# MINORITY REPORT

## Commission on Native Children

to the President and Congress of the United States

For the Alyce Spotted Bear and Walter Soboleff Commission on Native Children

February 27, 2024

**Letter to the President and Congress**

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To the President of the United States, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate: Pursuant to the Alyce Spotted Bear and Walter Soboleff Commission on Native Children authorizing legislation (Public Law 114-244), October 14, 2016, as amended, I respectfully submit a Minority Report of the Commission on Native Children.

This report attempts to include the perspective of those Native Americans who live outside of the reservation system and do not use any form of tribal benefit or program. Indeed, about 75% of Native Americans do not live on reservation land or participate in reservation politics. As a result, countless families of Native American heritage are not heard through methods normally employed by those assessing the needs of the United States's native population.

This is significant as legislation and administrative rules often include them and their children, whether they have chosen to be involved with the reservation system or not.

With their voices in mind, this report presents additional recommendations, several of which were presented to the Commission but were not put forward for discussion or vote.

Due to the strength of an 'iron triangle' encompassing federal Indian policy, it is necessary to submit this minority report.

Respectfully submitted,

Elizabeth Morris, Commissioner
*Alyce Spotted Bear and Walter Soboleff Commission on Native Children*

**Acknowledgments**

Dr. William B. Allen, Emeritus Professor, Political Science, MSU
and former Chair of the U.S. Commission on Civil Rights

Tania Blackburn, MPP

Jennifer Purvis MPA PhD

Timothy Sandefur, Vice President for Legal Affairs, Goldwater Institute

"... We are talking about our brothers and our sisters. We are talking about what happens to people who share with us an extremely important identity. And that identity is the identity of free citizens in a Republic…"[1] (Allen 2010)

**Preferred citation**

Morris, Elizabeth. *Minority Report, Alyce Spotted Bear and Walter Soboleff Commission on Native Children: To the President and Congress of the United States.* Minority Findings, Washington DC, 2024.

[1] Dr. William B. Allen's keynote speech at the Christian Alliance for Indian Child Welfare's ICWA Teach-In, titled '*Indian Children: Citizens, not Cultural Artifacts*,' on October 28, 2010, in the chambers of the Senate Committee on Indian Affairs.

## *VOICES*

**Michaela**
**10-year-old, ICWA-affected child**

**"**Laurynn died after she went down that hill. I came back to my [foster] mom and dad. I was scared and I had nightmares. I was afraid of Native Americans. It took a long time to ask my mom why she sent us away. My mom told me that she didn't and that somebody else made those decisions. I now know that the decisions were made for me by ICWA.

I am a smart, competitive girl. I have good friends and get good grades. I have read articles about ICWA, and I have thought about how it has changed my life. I miss my sister. I think about what it would be like if she was still here with me… I do hope ICWA can learn from our pain and make better decisions for other native children."

*– Community/Public Panel, Great Plains & Midwest Regional Hearing, Bismarck, June 24, 2022*

**Nina de la Cruz**
**Spirit Lake Tribe, Mother**

"I didn't want ICWA involvement. I hadn't lived on the reservation for almost four years at that time and I had told social services that I wanted my case to stay in Grand Forks. It was my home. It was my child's domicile. I had the right to choose. …[ICWA] stripped me as a parent of my rights. …I worked my case. I did everything that Spirit Lake social services required me to do, but I did it on my own…. My tribe, that was supposed to help me, that was supposed to keep my family together; ICWA that was supposed to be – the goal is reunification…there was no reunification. My reunification wasn't there, and my tribe took that from me. …Those rights I was given as a U.S. citizen, my rights under federal guidelines, my rights under state guidelines, all those rights I'm afforded as a citizen, I wasn't given. …I had to watch my daughter – and all my kids – I have to watch them from the sidelines, and it breaks my heart."

*– Child Welfare, Juvenile Justice and Violence Panel, Great Plains & Midwest Regional Hearing, Bismarck, June 24, 2022*

**Phefelia Nez**
**First Lady of Navajo Nation**
**Missing & Murdered Indigenous Women & Relatives Task Force**

*In response to Commissioner Gray's question:*

"I never think of solutions to our problems as something that can be solved by way of somebody else giving us something. I always think internally - our own solutions really need to come from our own people, with the understanding of our own worldviews with a lot of components added in from our own Navajo cultural teachings and our own Navajo cultural practices.

*– Child Welfare, Juvenile Justice and Violence Panel, Navajo Regional Hearing, Flagstaff, April 22, 2022*

**Gloria O'Neill**
**Chairwoman, Alyce Spotted Bear and Walter Soboleff Commission on Native Children**

First Lady Nez, I really appreciated your comments in response to Commissioner Gray's question. I feel that if we could take from our recording and ensure that those comments really put forth in our report, that those comments are really at a prominent place in our message to Congress, to the executive branch, but mostly, and more importantly back to our people. I completely agree with you, and I really appreciate how you use the respectful approach to insuring that all – that our people are the ones that are our representatives in our tribal communities…

- *Navajo Regional Hearing, Flagstaff, April 22, 2022*

## Honor and Dedication

This minority report is dedicated to Native youth and their families living across America, whether in urban, suburban, and rural communities, whose wishes, needs, and worldviews have been ignored by academics, tribal leaders, and legislators alike; whose voices are rarely, if ever, included in research and surveys, yet who are still included in blanket legislation based on their heritage.

**In honor of**

Roland John Morris, Sr.

Thomas Lee
Susan Lee Jones
Jacob Jones

William J. Lawrence

**Gone from this world too soon.**

Michelle Goose
Owen Goose
Rhonda Hurd
Alvina Jones
Christine Jones
Molly Jones
Brenda Morris
Sam Morris
Baby girl Morris

**Gi-ga-wa-ba-min me-na-wa**

## EXECUTIVE SUMMARY

In 2014, following extensive reports of child abuse, sexual abuse, and murder on the Spirit Lake Reservation in North Dakota, Congressman Kevin Cramer called for a hearing before the House Subcommittee on Indian Affairs. The primary issue was that, despite documented evidence that children were being sexually abused and even killed at Spirit Lake, the tribal government was doing nothing about it. In fact, it appeared to be actively trying to cover up these crimes. Further, the federal government, including the U.S. Attorney's Office and agencies within the Bureau of Indian Affairs and Health and Human Services (specifically, the Administration of Children and Families), were not taking any substantive action. Chairman Don Young warned the Chairman of the Tribe that he had "better not hear of another child being hurt." However, nothing further came out of that hearing.

The United States of America was founded on the principles of freedom: that all people are created equal, whether European, Native American, or African American, and that these people have fundamental rights, such as liberty, free speech, freedom of religion, due process of law, and freedom of assembly. And of course, government's role is to protect all citizens in their rights. The United States and the states have often fallen short of these principles, but the obligation remains: to treat people equally and to secure their rights.

The obligation of equal treatment has only become more pressing over time, as American families are increasingly multi-racial and multi-cultural. This is true within the Native American community as well as without. Seventy-five percent or more of tribal members do not live within Indian Country. Many have chosen to raise their children in diverse communities. The freedom to choose whom to worship and whom to associate with must be protected.

Yet, the final report of the Commission on Native Children supports increased tribal government jurisdiction and control over families across the United States, both enrolled and unenrolled, even over families that have no political, social, or other relationship with a tribal government, and even over families who may have consciously and deliberately chosen not to be associated with the tribal government. Further:

- The Commission rarely discussed the severe level of physical abuse, sexual abuse, and suicide youths experience within many tribal communities. If discussed, the abuse was blamed on "colonization" or "colonialism"—vague concepts that conveniently ignore the practical realities of life on reservations. There was no meaningful discussion of

whether, for example, children on reservations commit suicide due to rampant physical abuse, sexual abuse, or other crimes.

- While it was repeatedly said that the commissioners had final say on all decisions, federal detailees made recommendations and guided the commissioners along each step, at times presenting Commissioners with limited options to choose from.
- Most of the commissioners and invited witnesses worked for a tribal or government entity, or an NGO that had a financial stake in findings.
- Commission methods used to study policy issues were neither comprehensive nor effective, and routinely settled for politically palatable cliches rather than relying upon meaningful social science or logical analysis of the legal and social challenges facing Native children.
- The federal government, neither through the Constitution nor treaty, was given the power nor responsibility for many of the recommendations outlined within the Commission report. For example, dealing with trauma in the lives of citizens, while important, is not a federal responsibility, a treaty promise, nor a trust responsibility. It is an issue best addressed by the States, local communities, and tribal governments.

Journalist Naomi Schaefer Riley has examined why Native Americans have the highest rates of poverty, suicide, rape, and gang violence and concluded that current public policies "have turned reservations into small third-world countries in the middle of the richest and freest nation on earth" (Riley 2021). Yet the Commission applied no meaningful effort to understanding how today's laws and regulations governing reservations have created a toxic situation for Native Americans.

This minority report asks whether current federal Indian policy has been influenced by and immersed in erroneous and unhealthy policies as a result of fashionable but logically indefensible theories of victimhood, entitlement, and "anti-colonial" political ideology, and whether these policies interfere with emotional health and well-being by discouraging self-confidence, autonomy, strength, health, and growth among youth in our Native population.

It is worth noting at the outset that 2024 marks the centennial of the adoption of the Indian Citizenship Act—a federal law that ended the perplexing and damaging regime in which Native Americans found themselves aliens in the land of their birth. Since 1924, all Native

Americans have been citizens of the United States, entitled to the same legal protections as Americans of all other races. American citizenship is a great blessing—one for which countless people of all nations worldwide have struggled, sometimes against overwhelming odds, and for which many have willingly sacrificed their lives. Yet thanks to federal and state policies that treat Native Americans differently than other American citizens, based solely on their biological ancestry, these fellow citizens—half a million of them children—are unable to enjoy the full blessings of that citizenship. The reason is that they are the only American citizens against whom it is still legal to discriminate based on their biological ancestry. That discrimination is pervasive, and marks every aspect of their lives, from their opportunity to buy and sell property to their protection against physical violence. This dissent holds that it is vain to blame the problems faced by Native Americans today on the crimes of centuries past, or on vague and pseudo-scientific notions such as "generational trauma," when in reality the problems in Indian country are caused almost entirely by the failure of the federal and state governments to protect the individual rights of these American citizens—a failure that is abetted and even applauded by tribal governments who prioritize their own political power over the needs of their people, and by activists who scorn such concepts as individualism, private property, or the pursuit of happiness as forms of "white supremacy" and "cultural hegemony." The ideology that stands behind such foolish claims is self-destructive in the extreme, and when deferred to by state and federal officials, it fosters an environment in which the citizenship granted a century ago is rendered a hollow promise.

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## INTRODUCTION

Mired in "groupthink" and a decades old iron triangle[2] relationship between Congress, interest groups, and bureaucrats, the process of forming federal Indian policy is dangerously flawed. Rather than continue to use flawed commission processes that lend themselves to pre-fed talking points, clichéd lists of time-worn grievances, and locked-in concepts that only give the appearance of democracy, Congress must consider new, innovative methods that truly survey the voice of the people—and can actually resolve the problems of today.

A detailee is an employee of a federal agency who is temporarily assigned to another position within government, often within another agency. At the start of the Commission on Native Children, the newly appointed Commissioners were asked to vote to accept the federal detailees who were chosen by their federal agencies: the Department of Interior/Bureau of Indian Affairs, Department of Justice, Health and Human Services, and the Department of Education. While it is often said that the commissioners have the final say within each aspect of the Commission, the detailees make recommendations and guide the Commissioners along each step. Due in part to time constraints and the business of separate lives, Commissioners most often went with whatever the federal agency detailees (as well as the vendor writing the final report) recommended. This, of course, lends itself to groupthink.

> ***Groupthink**: psychological phenomenon that occurs within a group of people in which the desire for harmony or conformity in the group results in an irrational or dysfunctional decision-making outcome. Group members try to minimize conflict and reach a consensus decision without critical evaluation of alternative viewpoints by actively suppressing dissenting viewpoints, and by isolating themselves from outside influences.* (City of Portland, Oregon 2023)

The Commission was directed to conduct a "comprehensive study of Federal, State, local, and tribal programs that serve Native children including an evaluation of" a series of focuses related to child welfare. According to the Cambridge Dictionary, 'comprehensive' means "Including everything that is necessary; complete." The Collins Dictionary says the word means "includes everything that is needed or relevant." The American public expects policy to be based upon and their tax-dollars to be spent on "a posteriori" knowledge and empirical evidence.

[2] An "iron triangle" is a complex, three-way alliance between Congressional committees, various bureaucratic agencies, and special interests, which can include NGO's and academia.

The Hearing Subcommittee voted on which expert witnesses to invite. Yet the Subcommittee was first presented with a list to choose from by federal detailees. Most of these witnesses held similar worldviews, voiced similar talking points, and asked for increased funding, flexibility, and jurisdiction for tribal governments and programs. Although attempts were made by this Commissioner to increase the representation of witnesses with different points of view, those attempts were only minimally successful. Witnesses who were suggested by this Commissioner in early 2020, but not invited, include, Mark Fiddler, member of the Turtle Lake Tribe and former ICWA attorney for Minnesota Chippewa Tribe; Dr. Mark Butterbrodt, former pediatrician on the Pine Ridge and a key role in the conviction of Dr. Weber for child sexual abuse; Dr. Mike Tilus, author of "Letter of Grave Concern," a 15-page letter in April 2012 about the abuse of children at Spirit Lake; Dr. Sharen Ford, Adoption and Orphan Services Director at Focus on the Family; and Tom Sullivan, former administrator for HHS Administration of Children and Families, Region 8. Further, a request to hear directly from distraught parents on the White Earth Reservation who had complaints against their tribal ICWA[3] office was shelved as too complicated to organize. Of the over 300 witnesses heard by the Commission, four were among those suggested to detailees by this Commissioner.

The potential for bias in this process was reinforced by the fact that most individuals, organizations, and agencies involved with the Commission and invited as witnesses worked for a tribal agency, a federal agency, or a non-governmental organization that had a financial stake in the Commission's findings. Independent witnesses were extremely rare.

Further, not all expert witnesses provided current research data to accompany their testimony, and the Commission members considered it impolite to question witnesses in a way that challenged their veracity or accuracy. While individual experiences and anecdotes are important and certainly necessary to understanding the dynamics of any situation, forming federal policy based on a participant's "story" in lieu of objective, verifiable, challengeable, or quantifiable data runs the risk that personal agendas, wishful thinking, and the talking points of those with political influence will dominate the proceedings. In fact, some witnesses who testified—including both adults and minors—did not even relate their personal experiences, but merely read to the Commission political statements that appeared to be repeated from lessons

[3] Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. (1978).

taught in classrooms. This is not an appropriate way to gain evidence useful in formulating a well-balanced policy. It is instead a form of political theater.

This minority report will consider perspectives and needs not normally included in current government discussions concerning federal Indian policy, but which nonetheless reflect life stories and concerns of numerous tribal members. Testimony the Commission heard from grassroots, *not* from federally funded organizations and *not* noticeably reflected within the Commission report, include:

- Students in Oklahoma, as well as an ASBWS Commissioner, who expressed joy and appreciation for their boarding schools.
- White Earth families on video stating that the tribal ICWA office was placing their children into homes known to be sexually and physically abusive.
- A Spirit Lake mother whose tribal government took her children from her, through a perverse abuse of ICWA. Her parental rights were terminated, and youngest child taken despite her sobriety, marriage, full-time work, and having bought a home.
- A tribally owned, state of the art Treatment Center in Bismarck that serves entire families as units – without the use of federal or state funds. The treatment center was built with and is run by earnings from the Three Affiliated Tribe's oil refineries.
- The twin of a 3-year-old who was murdered ten years ago after placement, via ICWA, into the home of a dangerous relative.
- A Minnesota Supreme Court Justice who apologized for having placed children into an unprepared and unsupported home—but who did so solely because ICWA required it.

## Methodology

In addition to the hearings, site visits and information experienced by and available to the 11-member Commission, personal life experience as well as 20 years' experience with families through the Christian Alliance for Indian Child Welfare, this Commissioner also asked grassroot tribal members to write letters outlining their concerns. These testimonies were submitted to the Commission at large. One witness was invited to speak to the Commission at the Bismarck hearing in the summer of 2022. This Commissioner was also able to draw data from the 2019 survey "American Family Dynamics" (E. Morris 2019).

## Conditions and Baselines

Current federal Indian policy and the reservation system are built on philosophies destructive to the physical, emotional, and economic health of individual tribal members. Violence, criminal activity, child abuse and trafficking are rampant on many reservations (Riley 2021). Yet, despite well-documented dangers within the system, federal law forces many "Indian" children to be to be placed in homes on reservations—due solely to their biological ancestry—and despite the fact these homes are often so dangerous that, were the children non-"Indian," the law would require that these children be *removed* from those homes, not placed in them (Flatten 2015).

The *Minnesota Child Fatalities Maltreatment* study (2023) reports 161 deaths during the time period studied—but the authors were only able to get data on half of them. Author Rich Gehrman states,

> One thing to note in the more recent report is that Native American children, along with African American children, were killed disproportionately even to their already disproportionate representation in child protection and foster care. Current practices in Minnesota and most states put great pressure on workers not to remove children from their bio families, particularly BIPOC and Native American homes. Our data, along with the court records, show… this resulting in unnecessary deaths of children, with Black and Native American children being particularly affected. (Gehrman, 2024)

Of further concern is the dire economic situation on many reservations. Reservations are the poorest communities in the United States. The median household income in the Navajo Nation is about $20,000 per year. Per capita income on San Carlos Apache is $10,222. At Spirit Lake, it's less than $4,000 (ARPI/NAU 2011) (NAA 2022). Reservation land often includes plentiful natural resources and some of America's most popular tourist attractions—including Monument Valley and historic Tahlequah. Yet Natives are generally unable to enjoy these resources because, thanks to the tribal-trust system, Native individuals cannot own the land they live on. The most common source of capital for a would-be entrepreneur is a home loan, but without collateral, this opportunity is cut off for residents of reservations. Consequently, virtually all economic activity on reservation must be managed by tribal governments. This, as the Harvard Project on American Indian Economic Development has observed, has led to "cycles of institutional dependence on the federal government, with tribes encouraged to run their enterprises and their programs as job engines. Too often, this has led to bloating and bankruptcy,

created the perception that reservations have been merely make-work replacements for real productive effort, and **maximized the politicization of investment and employment decisions**" (State of the Native Nations 2008, 113). As long as *individual* Native American citizens cannot own reservation land in fee, this cycle of dependency and economic inefficiency—and consequent poverty—will continue, and with it the wholly unnecessary economic suffering of Native American children.

As a result of the poverty, crime, and corruption, many have left the reservation system (E. Morris 2019) The last three U.S. censuses have reported that 75% of tribal members do not live in Indian Country. Some descend from families who left Indian country generations ago and have never been connected to Indian Country or to federal tribal benefits. Others have recently left due to crime and conditions on their home reservations. Some have no desire to ever be connected to the reservation system. Nevertheless, most research and surveys of the Native American population involve only those still connected to Indian Country through federal, state, and tribal programs and services – and the assumption of some lawmakers is that these surveys represent the majority (E. S. Morris 2024). As a result, those individuals and families who are dissidents to tribal government or have otherwise divorced themselves from the reservation system are rarely interviewed or assessed as Native American stakeholders, despite the fact that federal laws, such as ICWA and VAWA,[4] include them and their families regardless. This demographic is rarely included in Native American research because, as mainstreamed citizens, they are not easy to locate or to separate from the larger population (2024).

The American Family Dynamics Survey (E. Morris 2019)[5], was a national survey of family worldviews and experiences. The following charts reflects the responses of survey participants who self-identified as having Native American heritage and illustrates reluctance by some to participate in the reservation system.

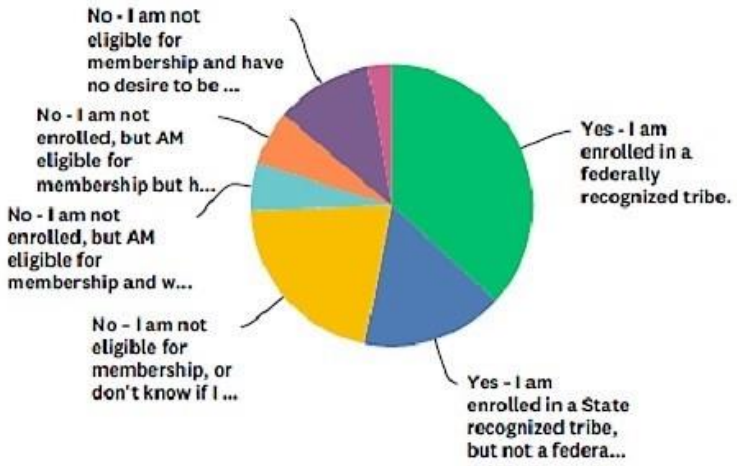
[4] Violence Against Women Act, 42 U.S.C. § 136 et seq. (1994).

[5] From the thesis *The Philosophical Underpinnings and Negative Consequences of the Indian Child Welfare Act* (E. Morris 2019)

American Family Dynamics Survey

## Q34 Are you an enrolled tribal member?

Answered: 369 Skipped: 982



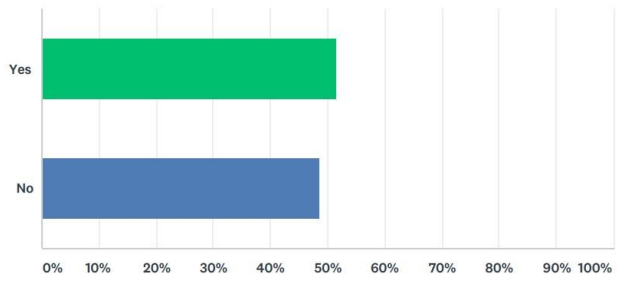

| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Yes - I am enrolled in a federally recognized tribe. (1) | 36.86% | 136 |
| Yes - I am enrolled in a State recognized tribe, but not a federally recognized tribe. (2) | 16.26% | 60 |
| No – I am not eligible for membership, or don't know if I am, but would enroll if I could. (3) | 21.41% | 79 |
| No - I am not enrolled, but AM eligible for membership and want to enroll, but don't know how or haven't had a chance (4) | 5.42% | 20 |
| No - I am not enrolled, but AM eligible for membership but have chosen not to be enrolled. (5) | 6.23% | 23 |
| No - I am not eligible for membership and have no desire to be a member of the tribe. (6) | 11.11% | 41 |

*American Family Dynamics Survey*

*Persons who self-identify as having Native American heritage*

## Q3 Do you identify your full heritage on the US Census?

Answered: 1,342 Skipped: 9

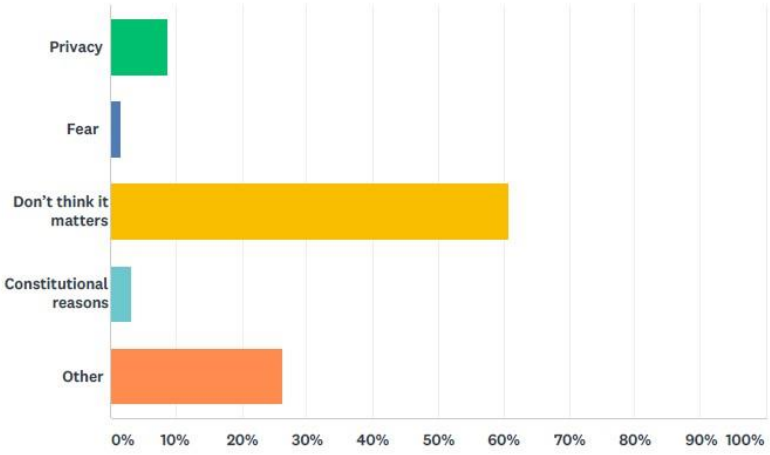



| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Yes (1) | 51.42% | 690 |
| No (2) | 48.58% | 652 |
| TOTAL | | 1,342 |

| BASIC STATISTICS | | | | |
|---|---|---|---|---|
| Minimum | Maximum | Median | Mean | Standard Deviation |
| 1.00 | 2.00 | 1.00 | 1.49 | 0.50 |

## Q4 Why not –

Answered: 647 Skipped: 704




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Privacy (1) | 8.50% | 55 |
| Fear (2) | 1.55% | 10 |
| Don't think it matters (3) | 60.74% | 393 |
| Constitutional reasons (4) | 3.09% | 20 |
| Other (5) | 26.12% | 169 |
| TOTAL | | 647 |

| BASIC STATISTICS | | | | |
|---|---|---|---|---|
| Minimum | Maximum | Median | Mean | Standard Deviation |
| 1.00 | 5.00 | 3.00 | 3.37 | 1.14 |

## Key Themes and Ideas

### *The Full Commission's Key Themes and Ideas*

The Commission's report cites five key themes reflected in the testimony of those invited to speak and discuss their work. These themes, noted below, are reflected in the Commission's recommendations.

1. *'Trauma'* is a root cause of many of the issues that Native children and families wrestle with today. Native children's trauma can be traced back to colonization, which causes historical trauma and gives rise to intergenerational and personal trauma.
2. *'Cultural engagement and language learning'* are critical to healing and resiliency
3. The term '*Native child*' needs to be expanded to include as many children as possible.
4. Local '*Community control*,' standards and decision-making yield the best results
5. '*Flexible funding*' from the federal government and across all agencies supports self-determination.

