In the 1977 ICWA Hearing, Mr. Abourezk questioned Nancy Amidei, Deputy Assistant Secretary for Legislation/Welfare, as follows:

Chairman Abourezk: During the hearings in 1974, HEW testified at that time the Department did not have any real planning or programming designed to address the special needs of Indian communities. At that time, I specifically asked the Department that they develop such policies and programming and said that I would be interested in knowing what the Department had done. I would like to know if you have developed anything during the past three years since that promise from HEW. Has anything been developed at all?

Ms. Amidei: Senator, I do not know any detail. Again, that is something I could check

back at the Department about. (ICWA, 1977, p. 75).

Ms. Amidei, at the ICWA Hearing stated that S.1928 was more appropriate than the Indian Child Welfare Bill, as they did not want to duplicate funding sources or administrative structures (ICWA, 1977, p. 63). HEW's position was that individual projects, like the proposed ICWA, "however sensitively designed cannot take the place of support for an adequately financed, officially backed, on-going system to address the needs of children, and to support the rights of families" (ICWA, 1977, p. 60).

Bertram Hirsch, of AAIA, shed light on the legislation supported by HEW, S.1928. He recounted how S.961, which preceded S.1928:

included specific provisions for a direct relationship between the U.S. Government and Indian tribes in the delivery of child welfare services to communities. For some strange reason which I, for one, do not understand, when S.1928 was introduced, all those Indian provisions were eliminated from the bill. (ICWA, 1977, p. 151).

When Senator Abourezk questioned Ms. Amidei if she thought the Indian child welfare abuse should be ended, she responded, "I cannot answer that at the moment Senator. I do not know whether or not we can say that in terms of our requirements under the Civil Rights Act" (ICWA, 1977, p. 73).

It is clear that HEW, also aware of the Indian child welfare abuses for several years, did not have a proposal specifically addressing Indian child welfare abuses. Senators, tribal organizations and Indian tribes spent almost a decade gathering reports and statistical analysis to quantify the Indian child welfare problem. HEW, the federal agency responsible for child welfare programs, promoted S. 1928 and did not believe the need for separate legislation for Indian children was warranted. The statements by HEW staff were upsetting the Indian witnesses in the room. Ms. Denny, Director of Social Services for the Quinault Nation, commented:

I heard a very skilled lady up here this morning who could not make a commitment whether this abuse toward Indian children should be halted or not. She could not answer the question. I do not understand that. If that is an educated opinion – well, I am glad I don't have that education.” (ICWA, 1977, p. 79)

The words and actions of HEW's representative during the ICWA Hearings was a clear indication the primary federal agency charged with the protection of children, did not support separate protections to reduce the myriad of Indian child welfare abuses that were consistently documented in the 1974 and 1977 ICWA Hearings.

Senator Abourezk requested HEW's comments on the technical sufficiency of S.1214 to which HEW complied, but reiterated the Administration's position was in favor of S.1928, rather than S.1214. In the report from the Senate Select Committee on Indian Affairs, the Committee took the position that was not designed to meet the specific needs of Indian people in child welfare because it did not contain basic provisions, such as direct funding to Indian tribes and recognition of tribal courts (ICWA, 1974, p. 13). The Committee further criticized that even with such provisions, “S.1928 still fails to address the basic jurisdictional and placement preference problems, which are basic elements of S.1214. The Committee concluded HEW's S.1928, did not meet the needs of Indian children because it was “a different bill designed for a different purpose” (ICWA, 1974, p. 13).

BIA's Opposition to S. 1214

The BIA was also aware of the Indian child welfare problems since the inception of AAIA's involvement in the early 1960's with the Devil's Lake Tribe. Integral to the S.1214 hearings was the opinion of the BIA, the primary agency charged with a fiduciary responsibility to American Indians. In spite of the amount of time the BIA was aware of the Indian child welfare problems, the BIA continued to fund state welfare programs that removed Indian children. The BIA had neither policy nor planning nor budgetary requests to assist the Indian people in

remedying the situation. The following is an excerpt from the 1977 hearing testimony by Mr. Raymond Butler, Acting Deputy Commissioner of the BIA:

Senator Abourezk: Has the Bureau developed any comprehensive plans for submission to Congress to halt the unjust removal of children and to provide adequate prevention and rehabilitation programs for families such as the ones we are talking about?

Mr. Butler: Senator, I am not aware that the Bureau has developed any broad comprehensive budget proposals in that area.

Senator Abourezk: How about any kind of budget proposals?

Mr. Butler: Budget proposals relative to the needs of the families with respect to financial assistance, relative to the individual needs of those estimated number of children who are in foster care and specialized institutional care. And then of course, with respect to the educational program.

Senator Abourezk: You say that is what you're working on?

Mr. Butler: Those are the budget formulations for the Bureau, at the present time.

Senator Abourezk: So then, you don't have any kind of plan to submit to Congress with regard to halting the unjust removal of children from their families?

Mr. Butler: The Bureau of Indian Affairs has not, Senator. This, with the supplementary aspects of our program, could certainly go far beyond the Bureau's program planning.

