104TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPT. 104–542 Part 1

ADOPTION PROMOTION AND STABILITY ACT OF 1996

APRIL 30, 1996.—Ordered to be printed

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

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 3286]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 3286) to help families defray adoption costs, and to promote the adoption of minority children, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Beginning on page 13, strike title III and amend the table of contents accordingly.

PURPOSE OF THE BILL

The purpose of H.R. 3286 is to help families defray adoption costs, and to promote the adoption of minority children.

BACKGROUND AND NEED FOR LEGISLATION

The Adoption Promotion and Stability Act of 1996, H.R. 3286, contains three titles. The Committee on Resources only has jurisdiction over title III, which deals with amendments to the 1978 Indian Child Welfare Act (ICWA). For that reason this report concerns only title III of H.R. 3286.

ICWA was enacted in 1978 in response to an appalling situation which existed in the 1970's where massive numbers of Indian children (in some States 25–35 percent of all Indian children born) were being put up for adoption. Unethical attorneys were locating children and arranging many adoptions without due process of law.

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Of great concern was a failure to recognize the cultural and social standards of Indian families and their communities. ICWA was based upon the premise that an Indian child's tribe has primary authority, shared with his or her parents, over that child's relationship with his or her tribe.

Congress found it in the best interests of all Indian children to establish minimum Federal standards for the removal of Indian children from their families and their placement in foster or adoptive homes which reflect the unique values of Indian culture. The most important component in its solution to the problems of Indian child adoption was to give tribal courts, instead of State courts, exclusive jurisdiction over Indian child custody proceedings. Congress also imposed certain standards on these proceedings.

Title III of H.R. 3286 would amend the Indian Child Welfare Act to exempt from its coverage Indian child custody proceedings involving Indian children whose parents do not maintain significant social, cultural, or political affiliation with the tribe of which the parents are members. This proposal represents a major change to ICWA. In particular, title III of H.R. 3286 provides that ICWA does not apply to any child custody proceeding involving a child who does not reside on or is not domiciled within a reservation, unless:

at least one biological parent is of Indian descent; and

at least one biological parent maintains "significant social, cultural, or political affiliation" with the parent's tribe.

In effect, this proposal would create a gigantic loophole in ICWA by allowing a State court, instead of a tribal court, to decide that an Indian child's parents have not maintained "significant social, cultural, or political affiliation" with a tribe.

Aside from the removal of the proceeding to a State court from a tribal court, this bill contains no legal definitions of the words "significant", "social", "cultural", "political", or "affiliation". These determinations would no doubt be subject to massive litigation.

Title III of H.R. 3286 also adds a new, universal requirement to each tribe's existing requirements for membership by requiring that "a person who attains the age of 18 years before becoming a member of an Indian tribe may become a member of an Indian tribe only upon the person's written consent." It is unclear what this language has to do with the adoption of Indian children or with ICWA. Whatever its intent, this provision implies that State courts, rather than tribal courts, will have jurisdiction over the question of whether certain individuals are or are not members of a tribe.

In sum, title III of H.R. 3286 would make massive changes in ICWA by removing from tribal courts, and giving to State courts, jurisdiction over whether ICWA applies to certain Indian children and certain adults.

COMMITTEE ACTION

H.R. 3286 was introduced on April 23, 1996, by Congresswoman Susan Molinari. The Committee on Resources received a referral of those portions of the bill under its jurisdiction until April 30, 1996. Only title III of the bill lies within the Committee's jurisdiction. No hearings were held on title III of H.R. 3286. On April 25, 1996, the Full Resources Committee met to consider title III of H.R. 3286. An

amendment to strike title III was offered by Committee Chairman Don Young, and adopted by voice vote. The bill as amended was then ordered favorably reported to the House of Representatives, in the presence of a quorum.

SECTION-BY-SECTION ANALYSIS

The Committee on Resources struck the only portions of H.R. 3286 (title III) which were referred to the Committee.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

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

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of title III of H.R. 3286, as amended by the Committee on Resources, will have no significant inflationary impact on prices and costs in the operation of the national economy.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out title III of H.R. 3286. However, clause 7(d) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, title III of H.R. 3286, as amended by the Committee on Resources, does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

2. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of title III of H.R. 3286.

3. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for title III of H.R. 3286 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 29, 1996.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared a cost estimate for Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, as ordered reported by the House Committee on Resources on April 25, 1996.

The Committee adopted an amendment that would strike title III of H.R. 3286. Therefore CBO estimates that title III of H.R. 3286, as ordered reported, would have no federal budgetary effects.

Since enactment would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this title to the bill. Title III of H.R. 3286, as ordered reported, contains no mandates as defeined in Public Law 104–4 and would impose no direct costs on state, local, or tribal governments, or the private sector.

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

Sincerely,

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

COMPLIANCE WITH PUBLIC LAW 104–4

Title III of H.R. 3286 contains no unfunded mandates.

DEPARTMENTAL REPORTS

The Committee has received no departmental reports on title III of H.R. 3286.

CHANGES IN EXISTING LAW

If enacted, title III of H.R. 3286, as amended by the Committee on Resources, would make no changes in existing law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill was referred to this committee for consideration of such provisions of the bill as fall within the jurisdiction of this committee pursuant to clause 1(l) of rule X of the Rules of the House of Representatives. Any changes made to existing law by the Committee on Ways and Means are shown in the report filed by that committee. The amendment made by this committee does not make any change in existing law.

SUPPLEMENTAL VIEWS ON H.R. 3286

We report these supplemental views on title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996 (the "bill"), because of our great concern that this bill, however well-intentioned, will do grave and unavoidable harm to the Indian Child Welfare Act (the "Act") and even, perhaps, to the future of Indian tribes and Indian children as well.

In addition, we write to express our displeasure with the process in which this bill has been introduced, referred, and scheduled for a floor vote. The fact that title III of this bill was introduced without any consultation with those people it affects the most—Indian parents, children, and tribes—strikes us not only as grossly paternalistic but a recipe for legislative disaster. Indeed, the laws and practices surrounding Indian adoptions are complex and poorly understood. Rather than proceeding rashly into a field armed simply with anecdotal evidence and fierce convictions, perhaps the sponsors should have sat down and gathered empirical information from the tribes and social workers most familiar with the day-to-day workings of the Act. In other words, the bill's sponsors should have at least thought about conducting a hearing on this important measure. Yet none were scheduled or even planned.

The bill's sponsors had originally planned to bring this bill to the House floor without any Committee proceedings at all. Although the House leadership apparently agreed with the Committee Chairman that there should at least be an experience of process and therefore granted a six day referral to this Committee, the fact remains that the this Committee's role was always viewed suspiciously, and even antagonistically, largely out of a concern that the committee membership would be sympathetic to the Indian tribes' point of view. Of course, we have serious membership with the bill, as set forth below. That is because this Committee takes this Nation's federal trust responsibility towards the more than 550 Alaska Native and American Indian tribes seriously.

This does not mean that the Committee is not aware of problems associated with the implementation of the Act, nor does it mean that the Committee is not willing to take measures to make improvements to the Act. The point is that the Committee members would have been willing to work with the sponsors in a constructive and deliberate manner on legislation that improves and strengthens the Act. But that is not what the sponsors apparently wanted. And that is unfortunate because the remaining adoption titles in the bill have strong merit. It seems odd to jeopardize passage of an otherwise worthwhile bill by burdening it with a controversial, untested, and hastily drafted provision that has merited

the strong objection of the Committee of primary jurisdiction and the unanimous opposition of Indian tribes throughout the country.[1]

Turning to the substance of the bill, our objections are manyfold. In order to fully illustrate the depth and nature of our concerns, we believe it is appropriate to first examine the history and purposes of the Act.