### *Problematic Aspects in the Commission Report*

a) The Commission research did not include cost analysis, independent outcome analysis, or quantitative and qualitative surveys. It should also be made clear that the vast majority of those who testified worked for entities that benefitted from federal funding.

b) **The *trauma* many children in Indian Country endure is indisputable, deep, and pervasive, and only getting worse, as CRT theories and methods encouraged by federal agencies and academia over the last four decades have failed the youth and their families.** Further, dealing with trauma in the lives of citizens is not a federal responsibility, a treaty promise, nor a trust responsibility. It is an issue best addressed by States, local communities, tribal governments,

**Tyler Jensen**
**16-yr-old**

"With many of my friends …once old enough, they were able to take care of the home and siblings. Many native youths are entrusted with this task at such a young age, and it takes a toll on some, their mental health and physical."

"One of the many troubles that has affected many native communities and nations is this reoccurring problem with trouble in the home… A few of the kids I went to school with lived in a drug house that was in full effect a couple house down. There was so much violence …going on in the community."

*- Community Youth Panelist, Navajo Regional Hearing, Flagstaff, Friday, April 22, 2022*

and civil society. Crime, of course, is a matter for federal government to be concerned with—yet the Commission rarely discussed the undeniably, shockingly high incidence of trauma, alcohol abuse, drug abuse, and suicide among the young in many tribal communities. Yet, rather than address the actual causes of these maladies – causes such as the drug culture and gangster-type societal norms rampant on many reservations – or consider genuine solutions, some experts testifying resorted to blaming conveniently vague and politically-charged clichés such as "colonization" or using unhelpful slogans such as "our children are resilient." Such slogans were often made in a context intended to imply that tribal youth are more "resilient" to trauma than children of other heritages, and consequently that local social service agencies and authorities outside of tribal governments should not concern themselves with these maladies. Yet it is obvious that **children of tribal heritage are just as affected by trauma as all children are.** The point is that in many instances it is clear that testimony to the Commission, and discussions of Indian policy in general are designed to serve tribal political agendas for the particular moment—even at the cost of self-contradiction,[6] and some might say, even at the cost of children's lives.

c) While witnesses before the Commission provided a steady stream of examples of *'cultural engagement and language learning,'* the Commissioners were provided a preselected list of potential witnesses by federal detailees. Most of these witnesses worked within organizations and agencies that receive federal funds to provide these services. Many appeared to have been selected by federal agencies out of desire for this testimony, rather than out of a desire to obtain the unvarnished truth about the actual state of affairs.

**This Minority Report's Key Theme:**

Safe
Nurturing
Genuine
Relationship

d) While this Commissioner personally emphasized the multi-heritage reality of many American families, it was not to suggest that the definition of "*Native Child*" be expanded, but to warn of infringement and interference of federal government in forcing families into a specific identity when it might not be the identity the child or family prefer. **Most of the enrollable children in the United States are multi-heritage.** This means most of these children's blood relatives are *not* Native American, and these non-

[6] The Dissent is *quite aware* that all governments—tribal, local, state, federal—are guilty of political manipulation of this sort. This Dissent is not claiming that tribal governments or activists are alone in manipulating the political system (or entities like the Commission) for political purposes. Rather, the Dissent is observing that due to such manipulations—and the Commission's willingness to indulge them without question—the final report of the Commission is practically valueless.

Native relatives might represent the community and culture within which that child is most familiar and attached. **Enacting laws that blanket one heritage group, and then expanding the definition of who is (mandatorily!) a member of that group and subject to its laws is an offensive, dangerous, and a frightening overreach.** As the U.S. Supreme Court warned in one of the famous Japanese Internment cases: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (*Hirabayashi v. United States,* 1943).

e) '*Local community control'* and standards refer to the community within which a family has chosen to live and raise the child and does not necessarily refer to tribal control. For many Native children, "local" may refer to their urban, suburban, or rural, setting, rather than connections to a tribal government entity that might be headquartered far away.

f) '*Flexible funding*' ignores the reality that federal money comes from the pockets of all American citizens, and it is not an endless supply. Further, discussions of tribal sovereignty, jurisdiction, and control often routinely include a self-contradictory demand for complete and flexible federal funding. There is often a claim of absolute tribal sovereignty—that is, autonomy—and, simultaneously, an insistence that Congress has the "plenary power"—i.e., supreme, and limitless authority—to enact laws governing tribal members and every aspect of their lives, particularly with respect to children of tribal heritage. This includes those who live off reservation and have no political, cultural, religious, or social connection to an existing tribe. This self-contradictory demand of "no interference" while simultaneously appealing to "plenary" subordination is untenable, and its persistence leaves federal Indian policy in a counterproductive twilight zone of legitimacy.

## Risk Reduction and Protective Factors

A risk factor is a trait, characteristic or condition of an individual, family or community that increases the likelihood of alcoholism, drug abuse, physical abuse, sexual abuse, and suicide. A protective factor or 'risk reducer' is a trait, characteristic or condition of an individual, family or community that decreases the likelihood of alcoholism, drug abuse, physical abuse, sexual abuse, and suicide.

In a 1990 statement by the former Chair of the U.S. Commission on Civil Rights regarding that Commission's final report on the Indian Civil Rights Act, Dr. William Allen

wrote: “the direction of [these] recommendations … is to infuse the federal government even deeper into custodial care of Indians, while the gravamen of our findings is that **that is the very source of most of the problems we uncovered**” (W. B. Allen 1990). Almost 35 years later, the federal government is even more deeply and detrimentally infused and embedded within the lives of tribal members. At the same time, alcoholism, drug abuse, physical abuse, sexual abuse, and suicide have increased (KRTV 2019) (Swaim RC 2018) (N. S. Riley 2022).

Nurturing, supporting, and capitalizing on individual, family, and local strengths will have significant effect in mitigating risk factors. This is because “…social, cultural, economic, political, and physical environments in which individuals live have a profound influence on their ability to thrive” and “interdependence on family and community members, life history and key life events, and individual agency all affect the achievement of wellbeing at every life stage” (Commission on Native Children 2024, 24).

Close social relationships are key. Using 2015–2019 data from the American College Health Association-National College Health Assessment survey, Qeadan, et al., examined opioid misuse and its impact on the social bonds of AI/AN/NH college students across the U.S. Applying multivariable logistic regression models, these researchers followed social relationship factors associated with substance use in the Social Development Model and found that the “percentage of opioid misuse was highest among AI/AN/NH college students (7.12 %) relative to other race/ethnicity groups” (Qeadan, et al. 2021). They also found that students who experienced loneliness, difficulty with social relationships, violence, or family problems, were most likely to abuse opiates. “Relationship problems with peers and family increase AI/AN/NH college student risk for opioid misuse” (2021). The authors suggest that colleges could help by offering support programs “addressing healthy social relationships” (2021).

The importance of relationships was found for elders as well. Cayir, et al (2018) examined the relationship between traumatic events and depression in 362 American Indians elders from a Southeastern U.S. tribe. While the authors state that mental health providers should consider trauma followed by depressive symptoms as a risk factor, less than half of the sample group reported trauma, and overall, there was a significant difference in odds of having clinical depression following a trauma. Further, several reported that social relationship helped heal the trauma.

Tanaka, et al., examined the relationships between generativity, loneliness, and quality of life in 98 elders living in a largely Native American community.[7] The authors found no statistically significant association between generativity and race/ethnicity or gender. However, there *was* significance between generativity and length of time living in a community. The findings suggest that creating venues in which elders can interact with younger generations may improve their generativity, enhance quality of life, and benefit the future (Tanaka, et al. 2020).

Nurturing and supporting the healthy strengths within individual, families and communities requires listening to and accepting differences of opinion and needs, and an end to forcing government-mandated cultural fiats on disinclined citizens through legislation and administrative rules.

Further, "Local community" does not necessarily refer to a reservation system or tribal community, but instead to any urban, suburban, rural, or tribal community a family has chosen to live in. American families are multi-heritage, and most children of tribal members are multi-heritage. While some off-reservation tribal members maintain connection to a reservation system, others have consciously chosen not to. The federal government needs to recognize, honor, and support the individualized strengths and constitutional rights of all its citizens, noting that:

- Avoidance of prejudicial government assumptions concerning individual wellbeing reduces risk to citizens.
- Acknowledging and supporting the unique strengths of all individuals, families and communities can be a protective factor and supports wellbeing at every life stage.
- Families and local communities that are encouraged and given autonomy provide better frameworks for healthy social policy than federal government.

Remedying these problems—by encouraging relationship,[8] enforcing rule of law within reservation systems, supporting law enforcement, allowing titled property rights for individual tribal members, and upholding full constitutional rights and protections of all Native American citizens—would make the reservation system safer for children and their families (E. Morris 2019).

[7] "Generativity" is the theory that elders want to give something to the youth as a way of giving fulfillment to their lives.

[8] Relationship based on something other than mere biological ancestry, that is.

# RECOMMENDATIONS

The Commission on Native Children offered 29 recommendations for improvements to programs serving Native children (Commission on Native Children 2024). These recommendations are discussed here in part but can be read in full within the Commission's official report. The report may concur or dissent in whole or in part.

The Minority Report has three sections of recommendations:

1. Concurrence with Commission Recommendations
2. Dissent on Commission Recommendations
3. Minority Report Recommendations

## Concurrence with Commission Recommendations

In general, this minority report supports recommendations that are constitutionally sound, and obligations specified in treaties, and proven to be beneficial to individual children should be supported. Few recommendations in the Commission's report meet that test, however. The following three examples are beneficial to children, as are other recommendations related to health, but they are better addressed at state and local levels rather than federal; most are not treaty obligations.

### Recommendation 17: Provide comprehensive prenatal health education and related services to Native mothers and families

Private, state, and local nurse visiting programs for newborns with a focus on health and parenting, such as a New York program called "*Hello, Baby*," are successful for young children of all heritages. Naomi Riley explains that out of all programs, there is most measurable benefit from "nurse home visiting services … to prevent child maltreatment." She relates,

> The one program for which there is significant evidence… is nurse home visit programs. Because abuse and neglect are often intergenerational issues, it is very useful for mothers and fathers to have access early on to information about healthy parenting. There are other programs that do this, but do not involve nurses. They are less expensive, but I need to warn you that they do not have the same level of effectiveness…A number of studies have been done and the results are significant for these nurse visiting services (Riley 2022).

'Best practice' for these programs is to be local, maintain confidentiality and be nursing focused.

**Recommendation 19: 'Develop immersive multigenerational nutrition and health programs for Native children and families.**'

Increased "access to natural whole foods and other healthy foods is beneficial for all children, no matter their heritage, as well as "limiting easy access to low quality, ultra-processed foods." But it is neither a federal responsibility generally, nor a matter required by treaty, so far as the Dissent is aware.

**Recommendations 27: 'Create incentives to expand and improve the workforce serving Native children and youth'**

This is a good recommendation, but again, belongs at a state or local level; it is not a federal matter.

**Recommendations 28: 'Incentivize positive progress against indicators of social distress in Native communities.'**

This is a good recommendation, but again, belongs at a state or local level; it is not a federal matter.

## Dissent on Commission Recommendations

These recommendations are organized by topic area. They are discussed here in part but can be read in full within the Commission's official report.

Some dissent is only in part. In general, recommendations that are unconstitutional, not mandated or specified by treaties, or not proven to be beneficial to individual children should be rejected. This includes recommendations for increased federal involvement, control, and interference in the lives of individual children, families, or communities that have not chosen to make their Native heritage a primary data point in their lives.

### *Child Welfare*

**Recommendation 2: Ensure compliance with the Indian Child Welfare Act.**

The Commission report recommends—rightly—an "adherence to the provisions of ICWA *related to parents' wishes*" (ASBWS-CNC 2024, 36), but does so as a single sentence buried in a mountain of language that demands greater government control over cases involving the welfare of "Indian" children.[9] The ICWA provisions regarding parental rights are minimal, however—in some respects, ICWA overrides parental rights (T. Sandefur 2021, 80-82 )—and when those provisions that protect parental rights are ignored, parents often cannot afford an attorney to defend themselves. Consequently, the provisions supposedly protecting them are inadequate and ineffective. This has led to the forced removal of children—many of whom have only the most minimal Native heritage—from homes they love by tribal governments with whom these children have no political, social, religious, or cultural relationship.[10]

Further, children have often been left in, or moved to, unsafe homes pursuant to ICWA (E. Morris 2019). These are homes so unsafe that children of other heritages would be removed from them. The difference in treatment of "Indian" children—a category based solely on a child's biological ancestry—offends the constitutional requirement of unequal protection.

The CDC-Kaiser Permanente adverse childhood experiences (ACE) study is one of the largest investigations of childhood abuse, neglect and household challenges and the impact those adverse experiences have on adult health and well-being. The results to date of that study show that early adversities have a long-lasting impact on children. Study findings have shown a "graded dose-response relationship" between childhood adversities and negative later-in-life health and well-being outcomes. "In other words, as the number of ACEs increases so does the risk for negative outcomes" (CDC 2019). These findings indicate the potential danger of taking children from safe foster homes and returning them to dysfunctional and sometimes violent homes of relatives (2019).

[9] This report uses the term "Indian" in quotes because ICWA's definition of "Indian" children includes children who are not and may never become tribal members, but who are classified as "Indian" based solely on their biological ancestry. In this respect, ICWA is an unconstitutional race-based statute.

[10] As, for example, in the infamous 2016 "Lexi" case in California (*In re. Alexandria P.*, 1 Cal.App.5th 331 (2016)).

But ICWA not only fails to address this problem, it worsens it dramatically, resulting in case after case in injury and even the preventable murders of Native children who state officials *know* are in dangerous and abusive households—but whom ICWA blocks the state from protecting. The deaths of Declan Stewart, Laurynn Whiteshield, Josiah Gishie, and Antonio Renova are only the most well-known examples (T. Sandefur 2021, 84). But ICWA also blocks Native parents themselves from taking steps to protect their children against abusive co-parents or ex-spouses.[11] And it blocks Native parents from deciding to place their children in non-Native adoptive households.[12] The Indian Child Welfare Act has often resulted in the placement of children into dysfunctional homes, including homes known to be abusive (E. Morris 2019). And by increasing the evidentiary requirements to prove an abuse case if the child happens to be "Indian," as opposed to a different ancestry, ICWA literally requires that "Indian" children be abused worse, and for longer, before they can be rescued, than is the case for children of other races. ICWA even overrides the "best interests of the child" standard which is the gold standard of child welfare law. In short, ICWA stands as the single greatest legal obstacle to protecting Native American children from harm. Notably, **ICWA applies only to children who do *not* live on reservation**—again, to children who are identified as "Indian" based exclusively on the blood in their veins. Again, this is a subject on which politically convenient rhetoric—such as vague talk of "colonialism" or "cultural heritage" is allowed to swamp any focused discussion of the actual needs of at-risk children. And, again, these are issues that are not adequately addressed by the Commission.

**Recommendation 3: Strengthen advocacy for Native children in child welfare cases.**

Children of every heritage, when faced with court proceedings, need advocates such as a guardian ad litem (GAL) and attorney. GALs and attorneys, however, should be concerned with the best interest of the *particular child* in his or her *particular circumstance* and should not be forced to filter their advocacy through political ideology. Not all Native children benefit from

[11] See, for example, *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017); *In re Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016).

[12] As in the *Mississippi Choctaw v. Holyfield* case, 490 U.S. 30 (1989), or the *Brackeen v. Haaland* lawsuit that reached the Supreme Court in 2022. Contrary to the political rhetoric that accompanies many ICWA cases, these were cases in which Native parents *volunteered* their children for adoption—only to have that parental choice overridden by tribal governments pursuant to ICWA.

what the Commission report calls "cultural intelligence, the Indian Child Welfare Act (ICWA), Native family connections and relationships, and… the customs and traditions of the Tribe where the child is enrolled/enrollable and/or of the Native Community where the child lives" (ASBWS-CNC 2024, 38). The phrase, "enrolled/enrollable and/or of the Native Community where the child lives" reflects the intent to rope in families who have left the reservation system—that is, who have no political, cultural, religious, or social affiliation with a tribe. We are a nation of individuals with personal views. The federal government cannot define citizens by their heritage.[13] Even individuals of 100% Native ancestry, who have grown up within the reservation system, have a right to choose alternate lives for themselves and their family[14].

### *Juvenile Justice*

**Recommendation 7: Keep track of Native youth in Federal, State, and local juvenile justice systems.**

One risk Native children face that children of other ancestry do not face is that if they commit a crime while a juvenile, they will end up in the federal justice system, whereas their non-Native peers would most likely be placed in the state system. The Commission report is correct that Native children should not be lost within the federal justice system as a result of crimes children of other heritages would not face the federal system for. But its recommendation of mandatory sharing of juvenile justice data with Native communities runs a dangerous risk of violating requirements of confidentiality. Sharing such data would be invasion of privacy if the juvenile and/or the juvenile's family has not invited the tribe to participate in that child's care.

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[13] The U.S. Supreme Court has said that while laws differentiating between Americans based on race or national origin are virtually never constitutional, laws that differentiate between "tribal Indians" and others do not typically offend the Constitution. *Morton v. Mancari*, 417 U.S. 535 (1974). But that case does not give the government *carte blanche* to differentiate between Indians and non-Indians, and ICWA exceeds the limits the *Mancari* decision created. That case involved adults who chose to join or remain members of a tribe, and the Court said the difference was that tribal membership is a *political* affiliation rather than an immutable biological characteristic. In fact, the Court emphasized that it was *not* giving a green light to laws that are "directed towards a 'racial' group consisting of 'Indians.'" (footnote 24). But ICWA is not based on political affiliation. It defines "Indian" child to include children who are "eligible" for tribal membership and have a biological parent who is a tribal member. These are immutable biological characteristics—and, in fact, are a national-origin category. ICWA therefore violates the Constitutional ban on race-based or national-origin-based laws even under the *Mancari* rule. Although asked to decide this question in the *Brackeen* case, the Supreme Court declined to discuss it.

[14] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891), a federal court in Nebraska said: "The individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it."

## *Education*

**Recommendation 9: Support Native culture and language learners in Tribal and publicly funded schools.**

This recommendation proposes mandating that public schools, along with tribal schools, teach American Indian, Alaska Native, and Native Hawaiian culture and language—including language immersion—in K-12 schools (ASBWS-CNC 2024, 54), and that Native American art, history and language classes be made available even if a school "does not receive Title IV IEFG monies" (2024, 54). Teachers will need to be certified in a curriculum that includes the language of the local tribe and "community-specific ways of knowing" (2024, 54). Further, not only are Congress and "relevant executive branch agencies" to provide funding for tribal governments to build schools, but they are also to "assist them in taking over management of Federal and public schools" (2024, 54).

Lastly, the Commission—based on its view that children involved in immersion programs have been "disadvantaged by culturally inappropriate mainstream kindergarten placement assessments" (ASBWS-CNC 2024, 54), i.e., are falling behind and have been placed in grades below their age level—**recommends that placement assessments *ignore lack of basic educational achievements and steppingstones*.** The report's position is that, as long as the child learns native culture, he or she does not need to know math.

This is foolhardy. Students of all backgrounds need the classic "three Rs," and it does not help them or their communities to ignore shortfalls in basic educational requirements. Whatever value the preservation and perpetuation of native languages and cultures may have, basic educational training in math, literacy, science, etc., are more fundamental and must take priority for American children, regardless of their race. Immersion may be an effective tool for language instruction, but studies have shown that immersion schools often do not spend enough time on basic education skills (Blackburn 2020), (Dortch 2020). Doctoral candidate and tribal member Tania Blackburn explains:

> While Native language programs are being funded and implemented in BIE and tribally run schools, there is little evidence that this will benefit Native students in higher education. In fact, **if too much instruction time is devoted to it, it could come at the expense of a knowledge base that would prepare and benefit Native students in higher learning**. Some BIE middle schools have even failed to prepare students for off-reservation public high schools (BIE Complaint 2018). (Blackburn 2020)

**Recommendation 10: Expand primary and secondary education to include Native Peoples' histories and cultures.**

This recommendation mandates Native American history and culture be taught at every elementary school and high school in the United States, and specifies that "no schools that receive public (Federal and state) funds are exempt from this recommendation, regardless of the percentage of Native students enrolled" (ASBWS-CNC 2024, 58).

Under this recommendation, state and local school staff would be mandated to consult and collaborate with local Native communities on educational approaches, and local tribal leaders would have the authority to design and demand any curriculum they wish. The wording of the recommendation leaves the door open for spirituality to be taught, as well—a matter that risk violating the Establishment Clause of the First Amendment. Further, "Tribal Colleges and Universities (TCUs) and Native American-Serving Nontribal Institutions (NASNTI)" will financially benefit from the influx of student teachers across the nation as they will be the sole providers of the necessary teacher training (ASBWS-CNC 2024, 58).

In other words, the plan is to mandate the use of federal funds to teach the language and culture of one select people group in every school, large and small, in the United States, regardless if any student in the school has heritage in that people group. It would be further mandated that every teacher in the United States be certified to teach these classes, and that certification can only come through tribal affiliated schools. It can be reiterated here that there is no treaty promise, trust responsibility, or constitutional tenet that authorizes this a federal mandate such as this. Cultural lessons are the domain of local communities.

Further, the Commission had agreed that tribal communities should be free to design their own curricula and that what is taught in schools should be decided at the local level. How, then, can the Commission also demand that every school in the United States be forced to teach what a select group of tribal leaders demand be taught? Whatever merit there might be in a local community deciding that "white history" and the "gold rush and missions"[15] will not be taught in their schools, there can be no justification for mandating that their own preferred curriculum be imposed on families 1,000 miles away. On the other hand, if local communities are to be deprived of this choice in the service of one racial or ethnic group's preferences, what is to stop another community from imposing its demands on Native community schools—perhaps even

[15] Pacific Regional Hearing, Woodland CA Aug 25-26, 2022

imposing a racially tinged view that locals would find offensive? To repeat, should the parents and local communities have the right to decide questions of curriculum, or not? This question was presented to the Commission but received no response.

**Recommendation 11: Ensure Native children's access to educational services through appropriate enumeration.**

The government should respect the individual's choice of cultural identity instead of imposing mandatory, biologically-based categories on people who—to reiterate—are American citizens entitled to equal treatment before the law, and against whom it is unconstitutional, not to say immoral, to discriminate based on biological ancestry.

**Recommendation 16: Expand loan forgiveness for Native Students.**

Forgiveness of loans at the expense of other students and taxpayers is not constructive or healthy for anyone. If a student needs financial help, in many instances grants and scholarships are available at a much higher rate for Native American students than for others. But taking out a loan is a contract. Perpetuating victimhood and feelings of helplessness—not to mention paternalism on the part of government—is not beneficial.

***Research and Data***

**Recommendation 29: Create a Federal Office of American Indian, Alaska Native, and Native Hawaiian Data, Evaluation, and Research.**

While better and increased sharing of data is beneficial, tribal claims of "data sovereignty" can also be damaging. Recommendation 29 stipulates that Congress:

- Ensure that Native community members can collect their own data on early childhood development, education, health, justice, food, poverty, family, economic health, physical infrastructure, and other relevant community concerns.
- Ensure that assessments and evaluations of programs that primarily serve Native clients incorporate Indigenous perspectives and Indigenous methodologies.

- Promote the collection and measurement of data that are useful to Indian Tribes and Tribal organizations and Native Hawaiians.
- Expand the definition of "evidence-based practice" to include practice-based evidence that acknowledges culturally based and community-based solutions.
- Work to ensure that the efforts of this office apply not only to future data collection but to data that already has been collected by agencies and departments of the US government (ASBWS-CNC 2024, 96-97).

When combining these recommendations with recommendations to increase child counts, expand the definition of an Indian child, deny the ability to self-identify, and ensure flexible funding, it seems arranged to increase funding to federal agencies, educational institutions, and tribal coffers.

Federal funding to tribal entities comes from the pockets of American taxpayers and is often based on head counts. As taxpayers, can we expect oversight and audit of data collection? How does the incorporation of "Indigenous perspectives and Indigenous methodologies" affect the data? How does promotion of "collection and measurement of data useful to Indian tribes" affect federal funding? If practice-based evidence is not the same as a practice born of evidence, what is it? And finally, why does the Commission want to change data that has already been scientifically collected and analyzed? The absence of answers to these questions illustrates the degree to which the Commission's recommendations are infected with appeals to vague, politically convenient slogans, as opposed to practical solutions for actual difficulties faced by real individuals.

## ***Hawai'i***

Hawai'i represents a unique case, one which does not readily map on to the existing paradigm of past and present relationships between indigenous and non-indigenous North Americans. For example, Hawaiians do not have a treaty relationship with the federal government and have never had a federally recognized tribal government. Indeed, there is nothing analogous to tribes in the indigenous culture of Hawai'i. Upon contact with the west, indigenous North America was separated into countless self-identified tribes, each with their own languages, cultural and

religious practices, and political identities—whereas, upon encounter with the west in the 1770s, Hawai‘i consisted of a homogenous group of Polynesians separated from each other politically but not linguistically or culturally. Today, as a state, Hawai‘i enjoys the jurisdiction and federal support all states do, in a manner not analogous to North American tribal governments. And Native Hawaiians participate fully in their state and local governments and many hold leadership positions to a degree unlike members of North American tribes.