I suggest it would go well into the HEW, well into the Justice Department planning as well. (ICWA, 1977)

There were three separate concerns that account for BIA's reluctance to support S. 1214. First, as Mr. Butler's testimony above confirms, the internal policy of the BIA was that their programs were limited to "supplementary" assistance, and, therefore, the BIA could not administer a comprehensive solution because it exceeded their program planning. A second reason for not supporting S.1214 was because it placed "new requirements on the Secretary of the Interior,

which may conflict with or duplicate current HEW authorities” (ICWA, 1977, p. 50-51). This is consistent with HEW and reflects the official Administration’s position. Finally, Mr. Butler stated that Title I of S1214, “would increase federal intrusion in the regulation of tribal domestic matters and sovereignty” (ICWA, 1977, p. 51). This concern seems to support an emerging federal policy of self-determination, as agencies were being pressured to turn over managerial control back to the Tribes. Senator Abourezk responded to this criticism:

Then you are saying that, by establishing this minimal procedure, it is federal intrusion and that you are, in effect, favoring an alternative. That alternative is that the tribes will have no voice whatsoever in how Indian children are placed. Now that is the only conclusion that I can draw from your statement. (ICWA, 1977, p.78)

Virginia Bausch, Executive Director of the American Academy of Child Psychiatry, testified that the morning testimony of the BIA highlighted their lack of concern for tribal preferences. (ICWA, 1977, pp. 104-105). The BIA, instead of supporting S. 1214, which already had support of national Indian advocacy, tribal governments and Indian communities, labeled S. 1214 as “too intrusive” because the BIA felt it violated the self-determination of the Tribes. BIA’s position was that HEW’s bill, S. 1928, could accomplish many of the objectives and goals set forth in S.1214 with amendments to “meet the special needs of Indian children and their families.” However, the S.1214, the legislation favored by the BIA, had no language or provisions “that specifically dealt with Indian children or tribal governments,” There was only the vague promise that the DOI and HEW would work together to address Indian child welfare.

Goldie Denny, Director of Social Services for the Quinault Nation, was shocked at the BIA’s comments. During her testimony she stated:

First of all, I would like to start out by saying I am appalled at what I have just heard from our trustee, the Bureau of Indian Affairs. But I don’t know why I am surprised because this has been typical of the BIA’s lack of response to Indian people for a good number of

years. I think it is a gross neglect of responsibility that they made these comments here today. I say this because these comments do not reflect the thinking of people in Indian Country, the people who live on the reservations, the people who deal with Indian child welfare problems on a day-to-day basis (ICWA, 1977, p. 76).

The BIA supported the HEW preferred bill that had 1) no tribal involvement or consultation, 2) no affirmation of exclusive jurisdiction over Indian children, 3) no Indian preventative or family preservation services, 4) no special protections for the unjust removals. And finally, 5) no placement preferences for Indian children to stay in Indian homes. Ms. Denny, was critical of the BIA:

I cannot understand why the BIA is not going along. As Mr. Butler says, Indian people are now beginning to speak out, learning, and trying to take care of some of their own problems. This is what Indian people are saying: the Federal, State, and county governments have messed up Indian child welfare matters ever since they started meddling around in them. So why not let the Indian people run their own show for a change? They can do it a lot better than any agency can. (Indian Child Welfare, 1977, p. 78)

Under Denny's leadership, the Quinault Nation developed its own social service program without any help from BIA, county or state of Washington. They reduced Quinault Indian foster care placements to under a year, while the average length of stay for the state of Washington was 4.5 years (ICWA, 1977, p. 79). The success of the Quinault Nation was unique at that time. Many tribes did not have the ability to financially implement their own family preservation and child welfare programs without BIA and state financial support. Denny confirms the BIA and State were unwilling to financially support their efforts for the development of their child welfare program. Denny's success highlights the capacity of Indian tribes to successfully exercise exclusive jurisdiction over Indian child welfare, but her testimony was in support of S. 1214

because she understood tribes would need leadership of the federal government in dealing with the states.

In spite of the testimony from Indian witnesses, BIA did not support S.1214, due to opposition from the Administration, lack of programming/capacity and the belief that to do so would be contrary to self-determination. The testimony from the Indian witnesses during the hearings also displays a strong belief that the BIA's lack of support of S.1214 was evidence that BIA was not living up to its trust responsibilities.

Administrative Oversight

The congressional hearings over S.1214 had considerable discussion regarding the federal agency that would oversee monitoring, enforcement, administration and ongoing data collection. The North American Indian Women's Association questioned what kind of governmental unit would end up directing the activities of S.1214 (ICWA, 1977, p. 297). BIA was consistently identified as an agency that could administer the program and ensure compliance, even though BIA was largely seen as an entity with a lack of leadership and sensitivity (ICWA, 1977, p. 105). However, the Oneida Tribe commented that "the services provided by the Bureau of Indian Affairs have long been targets of criticism by Indian tribes and Congress" but that it was still the "proper place to administer this program" (ICWA, 1977, p. 288). Other entities, including the previous recommendations of Task Force IV, promoted the Secretary of the Interior as the appropriate administrative body because the BIA is an agency within the Interior Department and would be the functional administrative unit. NCAI had specific ideas about implementation and compliance and recommended the establishment of an Indian policy committee, comprised of Indian tribes and organizations to "assist the Secretary in the implementation and monitoring of the Act and provide a vehicle for accountability" (ICWA, 1977, p. 84).