The Indian Child Welfare Act was enacted in 1978, after ten years of Congressional study, in order to protect Indian children and Indian tribes. This Committee, in its 1978 Report, determined that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[2]

As stated in the Act itself, Congress "has assumed the responsibility for the protection and preservation of Indian tribes and their resources" and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. * * *"[3]

Prior to enactment of ICWA, the Committee received testimony from the Association on American Indian Affairs that in 1969 and 1974 approximately 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.[4] The rate of adoptions of Indian children was wildly disproportionate to the adoption rate of non-Indian children. According to the 1978 House Report, Indian children in Montana were being adopted at a per capita rate thirteen times that of non-Indian children, in South Dakota sixteen times that on non-Indian children, and in Minnesota five times that of non-Indian children.[5] In one House hearing, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians explained the cause for the large removal of Indian children:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.[6]

Thus, Congress chose to act to protect Indian tribes against the disproportionate wholesale, and often unwarranted, removal of In-

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[1] To date, the Committee has received letters from twenty-two individual tribes, as well as the Intertribal Council of Arizona (representing nineteen Indian tribes), the Bureau of Catholic Missions, the National Congress of American Indians (representing 201 tribes), the Association on American Indian Affairs, the Native American Rights Fund, the National Indian Child Welfare Association, the Indian Child Welfare Law Center, and the United Indians of All Tribes Foundation, all strongly opposing the bill.

[2] H.R. Rep. No. 1386, 95th Cong., 2d Sess. (hereinafter 1978 House Report) 9. H.R. 12533, was introduced in the 95th Congress by Chairman Udall and co-sponsored by a number of committee members including Reps. Miller and Vento.

[3] 25 U.S.C. § 1901(2), (3).

[4] 1978 House Report at 9.

[5] Id.

[6] Hearings on S. 1214 before the House Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands, 95th Cong., 2d Sess. (1978).

dian children from their families and subsequent placement in adoptive or foster homes. Chairman Udall, the Act's principal sponsor, reaffirmed the need for the Act on the House floor, "Indian tribes an Indian people are being drained of their children, as a result, their future as a tribe and a people is being placed in Jeopardy."[7]

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

> The protection of this tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child which is distinct but on a parity with the interest of the parents.[8]

Another problem surrounding Indian adoptions that the Congress chose to address was the inability of non-Indian institutions, in particular state courts and adoption agencies, to recognize the differing cultural values and relations in Indian communities.[9] For instance, state courts and adoption workers usually failed to grasp the powerful rule and presence of the extended family in Indian communities.[10] Thus, Congress structured the Act to counter the tendency of non-Indians to focus solely on the immediate relationship of the Indian children to their parents whole ignoring the relationship of the children to their extended family. In fact, that is a glaring shortcoming of the proposed bill which stresses only the relationship of the child's parent to the tribe.

In order to balance the interest of Indian children and their tribes, Congress set up a carefully tailored dual jurisdictional scheme to provide deference to tribal judgment in cases involving Indian children residing on Indian lands and to provide concurrent but presumptive tribal jurisdiction in the case of Indian children not residing on Indian lands. It is important to recognize that this dual jurisdictional scheme settles jurisdictional and choice-of-law issues in a way that best facilitates the placement of Indian children with families. This is so for the simple reason that tribal courts are generally in a better position than state courts to know whether an Indian child has relatives who want to adopt the child, or whether there are other Indian or non-Indian families who want to adopt the children.

As a final matter, Congress enacted ICWA to address the social and psychological impact on Indian children of placement in non-Indian families. The U.S. Supreme Court has stated that "it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the det-

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[7] 124 Cong. Rec. 38102 (1978).

[8] *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 52 (1988) quoting In re *Adoption of Halloway*, 732 P.2d 962, 969–70 (Utah 1986).

[9] The Act states that "the States * * * have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in the Indian communities and families. 25 U.S.C. 1901(5).