These distinctions were obscured throughout the Commission's proceedings. For example, the Commission heard testimony concerning the reprehensible history of confinement of Queen Lili‘oukalani and the robbing of the Islands. A recommendation was proposed to return the land to the original Hawaiians. That recommendation was not put up for a vote as it was not within the Commission's purview. Yet the fact that this subject—so far beyond our remit—was discussed at length during hearings and site visits indicates the political bias that infected the Commission's proceedings throughout.

## Minority Report Recommendations

> *Native children are more likely to suffer abuse and neglect than any other racial or ethnic group in America. They are the group most likely to be living with a parent who has a substance use disorder, according to an HHS report that came out last month. And they are more than twice as likely to be the victim of a child maltreatment fatality than white or Hispanic children in this country. (Riley 2022)*

So, how do we protect children?

Many suggestions that witnesses made to the Commission or that Commissioners themselves proposed did not make it into the Commission report. This is inevitable, of course, given the large amount of recommendations and proposals discussed—but it is worth noting that **most of the Commission's chosen recommendations or proposals included some requirement for federal funding or expanding the power of tribal governments or federal agencies**. This gives the impression that what is needed is more power and more money for federal and tribal governments. But sometimes the best thing for a government to do is to back off.

The following recommendations are organized by topic area and reflect the proper role of federal, state, and local governments.

## *Child Welfare*

**The most important recommendation benefitting the safety, health and welfare of children is an intact and healthy family and community** – with the federal government removing their hands and backing off. Fathers must be encouraged and empowered to understand and honor their role as guide, protector, and provider for their families. This is not the role of federal government. As stated by Navajo Nation First Lady, Phefelia Nez:

> …the essence of solutions goes back to the Home. We really need to institute better parenting skills, remind our people what marriage means, [and] how do you raise healthy families. My prayer going forward would be that we start finding resources and lining up systems and services to better equip our homes in those areas. (Nez, 2022)

**Recommendations**

I. Local communities must encourage and empower fathers to understand and honor their role in loving, guiding, protecting, and providing for their families.

II. Enforce current laws and support state and NGO programs and services that **have a documented ability** to reduce child maltreatment.

III. Support private, state, and local nurse visiting programs for newborns with a focus on health and parenting, such as a 'best practice' New York program called "*Hello, Baby*."

IV. **Change Family Assessment [FA] practices that hinder caseworkers' ability to find information** necessary to keep children safe, including:

   a. End advance notice of the initial child protection visit
   b. Interview children separately from and prior to adults
   c. Mandate fact-finding in all assessments and investigations and require FA case notes to document maltreatment and identify victim(s) and perpetrator(s)
   d. Allow cases to be assigned to FA **only once** and implement **a "no screen out" policy for maltreatment reports of infants and toddlers** 0-3, when the child maltreatment report comes from a mandated reporter

V. Establish **mandatory tribal and statewide guidelines** regarding chronic neglect that address the number of opportunities for parents to limit drug use, chronic mental illness, domestic violence, or similar problems that make them incapable of nurturing their children and keeping them safe. **Tolerance for severe neglect should be particularly limited and time sensitive regarding infants and toddlers** because of their urgent developmental needs.

VI. State, tribal and local governments will work to develop **mandatory training** for caseworkers to recognize and respond appropriately to chronic multitype maltreatment.

VII. Develop **mandatory tribal and statewide guidelines** for when to return children from out of home care that includes:

a. Requiring parents to demonstrate that they have addressed the issues that caused the children to be removed prior to trial home visits or reunification.
b. Requiring local officials to use a standard and appropriate safety assessment tool for assessing reunifications.
c. Requiring a higher standard for returning infants and toddlers because they are defenseless against assaults or developmentally debilitating neglect.

VIII. Departments and courts will strengthen guidelines such that **seriously mentally ill parents are not returned home to care for children, especially young ones**. Children should either be placed in a safe environment, or the setting should be closely supervised such as with a live-in aide or other "set of eyes" until the parent's mental health improves sufficiently that they can care for the child or children safely.

**VERNON L. JACKSON Sr.**
**Senior Prosecutor, Office of the Prosecutor, Navajo Nation**

Dependency cases represent the front-line assault against children who are victims of neglect and abuse. Many of these cases evolve into sexual abuse cases and contribute to mental health difficulties for Navajo children. [Navajo Children's Code] is supposed to protect children, but it is plagued with systemic challenges that will serve as my thesis today.

Number 1, there are so many factors that account for the high rate of abuse and neglect that results in the loss of important family support systems. **On the Navajo Nation, the primary cause is indisputable: Substance abuse and addiction.**

Every day, we see parents who are combating substance abuse only to see them place their own need for alcohol or drugs ahead of the care of their children. The situation poses an immense challenge for the family courts of the Navajo Nation. For that reason, the 'Family Dependency Court Model' is NOT working… the manner in which the Navajo Children's code was written has created a system that is not designed to handle the specialized issues that saturate cases of abuse and neglect that stem from parental substance abuse. …

What IS working? Family Dependency TREATMENT Court.

*- Child Welfare, Juvenile Justice, and Violence, Navajo Regional Hearing, Flagstaff, April 22, 2022*

### *Justice*

Helping children avoid trouble with the law can start with ensuring they grow up feeling secure, valued, and cared for. Children need to know they will be protected. Local governments need to ensure children feel safe to report when they are harmed.

If local communities continue to allow drugs, gangs, crime, violence, and the sexual and physical abuse of children, the federal government

must value children above politics and enforce the laws, as many tribal members want the federal government to help stop crime.

For example, in 2012-2013, elders at Spirit Lake insisted that the federal government do something after children were murdered and their tribal police did nothing. Unfortunately—tragically—while the federal government did take over, it ultimately did very little to stop the crime. In February 2013, a town hall meeting was held. One tribal member after another stood up to scold both the tribal council and the federal government for allowing crime, physical abuse, and sexual abuse to continue. One elderly woman stood up to say she had witnesses two little boys, 8-years-old and 6-years-old, performing sex on each other in her front yard. She called the police, but nothing was done. While she was speaking, the tribal chair spoke over her and attempted to stop her testimony. Later, other tribal members said nothing was done, or will be done, because the boys were nephews of a tribal council member (CAICW 2014).

Four months later, under the careful watch of the federal government, 3-year-old Laurynn and her twin, Micheala, were placed in a Spirit Lake home with a woman who was known to be abusive. Three weeks after their placement, she and her sister were beaten and thrown down an embankment. Laurynn died that night. Unfortunately, Spirit Lake is not the only place this has happened, and Laurynn is not the only child who has been placed in a home known to be abusive. It is not an isolated or rare incident.

Michaela, now ten, testified before the Commission, stating:

> … When I was a baby, my twin sister and I were rescued from our home where we had been without care for more than two days. Our mom has addiction issues, and she was not there to care for us. …when we were almost three… the ICWA worker came from our tribe and said we had to go live with our grandfather and his wife. They had addiction problems, too. The social worker tried to help but we had to go. Life with our grandfather was hard. I remember being scared all the time. I remember their faces staring at me. The house was really dirty. I remember when we were pushed down an embankment and I tried to help my sister, but I couldn't. I remember trying to climb back up the hill and being pushed back down. I wondered why. I wondered where my [*foster/adoptive*] mom and dad were. I wondered if I had done something or Laurynn had done something that my mom had sent us away. I wondered why nobody helped us.
>
> Laurynn died after she went down that hill. I came back to my [*foster/adoptive*] mom and dad. I was scared and I had nightmares. I was afraid of Native Americans. It took a long time to ask my mom why she sent us away. My mom told me that she didn't and that somebody else made those decisions. I now know that the decisions were made for me by ICWA. Now I love my parents and my brothers and sisters. We come from two different native tribes, and many other

> nationalities. The oldest is 36 and the youngest is four, and I am in the middle. We love each other.
>
> I am a smart, competitive girl. I have good friends and I get good grades. I have read articles about ICWA, and I have thought about how it has changed my life. I miss my sister. I think about what it would be like if she was still here with me. I asked my mom one day if ICWA had changed since Laurynn had died. … I do hope ICWA can learn from our pain and make better decisions for other native children. (Kersey-Russel, 2022)

Cory Pedersen, ND Director of Children and Family Services[16], notes that background checks for kinship foster care are not required (Peterson 2022).

**Recommendations**

I. To make protection of women and children a primary policy focus, as well as find better ways to prevent of crime and alcohol/drug abuse, state, tribal, and other local governments will:

   (1) Strengthen and adhere to current laws related to background checks.
   (2) Add background checks for relatives offering kinship care.
   (3) Set up county-wide hotline and safehouse mechanisms.

II. Ensure that all sentencing reports involving departures from jurisdictional guidelines document **in the court record** the **reasons for the departures**.

III. Through cooperation and collaboration, unify tribal and county courts to establish **Family Dependency Treatment Courts** and **Family Wellness Courts** for cases involving tribal youth and adults. Establish holistic, family-oriented services and programs with a focus on healing and justice in areas of child welfare, juvenile justice, and violence. A 'best practice' model is the *Shingle Springs Family Wellness Court* in Placerville, California.

IV. County and tribal attorneys will work with state legislators to **explore homicide by child abuse statutes used in other states and tribes determine those most beneficial** for charging child abuse cases.

V. Representatives of state, county and tribal law enforcement, courts, prosecutors, and parole/probation programs will explore practical measures for **lowering tolerance for child injuries and violation of no-contact orders.**

[16] Cory Pedersen, Director of Children and Family Services Division, ND Dept. of Human Services, Bismarck, June 22, 2022.

VI. Establish a guideline that **if a parent voluntarily and repeatedly allows an abuser back into the home,** child protection must consult with the county or tribal attorney on the filing of a *Child in Need of Protection* (OFP) petition. If a parent or custodian is required to get **an OFP** as a condition of the child remaining with them, proof of the OFP must be provided to child protection within 10 days.

### ***Education***

The 2020 Congressional Research Service report on Native Education made this statement regarding Native Language Instruction:

> In prior decades, there were consistent calls to increase the use of native language instruction to increase cultural relevance and improve overall academic performance. One argument contends that language, culture, and identity are intertwined and thus are important to the tribal identity. A counter argument is that Native language instruction detracts from the core curriculum. In recent years, Congress has expanded program authorities and appropriated funds to permit Native language instruction. There is **no** consensus in the research literature regarding the relative effectiveness of Native language instruction. (Dortch 2020, 33-34) (Blackburn 2020, 9).

While Native language programs are being funded and implemented in Bureau of Indian Education (BIE) and tribally run schools, there is little evidence that this will benefit Native students in higher education" (Blackburn 2020, 10). In fact, if too much instruction time is devoted to it, the academic knowledge base that the child needs for preparation and benefit in higher learning and the job market suffers (2020, 10). "Despite a growing amount of literature advocating for more Native culture and languages to be included in instruction, there is little empirical evidence that supports increased cultural content translating into better academic performance" (2020, 17).

In both the 2015 and a 2019 Native American Education Studies, data showed that BIE and tribally run schools have the lowest performance rates of 4$^{th}$ and 8$^{th}$ grade Native Children in reading and math (Ninneman, et al. 2017) (Rampey, et al. 2021, 46-47). Further, a July 2020 Congressional Research report acknowledged "the poor academic performance of AI/AN students in BIE and public schools (Dortch 2020)" (Blackburn 2020, 15). This, despite data that reveals that schools performing worst among Native children receive nearly twice as much per pupil than non-tribal schools (2020, 13) (US-CCR 2018, 245) (N. S. Riley 2022).

In terms of 'best practice,' **the BIE schools have proven to be the worst**.

Riley notes that the BIE has the "lowest achievement outcomes" for students despite the most money spent and suggests that tribal leaders instead partner with high-performing charter schools (N. S. Riley 2022). Rather than the failed top-down mandates of federal agencies and the siphoning away of funds to pay the federal agencies, high-performing charter schools allow for local community involvement and community-led designing of curriculum. Community-led curriculum can include the level of language and culture preferred by that local community.

To do that, tribal leaders may need to first lobby the state to change its policies toward charter schools. According to Riley, the biggest impediment to charter schools serving Native children is state policies. "The states with the largest native populations do not allow" charter schools (Riley 2022). This includes states like South Dakota and Montana. Further, she added, "our current federal law restricts the use of BIE fund for charter schools" (Riley 2022).

> I think this is a terrible policy and again restricts the autonomy of Native communities to choose the schools that are best for their kids. There is no doubt that the federal government is failing its responsibility to educate native children, which why the leaders in those communities must advocate for change. (Riley 2022)

However, state politicians, Riley advises, "regularly court the vote of native communities and this could be a policy that many more communities could be lobbying for." Riley noted that if she were a leader in one of these communities, she "would be doing much more to advocate for state policy change" (Riley 2022).

**RYAN CHEE**
**PRINCIPAL, LEUPP ELEMENTARY**

***Chee Testimony included:***

**Challenges**

- Single parent homes, or raised by grandparents
- Language
- Internet access
- Transportation/remoteness
- Lack of a master plan
    - Lack of leadership
    - Lack of economic development
    - Lack of business plan
    - Lack of agricultural plan
    - Lack of local, county, state, and national law enforcement
- Poverty
- Unemployment
- Limited exposure to mainstream culture
- Domestic violence
- Drug and alcohol abuse
- Literacy
- Relationship issues
- Lack of housing, utilities
- SUICIDE

**Addressing the need**

- College and career readiness – *No Excuses University*
- Positive thinking
- Trust-based relational interventions (TBRI)
- Community based approach

**Recommendations**

- Mental health counselors
- Infrastructure
- College/career readiness
- Financial literacy programs

- *Community/Public Panel, Navajo Regional Hearing, Flagstaff, Friday, April 22, 2022*

**Phefelia Nez**
**First Lady of Navajo Nation**

"I homeschool my children, and …while you look at the education system a lot of our families rely on… there's a belief that when it comes to education, it's the business of schools and education institutions to dictate – to implement that for us. But as a homeschooler, you don't think that way. It's like we're in charge – we should be the ones in charge of …what it is that we want our children to learn and who to influence them. And to really have better control over what they experience, the things that they are exposed to, and the opportunities that are given to them. The western mainstream items should always be a supplement to that. I am not against any of it, but it should always be a supplement to what tribal nations have to build and offer for themselves first."

*– Child Welfare, Juvenile Justice and Violence Panel, Navajo Regional Hearing, Flagstaff, April 22, 2022*

Another 'best practice' that can be incorporated within current and public-school systems is the *No Excuses University* (Chee 2022), (Jensen 2022). According to former student Tyler Jensen and Leupp Elementary School principal Ryan Chee – the only Flagstaff Unified School District located on Navajo Nation – the *No Excuses University* has been integral to the encouragement and growth of students. Jensen states, "…at such a young age it was engrained into my head that I had to succeed and go to college. With the help of my school's '*No Excuses University*' program, at the ripe age of 8 I knew I wanted to go to Yale to become an accomplished brain surgeon and help my family" (Jensen 2022).

However, it is important to stress that while local cultural preferences are crucial and encouragement and motivation are vital, a solid academic foundation is also essential. Although many tribal colleges accept Native American students "using lower standards" (Blackburn 2020, 11) and argue that these colleges have a broader mission than just producing degrees – such as working "to prevent Native languages from going 'extinct' and to address 'social problems on reservations' (Butrymowicz 2014)" (Blackburn 2020, 11-12), entering college unprepared "leads to poor academic achievement and/or dropping out of college altogether" (2020, 11).

Nevertheless, attitudes and expectations of teachers and students play a key role in academic outcomes, which makes *No Excuses University* a best practice along with high-performing charter schools.

The *Alaska Native Science and Engineering Program (ANSEP)* represents 'best practice" in the teaching of science, technology, engineering, and mathematics (STEM) to Native Youth. Founded in 1995, ANSEP is "a group of more than 100 private corporations, philanthropic organizations, state and federal agencies, universities, high schools, and middle schools"(ANSEP 2012). ANSEP's objective is to "effect systemic change in the hiring patterns of Alaska Natives in science and engineering" by placing students "on a career path to leadership" (ANSEP 2021). Over the years, ANSEP developed into a "sequential education model," providing a "continuous

string of components beginning with students in kindergarten and continuing through middle and high school, into science and engineering undergraduate and graduate degree programs through to the PhD" (2021). Programs have included Jumpstart, Summer Bridge, computer assembly, Middle school academy, Acceleration Academy, Academies of Engineering, University Success, and Graduate Success (2012). These programs have improved academic outcomes, reduced time to degree, and saved money for families and governments. As of 2021, about 2,500 Alaska Native middle school students, high school students, and university students participated, and at each of these levels, they have been successful "at rates far exceeding national and state numbers" (2021).

**Recommendations**

I. A more **decentralized and tailored** approach. Federal bureaucracy cannot beneficially dictate to the myriad unique communities across America.
II. A system of **local, charter schools** with customized programs can help children succeed (Blackburn 2020, 21) (N. S. Riley 2022).
III. **Increase focus on STEM** (Apala 2022).
IV. **Encourage attitudes and beliefs** about success and ability (Blackburn 2020, 20) (Chee 2022) (Sutteer 2022).

### *Physical, Mental, and Behavioral Health*

Physical, mental, and behavioral health requires attention at all phases of development, from within the womb until adulthood.

The 2019 *Prevalence of Fetal Alcohol Spectrum Disorders* study assessed 94 Native American children and their mothers. Out of those 94, researchers found that 20 "met criteria for FASD (Montag, et al. 2019). SAMHSA notes that Native Americans "have some of the highest rates of fetal alcohol syndrome in the Nation" (DHHS/samhsa 2007). Further, SAMHSA reports that "Alcoholism is one of the most significant public health problems for Native Americans. They are five times more likely than whites to die of alcohol-related causes, including liver disease. They also have higher rates of drunk driving and related deaths than the general population" (2007). Many children who are born with FASD go on to abuse alcohol themselves. There is no argument that alcohol abuse and fetal alcohol disorders are a major public health crisis within the Native American community.

Jody Allen Crowe (2022), former high school principal on two Minnesota reservations and Founder, President, and CEO of Healthy Brains for Children, notes a study concerning FASD prevention (Driscoll, et al. 2018). This study, in a "Think before you Drink" campaign, placed FASD information and pregnancy test dispensers in 9 Anchorage and Kodiak Island bars. Over the course of a year, over 12,000 free tests were dispensed in one year. From those tests, over 2000 women responded to the survey. Out of those 2000 women, 43 found they were pregnant, and "alcohol consumption among pregnant women was lower at follow-up than at baseline" and that this 'best practice' program can "effectively promote informed alcohol consumption decisions among women who are, or may become, pregnant. (Driscoll, et al. 2018). The study found that "FASD prevention methods, particularly paired with pregnancy test dispensers, in the women's restrooms of establishments that serve alcohol can effectively promote informed consumption decisions among women who are, or may become, pregnant" (Driscoll, et al. 2018).

FASD PREVENTION

"FASD prevention methods, particularly paired with pregnancy test dispensers, in the women's restrooms of establishments that serve alcohol can effectively promote informed consumption decisions among women who are, or may become, pregnant"

*(A Formative Evaluation of Two FASD Prevention Communication Strategies 2018).*

For newborns, Riley recommends a nurse led wrap around program:

> The one program for which there is significant evidence, and many of you probably know about this, is nurse home visit programs. Because abuse and neglect are often intergenerational issues, it is very useful for mothers and fathers to have access early on to information about healthy parenting. There are other programs that do this, but do not involve nurses. They are less expensive, but I need to warn you that they do not have the same level of effectiveness…A number of studies have been done and the results are significant for these nurse visiting services (Riley 2022).

For the protection of children in general, the *Minnesota Child Fatalities Maltreatment* study offered several recommendations. Among those the study stressed are increased professional training for the recognition of abuse and neglect, as well as increased communication between medical providers, social services, courts, and other mandated reporters.

Finally, support families in crisis by establishing recovery centers and services that treat families as a unit, such as the services offered by *Good Road Recovery Center* in Bismarck, ND.

**Recommendations**

I. Establish **FASD prevention strategies**, including methods to reach women in vulnerable demographics.

II. Establish **nurse-led visiting services** that provide health and parenting education for young families.

III. Require **mandatory training for medical providers** as part of licensing requirements, and **protocols** to hold medical providers accountable for fulfilling their responsibility as mandated reporters**.** This would include:

(1) Identification of injuries that are likely symptomatic of neglect or abuse.

(2) Mandated procedures for reporting abuse while the parent and child are still with the provider.

IV. Establish **drug and alcohol treatment centers** and group homes on the 'best practice' model of the Three Affiliated Tribes *Good Road Recovery Center*.

***Cross-Systems Issues***

Public testimony at a Spirit Lake townhall meeting in February 2013 showed both federal and tribal officials to be complicit to abuses of women and children. Senate offices turned a blind eye, as did the federal Administration of Children and Families, the BIA, and the U.S. Attorney's office. This again became evident during testimony to the House Subcommittee on Indian, Insular and Alaska Native Affairs in June 2014. Tribal members often live in small, closely connected communities and know whom they can trust and who they cannot. Vulnerable low-income children and families are at the mercy of officials of jurisdiction. Federal mandates requiring jurisdiction based on heritage do a disservice to victims who know they cannot trust their tribal court of jurisdiction. Quite simply, if it is the judge's nephew who raped you, you might want to take your case to a county or district court.

Yet despite evidence and testimony by tribal members themselves, it is socially and politically unacceptable— and even "racist"— to mention such problems. For example, the Bureau of Indian Affairs' recent regulations governing ICWA forbid state courts from considering "negative perception[s] of Tribal or BIA social services or judicial systems" when deciding whether or not good cause exists to transfer a custody case to tribal court. (25

C.F.R. § 23.118) (Notably, the regulation allows the court to consider *positive* "perceptions.")

Corruption within federal, state, county and tribal governments must be addressed by federal, state, county, and tribal governments together.

**Recommendations**

I. Develop partnerships between tribal, county and state child protection and professions **that are trusted by parents** such as schools, public health, parenting programs, mental health, and domestic violence services to connect them more successfully to programs and services that reduce maltreatment.

II. Ensure the capability to cross-report information among tribal, county and state child protection, corrections agencies, and the relevant courts to share timely information regarding violations of an OFP or **Domestic Abuse No Contact Orders**, as well as dismissals or attempted dismissals of an OFP.

***Research and Data***

Riley suggests that to protect children, modern technology and data systems need to be employed. She states,

> The greatest predictor of child abuse or neglect is their previous history. Unfortunately, in many native communities, the collection of information on victims is woefully inadequate. Data systems are outdated and in many tribal child-welfare agencies, paper systems are still the norm. (Riley 2022)

Obtaining data concerning child deaths is also crucial to community wellness. According to the National Center for Fatality Review and Prevention, "Child Death Review (CDR) is a prevention-oriented process that reviews the circumstances surrounding the death of a child to improve the health and safety of the community" (CFRP 2024). But that data isn't always easy to obtain. Importantly, according to the primary author of the *Minnesota Child Fatalities Maltreatment* study (2023), Minnesota is the only state, as far as they could determine, "that makes child protection court records accessible to the public" (Gehrman 2024). But even with that – as well as a federal law[17]

[17] "On September 30, 2011, the Child and Family Services Improvement and Innovation Act (42 USC 1305) was passed into law. The Act requires states to describe the various sources of data on child fatalities and, if

that requires states to provide child fatality data when requested – the study was only able to obtain data on half of Minnesota's reported 161 child maltreatment fatalities (2023).

**Recommendations**

I. Congress will encourage states, tribes, and applicable counties to produce reports on child fatalities and near fatalities as required by law.

II. States, tribes, and applicable counties will make public "critical incident" reports and child protection court records for purposes of research and community wellness.

### *Economics: Employment and Property*

William J. Lawrence, a Red Lake tribal member, U.S. veteran, attorney, and publisher of the Native American Press, stated in 2002 that the Indian Citizenship Act "should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations" (Lawrence 2002, 395).

The root cause of such poor treatment is the ongoing assumption that tribal members are incapable and cannot cope without the help of federal government. This continuing paternalism, together with the greed of those who profit off the "Indian Industry," only feeds the cycle of dependency, victimhood, and dysfunctional living.

There is no basis for the belief in the helpless Indian any more than there is for belief in the "noble savage." Through historical research, Anderson, et al., examine traditional Native American economies and explain how Native American heritage and culture provide a foundation for renewed tribal entrepreneurship with less dependence on federal funding. Traditionally, vibrant tribal economies were built on solid and time-tested governance, property ownership, and trade. Resources were used for the benefit and sustenance of their communities.

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applicable, why information is not included from other relevant agencies, such as state vital statistics, child death review teams, law enforcement agencies, and offices of medical examiners or coroners. The additional information required by the Act will assist in improving the comprehensiveness and quality of national data on child fatalities from maltreatment. HHS … issued Program Instructions (ACYF-CB-PI-13-04) in April, 2013, requiring states as part of their 2013 Annual Progress and Services Report to address the sources of information used to report child fatality data and to describe efforts to expand the sources of information used to report such data [to] strengthen the completeness and accuracy of child fatality data by fostering states' use of cross-agency data sources" (GAO 2011).

Eastern tribes owned land, traded land, and invested in their land while "cultivating fields, propagating vegetation, and managing wildlife" (Anderson and Purnell 2019). American Indians had property laws before Europeans arrived. Pacific Northwest tribes staked out private property for clam gardens on sections of beaches. Southwestern tribes had cornfields with boundaries marked by stones (2019).