One other witnesses favored state level oversight, instead of a federal administrative

body. Don Milligan, Washington State Indian Desk of the Office of the Deputy Secretary, recommended a state approach to administration of S.1214 by creating a separate Indian program development and service delivery system within the state agency, staffed and administered by Indian persons with an explicit accountability to Tribal Governments (ICWA, 1974, p. 367). Milligan felt a state program was better suited to “take forceful steps to force compliance of counties who ignore or neglect Indian needs” (ICWA, 1974, p. 364). Likewise, Tony Strong, Social Services Director of the Seattle Indian Center, suggested that a monitoring committee be established to “ensure equitable implementation of S.B. 1214’s intent to meet the needs of both reservation and urban Indians” (ICWA, 1977, p. 302).

The Chairman of the Colville Reservation cautioned that S.1214 needed to utilize clear express language to oversee compliance with the Act, “If not overtly clear on its face, we feel the controls of some sort are needed to ensure that state courts and private groups and agencies comply with the provisions of the bill regarding child placement and adoption proceedings” (ICWA, 1974, p. 268). Language needs to be drafted “to strengthen the provisions to ensure compliance with S.1214, so that the intent of this bill would be implemented fully” (ICWA, 1974, p. 268).

The Indian Child welfare hearings of 1974, 1977, and 1978 all recognized the need for federal administrative oversight in order to properly implement the Act, oversee compliance measures and provide guidance in policy matters. Witnesses consistently doubted the BIA would implement S.1214 effectively, as the testimony revealed a long-standing mistrust between the BIA and Indian people. The BIA and HEW likewise denied authority over Indian child welfare, even though they could have advocated for formal language in S. 1214 granting them that authority.

Data Compliance and Sanctions

Ongoing data collection was frequently seen as integral to the success of the Act. NCAI

wanted the Secretary to establish a databank of adoption records of Indian children, requiring county courts, state archives, and state, county, and private agencies to supply the necessary records to the Secretary of the Interior (ICWA, 1974, p. 84). Gregory Buesing, Indian Task Force Coordinator, identified one of the problems, “there is no provision requiring states to provide an accounting of all the Indian children who are in state custody, or who have been placed in adoptive homes” (ICWA, 1974, p. 348).

It is no surprise that the 1977 ICWA Hearings included considerable testimony that the states were unwilling participants in helping tribal governments. The many testimonies regarding tribal-state conflicts gave Congress sufficient notice that it would take much oversight and the threat of financial sanctions to enforce Indian child welfare reform. The Oneida Tribe echoed earlier recommendations that “as a condition to federal funding, non-Indian social services work with tribes to transition child welfare to tribal governments, establish Indian preference, and change culturally inappropriate criteria” (ICWA, 1974, p. 287). Senator Abourezk, contemplated sanctions from the 1974 Indian Child welfare hearings, but no language supporting this policy was implemented in S.1214.

ICWA of 1978

On October 28 1977, the Senate Select Committee on Indian Affairs, by majority vote, recommended that the Senate pass S.1214 (Report 95th Congress, 13). On November 3, 1977, S.1214 was reported to the Senate from the Senate Select Committee on Indian Affairs, with an amendment, with the recommendation that the bill pass. On November 4, 1977, S 1214 was considered after a small discussion clarifying whether S.1214 would expand the definition of Indian Country. When it was determined that it would not change the state of Indian lands, the Senate passed the bill. S.1214/H.R. 12533 was then introduced into the House of Representatives on November 8, 1977. The House recently formed a Subcommittee on Indian Affairs and Public Lands. The House referred S.1214 to the Committee on Interior and Insular

Affairs, of which, Morris K. Udall was the Chairman. The Subcommittee worked closely with staffers from the Senate and together held two days of hearings on February 9, 1978, and March 9, 1978.

The ICWA Hearings before the House Subcommittee were a further illustration of the Administration's reticence to take on additional responsibilities in Indian Child Welfare. Forrest J. Gerard, Assistant Secretary of the Department of the Interior, in his written statement, outlined his objection to 302 (c) "which required the Secretary to present any proposed revision or amendment of the rules and regulations" regarding ICWA. Gerard wrote, 302(c) it would place an additional responsibility on the Secretary that was "burdensome and unnecessary" (ICWA, 1978, p. 6). The BIA confirmed and reiterated its earlier stance that it did not support S.1214. The BIA's position, through Rick Lavis, Deputy Assistant Secretary, had not deterred from its earlier position of opposing S.1214, which stated, "We simply believe that the bill, as it is written, is cumbersome, confusing, and often fails to take into consideration the best interests of the Indian child (ICWA, 1978, p. 55).

LeRoy Wilder, attorney for the law firm retained as general counsel for AAIA, countered that argument when he explained:

The statement of the BIA that nowhere is the best interest of the child a standard, is sheer nonsense. The entire bill is designed to achieve that end; unless the BIA is prepared to state that maintaining contact with parents and tribes in all cases is not the best interest of the Indian child, their statement cannot be supported. (ICWA, 1978, p. 70)

The BIA also stated that they were proposing substitute language for the S.1214, but it was not ready. The BIA thought alternative language would be ready and submitted to the Subcommittee by March, a period of 4 months. Several witnesses were of the opinion that the BIA's claim that it was developing alternate language for another bill was little more than a

stalling tactic. Mr. Wilder addressed the specific objections raised by the BIA by saying the witnesses for the BIA were irresponsible:

First they say there is no need for the bill, and then they ask for more time to submit their own bill, when they have been aware of the problems at least as far back as the oversight hearings in 1974. They have had plenty of time to prepare and submit a bill if they were interested. I don't think they want more time. I think they want to subvert this effort by delay. (ICWA, 1978, p. 70)

The BIA's comments were again met with incredulity and scorn. Ms. Denny related how at the 1974 Senate Hearings, the BIA agreed to consult with NCAI and tribes to work out an amenable agreement to S.1214, but that no efforts by the BIA were made. Ms. Denny confirmed that the BIA "failed to contact anybody or sit down and do anything about that particular piece of legislation" and "they never approached us at any time to ask the opinions of the 141 tribes" who were members of NCAI (ICWA, 1978, p. 67).