[10] As stated in the 1978 House Report: "[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." 1978 House Report at 10. See also Holyfield at 35, n. 4.

rimental impact on the children themselves of such placement outside their culture." *Holyfield* at 59–50. In particular, the Court noted studies that demonstrated that Indian children raised in non-Indian settings often have recurring developmental problems encountered adolescence. Id. at 50, n.24. See also, Berlin, "Anglo Adoptions of Native Americans, Repercussions in Adolescence," 17 J. Am. Acad. of Child Psychology 387 (1978). Removal of Indian children from Indian families precipitates not only a cultural loss to the Indian tribe but a loss of identity to the children themselves.

Recent studies indicate that ICWA has worked well in redressing the wrongs caused by the removal of Indian children from their families. A 1987 report revealed an overall reduction in foster care placement in the early 1980s after enactment of ICWA.[11] A 1988 report indicated that ICWA had motivated courts and agencies to place greater numbers of Indian children into Indian homes.[12] Testimony received at a May 1995 hearing on H.R. 1448 from Terry Cross, director of the National Indian Child Welfare Association, indicates that, contrary to assertion by non-Indian adoption attorneys and agencies of hundreds or even thousands of "problem" Indian adoptions, there may be only 40 contested Indian adoption cases in the past fifteen years, less than one-tenth of one-percent of the total number of Indian adoption cases during that period. As set forth later, we believe that the vast majority of those "problem" cases are the direct result of willful violations of the Act and can be addressed by changes to the law that promote greater notification and sanctions for violations.

Having examined the background of the Act, we turn to reservations about the substance of H.R. 3286.

Section 301 of the bill would limit the application of the Act to off-reservation Indian children with at least one parent who maintains a "significant" social, cultural, or political affiliation with an Indian tribe. A determination of such an affiliation is final.

Our first objection is that this section is vague. The bill provides no guidance to the courts as to the meaning of "significant" or "affiliation". The use of "final" can be read to preclude appellate review by state, federal or tribal courts. The vagueness inherent in this section is likely to lead to new levels and areas of litigation, contrary to the purposes of the Act and in frustration of efforts to quickly place Indian children with adoptive or foster families.

Second, the bill needlessly jettisons a simple test for the application of the Act, membership (which is a political test), in favor of a complicated test. Again, this will likely promote rather than curtail litigation involving Indian custody proceedings, contrary to the purpose of the Act.

Third, the bill would cede back to state courts and agencies the primary role of making placement and jurisdictional decisions. As explained in the history above, Congress chose to give primary jurisdiction over the adoption of Indian children to the tribes precisely because of the states' inability to understand tribal cultural and political institutions. Thus, to give states the role of first determining whether an Indian parent has sufficient social, cultural or

[11] See "Note, The Best Interests of Indian Children in Minnesota," 17 American Indian Law Review 237, 246–47 (1992).

[12] Id.

political affiliations with a tribe as to warrant tribal court jurisdiction runs contrary to the intent of the Act. To date we have heard no testimony or evidence to support the assumption that there has been any improvement in the state courts' or agencies' abilities to understand tribal values and cultures.

Fourth, by focusing solely on the relationship of the child's parent to the tribe, the bill ignores the entire role of the extended family in Indian country. Thus the bill operates at the expense of the child's grandparents, aunts and uncles who likely will have the requisite "significant" contacts with the tribe and who have a strong familial and cultural interest in the child. It was the inability of state courts and adoptions agencies to recognize this interest that led to the wholesale removal of Indian children from their culture in the first place.

Fifth, the bill misses the fat that the Act is largely jurisdictional in nature. In other words, the Act transferred jurisdiction in Indian adoption cases to tribal courts from state courts because the tribes were in the best position to act in the best interest of Indian children. But, the Act in no way requires that Indian children be placed with Indian families. The bill, unfortunately, seems driven in part out of fear that tribal court jurisdiction is tantamount to placement in an Indian family. We believe this fear is unfounded.[13] Rather, we believe that tribal courts remain capable of sound judgment and will place an Indian child with a family, Indian or non-Indian, when it determines that it is in the child's best interests.

Section 302 of the bill provides that an Indian who is eighteen years of age or older can only become a member of a tribe upon his or her written consent and that membership in a tribe is effective from the actual date of admission and shall not be given retroactive effect.