It was later political and legal forces that changed all that. Despite the purported purpose of the Indian Commerce clause, the rights and interests of tribal members were not protected or respected by the federal government from at least the 1830s on. This historical record needs additional examination in order to understand the "chronic underdevelopment of American Indian reservations" and the effect that the lack of enforceable property rights has on individual tribal members (Alston, et al. 2021).

**Stable and enforceable property rights are absolutely essential to economic development.** As economist Hernando de Soto (2000) has shown, much of the poverty of third world countries can be explained by the fact that they do not consistently respect or protect property rights or provide legal clarity respecting these rights. As a result, residents build illegal homes that cannot be used as leverage to promote economic expansion, or for similar reasons are unable to use the land they purportedly own as collateral for loans. Therefore, their economies "cannot function as efficiently" (Sowell 2009, 244-245). Currently, the Department of Interior holds title to the property of millions of individual tribal members. They are not allowed to sell it or use it as collateral without permission. This stifles economic growth in Indian Country, thereby worsening the lives of countless children. But it has a more insidious result, as well. By blocking alternative sources of revenue, this system forces tribal members to look to the government for sustenance, and one of the most effective means of obtaining increased government funds is to use children as leverage to persuade lawmakers to give them more money. In other words, the economic strangulation of Indian Country either creates an incentive for tribes to use children as leverage for federal funding or at least removes the economic incentive for tribes to improve the economic well-being of their vulnerable citizens.

As Friedman (2002) has argued, **competitive capitalism is inseparable not only from economic freedom but from political freedom.** Government overreach and control of

resources destroys liberty[18], whereas preserving political freedom in a system where the government controls the economy is impossible. As both the federal and tribal governments often practice extreme over-reach over citizens within Indian Country, Friedman's arguments are critical to understanding the political and economic conditions within the reservation system.

Gwartney, et al., assert that while tribal governments and the Bureau of Indian Affairs benefit from expanded communal property, individual tribal members living within reservation system do not. Communalization of property on reservations deprives individual Natives of financial leverage and dampens the incentives for individual users of the property to invest time or money in maintaining or improving it. The well-known economic principle of the "tragedy of the commons" teaches that private ownership provides motivation for thoughtful investment and careful planning—while the lack of private ownership creates incentives for over-exploitation and spoliation. Importantly, beyond physical property, economic analysis indicates that "extensive use of government planning will lead to both economic inefficiency and cronyism" (Gwartney, et al. 2016), two pervasive facts of life in Indian country. By contrast, in a society that enjoys stable and enforceable private property rights, individuals are not beholden to what government bureaucrats plan, and the economic incentives are such as to encourage individuals to pursue efficient, wealth-creating, sustainable development that improves their lives.

The Commissioners saw these factors at work in Bismarck when visiting facilities owned by the **Three Affiliated Tribes of the Fort Berthold Reservation.** The Fort Berthold Reservation has been in the oil business for some time and has profited in the millions of dollars. In 2014, the Reservation, about 120 miles north of the Standing Rock reservation, started building a "transload facility, the first part of the Three Affiliated Tribes' Thunder Butte Petroleum Services Inc. refinery projects" (AP 2014) to transport Bakken crude to market. At that time, they had 640 wellheads with an expectation of growing to 3,000, that use water from the Missouri river for refinery, extraction and byproduct, and feed downstream toward Standing Rock.

**This Tribe has spent its oil money on supporting its people.** Among many other things, it operates "the first treatment center centrally located, tribally funded and operated" (MHA Nation 2020). Built without any federal or state funds, this state-of-the-art facility was

[18] And government control over the media—which is practiced on many reservations—allows for the suppression of dissenting voices and prevents the truth from getting out.

the most extensive and well-funded duo-diagnosis "substance disorder treatment program" visited by the Commission. The program provides a holistic approach in an individualized manner - **free for their members from up to 18 months** (2020). Boasting 7 full-time addiction counselors, male and female cottages for high-level care, as well as aftercare, outpatient services, family programming, a medical clinic and recovery coaches. Even more exciting was that this center served whole families, understanding that alcoholism and drug dependency is a family illness and requires treatment for the entire family. With both male and female aftercare sober-living homes, the female home accepts women with their children.

**Gretchen Lee Schuchard**
**Case Manager/Care Coordinator**
"I have never seen a tribe put as much resources, people, and money, into a treatment center as MHA has. And of course, we all know that they have had a great fortune with …the oil boom. And they didn't have to choose to put [their fortune] into treatment services. …But they chose to, and that says a lot for the leadership and the commitment."
- *Good Road Recovery Center, Bismarck, North Dakota, June 22, 2022*

**The *Good Road Recovery Center* is the epitome of '*best practice*' and an example of how economic development can lead to the improvement of social conditions on reservations.** But economic development must begin with a reform of *institutions*—and particularly with the reform of those institutions that hinder the formation and use of capital by individual would-be entrepreneurs in Indian Country.

Lofthouse explains that it is unlikely for reservation poverty to be resolved under current federal Indian policy and institutions. Neither federal economic policies nor welfare policies are likely to ever affect problems positively. Understanding, appreciating, and utilizing market-process theory is more likely to alleviate the pervasive poverty plaguing much of Indian Country (Lofthouse 2019)**. Increases in government funding and interference will not improve the economy.**

**Recommendations**

I. Private property rights and reduction in bureaucracy will increase "mutually beneficial exchange, entrepreneurship, and innovation" (2019)[19] - and therefore, wellness, within tribal communities.

[19] These findings are consistent with those of the Harvard Project on American Indian Economic Development, particularly in chapter 7 of *The State of the Native Nations.*

### *Alaska*

While it may not be able to reach every village with a road, the federal government has not upheld its responsibility to villages where roads might be possible.

Of concern is wording within the Commission report that does not adequately reflect the genesis of the discussion of this subject by the Commission. At the very bottom of ***Recommendation 25,*** which concerns flexible funding and creating mechanisms to allow Native entities to consolidate funding streams, are three sentences meant to address that discussion. However, the discussion concerning Alaskan roads was not born out of a concern for flexible funding.

The heart of the recommendation came during the final meeting of the commission when the Commission was shown a video of Alaskan villages, and a side bar discussion began concerning the housing. The homes these children live in are often rudimentary—but come at exorbitant cost due to the expense of shipping building materials to Alaskan villages. This results in large families living together packed into small, decrepit spaces. Due to lack of roads, children in isolated villages also have great difficulty in getting to medical appointments, schools, opportunities for higher learning, and jobs. A medical emergency requires a plane to fly them to a hospital.

A recommendation was made to have the federal government fulfil its constitutional role in building infrastructure. However, a vote on the recommendation was not held due to a claim that it was not within the Commission's purview, and that this was the final meeting of the Commission, no new recommendations could be considered. The discussion that ensued concerning Alaskan roads delved into the first strong discussion the Commission had on poverty and infrastructure.

A transcript of the final meeting of the Commission (ASBWS-CNC 2023) documents the urgency of the discussion.[20] It was noted that:

- The poor economy and lack of Alaskan roads affect education, economic development, and medical care and is a child welfare issue.
- The issue of Alaskan roads and housing had not been heard before, and the Commission should have heard earlier about the lack of accessibility for these children and the expense required to build homes in the villages.
- Statements included, "There's a strong economic development piece that is being left out of the equation;" there is a culture of poverty that is "so ingrained that it is the norm;" the

[20] The subject of Alaskan roads did not come up within any witness testimony. It was an issue that came up almost by accident, in a discussion between Commissioners at the final Washington, D.C., meeting of the Commission in November 2023.

> "Commission report captured the cultural piece, but not the economic development piece;" "Alaska is a great example… there's people in Barrow [Alaska] right now that are… waiting for their turn to sleep on the sheets, because there's three or four generations living in these homes that are just horribly expensive to build, because [there are no roads]"

- "It isn't just Alaska that is suffering. We have houses boarded up, that are contaminated with meth use, cooking math… and we can't get back in them until we get that mitigated. …while this meth is happening in the home and parties are happening in a home, then the environment of those children is at issue because they're having to put up with that and then go to school next day. So, then it impacts their education. This is intertwined and interrelated."
- …"[Y]ou heard that in the Navajo Nation… their inability to build a daycare because its BIA controlled land… they're literally having to fly helicopter their healthcare provider back and forth between the community and the hospital every day because BIA won't give them permits to build staff housing; build a daycare, so that that system of poverty is still very much alive,"
- There is need to examine whether policies of federal agencies "hinder or support infrastructure development for the communities that they're surrounding" and not "come out with oppressive regulations, and there is a native community smack dab in the middle of those regulations that no longer have access to fishing or whaling, or their subsurface minerals…" There needs to be more consultation with the tribes by the federal agencies, and "a follow-up as to what was actually implemented as a result of the consultation."

One Commissioner queried whether there is a "system of intentional isolation," that questions "how do we keep these reservations isolated. How do we keep the villages isolated? It's a thought process that they don't deserve to be connected to the rest of the world like every other town in America."

In response to a suggested recommendation, the Commission was told it is too late to write any further recommendations. However, the Commission was assured that these issues would be added in the introduction, built out a little bit more in the cross systems issues, and woven as a theme through the discussion of each of issue "because this is context and frame." Although the report vendor stated, "We could go to the bottom where the cross system starts on recommendation twenty-five" as well as write more about flexible funding in the appendix, the Commission was assured this discussion would be "integrate[d] into the narrative."

The wording of the final paragraph of Recommendation 25 of the Commission report, as of January 2024, is as follows:

> Both the PL 477 Program and Self-Governance compacting are limited in scope and should be expanded to include all Federal child welfare, education, and juvenile justice funds. Many other funding streams that have the potential to improve Native children's lives are not even included in these opportunities. For example, while the Bureau of

> Indian Affairs distributes some funding for roads to Native communities, the bulk of federal infrastructure dollars are under the jurisdiction of the Department of Transportation, which does not participate in Self-Governance compacting. Yet the ability to combine such monies with other road and education infrastructure dollars could make a real difference in easing school attendance in remote areas, including Alaska Native villages and rural South Dakota. Such fully integrated and braided funding will best support efforts to improve outcomes for Native children and youth. (ASBWS-CNC 2024, 86)

Nevertheless, **a recommendation concerning the building of Alaskan roads by the federal government would be the only Commission recommendation that is a fully federal constitutional responsibility,** and would be within the Commission's purview under the enacting law authorizing:

- (1) In General: an evaluation of any (F) cultural or socioeconomic challenges in communities of Native children.
- (B)(x) solutions to other issues that, as determined by the Commission, would improve the health, safety, and well-being of Native children.

The wording of the Commission report's Recommendation 25 gives the appearance that *control of the money* is more important than getting vital roads built.

Further, with respect to ***Recommendation 4: Follow local community standards for Native foster and kinship placements,*** which cites Alaskan homes as an example of a situation where "window or bed requirements" are waived "in off-the-road system villages in order to keep children in their communities" (ASBWS-CNC 2024, 39), it should be noted that constitutional federal infrastructure could help to improve living conditions in off-the-road villages.

**Recommendations**

I. This minority report recommends that the federal government fulfil its constitutional role in building infrastructure in Alaska.

***Hawai'i***

Hilo Psychologist and CEO of the Bay Clinic reports:

> There is a big drug abuse, substance abuse epidemic. And it's not just our nation, it's our state, and it is a lot of Native Hawaiian families, so if there are any recommendations around, don't leave out drug addiction and alcohol prevention as a focus area, too. Because the biggest dream killer that I have been finding, the

biggest dream killer is addictions, and if our kids can stay away from addictions, then they get their dreams all in the palm of their hands. And that is what I've been seeing, and so, we have to continue focusing on that. (Alameda, 2023)

## Sexual Abuse

**DR. KIMO ALAMEDA**
**LICENSED PSYCHOLOGIST**
**CEO BAY CLINIC**

"Yes, so, there is, …it's a taboo subject. Some of it is incest. Some of it is the neighbor, or a family friend. And that's a sad reality, as well. But unlike other ethnic groups, other cultural groups, there are ways to address it. And it is within the community, actually, and then within the family. So, I've worked with a lot of children whose boundaries were violated and we talked through that and that's an issue as well. …Yeah, so, I appreciate you bringing that up. Thank you."

*- Physical, Mental and Behavioral Health Panel, Hawai'i Regional Hearing, Honolulu, Feb 15, 2023*

The Commission report relates: "Witnesses at the Hawai'i hearing also spoke to the military's contribution to criminal activity, including human trafficking and sexual abuse of Native Hawaiian children and young adults" (ASBWS-CNC 2024, 98). However, a 2020 statistical report on child abuse and neglect in Hawai'i showed that 10 times more children were abused by relatives than by military members, and 90% of those responsible were the child's parents (State of Hawai'i 2020, 15). Worse, there is evidence that the mistreatment of children in these cases is fostered by cultural factors that cannot be fairly blamed on the military. Former State **Senator Sam Slom, for example,** said there is "misplaced compassion" in Hawai'i for "perpetrators of sexual assault" and "there's also an underlying cultural problem here where some of our diverse cultures actually don't see any problem or any crime in having sexual relations with young children" (DePledge 2013). In a 2021 study on sexual abuse in Hawai'i, more than 25% reported that they have been trafficked. Further, 25% reported that they were first trafficked **by a family member**. This study linked childhood abuse to serious family and community problems that contribute to sex trafficking (Roe-Sepowitz 2020). Hawaiian news media in the last two years, one of which quoting data from the **Friends of the Children's Justice Center of O'ahu**, have reported a surge in sexual and physical abuse. To blame the problem on the military appears to be a transparent attempt to ignore more likely causes and to focus attention on a target that serves the political narrative of the exploitation of Natives by non-Natives.

**DR. KIMO ALAMEDA**
**LICENSED PSYCHOLOGIST**
**CEO BAY CLINIC**

"There are treatment facilities on this island. But there's not much on the big Island. Actually, there is no inpatient treatment facility on the big Island for youth."

*On Oahu:*

"I think it is available, but if you don't have insurance, it could be expensive, and I don't think they have enough beds, actually. So, even on this Island, some have to… go to the continent for that."

*- Physical, Mental and Behavioral Health Panel, Hawai'i Regional Hearing, Honolulu, Feb 15, 2023*

While some claim it must be dealt with quietly within the family unit (Alameda 2023), that has been the cultural method for decades, and has not proved to stem the chronic abuse children have been suffering.

**Recommendations**

I. The State will establish facilities and resources for the treatment of youth. The Three Affiliated Tribes of North Dakota are an example of best practices in this area.

II. Move from the idea that it is taboo to talk about the sexual abuse of these children, **to making it culturally and unconditionally taboo to touch a child sexually**.

III. Refer to the Child Welfare recommendations outlined on **page 24** for methods of increasing the protection of children.

## *The Rights of Children and Families regarding the Indian Child Welfare Act (CAICW 2020)*[21]

In 2023, the following recommendations were submitted to the Commission with respect to the Indian Child Welfare Act. This minority report reiterates the importance of these recommendations.

**Recommendations**

- Children of tribal heritage need **protection equal to that of any other child** in the United States. State health and welfare requirements for foster and adoptive children should apply equally to all. Importantly, those assigned to child protection, whether federal, state, county or tribal, need to be held accountable if a child is knowingly left in unsafe conditions.
- **Fit parents, no matter their heritage, should have the right to choose healthy guardians** or adoptive parents for their children without concern for heritage or the overriding wishes of tribal or federal government. The U.S. Supreme Court has repeatedly held that parents have a "fundamental right…to make decisions concerning the care, custody, and control of their children" (*Troxel v. Granville* (2000)). ICWA deprives Native parents of that right both by

[21] Submitted to the Commission by email January 2023

depriving them of the ability to choose adoptive families for their children (as in the *Holyfield* and *Brackeen* cases) and by blocking them from terminating the rights of abusive co-parents (as in the *T.A.W.* or *Stephanie H.* cases).

- The '**Existing Indian Family Doctrine**' should also be available to families and children who choose not to live within the reservation system, or the political designation associated with it. That doctrine holds that where the sole connection between a child and a tribe is biological ancestry, ICWA cannot be constitutionally applied to that child's case because doing so would constitute a form of race-based discrimination. As one California court has said, "recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA." (*In re Alexandria Y.*, 45 Cal. App. 4th 1483, 1493 (1996)). But state courts have now almost entirely abandoned this doctrine, with the result that ICWA is applied to children based exclusively on the blood in their veins—a clear violation of the Constitution's prohibition on treating people differently based on race or national origin.
- United States citizens, no matter their heritage, are guaranteed **civil rights which include fair hearings.** When summoned to a tribal court, parents, and legal guardians, whether enrolled or not, should be fully informed of their rights, including their right under ICWA (25 U.S.C. §1911(b)) to object to the transfer of their child custody cases into tribal court. Tribal courts are not bound by the Bill of Rights, and thus do not necessarily include such basic civil rights protections as the right to an attorney. And, despite the plain language of the Indian Civil Rights Act,[22] the Supreme Court has sharply limited the right of appeal from tribal courts (*Santa Clara Pueblo v. Martinez* (1978)). That means that any parent who, unaware of the risks, accepts transfer of a child custody case into tribal court risks waiving fundamental constitutional protections by failing to object. Parents deserve to be at least warned of this possibility.
- ICWA requires state trial courts to obtain testimony from "**qualified expert witnesses**" in cases involving the termination of parental rights. But ICWA does not define this term, and the BIA has now defined it by regulation as referring to a person who is an expert *in tribal culture,* not a person who is an expert regarding *the well-being of children.* This is, frankly,

[22] 25 U.S.C.§§ 1301-1304 (1968).

absurd, and hardly serves the best interests of children. While knowledge of tribal culture may be helpful in particular cases, the whole purpose of a child welfare matter is the welfare of the child—not the welfare of the tribe—and this definition of "expert" disregards that fact. A qualified expert witness needs to be someone who has not only met the child, but has worked with the child, is familiar with and understands the environment the child has thus far been raised in and has professional experience with some aspect of the child's emotional, physical, or academic health. This is far more important than understanding the customs of a particular tribe. Yet the existing BIA regulation means that, for example, if a child is being beaten by her parents, and her long-distant ancestor was a signer of the Dawes Rolls, the court can—indeed, must—hear testimony from a person who is an expert on the religious practices of ancient Cherokees, but not from a person who is an expert on child abuse in 2024. This is true *even if that child has been raised apart from the tribal community*. This is utterly nonsensical—and ultimately harmful to Native American children.[23]

- The **rights of parents or family members who are not tribal members** must also be safeguarded. Although the "placement preferences" in Section 1915 of ICWA specifically say that a child must be placed with a "member of the child's extended family" before placement with "other Indian families," the reality is that in many cases grandparents or other extended family members who are not members of a tribe are unaware of their rights, and they—and some lawyers and judges—assume that placement with tribal members takes precedence. As a result, these family members unwittingly waive or fail to assert their rights under ICWA, losing out to tribal members who have more knowledge of the Act. In other words, tribal and state courts discriminate against grandparents who are not tribal members, in direct contradiction to ICWA. What's more, even though ICWA expressly does not apply to divorce proceedings (see Section 1903(1)(iv)), ICWA is often used against non-tribal-member parents in divorce proceedings. This is most often the case in tribal court, but it happens in state court as well. In addition, non-member parents often find it difficult to serve people with state court summonses if such people reside on reservation land. Without

[23] A perfect example of this is the Alaska Supreme Court's decision in *Nate G. v. State of Alaska*, No. S-18454 (Apr. 18, 2023), in which the court reversed a trial court decision that terminated the rights of an alcoholic father who, among other things, was arrested for driving intoxicated with his 5-year-old son in the car—because the expert who testified at trial was not an expert in tribal culture. As one of the justices observed in a separate opinion, "everyone knows that drunk driving kills…. I do not see how expert cultural testimony is relevant." Yet that is how ICWA and the current regulatory definition of "expert witness" work in practice.

adequate access to legal representation or awareness of their rights, non-member adults are deprived of rights that even ICWA grants them.

- Finally, **if tribal membership is truly a political rather than racial designation**—as required by the Supreme Court's *Mancari* decision—then the definition of an "Indian child" simply must be limited to children who are "enrolled" in the tribe, not merely "eligible."
    - At present, every tribe defines eligibility based exclusively on biological ancestry, not on political, cultural, social, linguistic, or religious factors.[24] As a consequence, to deem a child "Indian" based on "eligibility" simply is to create a legal category based on biological ancestry. One result is that in many such cases, relatives are surprised to discover that these children are suddenly members of an entity with which the family has had no political, social, or cultural relationship.
    - Keeping children, no matter their blood quantum, in what a State would normally determine to be an unfit home—solely because the tribal government claims that "European values" do not apply to and are not needed by children of tribal heritage[25]—is racist in nature and a denial of the child's personal right to life, liberty and the pursuit of happiness.
    - Tribal members are not just U.S. citizens; they are human beings. They are not chattels owned by tribal governments or servants indentured to the success of tribal governments. Nor are they lab rats for Congress, pawns to be used at the negotiating table. Yet ICWA treats Native Americans as if they were categorically distinct by virtue of their birth—as if safety, stability, permanence, and other considerations do not matter for them in the same way they matter to black, Asian, Hispanic, or white children. This racial thinking is so pervasive in the ICWA community that some activists insist that Native children have different psychological needs from their non-Native peers. One prominent law professor has even argued that Native children

[24] To be clear, there is an important legal distinction between *tribal membership*—which is a function of tribal law—and *Indian child status* under ICWA, which is a function of state and federal law. Every tribe certainly has the right to decide what conditions will qualify someone for tribal citizenship, and that raises no constitutional problems. But for the federal or state governments to treat children differently based on biological factors, such as giving that child "Indian child" status under ICWA, runs afoul of constitutional prohibitions on race-based or national-origin-based discrimination.

[25] This might seem like an extreme and absurd claim, but Texas courts—to cite just one example—have ruled that the "best interest of the child" standard is a merely "Anglo standard" inapplicable to Native children. *Yavapai-Apache Tribe v. Meijia*, 906 S.W.2d 152 (Tex. Ct. App. 1995).

should never be raised by parents of different ethnicities for the same reason that "a baby elephant ought to be raised by elephants."[26] But Native children aren't a different species, as elephants are. They're human beings—and fellow American citizens.

- Even if a child had significant relationship with tribal culture, forced application of ICWA conflicts with the Constitution. There is nothing within the U.S. Constitution nor any treaty that gives Congress authority to force individuals to stay connected to a tribe, to support a particular political viewpoint, or to raise their children in a prescribed culture or religion. Yet in practice, ICWA does compel these things.

- For these and other reasons, the **ICWA cannot remain law**. Natelson (R. G. Natelson 2022) has shown that the ICWA goes far beyond the limited scope of the Indian Commerce Clause. Although the Supreme Court in *Brackeen* ruled otherwise, it is clear that Prof. Natelson has the better of the argument. Even if that were not so, however, ICWA would still be unconstitutional, for at least two reasons. First, even when acting within its Commerce Clause power, or any other power, Congress cannot adopt laws that treat people differently based solely on their biological ancestry, as ICWA does.[27] Second, even when acting under its *treaty* powers—probably the most expansive powers it has—the federal government cannot force American citizens into a court system that lacks due process protections (as is the case with tribal courts) or act in matters reserved to the states. (*Reid v. Covert* (1957)).

*End of Recommendations for the Rights of Children and Families regarding the Indian Child Welfare Act*

[26] Christine Metteer, "Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act," *Arizona State Law Journal* 28(1996): 589-628, p. 624 (quoting novelist Barbara Kingsolver).

[27] As noted above, the Court's decision in *Mancari* cannot justify ICWA, which, unlike the law in *Mancari*, is aimed at a racial group rather than a political group. Even if "Indian child" status is not regarded as racial, however, it is still a group defined by national origin. See *Oyama v. California* (1948) and *Espinoza v. Farah Manufacturing* (1973).

# THE IRON TRIANGLE AND FEDERAL INDIAN POLICY

Law and economics expert James Copland asserts that "scaling back the regulatory state" requires an "understanding [of] the forces that underlie the regulatory behemoth" (Copland 2018). With that in mind, this report will look at the three legs of the Iron Triangle of federal Indian Policy: federal agencies, special interest groups, and academia.

## Federal Agencies

Constitutional law and history professor Phillip Hamburger argues that administrative power is inherently prejudicial and discriminatory "for structural reasons" (Hamburger 2020). In a move that was due less to racism than to classism, President Woodrow Wilson founded the administrative state in the early part of the 20th century to take political power out of the hands of voters and put it into the hands of the "knowledge class" (2020). Worried that the bulk of mankind was "rigidly unphilosophical," Wilson complained in his book *The Study of Administration* (1887) that "the reformer is bewildered" by having to persuade "a voting majority of several million heads" (2020). Simply put, the elite felt their power threatened by the masses. Rather than try to persuade the public, Wilson thought administrative agencies could take over the actual power of governing, so while average citizens would still believe they had a republic "the right sort of people" would actually be making the operative decisions (2020).