HEW also testified while they supported the "goals" of S.1214, they opposed it because it "should lead to a cutback in state services to Indian families, that tribes did not have the capacity, and off-reservation Indians would be compelled to go back to tribal court, which would be "distant and unfamiliar surroundings" (ICWA, 1978, p.59). HEW asked for time to work with the Department of the Interior to prepare a substitute bill and they wanted to work with the subcommittee in the development of it (ICWA, 1978, p.58). Ms. Denny countered that there were no alternatives to S.1214 and that "no practical actions of relevance have been taken by any federal or state agencies or court systems to alleviate the socially undesirable practices identified in the 1974 Senate Indian child welfare oversight hearings (65).

Congressman Teno Roncalio, Chairman of the House Subcommittee on Indian Affairs, addressed HEW after their statements:

I have profound respect for my counterpart in the Senate, Jim Abourezk, and, if we

depart from what he thinks is a good bill, the burden of proof will be on those who want the change. So if you and the BIA people want changes in the text, I will look forward to receiving them, but I think the burden of proof will rest on you folks who want the changes made. (ICWA, 1978, p. 61)

The 95th Congress Second Session was on a tight time frame. As Chairman Roncalio listened to the testimony requesting amendment to S.1214, he was cognizant that such amendments as a practical matter might stall progress for that congressional year:

What we will not want to do is make amendments to this bill that might not be readily accepted by the Senate on reconsideration on the bill and end up going to conference. We are going into a terribly busy schedule. Speaker O'Neil is determined that we work five days a week, and on October 1, we adjourn. We are trying to avoid amendments on all legislation that will do no more than effectively kill bills. I know you do not want to do that so if we can get the right kind of amendment on this bill that would be acceptable to the Senate, we might do that, but it would otherwise create dissent. (ICWA, 1978, p. 82)

Summary and conclusions concerning the policy's interaction with the forces affecting its
development and implementation

The House of Representatives was working against a timeline, not just in terms of the congressional session coming to an end, but the mounting opposition from the Carter Administration. The Administration had been opposed to the Act since the 1977 Hearings. The Administration's official position was because of constitutional and programmatic problems, they opposed the bill.

The BIA and HEW were unable to delay or derail the progress of S.1214, additional pressure to impede its progress was applied by the Department of Justice (DOJ). The DOJ sent letters to the Subcommittee, challenging the constitutionality of the Act and reaffirmed that

S.1214 was “not consistent with the Administration’s objectives” (ICWA, 1978, p.35). Frustrated with the mounting opposition, Congressman Udall sent a stinging reply to the DOJ:

I fully intend to seek House passage of this bill as reported by the Committee. While we may have to accept one or two amendments on the floor, I will strongly resist any amendments inconsistent with my strong views, above, particularly your third constitutional argument. Should this legislation be sent to the President for his signature, it would be a shame and a travesty for the Department to recommend a veto. The right of Indian Tribes and Indian families to their children is a human right and the defense of human rights, like charity, begins at home. (HR 38103.)

Instead of responding to the Committee, the DOJ tried to influence other members of the Committee individually. The DOJ had contacted several members of the House to raise their objections over the bill, even though the Committee already provided the DOJ with an extensive analysis and rebuttal to their constitutional concerns. Congressman Don Young tried to stave off objections by the Administration. However, Representative Ron Marlenee, a member of the Subcommittee on Indian Affairs and Lands, was persuaded that the bill received substantive changes at the staff level. Marlenee wanted copies of the bill to be disseminated to state courts, juvenile judges, public and private child welfare agencies and tribal governments before debate by the full house and additional discussion time to explore the additional costs to the states (p. 46). As Congress was close to ending its current session, this would have forced the bill to die and await support in a new congressional session. Timing was a critical issue.

Congressman Donald Fraser of Minnesota stated he was aware that HEW and DOI had asked the Subcommittee to not approve S.1214 because they preferred their own proposal. However, Congressman Fraser acknowledged, “But I am also aware that before Congress begin action, these two agencies which have an inherent duty to provide for the needs which we now seek to address had done regrettable little in this area” (ICWA, 1978, p. 243). ICWA was

passed with a slim margin on the last day Congress was in session, fifteen days past its intended conclusion. Senator Abourezk and Congressman Morris K. Udall worked together to get ICWA passed. This effort, coupled with the advocacy of AAIA, who took out newspaper ads in support of ICWA, resulted in President Jimmy Carter signing ICWA into law, even though he, through his Administration, had opposed the bill for several years.