This section reaches directly into a core area of tribal sovereignty, membership,[14] and makes written consent a prerequisite for adults. The major problem with this approach is that tribal membership is not, as a matter of practice, synonymous with enrollment. Many tribes, especially smaller tribes, do not have updated enrollment lists. The Department of Interior's own Guideline to State Courts for Indian Child Custody Proceedings point this out.[15] The provisions of this bill would penalize Indian children and their parents in these tribes. Lack of funds is one reason. Another reason is that Indians often do not enroll until such time as they need Indian Health Service care or scholarship assistance. In addition, we have heard testimony that tribes often simply "know" who their members are.

The result is that many Indians who are part of the Indian community and eligible for enrollment would be excluded from the

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[13] The Supreme Court has rejected attacks against tribal court jurisdiction founded on claims of bias or incompetence, noting Congressional policy promoting the development of tribal courts. See *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987).

[14] See *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 55–56 (1978) citing *Roff* v. *Burney,* 168 U.S. 218 (1897).

[15] The Guidelines state: "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."

Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,586 (Nov. 26, 1979).

Act's coverage simply because they have not taken the formal step of enrollment. Thus, we believe the bill is overbroad in this respect because it will exclude children, even full-blooded Indians, whose parents are in fact members of a tribe. This bill exacerbates this problem by placing questions of membership in the hands of the state courts rather than tribal courts. We believe that at a minimum, membership is a matter that should be left solely to the tribes.

This section would also extend to involuntary proceedings and allow state agencies to remove Indian children from on-reservation homes where neither parent has enrolled in a tribe. Obviously, this is one of the very problems that led to the creation of the Act. We see no need to take such a dramatic step backwards.

Lastly, we take issue with the assertion that this Act not apply to children who are one-tenth, one-sixteenth, one-thirty second, or some other degree of Indian blood. The law is clear in this respect: tribes, as sovereign entities, are free to set membership on any number of criteria, and each tribe has the power to determine whether or not to rely upon degree of blood as such a criterion. As previously stated, Congress has no business intruding upon such central matters of tribal sovereignty.

Having set forth these criticisms, we suggest the following approach to address the real problem surrounding lengthy adoption disputes, namely the willful failure by adoption attorneys and agencies to comply with the terms of the Act. First, mandate notice to the tribe in all voluntary proceedings. Second, impose sanctions upon willful violators of the Act.

While it is true that there are rare instances of Indian child custody cases that are painful for the children and families, we believe that most of the problems lie not in the Act itself, but rather with the failure to comply with the terms of the Act. For instance, in the *Rost* case involving the twins from California, the biological father testified in court deposition that he had been counseled to omit any reference to his Indian heritage in order to avoid ICWA proceedings. When the terms of the Act are complied with, the Act works well and facilitates the quick placement of Indian children. We are aware of the discrepancy in the Act which gives a tribe a right to intervene in custody proceedings, voluntary or involuntary, at any point, 25 U.S.C. 1911(c), yet mandates notice to the tribe only in involuntary proceedings, 25 U.S.C. 1911(a). We believe that as a matter of policy, the best approach is to provide notification to the tribe in all state court proceedings, voluntary and involuntary, in order to carry out the goals of the Act. We would be glad to work with the bill's sponsors on these changes if they desire.

In sum, we believe that the Indian Child Welfare Act has been successful as a protection to Indian tribes and families. There will undoubtedly arise, from time to time, difficult adoption cases, but these cases are usually the result of an unintentional or, as is often the case, an intentional attempt to get around the requirements of the Act. We do not believe that the legislation at hand adequately addresses those problems. Such legislation deserves thorough ex-

amination by this Committee and input from the tribes it affects or we run the risk of imposing even more big-government, paternalistic measures upon the Indian tribes.

GEORGE MILLER.
BILL RICHARDSON.
NEIL ABERCROMBIE.
ENI FALEOMAVAEGA.
SAM FARR.
PATRICK J. KENNEDY.
ROBERT A. UNDERWOOD.
DALE E. KILDEE.

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