It did not take long, however, for the administrative agencies to do the opposite of what was hoped, not just by usurping Congress but by making a president's ability to reform more difficult as well. James Copland explains there are "four forces of the regulatory state—regulation by administration, prosecution, and litigation; and progressive anti-federalism" (Copland 2018). These four

> - operate mostly independently of Congress, notwithstanding the legislative branch's constitutional power to 'regulate Commerce… among the several States.' To a significant degree, each force operates independently of oversight, the elected president as well. These forces both complement and interact with one another, frustrating ambitious reformers (Copland 2018).

But agencies are not alone as wielders of power. This is where an iron triangle begins. Dwidar raises questions concerning interest group lobbying and "federal bureaucracy's implementation of public policy" (Dwidar 2022). Dwidar analyzed datasets of "co-signed"

public comments of organizations "across nearly 350 federal agency rules proposed between 2005 and 2015," and found that "agencies favor recommendations from organizationally diverse coalitions" (2022). Influence is higher when the lobbying coalitions are large and well-funded, and the policy goal can be accomplished under the radar (2022, 224). This raises "issues of legitimacy and political control for American government, as the bureaucracy mainly consists of individuals who were neither elected nor appointed to their positions, without constituents routinely holding them accountable" (2022).

Currently, about 90% of all laws originate from agencies, not legislative bodies, and most lobbying efforts are done by joint special interest coalitions. Dwidar asserts that this "is no fluke; as the major political parties have polarized, substantive lawmaking by the U.S. Congress has declined and legislative language has grown increasingly vague," and agencies have "strong incentives" to consider policy recommendations of special interest groups (Dwidar 2022).

Agency overreach can harm tribes as well. Just recently, the president of the Navajo Nation "ordered the tribe's attorney general to weigh legal action" against the Biden administration after Interior Secretary Deb Haaland violated its tribal sovereignty by ordering a 20-year ban on oil leasing within one of their communities. Haaland's order affected 53 Navajo allotments "located in the 10-mile buffer zone around Chaco Canyon, generating $6.2 million per year in royalties for an estimated 5,462 allottees, according to Navajo Nation data. In addition, there are 418 unleased allotments in the zone that are associated with 16,615 allottees" (Catenacci 2023). Yet thanks to the power of the administrative-law system, Haaland was able to effectively confiscate this land from the tribe without Congress ever deliberating over the decision or voting on it, and without the President ever signing a bill.

Hamburger concludes that administrative power "is an unlawful power which deprives vast numbers of Americans of their constitutional freedoms, including their freedom to live under laws made by their representatives, their jury rights, and their freedoms of speech and religion" (Hamburger 2020).

Nowhere is this played out more clearly than within federal Indian policy.

### *Rulemaking*

Romero and Palazzo propose that through unorthodox rulemaking, federal agencies impair both separation of powers and cooperative federalism. Agencies justify the process by

asserting that it defuses political conflicts and that either actual rulemaking or more unorthodox forms of rulemaking (such as "guidance" instruments) are more "flexible and effective in advancing federal policies" than are the processes of either lawmaking or actual rulemaking (Romero and Palazzo 2018). By calling their directives "guidance," or "FAQs" or "Dear Colleague Letters" rather than a policy or "rule," an agency can appear to be "not affecting existing rights and duties" or "changing a slice of the world" even when they are (2018). However, Romero and Palazzo argue, these methods clash with constitutional authority (2018).

## Special Interest Groups

After studying the founding dates of more than 7,000 organizations, Holyoke (2021) finds that during the 20th century thousands of civic groups, professional associations, and labor unions began to appear in Washington, D.C. In the late 1960s and 1970s, so many new activist groups appeared on behalf of the interests of their members that by 1981, President Ronald Reagan tried to cut their government funding. Nevertheless, by 2019, there were more than 9,000 interest groups lobbying Washington (2021, 716).

Most often, activist groups formed in response to "threats of regulation from the state itself" (Holyoke 2021). However, advocacy groups formed when "the state offered them hope of realizing policy goals" or "potential to radically transform American society" (2021).

Mahoney and Baumgartner, noting that winning federal officials to one's side is one of the most important paths to power on Capitol Hill, interviewed over 300 policy advocates and gathered data on more than 2,000 advocates who played "a significant role in a random sample of 98 [federal] policy issues" from 1999 to 2002. They then demonstrated that federal officials respond better to *conflict* more than to lobbyist resources. Favoring the likelihood of policy success, most policy makers join bandwagons and avoid "extreme partisan conflict, too much news coverage, or the demands of individual interest groups not backed up by an extensive supporting side" (Mahoney and Baumgartner 2015, 214). Mahoney and Baumgartner thus conclude that "lobbyists, like wolves, work in packs," and that a large, diverse group with shared policy goals. is necessary for success because policy makers take the lead of the strongest (2015, 214).

***Entrenched special interest groups***

It is important to understand how these select entities came to be allowed to analyze agency data and create many federal rules that have then become entrenched within federal programs serving tribal members. David L. Weimer, in his research concerning policy analysis in the United States, explains that federal agencies delegate data analysis responsibilities to outside organizations that have a known stake in the federal policies. At an extreme, "contracted personnel may perform ongoing tasks as if they were part of the agency staff" (Vining and Weimer 1990) (Weimer 2018, 15).

Referring to these outside agencies as "the shadow bureaucracy," Weimer raises questions concerning the accountability of federal and state agencies. (Weimer 2018, 15, 20). Noting that "assistant secretaries don't like to be a lone voice of dissent on a policy issue" (2018, 20), he observes that stakeholders have not only written policy, but have coordinated "policy decisions with other federal agencies and offices as well" (2018, 15).

> Specifically with respect to policy analysis…the content of many analyses nominally done by government agencies many actually have been produced by private entities. It also means that any counts of policy analysists within the federal and state bureaucracies would likely grossly underestimate the number of people actually doing policy analysis on their behalf (Weimer 2018, 15).

One particularly troubling manifestation of this phenomenon is that recommendations from the Government Accountability Office often come from "the agencies whose programs are being evaluated" (Weimer 2018, 17)! Unfortunately, Congress allows this because when there are "identifiable losers, such as children who have negative side-effects from vaccination or the allocation of very scarce transplant organs, legislators may seek to insulate themselves from demands by delegating policy design to…other stakeholders rather than to a bureau that constituents would expect their representatives to influence on their behalf (Weimer 2006)" (2018, 16).

All of this is consistent with what was witnessed within the Commission's work. In fact, at least one Commissioner enjoyed simultaneous salaries from both non-profit sector and government agency at one point in career. In any event, Native Americans occupy the unenviable position of being the group of Americans most directly, consistently, and pervasively governed by the administrative agency form of government—and, consequently, the group most

subjected to the special interest influences that so dramatically affect how agencies operate. The philosopher Hannah Arendt wrote of bureaucracy:

> [it] is always a government of experts, of an 'experienced minority' which has to resist as well as it knows how the constant pressure from 'the inexperienced majority.' Each people is fundamentally an inexperienced majority and can therefore not be trusted with such a highly specialized matter as politics and public affairs. (Arendt rev. ed 1994, 214)

Being ruled by bureaucracy, in other words, means being ruled by a special-interest elite.

## Academia

The third leg of the Iron Triangle of federal Indian policy is the academy. And unfortunately, academic focus on Indian policy is of extraordinarily poor quality, being almost entirely dominated by a particular ideological perspective which disregards constitutional and historical realities, as well as basic issues in the actual lives of Native people out of a pre-commitment to political mythologies.

### *Legal Scholarship*

In an article titled "The Cult of Advocacy," Professor Robert Natelson has remarked on the degree to which political partisanship dominates legal scholarship, particularly in Indian law:

> …the situation in Indian law is probably even worse than in constitutional law, as I learned when researching my 2007 article, "The Original Understanding of the Indian Commerce Clause." Much Indian law writing is confessedly agenda-driven. A common motif is promoting congressional authority at the expense of the Constitution's scheme of federalism and separation of powers. The motif is exemplified by the book treated as the "bible" of the field—written by a political appointee in the Franklin D. Roosevelt administration and duly parroting the administration's version of the Constitution. (R. Natelson 2022)

As an example, Professor Maggie Blackhawk (2019) writes that federal Indian law and Native history can teach Americans to reimagine their constitutional history. She asserts that too much State power is dangerous and argues for "a more inclusive paradigm" that highlights federal Indian law and colonialism (2019, 1789). She argues that while some claim that federal Indian law is inconsistent and does not align with "general public law principles," it is in fact the general principles of public law that need to be changed (2019, 1790).

In her treatise, *Legislative Constitutionalism & Federal Indian Law* (2023), Blackhawk claims she expresses the view of Native people when she says the Supreme Court's vision of constitutional law, history, and tradition (2023, 2) is a "narrowed vision of equality." She asserts that "equal treatment" is the only constitutionally recognized vision of equality and the Supreme Court is "hostile to fundamental constitutional values." Blackhawk purposes to change a current, "constitutional culture" and "deeply flawed, juricentric system" (2023, 3) and questions whether "aggressive judicial review is necessary or even beneficial for our constitutional framework" (2023, 3). Blackhawk believes "congressional mitigation of American colonialism" has shown that Congress can not only limit the overreach of the courts but can change the constitutionalism writ large (2023, 97), and "Native advocates" play a unique role in this (2023, 4).

Professor Gregory Ablavsky and Blackhawk collaborate on theories concerning constitutional history with a "Case study for Originalism" in a 2023 conference. They begin their discussion with "whether and how a new history of the United States, inclusive of Native peoples and American colonialism, could shift broader approaches to constitutional history and legal history" (Ablavsky and Blackhawk 2023). Questions for participants include how does "the inclusion of Native peoples impact the subject-specific practice of constitutional history" and "how would inclusion of the histories of Native people and American colonialism impact the study and theorization of "originalism"? (2023).

Ablavsky also argues that Native leaders were adept at using the resources of international law to assert that they were subject to a doctrine not of their choosing. Yet after having acknowledged the great disadvantages their situation has inflicted upon Native Americans, Ablavsky goes on to maintain that Congress has "plenary" power over the domestic affairs of all tribal members and all children eligible to be tribal members (Ablavsky 2015). He does so while simultaneously acknowledging that the "the authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was not plenary."

Professor Robert Natelson published "A Preliminary Response to Professor Ablavsky's 'Indian Commerce Clause' Attack" (R. Natelson 2022) in which he pointed out academic errors in Ablavsky's scholarship, and followed this with "The Original Understanding of the Indian Commerce Clause: An Update" (R. G. Natelson 2022) which he had been working on when he came across a 2015 Ablavsky criticism. Natelson maintains that Ablavsky's claims "are

inconsistent with the Constitution's separation of powers approach" (R. G. Natelson 2022) and concludes that Congress has no authority to meddle in family affairs. Further, Natelson maintains that the states have jurisdiction over domestic family issues and that the Indian Child Welfare Act is unconstitutional (R. G. Natelson 2022). Joining this conversation, Kopel (2022) examines the claims of both Ablavsky and Natelson, checks their citations and finds Natelson correct in his critical assessment of Ablavsky's paper. Kopel states "it does not seem plausible to contend that the original meaning of the Indian Commerce Clause gave Congress the power to regulate noncommercial matters, such as adoptions, involving Indians" (Kopel 2022).

Unfortunately, in the *Brackeen* case, several justices were persuaded to endorse Professor Ablavsky's profoundly flawed arguments and to endorse the "plenary" theory of federal power respecting Indians. This minority report is not the place to resolve that legal dispute, nor is it relevant to the point here, which is to observe that the academic field of American Indian law is overwhelmingly dominated by political motivation—that is, an advocacy culture—rather than academic motivation to learn the truth about, say, the federal government's power with respect to tribes. This is undeniable to anyone familiar with the current scholarly literature.[28]

### *Academic Scholarship*

Critical Theory arrived in the United States in the early 1930s, about the same time Roosevelt's federal agencies hired Felix Cohen to write his infamous bible on Indian policy. Cohen had been entertaining socialism since his law school years. From that time on, federal Indian policy has been shaped by socialist concepts and Critical Theory (E. S. Morris 2024).[29] Richard Degado stated in his 2001 dissertation:

> I used Tribal Critical Race Theory (TCRT) as my theoretical framework. As part of Critical Race Theory, this lens allowed me to approach Native American higher education in "a broader perspective that includes economics, history, context, group- and self-interest, and even feelings, and the unconscious (Delgado and Stefancic 2001, 3).

[28] To cite just one example, in 2021, the *American Indian Law Review* signed a publication contract with attorney Timothy Sandefur to publish an article critical of ICWA and of Professor Ablavsky's theories. Some months later, the *Review* illegally chose to break their contract, due to their refusal to allow a perspective critical of ICWA to be heard— "cancelling" in today's parlance. https://sandefur.typepad.com/freespace/2021/12/american-indian-law-review-tries-to-cancel-me.html.

[29] This will be explained in more detail in the dissertation, *An Examination of Critical Race Theory, Federal Indian Policy, and Child Welfare Through Lived Experiences*, to be published in the fall of 2024.

Justin Krueger (2021) argues that researchers should seek biased data to confirm their thesis. Explaining that the "eisegesis of data" is about the subjective, non-analytical reading of data to achieve the findings one is looking for," Krueger supports allowing teachers to flexibly apply research and "historical knowledge" that is outside the approved class curriculum. While he states it is "additive" in nature, it is not intended that just anything be added. According to Krueger, any "mined" data should be limited to theories that are critical of "white" history. Anti-colonist teaching should be applied whenever discussing Native American issues. This paper is important to the discussion of Critical Race Theory and how it is included in classrooms.

Krueger notes that "The utilization of curriculum mining is about the process of extracting. In this case, the extraction is about uncovering more context and therefore meaning" (Krueger 2021). He explains that it is "fundamentally about moving teachers and students beyond set curriculum standards and/or traditional stories and perspectives in textbooks," allowing teachers the "flexibility to apply research and historical knowledge found outside curriculum standards and textbooks in their teaching" (2021). The process is intended to "engage their students" in studies concerning "systems of power" and "racist policies" (2021). He asserts that "It is important that teachers implement anti-colonialist pedagogy within their classroom when exploring Native American stories" (2021).

According to Krueger, "contemporary Indigenous topics" should include:

- Gaming (casinos and bingo halls)
- Treaties
- Protection of traditional fishing/hunting rights
- Access to healthcare
- Federal laws
- Protests
- Reservations
- Names/locations/status of tribes
- Protected lands
- Indigenous artists (authors, singers, visual)
- Tribal sovereignty
- Mascot names & symbols (Krueger 2021).

Evidence suggests that Krieger is not alone in his endeavor to teach anti-colonialist pedagogy. Academia is rife with poor research and skewed data in the field of Native American studies (E. S. Morris 2024).

How has Critical Race Theory detrimentally affected federal Indian Policy? Through the efforts of some in academia, many Americans have come to believe:

- An unexplained factor within the DNA or spirit requires tribal members to stay connected to a tribal community.
- Most treaty promises have been broken, all the land within the United States was stolen by Europeans; and the federal government needs to hold title to the allotments of tribal members for their own protection.
- Tribal leaders, together with the iron triangle with federal agencies, Senate committees, and special interest groups, speak for a united Indian Country.
- The Federal government must mandate and fund the education of traditional culture and religion in schools.
- Application of Critical Race Theory is important to research processes regarding Indian Country and "identify protective factors" related to tribal communities.

It is not the case that academics who teach these mythologies, nor the BIA, nor most tribal leaders represent the interests of <u>all</u> U.S. citizens of tribal heritage, as the last three United States censuses have shown that 75% of tribal members do not live in Indian Country. Many do not participate in any tribal programs or benefits. They are a silent, ignored demographic. This is because over the decades, many parents have taken their children and purposefully left the reservation system. One major reason for many currently doing so is to protect themselves or their children from the high incidence of crime and addiction within Indian Country. For some, the well-being and constitutional liberty of individual tribal members has come to count less to the federal government (and tribal governments) than the protection of tribal sovereignty and the reservation system.

Regarding the mythologies, this minority report maintains that repeatedly telling a tribal child who also has white heritage that there is something evil about "whiteness" is emotionally abusive. The Commission heard from several witnesses who stated that heritage needs to be respected - while at the same time making divisive remarks about the white heritage many enrolled children have. Today the full heritage of many enrollable children is not only disrespected by some tribal officials but ignored by federal Indian laws—that is to say, the non-Native heritage of children of mixed ancestry. If we are concerned for the psychological

consequences of demeaning children's racial background, then it is time to stop putting down not only half *these* children's heritage, but that of the parents or grandparents they love.

As to the stealing of permanent homelands, etc., a reading of treaties shows that most did not promise a permanent homeland or permanent benefits and most of the former tribal land was paid for, with tribal leaders as recently as the 1970s signing off a second time on receipt of the funds. Along with land having been paid with interest in an amount accepted by tribal leaders (in some cases, more than once) (E. Morris 2019), full title to land allotted to tribal members is important for economic advancement (Sowell 2009, 244-245).

Regarding the teaching of culture and religion, it is a beautiful and time-honored right for all communities throughout history to pass their traditions and language down to their children. That is a right likely included and intended within the 'Pursuit of Happiness.' Tribal members have a constitutional right to freedom of religion and the federal government is constitutionally forbidden from funding religious teaching. Nevertheless, several federal agencies—including the Bureau of Indian Affairs (DOI-BIA); Administration for Children and Families (HHS-ACF); Office for Tribal Justice (DOJ-OTJ); Bureau of Indian Education (DOE-BIE) and others—systematically push for administrative rules that mandate that "traditional culture" be taught in schools with federal funds—justifying this with the assertion that the only way life on the reservations will improve is if everyone practices traditional tribal culture. But this entanglement of federal funding and tribal culture not only offends rules against government interference in religion, but it also expands federal mandates and controls under the guise of promoting tribal sovereignty. The result is a disturbing situation with respect to freedom of religion on and off reservation.

Freedom of religion also includes the right of tribal members to choose their faith. James Paddock, tribal member and founder of the Navajo Christian Foundation, testified at

**The Rev. Walter Sobeloff**

Co-namesake of the Commission

…"arguably the spiritual leader of Alaska's Native community," "regularly visited between 8 and 10 remote village churches, bringing a teaching, preaching and sacramental ministry to the furthest reaches of Alaska. The ships …conducted vacation Bible schools in villages that were only accessible by sea" (Marter, 2011). Walter said, "and, oh, those young people, how they loved to see us coming to teach them the Bible! " (2011).

"After 100 years Soboleff has few regrets. The only one he's willing to mention is 'that I haven't won more people to Jesus,' he says" (2011). At 100 years old, Walter still preached "regularly and [was] a fixture on radio and television, interviewed constantly on radio and television and quoted in the newspapers, fiercely defending Native Alaskans rights and culture and gently calling people to forswear the material for the sake of the spiritual" (2011).

… "It's Jesus that makes these things happen," he says. "And whatever Jesus has made me do makes me feel so good" (Marter, 2011).

the April 2022, Navajo Regional hearing "on behalf of the faith-based" (Paddock 2022). His son, Bo, also testified and stated that 60% of Navajo claim to be Christian. He further stated that "those that come from Christian background…I feel like approach them with what they are already understanding of Christian teaching, that the Christian approach to addiction will work with them better" (2022). Despite this, a federal employee of the Indian Health Service proudly testified that she regularly teaches tribal members that to be a "good Navajo," they need to adhere to daily traditional religious practices. **This is not what the federal government should be doing.**

The philosophical musings of Critical Race Theory should be rejected in favor of measurable physical, emotional, and economic repercussions individuals, families and communities are currently experiencing.

### *Confirmation, conformation, consensus, collaboration, or collusion?*

The findings of Commission on Native Children are not unlike the findings of Attorney General Holder's committee, whose report was written by the same vendor. The experience of the Commission on Native Children is also reminiscent of the experience Dr. William Allen had while serving on the U.S. Commission on Civil Rights.

In a 1990 statement regarding the U.S. Commission on Civil Rights' approved final report on the Indian Civil Rights Act, former USCCR Chair Dr. William Allen remarked that the Commission's work had suffered "from [an] unhealthy and collusive connection with the Department of Justice's efforts to build a case for legislation." That interference had reached such an extreme that at one point, the USCCR "actually had less control over its own study than did certain staff from the Department of Justice." Although Allen was pleased to see that this unhealthy entanglement had ceased, he remained troubled that the USCCR's final report still contained elements of this influence, and wrote, "some aspects of the prior analysis remain in the final product (to be expected, since the whole work could not be redone), and these convey erroneous conclusions even while no longer supporting their pre-determined end." As a result, "the direction of [the report's] recommendations…is to infuse the federal government even deeper into custodial care of Indians, while the gravamen of our findings is that that is the very

source of most of the problems we uncovered" (W. B. Allen 1990). In short, Allen believed the DOJ Tribal Justice Office had, in his words, "hijacked" the final report of the U.S. Commission on Civil Rights concerning tribal justice.

Over a decade ago, Attorney General Eric H. Holder initiated the Advisory Committee on American Indian and Alaska Native Children Exposed to Violence as part of his Defending Childhood Initiative. This initiative was said to have been advanced to spur resources across the Department of Justice to prevent children's exposure to violence; mitigate the impact of violence on children; and develop knowledge and spread awareness about children's exposure to violence.

After taking testimony from an array of witnesses chosen by federal agencies, the Holder's Task Force announced, in a report written by a vendor from Arizona State University, , (ASU), that continuous exposure to violence can have a shattering impact on a child's "cognitive, emotional, and neurological functions" (DOJ 2014). Yet the Task Force did not recommend what most Americans would consider common sense actions. Instead, the final report states "Progress will not be made until Congress passes legislation requiring mandatory spending for tribal children and youth" (2014). The final report also urged return to traditional Indian culture and language to stem violence against children, along with support for the Indian Child Welfare Act. The Task Force claimed that its recommendations were "a blueprint for preventing AI/AN children's exposure to violence" (2014). These recommendations were presented as the "blueprint," despite the Task Force's own admission that "a vast majority of American Indian and Alaska Native children live in communities with alarmingly high rates of poverty, homelessness, drug abuse, alcoholism, suicide, and victimization. Domestic violence, sexual assault, and child abuse are widespread" (2014). (Evidence that ICWA potentially increases exposure to violence.)

Ten years later, the Commission on Native Children is doubling down on the Holder "blueprint," despite testimony and admission that little has changed in the ten years since the Holder initiative.

Further, it is important to note that when choosing a vendor for the Commission on Native Children, there was **just one meeting** of the subcommittee concerned with the hiring of the vendor. At this meeting on January 14, 2020, the detailees presented only one choice of vendor to the subcommittee members: ASU. Objection was raised—based in part on the USCCR Dr. Allen statement years before, and the fact that the suggested vendor had also written

the report for the Holder Task Force. The Subcommittee as a whole then asked that proposals be invited from additional vendors**. There were no subsequent meetings of the subcommittee.**

A quorum of the full Commission met on March 13, 2020, and members were presented with a choice of three vendors. The detailees had given each vendor a rating, and ASU was given the highest rating. Again, the detailees recommended ASU. **The subcommittee had been omitted from the process and the Commission chair was not present for the discussion or vote concerning the vendor.** Two subcommittee members moved that the issue be sent back to the subcommittee for discussion and possible rebids, but after an impassioned plea by the DOJ detailee stating that sending for rebids would take time and be quite complicated, the commission quorum voted down the motion and approved ASU.

It is also important to note that despite admission by the Holder Task Force that "domestic violence, sexual assault, and child abuse are widespread" within Indian country, **whistleblowers whose names were submitted to the Commission on Native Children—such as medical Dr. Michael Tilus and former ACF administrator Tom Sullivan—were not invited to speak.** The Commission also heard very little directly from victims. **Those who have been sexually abused by relatives and neighbors within Indian Country were not among the invited witnesses**. Those who could best describe the despair of sexual abuse at the hands of those they were closest to on their home reservation did not come as invited guests, nor did they come on their own.

# RECOMMENDATION ANALYSIS

## Grassroots Testimony

One former ICWA youth who had shared in other settings that she fought to stay in her foster home off the reservation because of abuse she endured on the White Mountain reservation (E. Morris 2019) **refused to testify before the Commission because she did not feel safe doing so.**

However, there were some standouts at the Bismarck hearings. Laurynn's twin, now ten years old, came to testify about her sister's murder and the part ICWA played in it. Nina de la Cruz, another Spirit Lake tribal member and mother of five, also testified concerning the harm ICWA has caused her family and is continuing to cause her family, stating "I didn't want to go back to the reservation, because, number one, I wouldn't be alive today if I did. There's nothing there" (Cruz 2022).

Also, Minnesota Supreme Court Justice Ann Mckeig apologized for what she said was a failure in ICWA's child protection system:

> …we have done a very poor job of just dropping off the kids and then never being seen again. The system does a horrible job of supporting the healthy families, … It's like we leave you, and then just expect that you're going to find your way without any sort of support, and it's been a failure across the board. And unfortunately, your story is also not uncommon, and what that results in is kids ending up having failed placements as a result of us not being thoughtful about the placement. (McKeig 2022)

**ANONYMOUS**

Being able to see both sides, I understand that there definitely needs to be systemic change. I have a lot of family members who have to deal with it, and I believe them 100 percent. And I know that there has to be more accountability in these departments…I know it has failed a lot of families – including my own, so – that's why I am…that's my true perspective on it" (Anonymous 2022).