BIA Guidelines

In 1979, the BIA issued *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings* (BIA Guidelines), to provide guidance to state courts in their implementation of ICWA. The BIA Guidelines were criticized because they were only advisory and did not have a binding effect; so they were ignored. In the 2014 DOJ Report, *Ending Violence so Children Can Thrive*, one recommendation was the BIA should issue regulations, “not simply update” the BIA Guidelines (p. 16). Recently, the AAIA actively engaged tribes, Indian organizations and the DOI to improve the Guidelines. In 2014, the BIA conducted listening sessions to determine if the ICWA Guidelines needed to be revised. The BIA conducted the sessions at a meeting of National Conference of American Indians and the National Indian Child Welfare Association Conference to understand the experiences and issues regarding implementation. In February 2015, the BIA revised its 1979 Guidelines, to improve ICWA implementation and to clarify certain aspects of the law. Jack F. Trope, AAIA’s Executive Director, commented on the revised ICWA Guidelines:

They are an excellent first step. Guidelines are advisory, however, and their efficacy depends on the willingness of the state courts and agencies to follow them. Thus we hope that the Bureau will take the next step and consider adopting some of these Guidelines and binding regulations. (AAIA, personal communication, March 5, 2015)

On March 18, 2015, the BIA announced a proposed rule that would make several of provisions issued in the 2015 BIA Guidelines binding as regulations to ensure consistency in the

application of ICWA (BIA, 2015, pg. 2). This is the first time the BIA has engaged in clarifying ICWA through binding regulations. This is the BIA's first effort to provide meaningful guidance in state ICWA matters.

Even after ICWA became law, Indian families still faced challenges for several reasons. First, there is a litigious nature to child placements. The constitutionality of the Act, formerly questioned by the DOJ in the legislative hearings, was upheld by a landmark Supreme Court case. The Court upheld the tribe's exclusive jurisdiction to protect the tribal interest in the child, which is distinct from, but on parity with, the interest of the parents (*Mississippi Choctaw v. Holyfield*, 1989). Second, the BIA established written guidelines for ICWA in 1979 and revised them in 2015, but they are not currently binding regulations and can be ignored. Third, States and Tribes are inconsistent in developing state-tribal agreements. Finally, there is continued overrepresentation of Indian children in child welfare.

SECTION E: DEVELOPMENT OF ALTERNATIVE SOCIAL POLICIES

Aimed at the Same Policy Objective but Involving Alternative Measures.

ICWA is a good policy, but one alternative measure would be to amend the Act to clearly authorize a federal agency to assume oversight and compliance with the Act as well as the ongoing collection of data regarding Indian child welfare. In 2010, the Tribal Law and Order Act P.L. 111-211, (TLOA) was passed, which created the Indian Law and Order Commission. TLOA completed a comprehensive review of criminal justice and public safety and also developed recommendations for improving criminal justice systems in Indian country. TLOA created the Office of Justice Services in the BIA and also established the Office of Tribal Justice to serve as policy advisor to the Attorney General. Although the creation of the TLOA and Indian offices in the BIA and DOJ did not have a direct impact on Indian child welfare, per se, it created more awareness of challenges Indian youth face in today's society and focused attention on corrective action for Indian juvenile offenders.

In addition, TLOA 2013 *Roadmap for Making Native America Safer*, recommended amendments to ICWA that enlarged its application to Indian children in state delinquency proceedings for acts that took place on the reservation and additional federal and state notice requirements to the Tribe during key stages of juvenile justice proceedings. This is a positive step forward for ICWA because any further discussion on amendments to the Act will potentially bring discussion of all of ICWA's deficiencies. Increased interest in amending ICWA could bring about comprehensive reform to resolve the lack of federal oversight and comprehensive data collection.

Aimed at a Different Policy Objective Concerning the Same Policy Issues

Instead of amending ICWA, a different policy objective may be to influence federal agencies such as the Department of Justice, Department of the Interior, or Health and Human Services to provide the oversight to ICWA without an express authorization or amendment to ICWA. Recently, federal agencies have increased their collaboration with tribes to ensure the intent of ICWA is supported. The recommendation to improve ICWA oversight and data collection may be a viable option supported by the present Obama Administration. In 2012, the *Report of the Attorney General's National Task Force on Children Exposed to Violence*, recommended:

Because ICWA is a federal statute, successful implementation will be best ensured through strong, coordinated support from the Bureau of Indian Affairs in the Department of the Interior, the DHHS Administration for Children and Families, and the Office of Juvenile Justice and Delinquency Prevention within the Department of Justice. (p. 121)

The appointment of a federal task force or commission to examine the needs of Indian and Alaska Native children exposed to violence was recommended. In 2014, the Attorney General's Advisory Committee Report, found, "thirty-five years after its passage, full implementation of the ICWA remains elusive" (p.18). There were over thirty recommendations, including specific

ICWA implementation and compliance reforms: 1) The legislative and executive branches of the federal government should ensure ICWA compliance. 2) ACF, BIA, DOI, and tribes should develop a modernized unified data-collection system designed to collect AFCARS, ICWA, and tribal dependency data on all Indian and Alaskan Native children who are placed into foster care by their agency and share that data quarterly with tribes, to allow tribes and the BIA to make informed decisions regarding Indian children. 3) The ACF and BIA should work collaboratively to ensure state court compliance with ICWA. 4) The BIA should issue regulations and create an oversight board to review ICWA implementation and designate consequences of noncompliance and/or incentives for compliance with ICWA to ensure the effective implementation of ICWA. The DOJ's report mirrors many of the same recommendations documented by the witnesses in the 1974, 1977, and 1978 congressional hearings. Other non-governmental organizations have recently weighed in on the application of ICWA as high profile cases have shed light on the continuing ICWA problem.