However, much more could have been heard. In the spring of 2022, YouTube videos of meetings between White Earth reservation social services and parents were posted (RBC 2022). The parents were confronting tribal social services concerning the sexual and physical abuse their children endured when placed into foster homes chosen by the ICWA office. One parent reported that her children were raped by the tribal foster parents chosen by the tribe's ICWA office (Anonymous 2022). The parents stated that such wrongs had been going on for years and that one tribal foster family in particular was punishing

foster children by allowing their older birth son to sexually abuse the foster children. (If the children were naughty, they had to spend the night with big brother.) These videos links were made available to the Commission, and the Commission was asked to make time for these parents at the Bismarck hearings. Suggestions were made to bus the parents in or set up a video or zoom link. For one reason or another, **this did not happen.** (Sadly, at that same Bismarck hearing, the Commission was told that tribal foster homes do not need separate bedrooms for boys and girls.)

After having mentioned that these things were happening at Leech Lake and Red Lake as well, and that it isn't "just White Earth," an anonymous tribal leader was asked if she/he could reach out and see if someone from those reservations would be willing to testify before the commission as well. The member responded:

> I could reach out, but that's about as far as I want to go with it, too. I don't really want to put them in the same position – or difficult position, because it is a difficult position. It's basically asking us to – us as leaders over these departments – to throw these departments out to the wolves, essentially because that is what is going to happen. I don't want to do that. And I understand that we have to have accountability, but I want to do it in a good way. (Anonymous, 2022)

The Chairman of the White Earth Nation did participate in the commission hearings through video link. He was asked by this Commissioner why tribal meetings scheduled to address these accusations had been canceled. The Chairman responded that he is new to his role and is still trying to understand the issue, but the tribe is working on it internally and has posted job announcements to increase the staffing within their ICWA office.

The Commission also heard compelling testimony at several hearings from numerous youths involved in various community programs. They spoke concerning racism and the benefits of culture and language. Their testimony was appreciated by the Commission and their testimony is included within the Commission's final report.

The most valuable and revealing testimony throughout all the hearings was from grassroots individuals—not from any of the federally funded agencies or organizations. Those who lobby Congress for a living do not necessarily have the best interests of the public in mind. Federal Indian policy pushes too many rules, guidance, and laws rooted in assumptions about heritage and political ideologies regarding the "evils of colonialism," etc. Yet the Commission's investigation was, and its final report is, fatally undermined by the overwhelming influence of

academics, nonprofits, tribal leaders, and special interest groups who remain in an ideological lockstep, and for whom every malady is proof of the helplessness of Natives and the need for more government intervention and more federal funding. The voices of actual Native individuals residing on reservation are either drowned out or silenced by intimidation. And because the vast majority of tribal members do not live within Indian Country in the first place, and are therefore never surveyed, the resulting data—including the Commission's final report—is politically skewed.

On November 7, 2023, at the final meeting of this Commission, all Commissioners were handed a paper with a printed suggestion of what they might say to Senator Lisa Murkowski during her half hour visit. It was suggested that this Commissioner state "The Commission also heard evidence about the importance of following local community standards for Native foster and kinship foster home licensure." This was said to the Senator, as well as that this does not necessarily refer exclusively to tribal culture. It was explained that "Local community standards" refers to the standards of *whatever* community a child lives within, whether suburban, urban, rural, or tribal. Supporting local community standards and jurisdiction refers not to the child's affiliated tribe or the nearest tribe, but to the local community the child is at home in and most familiar with. Further, diversity exists even within tribal communities.

The best interest of the child means recognizing the child as a unique individual and not chattel to be owned, or a doll to force into a predetermined mold. Most children of Native American heritage do not live on a reservation. Further, most children of Native American heritage are less than 50% tribal, and therefore have more *non*-tribal relatives, including grandparents or a parent, than tribal relatives. It is long past time to recognize the diversity of the children in question. It is long past time for the federal government to stop dictating to individuals what their preferred culture should be. Supporting mental health includes allowing people to be individuals. Mandating cultural and spiritual education for those who choose not to live within tribal communities is an attempt to force families to live as governments think they should live.

For their study on developmental outcomes of teen mothers in Indian Country, Dalla, et al, (2015) used data originally collected from 29 Navajo Reservation teenage mothers in 1992 and 1995. A follow-up study in 2007 included 71% ($n$ = 21) of the original sample participants.

In 2008, additional data was collected from the children of the original participants, who were all considered to be "at risk" youth. Dalla, et al., examine the results of the 2008 collection and describe the developmental outcomes of fourteen of those who were born to the mothers.[30] Of interest is the number of youths who wanted to leave the reservation, one of whom stated, "I Want to Leave—Go Far Away—I Don't Want to Get Stuck on the Res[ervation]" (2015).

In the study of 362 American Indians elders by Cayir, et al (2018), several participants reported that social relationships helped heal trauma in their lives. Not only is this contrary to the fashionable political narrative that all tribal members are subject to the debilitating effects of historical and intergenerational trauma from colonialism, but it is one indication of why that narrative is such an unhelpful opiate. To blame the ills of Indian Country on a vague slogan such as "generational trauma" rather than on the practical realities of today's world is effectively the same as blaming "bad luck." It teaches nothing and provides no guide for action in alleviating the problems suffered by actual people today—but it serves as a convenient means to shuffle responsibility off onto some future generation that has the courage to confront the actual problems. Talk of "historical trauma" may serve as a convenient sound bite for those seeking more federal dollars or more political power. It does nothing to fix the poverty, alcoholism, drug abuse, sexual molestation, murder, beatings, rape, and suicide that go on in Indian country.

Does current federal Indian policy facilitate feelings of helplessness and hopelessness brought on by constant enforcement of permanent victimhood? Teenage years are difficult, and many youths feel they do not "fit" into junior high and high school, and this is not a matter of one's heritage. Society sometimes makes the mistake of thinking everything is always all about heritage when that is just one factor of many that affect all teen lives. Not everything can be "fixed" to make every teenager always feel "at home," because feeling awkward and "out-of-place" is endemic to the maturing experience of teenagers. It is not to diminish the unique challenges Native teens face to recognize that to public policy should avoid assuming that the experiences of Native teens are necessarily and categorically distinct from the struggles their non-Native peers face—and should likewise avoid assuming that these struggles are necessarily the result of society's racism, or anti-Nativism, or that the solution to such struggles is more government intervention, more federal dollars, and more tribal autonomy. In short, many of the

[30] Limitations of this study include small sample size, from just one reservation.

challenges Native youth face are common challenges of all American teenagers, albeit within distinctive contexts. We can support and encourage youth—but *Congress cannot fix this*.

**Flexible Funding**

It has become a commonplace assertion that tribes should not have to show evidence of success, or compete for funding, or have to deal with temporary funding, but should instead receive increased, permanent funding streams from the federal government. This, even though hundreds of treaties not only clearly stated the *exact amount* of money to be paid by the federal government (which was typically paid in full long ago) they set a time limit on annual payments (usually only 25 to 40 years). Treaties are the "supreme law of the land," and these limits in time and amount ought to be binding. To disregard those limits in the name of "flexible funding" **is to ignore not only the law but also the reality that federal money comes from the pockets of all American citizens and** is not an endless bucket. American taxpayers have a right to request and expect limits, audits, and accountability in how their money is spent. Further, "equitable funding and processes" should not mean funding and processes that are beyond what is provided to, or required for, all other citizens of the state. Tribal funding should remain within treaty promises—no more, no less.

a) Quite frequently in such discussions, what is claimed to be a treaty promise proves not to be a true treaty promise. An example of this is the call for permanent funding as a treaty right, when in fact most treaties clearly state that the annual payments promised in most treaties was temporary[31]. The treaties outline the payments for a set period of time until

[31] e.g. Treaty of the Flatheads, also known as the Hellgate Treaty of 1855, states: In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the **sum of** one hundred and twenty thousand dollars, **in the following manner**… For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States… (U.S. Govt 1855, Art. 4)

The United States further agree to establish…an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one

the land payment was made in full - often just 25 years. This calls to question what truly counts as a trust responsibility.

b) With respect to land, the federal Indian Claims Commission[32], which existed from 1946 to 1977, paid $880 million to a number of tribes as compensation for instances in which tribes had not received fair compensation for lands they sold to the United States in the nineteenth century. Tribes made over 500 claims before the Indian Claims Commission and won awards in 60 percent of them. Most were property rights claims (Lawrence 2002, 396). This was full price of land, plus interest. The Commission was confronted with a massive job. Almost all the 176 known tribes or bands filed one or more claims on old grievances. Only 17 tribes (as of July 1951) were undecided as to their desire to file claims and several said they had none (ICC 1978, 5). Only one tribe out of all refused to accept payment for their claimed land. All others signed for the funds upon receipt.

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wagon and plough-maker's shop; and to keep the same in repair and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service **for the period of twenty years** (U.S. Govt 1855, Art. 5).

[32] , on August 6, 1946, Congress established the ***Indian Claims Commission***[32] and ensured the Act allowed re-hearings "in all cases heretofore dismissed for jurisdictional reasons" (Cohen, Original Indian Title 1947, 57). The Commission was further intended to resolve with finality "all existing tribal claims against the Government" (Cohen, Original Indian Title 1947, 43). President Truman stated while signing the Indian Claims Act on August 13, 1946:

*This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them* ***approximately 800 million dollars in the process****. It would be a miracle if in the course of these dealings - the largest real estate transaction in history - we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made* (1947, 58-59).

**ICWA**

The Supreme Court Brackeen v Haaland upheld the Indian Child Welfare Act for the time being. What was interesting was the position tribal leaders took regarding Congressional authority over Indian Country. When tribal governments, leaders, and their supporters insist that Congress not only enact laws governing children of Native heritage, but that Congress has the absolute authority to govern tribal affairs within and without reservation boundaries[33], they are effectively conceding that they do *not* have absolute tribal sovereignty—and worse, they are taking the position that enrollable families do not have the liberty to choose the religion, culture, or community in which they want their children raised.

Because the Indian Child Welfare Act is so central to the issues facing Native American children, it is worth exploring in detail the Act's many flaws. ICWA is the primary legal obstacle today to protecting and supporting Native American kids. Yet open dialogue about ICWA's flaws is rendered virtually impossible by a political atmosphere in Indian Country that regards criticism of ICWA as anathema or shrugs it off as categorically racist. The reverse is actually the case. ICWA imposes a color line with respect to Native American kids—depriving them of the legal protections other children enjoy, based solely on their biological ancestry. Yet the intellectual atmosphere is so poisoned by a refusal to brook criticism of ICWA that it is crippling even the courtroom legal representation of Native kids and families.

First, many of those caught in the crosshairs of ICWA have trouble getting legal representation for their ICWA cases. Not every attorney understands ICWA well enough to properly represent a family; on the contrary, ICWA is a complex, niche area of the law with which few attorneys—even a minority of family law attorneys—are familiar. Of course, many parents simply cannot afford an attorney.[34] And even if they can, not all attorneys are permitted

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[33] The Amicus Brief of "180 Indian Tribes and 35 Tribal Organizations" as Amici Curiae in Support of Cherokee Nation, et al. in Brackeen v Haaland argues "See, e.g., United States v. Nice, 241 U.S. 591, 600 (1916) (noting Congress' authority over Indian affairs is a 'continuing power of which Congress c[an] not devest itself'); see also McClanahan v. Tax Comm'n of Ariz., 411 U.S. 164, 173 n.12 (1973) (noting that provision of state services to a tribe 'cannot affect their [relationship with the United States], which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.' (quoting In re Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866)))" (Brief of 180 Indian Tribes and 35 Tribal Organizations as Amici Curiae in Support of Cherokee Nation, et al. 2021, ft 5). An interesting note is that while 180 tribes did sign this amicus, over half of federally recognized tribes did not.

[34] Attorneys who are fully versed in ICWA are few, and while they will sometimes do pro-bono cases, they cannot do that with everyone. At some point, they must make money and pay their own bills.

to argue in tribal courts. Those who are frequently avoid running afoul of the court by arguing an ICWA case. It appears to be a bridge too far for many who fear losing their standing in tribal court.

In state court, it is hard to find an attorney who can or will argue against ICWA. Either they do not know enough about ICWA to know the right issues to argue, or they are proponents of ICWA and will not take a stand against a tribal government pronouncement. Consider, for example, what happened in one shocking Ohio case.[35] That case involved a child born in Ohio and placed in foster care with an Ohio family. The child's birth father was a member of the Gila River Indian Community in Arizona, and after the child had lived with his foster family for several years, the tribal court issued an order commanding that the child be sent to live on the reservation in Phoenix with strangers, based solely on the child's biological ancestry. He had never even been to Arizona before. The child's GAL objected to the application of ICWA to the child's case. As a result, the tribe filed a motion with the state court objecting that the GAL "does not support ICWA"—and succeeded in having the GAL removed from the case for that reason (T. Sandefur 2021, 96). This was a blatant violation of the First Amendment, which prohibits the government from silencing a person's legal argumentation in court. (The case ended with a settlement that allowed the child to remain with his foster family.) It is obvious that in an atmosphere in which a GAL attorney risks being removed from a case if he makes a perfectly legitimate legal argument that he believes is in the best interests of the child, GALs will in general avoid making such arguments—and the best interests of children will suffer. Lawyers call this an "*in terrorem* effect"—that is, a method of intimidating the other side into not even raising a valid legal issue.

A similar effort at intimidation affects the legal academy. Law schools only teach one perspective on ICWA, and law professors and students often prohibit open debate on the subject from appearing on legal campuses. The same is true among professional lawyers. In October 2018, the Minnesota Bar Association cancelled a scheduled presentation by attorney Mark Fiddler—perhaps the nation's leading ICWA attorney—because, as the Association's "Diversity and Inclusion Director" put it, members of the Minnesota American Indian Bar Association "expressed concerns" that the presentation would not be "fair and balanced"—which is a

[35] *In re. C.J. Jr.* (Nos. 16AP-891, 15JU-232 (Ohio Ct. Com. Pl.) (filed in Franklin County).

euphemistic way of saying that the Bar Association would not tolerate an open critique of ICWA (2018).

But most of the time, the reason lawyers fail to raise concerns about ICWA in open court is because they are subjected to one-sided propaganda about ICWA from tribal government officials and their allies in state government, to whom ICWA is a sacred cow. Educational presentations for would-be GAL lawyers, for example, never even address questions about, for example, ICWA's contradiction of the best-interests test, or the constitutional issues of due process and equal protection that it raises. Such lawyers are simply taught to view ICWA as an obvious benefit to Native Americans—which is contrary to fact—and that criticism of it is evidence of racism. Most lawyers, afraid of incurring an accusation of racism, and too busy to delve into the actual legal issues, will simply go along with it. And obviously, if the legal community's thinking is so stifled, the layman can hardly be expected to learn of his or her rights in an ICWA case. One grandmother in Colorado, for example, was initially told by social workers and attorneys that she should give up, because if the tribe wants the child, they have a right to him and there is no fighting it. How is she to know otherwise?

This situation is worsened by what can only be called a conspiracy of silence by the foster and adoption community, who, for a variety of reasons, typically remain silent about the harms ICWA causes. Aside from the ideological refusal to permit criticism of ICWA mentioned above, there is the fact that foster parents and state child welfare officials who witness the deleterious consequence of ICWA are often afraid to speak out, lest they incur retaliation in the form of discipline or being fired or losing their foster care license.

ICWA's flaws begin with its definition of "Indian child," which is based on *biological ancestry*, instead of political, social, cultural, religious, or linguistic connections to a tribe.[36] Whatever legitimacy there might have been in defining the term this way in 1978, racial and ethnic categories today are far more complicated. Many children of tribal heritage are multi-heritage and do not identify as Indian. Yet ICWA requires simple binary categorization that does not reflect reality.[37] And that categorization is, again, based on immutable characteristics

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[36] 25 U.S.C. § 1903(4).

[37] The result is sometimes absurd, as in the *Brackeen* case, where a child who was half Cherokee heritage and half Navajo heritage was deemed Navajo for purposes of ICWA *by tribal lawyers who reached that agreement in the hallway of the courthouse during the hearing*. CITE: Timothy Sandefur, "Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?," *Texas Review of Law & Politics* 23 (2019), p. 454.

determined at birth. In some cases—such as the "Lexi" case in California in 2016—so called "Indian" children are from families with no contact with the tribe. Yet biological heritage does not define individuals. As historian David Treuer—a member of the Ojibwe tribe—puts it, "you can't measure culture by percentages of blood" (Treuer 2012, 279). It is wrong and unconstitutional for federal, state, or tribal governments to unilaterally classify someone into one race over another—deeming a child "Indian" instead of "white," for example, if the child shares heritage of both—and then to make that biological category the legally defining point in that person's life.

Yet ICWA does precisely that. As legal scholars have shown, ICWA renders "Indian children" more vulnerable to abuse and neglect than children of other races, because it imposes a higher burden of proof in cases seeking to protect these children, than it does in cases involving white, black, Asian, Hispanic, etc., children. If, for example, a white child is being abused or neglected by a parent, state[38] child welfare officials can intervene based on "clear and convincing evidence" that doing so is necessary for the child's best interests. But if the child is "Indian"—even where that is based on an ancestor who lived centuries ago, as in the Lexi or Baby Veronica cases—the state must show evidence "beyond a reasonable doubt," based on expert witness testimony, a far higher burden of proof.[39] In practical reality, that means that **the "Indian child" must be *more abused* than a white child before the state can take action**. In fact, it means that even if a Native parent wants to protect her child from an abusive *non-Native* co-parent—as in the *T.A.W.* case in Washington or the *Stephanie H.* case in Arizona[40]—**ICWA actually prohibits these parents from protecting their own children.**

As mentioned earlier, ICWA also effectively prohibits the adoption of at-risk "Indian children" by non-Native adults. It forces state judges to place these children with "Indian" families rather than with white, black, Asian, etc., families—and it does so because of what the Supreme Court itself has called "a Federal policy that, where possible, an Indian child should remain in the Indian community" (Mississippi Band of Choctaw Indians v. Holyfield 1989). But **a policy that disregards what is in the interest of an *individual child* in his or her *unique* circumstances, in order to ensure that they remain within one biologically defined category**

[38] Remember, ICWA only applies to children who do *not* live on reservations.
[39] 25 U.S.C. § 1912.
[40] *In the Matter of Adoption of T.A.W.,* 383 P.3d 492 (Wash. 2016); *S.S. v. Stephanie H*., 388 P.3d 569, 572 (Ariz. Ct. App. 2017).

**rather than another can only be called racial segregation.** Congress has already recognized the evil of prohibiting a child from obtaining an adoptive home due to racial factors: in the Multiethnic Placement Act of 1996, it outlawed denying or delaying foster care or adoption based on a person's race, color, or national origin.[41] Yet when it comes to "Indian children," it remains legal to discriminate against them on a matter that matters perhaps more than any other.

ICWA also overrides the long-standing "best interest" rule, which prioritizes the *specific* needs of the *individual* child in his or her *unique* circumstances, and replaces it with a blanket, one-size-fits-all rule that it is always in the best interest of an "Indian child" to be with adults of his or her racial ancestry, regardless of other circumstances. In fact, ICWA has encouraged a now pervasive—or at least dominant—attitude in Indian Country that "Indian children" should simply *never* be raised by white adults, despite the fact that ICWA itself contemplates custody by white grandparents.[42] Much of this hostility to non-Native adoption is rooted in junk social science which claims that Native kids are psychologically traumatized by being adopted by non-Native families (Kennedy 2003, chapter 12) (Cleaveland 2015). The reality is that adopted children or foster children often do suffer from psychological difficulties—as a result of the *conditions that caused them to be placed in care*, rather than as a result of that care itself. Yet the literature about ICWA is deeply distorted by the influence of shoddy surveys purporting to show that "Indian children" suffer from being in the custody of adults of other races.

Not only have some courts, as noted above, declared that the "best interests" of Native Americans are categorically distinct from those of non-Native kids, based solely on their biological ancestry—which reflects a repulsive racial essentialism—but some courts and the BIA itself claim that ICWA's racial scheme of placement *just is* the best interest of Indian children, *per se*, because Congress has declared it to be so.[43] But to declare across-the-board what is in the best interests of all children who fall within one biologically defined category is, again, simply to impose a racial stereotype. In fact, for Congress to declare what is *per se* in the best interests of all Indians is just what has caused Native Americans so much suffering for centuries.

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[41] 42 U.S.C. § 1996(1)(B). The Act expressly exempted ICWA cases, unfortunately.

[42] This is one point that experienced attorneys can point out to a judge, but uneducated attorneys will not. The grandmother in Colorado, who CAICW assisted in representing herself, was aided by being able to point this and other facts out to the judge.

[43] Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,826 (June 14, 2016) (asserting that "ICWA establishes the placement preferences as being in the child's best interest.")

Not only does ICWA require state judges to place "Indian children" with "Indian" adults rather than adults of other races, but it also empowers tribal governments to intervene in foster and adoption cases and to effectively compel children to be taken away from foster families and placed with other families instead, whenever it suits the tribal government to do so. This, added to the attitude that non-Natives must never be permitted to adopt Native children, has resulted in a situation in which any time non-Native foster parents express interest in adopting the "Indian child" for whom they have been caring, tribal officials immediately intercede and remove the child—even if that child has lived with the foster family for all or nearly all of his or her life.[44] All of this might make some sense if there were plentiful "Indian" adoptive or foster homes available, but there is an extreme shortage of them. As a result, "Indian children" are left without the possibility of adoption. Although there are plenty of families who would be willing to offer homes to these at-risk kids, few are willing to risk the emotional trauma, not to mention the financial and legal burden, of attempting the almost certainly doomed enterprise of trying to adopt an Indian child (Stuart 2016). As one California court has put it, "ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation. As a result of this disparate treatment, the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk than do non-Indian children of being taken from that home and placed with strangers" (In re Bridget R. 1996, 1508). And the children therefore remain in foster care until they "age out" of the system, never finding a permanent adoptive family. This, of course, is a massive hinderance to their success and happiness in life.

Tribal officials and their allies in the academy are extremely fond of a slogan that says that ICWA is the "gold standard" of child welfare. That is nonsense. The gold standard is not

[44] In the "Lexi" case, for example, the child had lived for four of her seven years of life with the family—had come to call them "Mommy" and "Daddy" and regard the family as her own—only to be snatched away by state officials at the behest of the tribal government the moment they expressed interest in adoption. The psychological trauma this inflicted on the child can only be imagined, which is why state law would have prohibited such a thing had Lexi not been an "Indian child." Under California law, a foster child who has grown so attached to a family cannot simply be removed from that foster family, even the behest of a birth parent. See *Guardianship of Kassandra H.*, 75 Cal. Rptr. 2d 668 (Ct. App. 1998). Yet because Lexi was deemed "Indian"—based solely on biological factors; she had no cultural, political, linguistic, or religious connection to the tribe—California courts said that the best interest rule was only one of several considerations to be weighed. *In re Alexandria P.,* 204 Cal. Rptr. 3d 617, 634 (Ct. App. 2016). For non-"Indian" children, by contrast, California law considers it the *overriding* consideration.

one that subordinates a child's needs to preconceived racial assumptions, such as the idea that all "Indian children" should be raised by "Indian" adults—or that the abuse of "Indian children" should be tolerated until it reaches the extremely high level of "beyond a reasonable doubt." On the contrary, the gold standard of child welfare is, and always has been, *the best interests of the child* test, which is inherently individualized—that is, it focuses on the individual needs of the specific child in his or her case, rather than relying on such clumsy, crude, immoral, obsolete, and irrational categories as racial or national origin.

What's more, ICWA allows tribal courts to intervene in a child welfare case and force the court to send the case to tribal court. As mentioned earlier, these courts are not governed by the constitutional standards that apply in state or federal courts, and the right of appeal is sharply limited. (Basically, a person must appeal all the way through the tribal court system and then ask the U.S. Supreme Court to take the case, but the Supreme Court takes only about 1% of all the cases it is asked to take.) This means that transfer to a tribal court is typically the equivalent of a *verdict* in many cases—not to mention that tribal courts are often far away from where affected families live, making it virtually impossible for the people involved to actually attend these hearings. These are families who never imagined that they would ever have to fight a tribe for custody of their grandchild, niece, cousin, or sibling—let alone a foster or would-be adoptive child. How are people, blind-sided by a tribal involvement, supposed to fund a fight against a legal team trained in ICWA? There are birth fathers who have no money to fight for custody of their children. An Oklahoma grandfather, after mortgaging his home and fighting five years for his grandchildren, finally had no choice but to give up, and signed off as "*former* grandfather of..." in a final, heartbroken letter to CAICW. Families, in short, have been broken up through tribal government abuse of the ICWA law.

There is, of course, no central database of ICWA cases, and such cases are almost always heard in state court rather than in any central federal court. Thus, it is impossible to get statistics to demonstrate broad trends in ICWA cases. Ironically, this serves as a handy rhetorical device for tribal officials and their academic allies, who dismiss every example of ICWA abuse as a mere "anecdote." But these are not "anecdotes." They are the decisions of state courts—often state supreme courts—and they set binding precedent for future cases. They are, moreover, examples of actual litigation in actual ICWA cases. And because of the academic bias, the legal ignorance, and the conspiracy of silence mentioned above, there is no other way to demonstrate

the way ICWA harms "Indian children" except to point to cases such as those of Declan Stewart, Laurynn Whiteshield, Anthony Renova, Josiah Gishie, Shayla H., and others. Worse, however, are the cases we never hear of: cases where an abused or neglected "Indian" child *could* have found a loving, permanent adoptive home, *could* have had a stable family life, *could* have had the resources necessary to succeed academically and achieve great things—but who never has these options open to him or her because ICWA prevented anyone from reaching out and helping. As the old poem has it, "of all sad words of tongue or pen, the saddest are these: 'it might have been.'"