On August 12, 2013, the American Bar Association (ABA) approved a resolution that urged the full implementation and compliance with ICWA. ABA was concerned that since the passage of ICWA, "effective implementation and state compliance with its requirements have been unclear" and no nationwide data is available to determine the exact nature of the problems. Likewise, in October 2013, NCAI passed a resolution to "urge the U.S. Department of Justice to launch a formal investigation of non-compliance with the Indian Child Welfare Act" to understand "the scope and frequency of non-compliance." The NCAI charged that since no federal agency had taken action to formally examine ICWA's noncompliance, this has "allowed these issues to continue and worsen" (NCAI, 2013).

On October 30, 2013, U.S. Senator Heidi Heitkamp introduced S.1622, the Alyce Spotted Bear and Walter Soboleff Commission on Native Children. The purpose of S.1622 is the creation of a national commission authorized to conduct an intensive study into issues

facing Indian children. The Commission would make recommendations on how to improve the lives of Indian children, including an investigation into the overrepresentation of Indian children in child welfare. S.1622 had 34 co-sponsors and was referred to the Senate Committee on Indian Affairs. The Committee made a few amendments and with its recommendation, it was introduced on May 21, 2014; however the bill was not enacted. On January 22, 2015, Senator Heitkamp reintroduced S. 1622 as S. 246, with 24 co-sponsors and it was sent to the Senate Committee on Indian Affairs. On February 4, 2015 it was reported favorably from the Committee with an amendment. If this bill becomes law, this will be the first comprehensive investigation into the well being of Indian children, filling an existing gap of information that will aid future states, tribes and national policymakers.

On August 8, 2014, DOJ filed an Amicus brief in the case of the Oglala Sioux Tribe v. Van Hunnik. The class action lawsuit filed by the ACLU on behalf of Oglala and Rosebud Tribes and three tribal members, alleged that ICWA protections and due process were violated. This is the first time DOJ has participated, alleging noncompliance with ICWA. On December 3, 2014, Attorney General Eric Holder announced the DOJ was establishing an initiative to promote compliance with ICWA. Holder stated:

And we are redoubling our support of the Indian Child Welfare Act, to protect Indian children from being illegally removed from their families; to prevent the further destruction of Native traditions through forced and unnecessary assimilation; and to preserve a vital link between Native children and their community that has too frequently been severed – sometimes by those acting in bad faith. (p. 4)

Holder identified specific ways DOJ would assist ICWA compliance through 1) identification of state court cases where the United States Government can file opposing briefs in the removal of Indian children. 2) Partnering with DOI and HHS to use all the tools available to promote ICWA compliance. 3) A collaborative effort to expand training opportunities for state judges and

agencies. 4) Promote the tribe's authority to make placement decisions. 5) Discover where ICWA is being systematically violated. These examples are indicative of the overwhelming ways that ICWA can be improved upon through better intra-agency coordination.

Comparison and Evaluation: each alternative policy is to be analyzed in accordance with relevant sections of the framework and compared with the original policy and compared with alternative policies.

Although recommending ICWA be amended may seem like the strongest measure to authorize a federal oversight body and ensure data collection to oversee compliance, this may be a difficult process. ICWA has had several amendments proposed and none have passed Congress. The recent cases involving ICWA were contentious and many groups, such as adoption agencies, outwardly oppose ICWA; and they could be a strong force against any improvements to ICWA that could strengthen the law.

The other alternative would be to continue to follow the Attorney General's Advisory Committee Report (2012) and encourage federal agencies such as ACF, BIA or DOJ to collaborate, issue regulations, and assume the role of administrative oversight to ensure state court compliance. The 1995 GAO report already identified ACF with general administrative oversight. The existing focus on Indian issues by the Obama Administration and DOJ is in sharp contrast to the environment that existed in the 1970's. The recent legal developments in ICWA have raised awareness regarding areas that ICWA could be strengthened. Now may be the most opportune time to take advantage of these two factors, in order to push for a federal oversight body and a uniform assessment of the extent of ICWA noncompliance.

This study confirms a remedy to this situation would be to follow the recommendations of the early Indian child welfare advocates; which advised for a federal oversight agency to coordinate ICWA implementation and compliance, as well as to provide uniform collection of

Indian child welfare statistical data on a national level. An amendment to ICWA could accomplish this goal, but may be a long, challenging process. Alternatively, Tribes could lobby the federal agencies to better coordinate and assume some of these responsibilities, as there has been increased federal dialog and governmental reports that have recommended such action take place to improve ICWA compliance. Either alternative policy would help reduce the insidious problem of overrepresentation of Indian children in child welfare and improve ICWA compliance.

CHAPTER 5

SUMMARY

The Indian child welfare practices in the 1960's and 1970's are documented in the U.S. legislative history from 1974-1978. The factors that influenced the passage of ICWA were attributed to data from surveys and reports from Indian advocates. This data was coupled with testimony from tribes and tribal organizations, non-Indian professionals, and federal agencies and justified the need for a federal law to address Indian child welfare.

First, the quantifiable data from AAIA was by far the backbone of the justification for an immediate federal action. As the first measurement of the extent of the Indian child welfare problem, this prompted the congressional inquiry in 1974 by the Senate. The surveys conducted by AAIA in 1969 and 1974 are the source of the often quoted statistics that 25%-35% of all Indian children were placed in non-Indian adoptive homes and foster homes at a rate of 92.5 percent (AIPRC, 1976, p. 190). The AAIA surveys, coupled with the subsequent Task Force IV Report, all affirmed that "abusive child welfare practices" were committed against Indian children. There was no testimony proffered that contradicted the data; in fact, there was concern that the statistics were not inclusive of Indian children in boarding schools and thus the number of removals was believed to be much higher. AAIA helped draft legislation that led to the final version of ICWA and helped ensure its passage.

Second, the Tribes were outspoken and proffered first hand testimony regarding the Indian child welfare issues. Their testimony illuminated the day-to-day problems that existed between state and federal agencies that were often unwilling to help or that exhibited outward animosity towards the Tribes. Numerous accounts that documented specific Indian child welfare problems were outlined and shared with Congress. Although each Tribe had different circumstances and experiences, there was a consensus that confirmed the pervasiveness of state social worker bias, lack of due process for Indian families, and preference for non-Indian placements, all which threatened the continued existence of Indian tribes. In addition, tribal

governments and Indian organizations voiced their concern with state and federal agencies that financed state government child welfare programs that participated in the perpetuation of these abuses. Indian organizations, such as NCAI, were influential, in that it had the support of its 130 member tribes. The NCAI was a unified body and was able to summarize the major issues and draft specific recommendations for comprehensive change.

Third, the testimony from non-Indian professionals focused on the mental impact of the removals on the Indian children. The APA testimony delved into the traumatic impact of the removals, the assimilation efforts, termination of the parent-child relationship, as well as lack of parent models in the Indian boarding schools. These efforts were attempts to destroy Indian culture and it had disastrous effects on Indian families. The professional testimony further emphasized the need for immediate changes in Indian child welfare.

Fourth, the testimony from the BIA and HEW was integral in confirming the breakdown of services from federal agencies to Indian children. Neither agency took affirmative action to organize its departments to assist in reducing the disparity in treatment of Indian children. For example, the BIA did not establish guidelines for foster care and adoptive placements of Indian children, even though they funded state Indian child welfare programs. They did not ask for additional appropriations to address the issue. They stated they were only a supplementary agency, and thus, other federal departments, such as HEW or DOJ, were more appropriate agencies to participate in child welfare matters.

HEW was asked at the 1974 Indian child welfare hearings by Senator Abourezk to develop policies and programming for Indian child welfare and yet, at the 1977 hearings still had not done so. The testimony of BIA and HEW seem to indicate they did not believe they had authority to take action. Their inaction seemingly influenced Congress to create a legislative solution. For example, Senator Abourezk questioned, "Why is it that BIA and HEW by their silent complicity, continue to fund state welfare programs which act unlawfully toward Indian families and children? (Indian Child Welfare Program, 1974, p. 2).

Congress was justified in passing ICWA to provide immediate and comprehensive relief on a national level. The record is replete with multiple examples of the disparate factors that were contributable forces to the Indian child welfare problems. Federal agencies denied they had the authorization to take action and this reinforced the need for legislative action. These examples are a clear justification of the need to craft a federal law to prevent the abuses and also reaffirm exclusive jurisdiction of tribal governments over their children.

The question of why congress did not provide federal administrative oversight of ICWA is difficult to assess, as the record does not indicate an answer to this question. However, there were various forms of administrative oversight bodies that were recommended in the 1974, 1977 and 1978 hearings. With the need for federal oversight clearly supported by the testimony during the 1974, 1977 and 1978 Hearings, why was all reference towards such a solution omitted from the final draft of ICWA? A review of the legislative record is silent on this issue. There is no mention or justification for its omission. This was clearly a significant part of the suggestions from the witnesses, but a thorough review of the record still reveals no direct causal relationship for it being excluded. However, the record does reflect several factors that had a significant impact on the passage of ICWA. First there were four reasons (1) Opposition from the Administration, (2) No collective body (3) Data Collection, and (4) Timing.

First, the Carter Administration tried to derail passage of the Act through the testimony of BIA, HEW and the DOJ. The Administration “cleared” both BIA and HEW’s statements at the 1977 and 1978 Hearings, which adamantly reinforced its opposition to ICWA. Each of these cabinet level administrations were carrying out the policies of the President rather than supporting the needs of the Indian people, who labored for years to create a change for their children. An example of how entrenched HEW was in promulgating its objectives at the expense of Indian children is evidenced in the exchange between Senator Abourezk and Ms. Amidei during the 1977 Hearings. Ms. Amidei was asked if she thought Indian child welfare abuse should be ended. She stated she could not answer and her justification was that she

was unsure if she could respond to that question (ICWA, 1977 p. 73). Her evasive language was upsetting to the Indian witnesses and appeared to indicate a level of calculated detachment.

Second, although the majority of witnesses confirmed the need for a federal oversight body, there was not a consensus as to which federal agency would be authorized with this responsibility. The witnesses did not have a cohesive, unified plan for who would oversee ICWA because they were distrustful of the very federal departments that were most appropriate for ICWA's administration. The testimony confirms BIA and HEW did not take an active role in crafting responsibilities for their department to improve Indian child welfare, which was reaffirmed by their testimony during the hearings. Many witnesses, as well as the House and Senate committees, noted this as an abdication of their federal responsibilities. NCAI preferred the BIA as the administrative body, and clearly this would have been an appropriate body, as they had an existing Department of Social Services and existing appropriations for Indian child welfare, as well as a compendium of knowledge regarding Indians, to wit, existing federal Indian law. Implementing NCAI's recommendations was fully supported by its 130 member tribes and, as such, should have been the most persuasive argument. However, the reality was there was no viable alternative that was amenable to all parties and this made the final recommendation controversial.