None of this made it into the Commission's final report, which unfortunately perpetuates the conspiracy of silence, and the superficial and stereotypical thinking that keeps ICWA in place as the single greatest legal obstacle to Native child welfare in the United States.

### ***Research to be Done***

The Commission received testimony concerning statistically poor outcomes for children who have gone into foster care. However, the information was incomplete as presented. Foster care is only one factor affecting outcomes. Children who are sent into foster care have typically already suffered in some aspect, whether through neglect, abuse, fetal alcohol effects, etc.—that, after all, is usually why these children have been placed in foster care to begin with. Yet statistical outcomes following foster care are bandied about as if the foster care itself is the only factor.

What would be helpful is comparative analysis between children who have been removed and placed into foster care; children who were not removed but received home services; and children who were not removed and did not receive any services. That is data with which policy makers can make an informed decision. Unfortunately, as scholars Alicia Summers and Kathy Deserly observe, "little in-depth data exists on actual child outcomes in ICWA cases" (Summers and Deserly 2017, 22).

Worse still, the fact that Native children are overrepresented in foster care is typically used as a rhetorical point by advocates of the ICWA status quo, who claim that the disproportionate number of Native kids in foster care is *proof that the non-Native child welfare system is racist*, and therefore as *proof that ICWA is needed*. This is absurdly illogical. The disproportionately high rate of Native children in foster care is the result of the

disproportionately high number of challenges these children face. To blame foster families and child welfare systems to blame the result rather than the cause. Yet that is precisely how ICWA works. Rather than addressing the causes of Native youth's hardships, ICWA limits or eliminates the available responses to those hardships. As Harvard Professor Randall Kennedy—one of the most perceptive critics of ICWA—has observed, the Act "diverts attention away from the most menacing threats that face the vulnerable children caught up in the politics of Native American identity" (Kennedy 2003, 489).

### *Commission Process*

Commissioners are said to be advisors, not researchers or decision-makers, but it is difficult to understand how one can fulfill the duty to "examine" the benefit or lack thereof of federal and tribal agencies serving children without doing some research. Yet the federal agencies the Commission was supposed to be examining were the same ones the Commission depended on for guidance. These agencies chose the witnesses the Commissioners were to select from, and most of those witnesses were employed directly or indirectly by programs receiving federal funding from these same agencies. A good indication that an iron triangle is controlling decision-making is when input is not coming from outside but within. Indeed, one Commissioner stated on January 9, 2024, in reference to those chosen to testify as invited witnesses, that she knew "all the youth who spoke in Oklahoma."

At times, decisions seemed to be made between the chair and the detailees, without any Commission discussion. For example, the chair testified, and a statement was sent to Congress in 2020 concerning COVID-19 in Indian Country, and the need for more money, although the Commission had never engaged in any discussion concerning COVID or stimulus money. Later, the Commission conducted an online interview with three witnesses chosen by the agencies—all of whom stated that Native Americans had been hit harder than any other people group by COVID and need more money. None offered any research to confirm their claims and the Commission never convened any meeting to discuss what they said. This is yet more proof of the kind of "capture" that Dr. Allen referred to above: the Commission was fed information by the same entities it was supposed to be reviewing, out of an effort to get the Commission to produce a predetermined result that would serve the interests of those entities. This may be convenient political theater, but it is not an objective process and is unlikely to expose the facts.

# CONCLUSION

It is possible that the high percentage of suicide and addiction among youth on many reservations may have something to do with the helplessness and hopelessness of not having anyone to turn to when suffering physical and sexual abuse. But we won't know this without fully and honestly exploring it.

If tribal members are "wards" of the federal government, as patronizingly claimed, then the federal government has a "trust responsibility" to protect the children at all costs – even if at the cost of ruffling political feathers. If the federal government does not want that responsibility, then it should stop the façade of having a "trust responsibility" for Native Americans.

If, on the other hand, 'trust responsibility means only to support tribal governments and tribal sovereignty at all costs – even at the cost of children's lives – then the federal government needs to be clear about that.

That said – life, liberty, and the opportunity to pursue happiness is God-given and a constitutional guarantee for all, whether members of a tribe or not. Encouraging family and community relationship, enforcing rule of law, supporting law enforcement, allowing titled property rights for individual tribal members with regard to the harvesting of resources on their families allotted land, and upholding full constitutional rights, liberties and protections of all citizens – would make the reservation system safer and more beneficial for children and their families (E. Morris 2019).

The federal government and its agencies have held back some of these rights and resources from families of Native American heritage for close to a century.

- Current federal Indian policy facilitates feelings of helplessness and hopelessness through constant enforcement of permanent victimhood.
- An assortment of Commission findings, congressional hearings, first-hand reports, and sociological, political, and historical research indicate the existence of a federal iron triangle that is directing federal Indian policy through the lens of critical race theory for close to a century.

As Phillip Hamburger stated with regard to the unrestrained administrative power of federal agencies,

> … So, if you are inclined to defund oppression, defund the administrative state. If you want to tear down disgraceful monuments, demolish the prejudiced and discriminatory power that is Woodrow Wilson's most abysmal legacy. If you are worried about stolen votes, do not merely protest retail impediments to voting, but broadly reject the wholesale removal of legislative power out of the hands of elected legislators. And if you are concerned about the injustice of the criminal justice system, speak up against the loss of juries, due process, and other rights when criminal proceedings get transmuted into administrative proceedings. Little in America is as historically prejudiced or systematically discriminatory as administrative power. It is a disgrace, and it is time to take it down (Hamburger 2020).

Governments do not make good parents. Intact families, with fathers encouraged and empowered to understand and honor their God-given role as guide, protector, and provider, are the surest benefit to families. And this is true no matter the enrollment status or heritage of the people involved.

All United States citizens are individually guaranteed by God a personal and distinct right to life, liberty, and property, and no government can constitutionally remove those rights. We welcome a federal administration that views citizens who are eligible to be tribal members as individuals with separate and unique visions and needs, not as property of a government, a caricature, or entertainment—but as fellow Americans who deserve to be treated as friends, neighbors, and fellow citizens.

Communities that support health, peace and full life only exist within the environment of forgiveness, respect, and cooperation that comes through understanding gifted from God. Clearing the path for individuals to employ their full constitutional rights is what the United States government is tasked to do.

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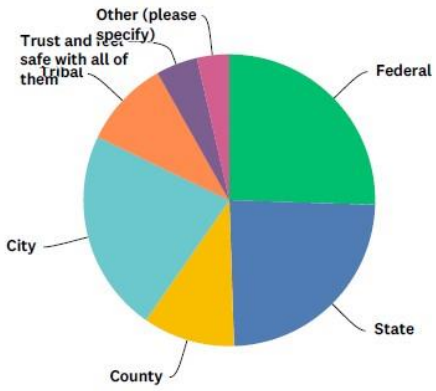
# APPENDIX



American Family Dynamics Survey

Q14 If you were to experience a violent crime and were able to pursue justice, which law enforcement and court would you feel safest turning to for justice?

Answered: 196 Skipped: 0




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Federal (1) | 25.51% | 50 |
| State (2) | 23.98% | 47 |
| County (3) | 10.20% | 20 |
| City (4) | 22.45% | 44 |
| Tribal (5) | 9.69% | 19 |
| Trust and feel safe with all of them (6) | 4.59% | 9 |
| Other (please specify) (7) | 3.57% | 7 |
| TOTAL | | 196 |

| BASIC STATISTICS | | | | |
|---|---|---|---|---|
| Minimum | Maximum | Median | Mean | Standard Deviation |
| 1.00 | 7.00 | 3.00 | 2.95 | 1.69 |

*American Family Dynamics Survey – Response of enrolled tribal members*

## Dissenting Testimonies from Tribal Members and family

**Nina de la Cruz**

My story brings up so many emotions, for a moment I decided not to go through with it, but this isn't about just me anymore, if I can prevent this from happening to any other struggling parent then everything my family has endured will have not been in vain. I began going through all the paperwork I have collected over the years, believe me when I say those wounds are just as fresh as they were 7 years ago if not worse! I still carry so much guilt, shame for what I put my children through. Emotions I will never allow myself to forget. Anger and bitterness is the hardest to overcome. The picture enclosed in my Bio, I chose it because for the first time in my life, I was proud of myself. I was getting my life back. I was making progress, I had hoped that if I kept moving forward my family would see things had changed, and allow me to at least have contact with my children. I know I've burnt bridges. I have accepted that. The hardest realization and what hurt the most, is knowing my family never wanted me to get better. What I have learned about myself and our family dynamics has changed the way I perceived myself then and now. I think back now after all is said and done it makes me furious is how my family thought so little of me and my life. How easy it was for them to take from me the only beings that loved me, fill their heads with lies to make them hate me. They made me out to be a monster.

It's hard to look at myself in the mirror at times or to go out in public because the person they portrayed me out to be is what people believe me to be and after awhile I started to believe it myself. I felt unworthy of anything good that came into my life and felt as though what was happening I deserved. Saddest part about how I perceived myself, has nothing to do with my shortcomings. The way I was treated was EVIL, that is the only way I can describe it. My family, tribal council members, tribal judges, Juvenile Presenter, guardian ad litem, the foster parent, their actions were beyond unethical. Nothing short of Cruel. They never had any intentions of returning my daughter. They knew from the very beginning I didn’t want my case transferred, I did not reside on the reservation, my home was Grand Forks and had no intentions of ever returning. After numerous attempts at having my case transferred back to Grand Forks failed and the Judge assured me that once I completed my case plan I would have my daughter back, I began case management. Nothing could have been further from the truth. Right from the beginning there were obstacles, I lived 100 miles away, which created a barrier when it came to visitation, I was shuffled between 5 different case managers. At one point the social workers refused to take my case because of the fate of the previous case managers. Majority of employees that tried to help me reunify with my child had been terminated or resigned. One was given a lifetime exclusion order. I was assigned 3 different attorneys, the first two fought for me, after the second resigned, she made it clear why to myself and in her resignation letter. I was never meant to win. They never anticipated that I would fight back. They wanted me to fail and did whatever they could to ensure I would fail. When I say “They” I am making reference to my family, tribal council, Juvenile Presenter, the GAL, and the foster parent. Social Services did what they could to help me, it was most of the time hindered by council intervention and the foster parent making false allegations and the GAL supporting them. They absolutely did whatever they wanted, I was treated as though I was non-existent, when I brought these matters to officials who were supposed to be unbiased in this situation, I was ignored, most times I wasn't even given the time of day. The accusations were horrible, my probation officer received an anonymous letter with false allegations that could have sent me to prison. They sought out

recommendations from two doctors to have my parental rights terminated. I confronted one Doctor, I had advised him that the information he had been given was not true and that he should have actually verified the information before making that recommendation, the truth would be found in our medical records. This is the letter that the Juvenile Presenter used as her reason to file for the TPR. which was not her call to make. She did it on her own without consulting Social Services. My rights as a parent, as a citizen were violated. I had no rights. I could do nothing but sit there and take the abuse and blatantly that is exactly what it was, every day was a battle, I was brought to tears so many times, they had no empathy at all, they did not care that the constant accusations, harassment was taking a toll on me. I fought with everything I had, I told the truth, I was in trial home placement, yet my rights were still terminated and the reasons were absolutely ridiculous. What happened to me is cruel at any measure. I have gone through ICWA guidelines and made note of which never took place, never implemented or followed in my case.

**My right to Due Process.**

My rights under ICWA were never explained to me, when I asked about an attorney, I was told this was a shelter care hearing and that would come later. When asked if she was an Indian child I stated she was ineligible. I had questions, the judge called a short recess and I spoke with the case worker from social services, I told her and the other social worker that came after I gave birth, I did not want ICWA intervention. I did not live on the reservation, I had been a resident of Grand Forks for nearly 4 years. I was told again it was a shelter care hearing and another hearing would be held in 30 days and this would be addressed. I agreed to the 30 day shelter care. l This hearing took place June 3, 2016, that very same day Spirit Lake Tribe had accepted the transfer of jurisdiction. There was no hearing held, the tribe did not have exclusive jurisdiction over my child, the reservation was not my child's domicile or residence nor was it mine. I did not give my consent, I wasn't asked or notified of the transfer til July when a social worker From Grand Forks came to see me.

**Right to Notice.**

Parents must receive clear and understandable notice, by registered or certified mail, return receipt requested of an involuntary proceeding. The court will not hold a foster-care-placement or TPR until at least 10 days after receipt.

**Never received any notice.**

ICWA requires documentation that Active Efforts have been made to prevent the break up of the Indian Family and that those efforts have failed. I was never offered any services, I completed my service plan on my own, I had to seek out resources in Grand Forks. After the TPR, the foster parent license was not renewed by the board, it was decided by the regional Supervisor that my daughter would be placed with me while I appealed the TPR. The day Social Services went to retrieve my daughter, she was notified that the tribal judge had awarded emergency custody to the foster parent, without any explanation.

**My right to appeal.**

> Spirit Lake has no appellate court. They coincidentally terminated their contract with Northern Plains intertribal court of appeals 2 weeks after my TPR was finalized. I filed with my intent to appeal with Spirit lake Tribal Court and my objection to the adoption which took place less than a month after the TPR. When it became evident that trial home placement had commenced and my daughter would be with me 5 days out of the week, the tribal chairwoman issued an executive memorandum forbidding my daughter to leave the boundaries of Spirit Lake. She wasn't enrolled, the entire time they had custody I would not allow her to be enrolled.

I have come to the conclusion that what happened in my case is of no importance. And it will continue to happen. There is no one ensuring these guidelines are followed or anyone held accountable for violating ICWA. No resources or an entity to report misconduct.
This has to change.

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## ADDITIONAL VOICES

### Former ICWA Child

My name is [*xxxx*] and I wanted to share my experience with the Indian Child Welfare Act. In 1994, I was four years old and my grandparents tried to adopt me, but were unable to because I was considered an Indian child. Even though they had raised me since the age of one, the courts ruled that I must live with my Indian birth father. As far as I know, he had no previous interest in being involved in my life. He had no place of his own to live and there was evidence of drug use and neglect of his other children. I was taken out of a stable two-parent home, and placed in full custody of my birth father. My father's home was full of violence and drugs with no safe place to go. I was only allowed to see my grandparents two weeks a year.
The effects of this were devastating on my development. I "turned off" as a child and felt like I wanted to die. I was diagnosed with learning disabilities, despite having an above average IQ. I rarely spoke for years and felt I could not trust the authorities to protect me. As a result, I never spoke up to the police, or anyone, about the abuse I was suffering.
It is now about 30 years later, and I still struggle with the trauma that the Indian Child Welfare Act put in my life. Depression, PTSD, anxiety, and trauma-related health problems are a daily struggle for me. I try my hardest to not pass it on to my daughter, but it's difficult to be a present loving parent when I feel frozen from trauma.
I believe that every child has the right to feel safe regardless of race. I hope that my story will help advance our world toward that reality. Thank you for listening.

---

### Birth Dad

idk where to begin with my testimony. I have 2 beautiful little girls who are in dhs care. and they are federally recognized tribal members. and we are a little more than 2 years in to our journey with dhs. one is I made a mistake in judgement. 2 I got them back and they been removed from 3

times all together. it's an ongoing uphill journey getting them back! so idk how to begin my testimony. idk what you are wanting to know!

---

**Tribal Member**

Corruption and nepotism take precedence over innocent children.... I've seen it done many times.... The tribal ICWA does not have a good track record... I know all too well what goes on.... I used to work for our tribe. When they actually had an awesome attorney who was really for the children..... I have a deep passion for the children also.... But here are what [*xxxx*] goes by and basically sits on the judges shoulder.... And tells them what she thinks...
It's sad but because of the recent ICWA related cases.... I assume the states attorney went want to rock the boat per say....
So much happens on the reservation that gets swept under the rug.... So to speak.... And the ppl won't talk to outsiders about anything...

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**Birth Father**

I'm dealing with a lawsuit with the [*xxxx*] Nation. They issued a custody order that was used outside their reservation without getting it converted into state court order. They didn't give me due process or offer me tribal remedies. The [*xxxx*] police enforced the order and forcefully took my kids out of the home by threatening my grandparents with disorderly charges if they didn't comply with them. So then the great auntie and her husband came into our home and took my kids with the help of the [*xxxx*] police. When there should of been CPS and Tribal police and [*xxxx*] County sheriff that enforced it with the [*xxxx*] county district court judge [*xxxx*] signature and court order. Now they trying to get it dismissed under tribal sovereignty and judicial immunity. When they should of dismissed it along time ago in their tribal family court when I have two tribal lawyers that put in motions to dismiss I never got any evidence of why I was a danger to my children but instead everytime I went to court it was a new stipulation on visitation with my children. It was a one sided court room. Also my former attorney represents the other party in the custody suit when I told him it's a conflict of interest. He also was notified by phone that we was seeking a continuance to seek tribal representation and he said he get ahold of us, so he had every right to object to our continuance or to notify the court we contacted him that we needed more time but instead he goes in there on [*xxxx*] 2021 and wins the case for the other side. In the past when he never called it meant continuance was accepted. It took me until [*xxxx*] 2021 to find tribal representation who is a legal advocate and September 2021 I found a law firm lawyer to come represent me also. My kids didn't see me in over five months because of the hands of these people that are supposed to know law. They probably thought I gave up on them. I didn't get a court date until [*xxxx*] 2021 when my legal advocate represented me and got me visitation of my kids when it should of been dismissed because the order was enforced outside the reservation but instead my former attorney said they was simply respecting a tribal order. I ended up dealing with them until [*xxxx*] 2022 I found federal representation and he looked over my paperwork and said that everything about court papers was crazy. That they should of never took my children. That it's was causing them emotional harm by keeping them from me. Every

weekend I got visitation from 12 to 5 . When there was no evidence against me. When I drop my kids off they cry not to go back. From September to December I got visitation until the great aunt quit letting me see them just because she said that she was the custodian she has every right to tell me no. When in Court cases I read that's enough for a custodian to lose their custody rights. On [*xxxx*] 2021 the children's mother passed away from a car accident and she barely got to spend time with them before her passing. The reason why they was holding custody was because they was saying the mother needed to get drug treatment help that they was going to provide but instead she ended up passing. I complied with all their stipulations that was in their orders so they should of been released to me. There is way more to the story but I feel like they violated my children and my rights and they are trying to not be held accountable. Who knows what other tribes are getting away with this . I didn't contract with them saying my child and I were their slaves. I got them back now but I had to violate a court order advised by my federal lawyer and keep them away from the reservation until all this legal stuff settles. The way ICWA is written up has me worried a little bit though. How tribes are saying their enrolled children are there property when that is not right.

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**Uncle**

…, I saw your organization sometime ago and really liked what you guys do. My family too is in a battle for it's children against a corrupt tribal court system. Lately I've wondered if our case could possibly set new precedents on ICWA. Our family is native. My sister's children were adopted out in her without notice and against her will to non people. This was done by the [*xxxx*] Peacemakers Court. Most are shocked to hear this. After 3 years of litigation in tribal court we learned that neither this adoptive family nor the tribal court system could provide any documents showing that they had a legal adoption. They have no documentation and we're able to get her children by pulling some strings and knowing the right people in tribal government. One of the children had even ran away from home to get back to us but were taken back to tue so called adoptive family by the police. The tribal officials on our reservation say they do not honor ICWA and do not follow it. We tried to get the case transferred to state court so she could acess her ICWA rights but the tribe denied the transfer and the state refuses to take it. Does it violate ICWA? Yes it does but it's more than that. Even if you take away all the ICWA components away from our case it is still fraud and kidnapping. I've reported it to the FBI and talked to different state organizations and our district senator. It's like since we're native American we have no civil rights. The tribe can come in and take your children, give them to whom ever and they do not have to legally justify it. The BIA says tribes do not have to honor ICWA. It seems tribal governements are playing both sides. They will claim jurisdiction but deny the rest of ICWA. The only thing that gives them jurisdiction is ICWA. We've found out that ICWA isn't about the children nor the culture but it's all about maintaining the power structure of the tribal government. People we talk to said it's the first case they've ever heard of a tribe fighting a native family and ICWA. I'm not sure if that can help or not but part of me was thinking our case could set an example of how tribal governements play both sides and use a law meant to protect children and families and hi jack it for their own pourposes. It's just insane this family who jas my sister's children can have possession of them with no documentation and yet have them enrolled in a [*Public*] school system and receive benefits. If we weren't native American they

they would be in prison right now. But since it was done by the tribal court we have virtually no legal recourse. We've been contemplating sueing the state because they're giving the tribal governement more rights that the children's biological mother. It's happened to other families too. Native mothers are being told in tribal court that they are not their children. Their children belong to the [*xxxx*] Nation. I've been saying this violates the 13th and 14th amendment. Technically a reservation is federal land and it is under the authority of the US congress and the US constitution and native Americans are US citizens. All tribal sovereignty is is a legal privilege given to them by the federal government. I think people forget that. Anyway we're still going to move forward however we can but I thought I'd pass this info along.

…In some ways I've made the argument that tribal governements are using ICWA as way to traffic children. That's what we're feeling they did to us. I hope and pray some new legislation or at least some protections can be put in place. Maybe even out right abolishment of it.

… We'd love to get our story out there. We tried a few media outlets. The local news stations say it's too big and complicated of a story for them to cover. Weve reported it to some native media but with them they were all interested in it intil they found out the tribal governement did it to us. Then they didn't want to do anything because I think they're not going to cover a story that reflects poorly on the tribal governement.
…[*The state gets*] revenue from the casino so basicly nobody wants to rock the boat even though people's human rights are being denied. In 2010 they passed that one law that says you have to go through all tribal options first before you can go to federal court. Then a few years back the tribe was saying that people were going to state court and it was damaging their soverighty so that's why they made that deal with [*the state*]. What people don't realize is that the reason native americans were going to state and federal court was because they were doing as a way to escape from the abuse of the tribal government. They tribal government didn't like that so now the've been setting up things so you cannot access state of federal courts. To us it feels like they're trying to set up an iron curtain.
**...** Many people don't realize that tribal governments are completely unregulated and have no over sight when it comes to adoptions. As we found out they can take your children, give them to whom ever and they don't need to follow any minimum standard or provide any legal justification. Being native american gives you no protection. Your children are considered property of the tribal government. With what happened to us there was no out cry from native rights groups. Some people at the BIA and from native rights groups got tough with us and told us that the tribe can do whatever they want. It shows the selective outrage they have when it comes to ICWA. We tried to go to state court to get access to ICWA but we found out that the tribe and the state governor made a deal a few years back where native americans need tribal permission to access the state court system. Even if it's a native biological mother wanting to access state court for ICWA. The tribe wouldn't allow that. It also showed us that it's not about the culture or the children or native families. It's about maintaining the power structure of the tribal governments. A government that is being given almost unlimited power and is allowed to operate outside of the US Constitution despite native Americans being US citizens.

… when I talked to some attorneys that do tribal law. …A lot of them had defended tribal officals in the past and didn't seem to want to go up against [*the state*]'s agreement with the tribe that natives can't have their cases heard in state court. People used to do it a lot about 5 years

ago. They fo on about how it's an agreement well they're agreement is illegal. None of it is actual law. The governor … has zero authority to write legislation. ICWA cases can be heard in state court and the only reason why ICWA allows cases to be heard in tribal court is because they wanted to allow native biological parents to have access to tribal court if they wanted to. It's supposed to be at the biological parents descrection. Now it's been distorted where tribal governement is deciding where cases are heard over the wishes of the bioligical parents. That was never the intention of ICWA. Our case is about the tribal judges ego. They've become arrogant and corrupt with power and even though federal and tribal law and supposedly native tradition is overwhelming on our side they're fighting us because ... they feel who is anybody to question their judgement or their authority. … Their last order was designed to inflict the maximum amount of damage and destroy any relationship those kids had with their family. Absolute power corrupts absolutely. They've forgotten where they came from. Most of them know they have immunity on stuff like this and that's why they do it. They know you have few options. …These are multimillionairs with lots of legal resources. They have their own lobbyist that lobby on their behalf in DC. Can you imagine if Pepsi or Coca-Cola or Texico was given total federal immunity. … there needs to be definite major reforms to ICWA. Bith tribal governements and state governments are acting outside the bounds of the US constitution which tribal governements are subject to. They are not their own country despite what native rights groups would like you to belive.