Third, the requirement for the collection of national data on Indian child welfare was ignored in the final draft of ICWA. Task Force IV's findings were that "systematic and comprehensive recordkeeping" from the non-Indian agencies was of paramount concern. It was reasonable to request the collection of statistics and annual reports from all agencies receiving federal moneys. Ongoing national and tribal statistical data collection was paramount and repeatedly cited as a major problem, as a comprehensive uniform collection of Indian child data did not exist. However, the proposals addressing the collection of such data were coupled with the problematic establishment of a federal administrative body. Without a federal administrative

body in place to oversee the act, it is probable that implementing this recommendation was not feasible.

Fourth, timing affected the final version of ICWA. Appropriate congressional bodies were not in place to facilitate S.1214 and it took years to develop congressional infrastructure. After the 1974 Indian child welfare hearings, the AIPRC was established, and it took two years to complete their study. Congress then had to establish a Select Committee on Indian Affairs with full jurisdiction over all proposed legislation and other matters relating to Indian Affairs, not just a temporary one. The House had to establish the Committee on Interior and Insular Affairs Subcommittee, as this was the appropriate committee to address S. 1214. By the time this bill was introduced to the House, opposition was mounting from the Carter Administration. In addition, one member of the House Committee on Interior and Insular Affairs was promoting a delay. However, Congress was about to adjourn and no controversial amendments were made in order to pass the bill. If S.1214 was not passed in the current session, it would die, and the effort would have to be repeated in the next congressional session. Too much was at risk and it seems, although there were acknowledged deficiencies in the final draft of S.1214, it was deemed an appropriate risk in order for S.1214 to pass. Representative Donald Fraser noted, "Though history may show that the legislation which this Subcommittee reports was not perfect, waiting for guaranteed perfection is not a luxury we can often afford. And of one thing I am sure – without action, no problem would ever be solved. (ICWA, 1978, p. 243)

Conclusion

ICWA's beginnings initiated a written record of prolonged genocide against Indian tribes with personal stories from Indian families that were previously undocumented. Indians protested against the large number of Indian children removed and placed in non-Indian care. This resulted in the passage of a unique law, ICWA, which intended to protect vulnerable Indian children. Since the early reformation days of Indian child welfare, the role of the federal government, specifically the Department of the Interior's BIA and HHS, have been controversial.

The history of the passage of ICWA also confirms the overwhelming pressure from the Carter Administration, which tried to defeat the Indian child welfare bill. The voluminous legislative records of ICWA demonstrates the tenacity and determination of Indian mothers, tribes, advocacy groups and the unwavering public service of the Senate and House members who worked tirelessly to halt the Indian child welfare abuses. Ultimately, the ICWA hearings mark an era of self-determination in history as Indian people used the democratic process to fight back against intolerable bias and coercion, to enjoy the basic rights of Indian families to live together with their culture and traditions.

The goals of ICWA were founded on rectifying problems that existed historically, but those issues, such as overrepresentation, still exist for Indian children today. The 1974, 1977, and 1978 Indian child welfare hearings early on identified the need for federal involvement to oversee ICWA implementation and compliance. However, to date, no federal agency has assumed this responsibility as each has denied it has authority to do so. Consequently, compliance with the law has suffered, and although many efforts have been made to rectify this situation, none have been successful. Proper oversight and compliance of ICWA could address and ameliorate the current overrepresentation of Indian children in child welfare. A step to address this problem would be the authorization of ICWA oversight through an amendment to ICWA or federal intra-agency coordination to share the assumption of authority. Secondly, the collection of nationwide ICWA data could help identify the extent of ICWA problems, assist with full implementation of ICWA and promote future policy development for continued improvements. If these measures were finally put into place, the full protective measures of ICWA would be employed, resulting in greater protections for Indian children. This oversight and identification of ICWA problems could effectively reduce the overrepresentation of Indian children in child welfare.

In the last thirty-four years, nongovernmental agencies have done their part in trying to assess the problems of ICWA and improve the outcomes for Indian children in the child welfare

system. It is time for the federal government to acknowledge and embrace its role in Indian child welfare and begin to work with the Tribes and States to link together all resources for a permanent solution. ICWA was a major win for Indian rights; but tribes have a lot to lose if compliance with the Act continues to be overlooked. As Ramona Bennett, Indian activist, cautioned, “If you lose your children, you are dead, you are never going to get rehabilitated, you are never going to get well” (ICWA, 1977, p. 164).

LIST OF ABBREVIATIONS

AACP	American Academy of Child Psychologists
AAIA	Association on American Indian Affairs
ABA	American Bar Association
ACF	Administration of Children and Families
ACLU	American Civil Liberties Union
AFCARS	Adoption and Foster Care Adoption Analysis and Reporting System
AI/AN	American Indian/Alaskan Native
AIPRC	American Indian Policy Review Commission
ARENA	American Resource Exchange of America
BIA	Bureau of Indian Affairs
CPS	Child Protective Services
CWLA	Child Welfare League of America
DOJ	Department of Justice
GAO	Government Administration Office
HEW	Health, Education and Welfare
HHS	Health and Human Services
IAP	Indian Adoption Project
ICWA	Indian Child Welfare Act
IHS	Indian Health Services
NCAI	National Congress of American Indians
NICWA	National Indian Child Welfare Association
NPR	National Public Radio
SOI	Secretary of the Interior
TLOA	Tribal Law and Order Act

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