… I knew the tribal law attorneys knew that too but didn't want to go up against the tribe. I knew the native rights groups knew that too and I could tell they were trying to steer us away from perusing this because they wanted to protect the tribe. They kept saying the tribe does whatever they want and they decide all matters on this. To which I said [*xxxx*]'s children are not government property. The tribe has no authority to deny her access to ICWA. First they said tribes don't have to follow ICWA to which I said fine, then [*xxxx*] has a right to go to court that does follow ICWA. Then they didn't know what to say. Then when [*xxxx*] was saying they wouldn't take her case I reported it to the Federal Attorneys Office. I told them at the very least this deal and a big portion of ICWA that gives tribes more power than a biological parent is a violation of the 13th amendment. Native Americans, who are United States citizens are being put into Involuntary servitude to a tribal entity. The Native rights groups were getting pretty mad we wern't dropping this. … Tribal governments are far too corrupt, incompetent, and unstable to have that kind of power. Then we see NARF making a statement about this and native tradition but they wouldn't even talk to us. They wanted us to go away and quit causing problems for the tribal governement. But that's the selective outrage I talked about earlier. …

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**Birth Mother**

I'm a member of the [*xxxx*] tribe so are my children . We were residing on the [*xxxx*] tribe when I was found non reporting of abuse on my girls by their brother my son.
I tried to refuse tribal court they said no
My abuser got custody even though he was convicted of murder and can't pass a background check
Tribe placed them with his daughter,

Foster care
Tribe has custody
They don't send me notice or paperwork
My ex is very connected to everyone on the reservation, my caseworker is his brothers son. I am banished from the reservation also. I am making my caseworker mad because I keep questioning stuff. I'm not supposed to bother him anymore. I have supervised visits but the tribal social service is not obligated to set this up or I have to pay the caseworker his wages on my own. There is a new head of the social services but I think it maybe too late. Nobody notifies me of any court dates. I just called today and found out about court on [*xxxx*] That's in a couple days. The clerk will mail me a notice today. I may have it by the end of the week.
He abused our daughter ,they sent her to placement til she was 18. Allowed him to keep my 2 children who are not his after this happened. He went to jail also during this time because he was drunk. They gave them back to him as soon as he got out of jail. The same judge does our criminal and family court.
My ex was tribal chairman before we got together
I'm losing hope, it's so bad for me. …, I feel like going crazy would be a blessing. I allowed this to happen because I lived with him for 25 years and couldn't save myself. I never knew better. I am really lost . Please say a prayer for us. I know God is watching and I don't know what else to do...
…I've never lived a life without abuse. My life stopped when the kids left, now I go through the motions. I held my job over a year, I have my own apartment. It's so empty, I used to think God had a plan and I was going to be a part of it. Now I know I don't deserve it because of my own mistakes. But they do and I really would do anything to be a part of it

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**Former ICWA Child**

I didn’t allow Jesus into my healing initially, because I was very angry with him. I thought he left my side. But one day I had an awakening and realized that he’d been there the whole time. Realizing that was an important part to my healing. My mother was a member of the [*xxxx*] Tribe, however, I was initially raised off of the reservation. My native family would come visit often and we would visit them. My father, a Caucasian, was a very abusive man. I saw every form of abuse possible in our home and unfortunately experienced sexual abuse as well. I told my mother when I was 12. She said we were leaving. I was ready to go. But unfortunately he talked her into staying with a promise he’d never do it again. He didn’t stop, I just learned to stop talking about it. But the summer after sixth grade, after a particularly bad episode of domestic violence, my mother left him and we moved about 15 miles away. My dad started to come visit, and they made up. Despite multiple slip ups with violence and other abuse again, after two years she decided we were moving back. I couldn’t do it. I knew somebody was going to die if I didn’t do something. I told. I told the social workers. I told the police. Things started moving really fast. We were removed from the home. They wanted to investigate her to see if she was even fit to parent. My sister and I were sent to separate foster homes. It was the first stable and safe time I’d ever had in my life. But it wasn’t to last. My sister and I were met the blood quantum to be enrolled as [*xxxx*]. Mom had enrolled us several years before. Under ICWA, she approached [*xxxx*] Tribe. They declined with the comment that they wouldn’t touch the case with a 10-ft

pole. Grandma was enrolled in [*xxxx (different tribe)*]. Because the home tribe declined, it allowed them to approach [*xxxx*]. They intervened. I was ripped from the stable foster home. We were rushed out of our town to the [*xxxx*] Reservation. It was never questioned if my mother was fit to parent despite the things she had allowed to occur in our home, those same things she defended to some lengths. It was made quite clear that I was a bad kid for sending my dad to jail. We stayed with family in Rosebud. All of my aunts and uncles told me to "straighten up and fly right". I saw a judge in his office once. He told me he was sorry for the support system I lost but that this is how it was. My father was sent to prison. For part of my punishment for being such a bad kid I was forced to visit him in prison, forced to let that awful man touch me. I was verbally and physically abused to the point that I was removed from her care again in 11th grade. I was emancipated by the court at 18 and have been taking care of myself since. The ironic part of all of this is that the same community that marched into a courtroom to save me from the evils of the state foster care system, that same community now excludes me for having light skin. I am angry that I had to fight so hard to just exist normally. I am angry that they didn't even make sure the orders they gave after handing me back to my mom without question were followed. She sat in on my counseling sessions to intimidate. The counselor didn't tell me I was bad kid for sending my dad to jail. So she stopped taking me. They knew it. They never enforced it. So basically other than marching in like a bunch of rebels in that state courtroom, they pretty much abandoned me. Is that part of those values they were afraid that white family couldn't give me? Thanks for listening, and keep doing what you do.

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**Birth Mother**

… my oldest daughter [*xxxx*] was taken due to social services' lies & utter bs they forged on reports. The actual, legitimate reason was my bf (her dad) & I had domestic issues between us. [*Then*], social services illegally entered my home to take our 16 day old daughter without a verbal or written TCO. They then came back that night with a sheriff's deputy & took her. There was no explanation, no reasoning. They then denied this happening. In the course of 14 months, 3 people involved in social services (employees) quit while working with us because I kept calling their bs. They got sick of me filing misconduct reports, complaints & harassment police reports on them, so they tried to adopt our native kids out. [*Then*], [*xxxx*]CP intervened. We haven't had one visit since then. They called today to say our kids would be getting adopted out due to a missed phone call. We moved into a new apartment after being homeless for almost a year that day & they scheduled a visit! They are located 3-4 hrs away from where we live. They drove here to the foster home & then left town before our visit was due to take place!!! They blamed us for missing a phone call even though they didn't call my bf's phone!! Now they want to adopt our kids out! This is all because of ICWA!!! I want to destroy ICWA & social services in [*xxxx*] like they have done to me & my kids. This isn't ok!! I won't stop until my kids are home!!!

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**Birth Father**

On [*xxxx*] 2021 my sons mother, a [*xxxx*] tribe member, came to my home and kicked my door in yelling and screaming. She assaulted me and tried to abduct my son. I shoved her outside and

called police. State police showed up and charged her but released her. Police interviewed my son and specifically left him with me based on that interview. My son's mother ran down to chief of the tribe who is her aunt, and complained about what had just happened. The next day my son is being removed from my home and brought right back to his violent mother. My son had just witnessed his mother in a physical altercation 5 days before.

I am not native american, I do not live anywhere near a reservation. The court order that removed my son had no jurisdiction. The subpoena that I received to appear in court had no jurisdiction over me. The court order restricting my contact with my son and forbidding me to own a firearm had no jurisdiction over me. My son was taken from a home where there are no drugs crimes or violence and brought to the home where drug use is rampant and crime and violence are a normal part of life.

It has been 7 months since I have seen my son [*xxxx*]. Since then, the family he spends alot of time with has had a death from overdose and apparently a member of the household has fled because he is prime suspect in a murder investigation. Yet myself nor my family can get nowhere near my son. It would seem we are the wrong race to be victims of a home invasion, assault and attempted child abduction. None of this is in [*xxxx*]'s best interest.


Members of the Commission:

My testimony focuses on the harms that the Indian Child Welfare Act (ICWA) inflicts on children of Native American descent in the United States.

This has proven a controversial topic, because tribal government officials and outspoken ideologues typically refuse even to consider questions about the justice or effectiveness of ICWA, as I will discuss later. They prefer to accuse those who criticize ICWA of racism, and ignore the *facts* of how ICWA operates.

But trying to silence discussion cannot change the fact that ICWA stands today as one of the greatest obstacles to justice and security for Native American children in this country. It does so for many reasons, some of which are quite complicated,[1] so I have submitted written testimony that gets into some of the more complex aspects of the law.[2] Here, I will address only three problems: (1) ICWA's restrictions on termination of parental rights, (2) ICWA's "active efforts" requirement, and (3) ICWA's race-based placement preferences for foster care and adoption. I will also discuss the popular soundbite that falsely claims that ICWA is the "gold standard" of child welfare.

ICWA was passed with good intentions: to put an end to abusive practices whereby states often took children away from Native parents without sufficient reason. This sometimes resulted from ignorance of tribal cultural practices, and sometimes from an outright policy of forced assimilation. Nobody disputes that these were improper and hurtful practices that resulted in harm to Native children and parents. The problem is that ICWA fails to remedy this problem, and in fact worsens the treatment of both parents and children.

Another preliminary note: ICWA applies to what it calls "Indian children." This is not the same thing as tribal membership, and the difference is important to keep in mind. Tribal membership is a function of tribal law (and every tribe is free to set its criteria as it chooses). But "Indian child" status under ICWA is a function of federal and state law, which means it must comply with constitutional rules.[3]

ICWA defines Indian children as either children who are current tribal members, or as children who are eligible for tribal membership and who have a biological parent who is a tribal member. What that means is that a child is deemed "Indian" under ICWA even if that child has no cultural, social, or political connection to a tribe, has never visited tribal lands, and maybe has no idea that he or she has Native heritage. On the other hand, a child who is fully acculturated to a tribe, speaks a tribal language, practices a Native religion, etc., may *not* qualify if that child lacks the biological criteria for membership or lacks a biological parent who is a tribal member.

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Now, how does ICWA harm "Indian children" and their parents? Consider first the termination of parental rights. While it's always a tragedy when a parent's rights must be terminated, the fact is that it is often a necessary step, if a child is going to be rescued from abusive or neglectful parents. Under the law of every state, and under federal law, parental rights may be terminated when there is "clear and convincing evidence" that the child is at serious risk. That "clear and convincing" standard requires more proof than the "preponderance of the evidence" standard used in ordinary civil lawsuits, but less than the "beyond a reasonable doubt" standard used in criminal law. And in the case of *Santosky v. Kramer*, the U.S. Supreme Court said that the "clear and convincing" standard was required for termination of parental rights, because the "preponderance" standard would make it too easy to take children away from parents, and the "reasonable doubt" standard would make it too hard. In fact, the Court said "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption."[4]

But ICWA imposes that "reasonable doubt" standard. In fact, it goes even further, and requires both "beyond a reasonable doubt" and *also* expert witness testimony. What that means is that it is literally easier to put a criminal on death row than it is to terminate parental rights when an Indian child is being abused by a parent.

It should be obvious that making it harder to rescue children from abusive homes does not serve their best interests.

And because state courts also force *parents themselves* to comply with this rule, the result is often to block *Native parents* from taking steps necessary to protect their own children.

Consider the 2016 case of *In re TAW*, for example, a Washington State Supreme Court decision that involved a Shoalwater Bay mother who wanted to terminate the rights of her abusive ex-spouse, who was non-Native, and who was a repeat criminal offender.[5] She wanted to terminate his rights so that her new husband, a tribal member, could adopt her son legally. But the court ruled that she was

still required to comply with the "reasonable doubt" rule and the expert testimony rule. And because that's such an extremely high standard, she could not terminate the rights of her non-Native ex. Such an outcome does nothing to preserve Native families. On the contrary, it prevented the Native mother from forming a new, legally recognized Native family.

Or take the case of *J.P.C.*, in which a mother who was a member of Tohono O'odham, but lived in Tucson, off the reservation, sought to terminate the rights of her abusive, neglectful exhusband.[6] If the child had been white, black, Asian, or Hispanic, then Arizona state law would have applied, and the rule would have been "clear and convincing." And if the mother had lived *on* reservation, tribal law would have applied, and it imposes the same "clear and convincing" rule. But because the mother lived off reservation, and the child was deemed an "Indian child," the "reasonable doubt" and expert witness rules applied instead, which meant she could not terminate the ex's rights.

In these and other cases, ICWA bars Native parents themselves from taking the steps necessary to protect their children—and deprives them of their constitutional rights, since the U.S. Supreme Court has said that parents have a *fundamental right* to direct the upbringing of their children.[7] The only parents in America who are deprived of that right by federal law are Native American parents.

Another way ICWA harms Indian children is through the "active efforts" requirement. Under state and federal law, if child welfare officers take a child away from an abusive family, they must take what are called "reasonable steps" to return the child to the family—to provide them with the social services they need in order to help them get back on their feet. But state and federal law do *not* require this if there are "aggravated circumstances," such as systematic abuse, or sexual molestation, or drug addiction on the part of the parents. That makes sense, because it would be very bad to require child welfare officers to send children back to homes that are already known to be abusive, where they will simply be harmed again.

Yet ICWA *does* require that. Instead of "reasonable" efforts, it requires "active" efforts, and although courts have not definitively said what that means, they have said that it means something more than "reasonable" efforts—and that it is *not* excused by aggravated circumstances. As a result, Indian children must be sent back, time and time again, to the families that the state knows are mistreating them. The horror stories such as Declan Stewart in Oklahoma,[8] Anthony Renova in Montana,[9] or Josiah Gishie[10] here in Arizona, are a direct consequence of the fact that state child welfare officers cannot take steps to protect these children—steps they could take if those children were white, black, Asian, or Hispanic.

Or consider the case of *S.S. v. Stephanie H.*, here in Arizona.[11] The father was a member of the Colorado River Indian Tribes. He sought to terminate the rights of his ex-wife, whom he accused of alcoholism and neglect. Because the children qualified as "Indian children" under ICWA, however, he was required to take "active efforts" to preserve the children's relationship with their mother. In other words, federal law forced him to put his children in the care of a woman he knew to be an unfit parent.

Or consider the case of *Shayla H.*, from Nebraska.[12] State officials knew she and her two sisters were being abused and molested in their home. They took the three girls out of the home—but state courts later ruled that while investigators had satisfied the "reasonable efforts" rule, they fell short of the "active efforts" rule, and the girls had to be returned to the home—where they were molested again. A state court judge later said they had endured "lifetimes of trauma" that they would not have endured, had they not been subject to ICWA.

A third way ICWA harms Indian children comes with the race-based placement preferences for adoption and foster care. ICWA requires that an "Indian child" be placed either with their biological families, or, if this is not possible, with "other Indian families," *regardless of tribe*. This means that a Navajo child must be placed with a Cherokee or Penobscot or Seminole family before that child may be placed in a white, black, Asian, or Hispanic home—even though these tribes have entirely different histories and cultures. Simply put, ICWA treats "Indians" as fungible—as a single group—instead of respecting the differences between tribes. But the idea of the "generic Indian" is a racist concept, one imposed on Native Americans by settlers. ICWA continues to divide people into "Indian" and "nonIndian" categories, perverting traditional concepts of tribal citizenship.

This has real world consequences because there is a drastic shortage of Native foster and adoptive homes.[13] There are so few, in fact, that Native children typically must be placed with nonNative families, which is called "non-compliant" placement—and which means the child can be removed from that foster family at practically any time tribal officials desire. As a consequence, Native foster children are frequently moved from one foster home to another—which deprives them of the stability that is so crucial to any child's upbringing.

What's more, if a Native child is in need of a permanent, adoptive home, he or she can be—and frequently is—denied that home because the adults who want to protect that child are white, black, Asian, or Hispanic. This is true even if the Native parents want their children to be adopted by adults of another race. For example, in the *Brackeen* case now pending before the U.S. Supreme Court, the parents, both Native, agreed to the adoption of their children by a white family. But ICWA allows tribal governments to veto that decision and send the child to live with strangers in a state the child has never even visited. The U.S. Supreme Court in *Troxel v. Granville*, said that parents have a fundamental constitutional right to make decisions about their children's upbringing.[14] But ICWA deprives Native American parents of that right.

I want to say a final word about the soundbite that you'll often hear, to the effect that ICWA is the "gold standard" of child welfare law. This is a false statement, and a misleading one. That phrase first appeared in a brief filed in a 2013 lawsuit called *Adoptive Couple v. Baby Girl*, where the phrase referred to the idea that the "gold standard" of child welfare is to ensure that child stay with "fit" birth parents.[15] But of course, nobody disagrees with that. *Obviously* children should be raised by *fit* birth parents. The problems arise when parents are not fit, but are abusive or unable to care for their

children. In those cases, the state has a legal and moral duty to protect that child—and ICWA stands as a major obstacle to that.

The actual "gold standard" is the well-known "best interest of the child" rule. That rule says that in any child welfare case, the child's *individual*, *specific* needs and interests take priority over other considerations. The "best interest" test considers everything from the child's physical health to the child's cultural needs. It's an individualized, case-by-case assessment. But ICWA overrides that test, and—depending on how you interpret it—either blocks courts from using the test entirely, or substitutes a different, and less-protective test that prioritizes other considerations, and particularly the interests of tribal governments, over the welfare of the individual child.

This is literally "separate but equal"—or, actually, separate but substandard. In a case called *Alexandria P.*, the California Court of Appeal declared that while a child's best interest is the overriding concern for most children, the rule for Indian children is different—for them, best interests is only one of a "constellation of factors" that judges should evaluate.[16] The Texas courts have been even more explicit. They've declared that there are two separate tests: the white best-interests rule, and the Indian best-interest rule. Under the white best-interest rule, the child's welfare is the most important consideration. But for Indian children, that doesn't matter as much.[17] This is doubly tragic because the traditional best interests test—the one the Texas courts have called "white"—*does* include consideration of a child's need for tribal connections. But it also includes consideration of the child's emotional and physical well-being in ways that current law ignores.

Others have said that ICWA doesn't eliminate the best interest rule, but instead imposes a onesize-fits-all federal "presumption" that an Indian child should stay in the Indian community. But the Supreme Court has already said that it is unconstitutional to use "presumptions" in child welfare law, because children are entitled to have their own, unique circumstances viewed as the most important consideration.[18] For Congress to impose a one-size-fits-all standard on Native children—to declare what's in their best interest, regardless of their own particular circumstances—harkens back to the worst elements of the government's treatment of Native Americans, and perpetuates injustices that reach back centuries.

Let me end by being frank with you. I know that ICWA is an emotionally fraught issue. I know that tribal government officials claim that ICWA is crucial for protecting tribal communities, and they tend to downplay the abuses and harms that I've mentioned as mere "anecdotes." I also know that hearing someone who looks like me talk about this issue in this way makes many people uncomfortable. Many people refuse to let themselves be convinced by the facts and the law. I consider that tragic. But the reality is that ICWA is in drastic need of fixing, if we are to spare the next generation of American Indian children—and the adults who love them—from harm.

I beg you—I beg anyone who hears my words—to lay aside your preconceptions and examine how this law actually operates—how it denies children of Native ancestry the legal protections that kids of other races enjoy and that they are entitled to under our Constitution. Too many Native kids are in need. And there are people willing to help them. It is a crime against humanity that federal law today says no—because their skin is the wrong color.

Timothy Sandefur
Goldwater Institute

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[1] There are, for example, questions of the constitutionality of allowing tribal courts to assert jurisdiction in the absence of constitutionally required "minimum contacts," or of dictating to state courts how they may interpret their own child welfare statutes, and other questions, or of interpreting such family law questions as the amount of time required for the acknowledgement of paternity under
ICWA—among other things. On the minimum contacts issue, see Timothy Sandefur, "Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children," *Children Legal Rights Journal* 37 (2017), pp. 23–32. On the commandeering of state courts, see Timothy Sandefur, "The Federalism Problems with the Indian Child Welfare Act," *Texas Review of Law & Politics* 26 (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853970, pp. 32-42. On the question of acknowledgement of paternity, see Timothy Sandefur, "Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?," *Texas Review of Law and Politics* 23 (2019), pp. 448–52. (2019)

[2] Timothy Sandefur, "Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children," *Children's Legal Rights Journal* 37 (2017): 1–80 https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1137&context=clrj; Timothy Sandefur, "The Federalism Problems with the Indian Child Welfare Act," *Texas Review of Law & Politics* 26 (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853970; Timothy Sandefur, "The Unconstitutionality of the Indian Child Welfare Act," *Texas Review of Law & Politics* 26 (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3823987.

[3] *In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016).

[4] *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

[5] *In Re Adoption of T.A.W.*, 387 P.3d 636 (Wash. 2016).

[6] *In re J.P.C.*, No. S20150158 (Pima County Super. Ct.), *special action denied*, CV-17-0298-PR (Ariz. Feb. 13, 2018).

[7] *Troxel v. Granville*, 530 U.S. 57 (2000).

[8] Mark Flatten, "Death on a Reservation," pp. 25-26, https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf

[9] Naomi Schaefer Riley, "The Indian Child Welfare Act: A Law That Paved the Way for a 5-Year-Old's Death," *USA Today*, Jan. 29, 2020, https://www.usatoday.com/story/opinion/2020/01/29/indianchild-welfare-act-law-paved-death-column/4519511002/

[10] Arizona Department of Child Safety, "Statement on the Death of One-Year-Old Josiah Gishie," Oct. 12, 2018, https://dcs.az.gov/sites/default/files/StatementFatality/Fatality%20Statement%20Josiah%20Gishie.pdf [11] *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied*, 138 S.Ct. 380 (2017). [12] 846 N.W.2d 668 (Neb. App. 2014), *aff'd* 855 N.W.2d 774 (Neb. 2014); *see also In re Interest of Shayla H., et al.*, Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015).

[13] Elizabeth Stuart, "Native American Foster Children Suffer under a Law Originally Meant to Help Them," *Phoenix New Times*, Sep. 7, 2016, https://www.phoenixnewtimes.com/news/native-americanfoster-children-suffer-under-a-law-originally-meant-to-help-them-8621832; Daniel Heimpel, "L.A.'s One-and-Only Native American Foster Mom," *The Imprint*, June 14, 2016, https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823.

[14] 530 U.S. 57 (2000).

[15] Brief of Casey Foundation, et al., 2013 WL 1279468 at *4.

[16] *In re Alexandria P.*, 1 Cal. App. 5th 331, 351 (2016), *cert. denied*, 137 S.Ct. 713 (2017).

[17] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995).

[18] *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

# THE INDIAN CIVIL RIGHTS ACT

United States Commission on Civil Rights

Statement

by

Commissioner William B. Allen

The temptation to approve this report is great despite its manifest errors of legal and historical interpretation.[1] The reason for this is that the Commission's study has finally been freed from its unhealthy and collusive connection with the Department of Justice's efforts to build a case for legislation previously introduced as S. 517. During that earlier phase the Commission actually had less control over its own study than did certain staff from the Department of Justice.[2] The sheer scope and importance of the inquiry, however, had the effect of producing a record of far greater weight than the collusion intended. Despite the passage of time and changes in staff, the record remains to support a broader effort, and the Commission's study is now free from those prior suspicions. Nevertheless, some aspects of the prior analysis remain in the final product (to be expected, since the whole work could not be redone), and these convey erroneous conclusions even while no longer supporting their pre-determined end. I write, now, therefore, largely to clarify these errors of legal and historical analysis and also to take full advantage of the rich record this six-year study produced.

Moreover, I cannot concur in a report that claimed fewer than ninety seconds of substantive Commission deliberation after more than six years study and six-hundred thousand dollars of resources invested in it. The report is far briefer than such an extensive record would seem to justify.[3] Furthermore, the direction of its recommendations, contrary to the recommendations of the very worthwhile "Final Report and Legislative Recommendations" of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate, is to infuse the federal government even deeper into custodial care of Indians, while the gravamen of our findings is that that is the very source of most of the problems we uncovered.[4]

This abbreviated version seems to suggest far less importance for the ultimate product than I believe it in fact merits. Indeed, I am persuaded that the hearing and study record behind this report make it possible, for the first time in our history, for the Government of the United States to be completely honest rather than merely apologetic about its failures in treating with American Indians. The approved Commission "Report" fails to live up to this high expectation.[5]

Accordingly, I add now my own brief statement about the meaning of this extensive record.[6] In order to provide coverage as comprehensive as possible in the circumstances, I restrict the text to a further elaboration of findings and recommendations supported by the record. I omit interpretations save where absolutely necessary to justify findings or recommendations, and then I relegate them to footnotes in order to preserve an undisturbed flow in the text.

## FINDINGS

I. There is no foundation for Congress' and the Court's assertion of a "plenary power" over Indian tribes taken as independent and sovereign governments. Such a "plenary power" neither has been nor can be acquired by conquest, treaty, or constitutional stipulation.[7]

A. Whatever may be the rule in international law, the assertion of complete and arbitrary power over non-citizens by the Government of the United States is incompatible with the Constitution of the United States, which is superior to every positive determination by the Government.[8]

B. Even if complete and arbitrary power over non-citizens were possible for the Government of the United States, such unlimited power could not be extended over citizens who, as such, are parties to the Constitution that limits the power of government.

1. Nor can citizens be placed outside of the protection of the Constitution by means of the fiction of "government to government relations," where the "government" with which the United States deals is not in fact independent and sovereign (including control of its own territory).[9]

a. Therefore, insofar as the ICRA applies to U. S. citizens, it exceeds the power of Congress to enact.

C. The Congress of the United States can legitimately exercise no power over tribes whose members are citizens of the United States which power is not in fact a power over the citizens themselves and therefore subject to the relevant constitutional limitations.

1. With respect to special protections afforded against lawfully subordinate governments, the United States has no power whatever to make exceptions, for any purpose whatever.[10]

a. With respect to special protections afforded against lawfully subordinate governments, the United States may not apply a lesser standard of protection against itself.

D. Not one federal dollar has been spent on the enforcement of fundamental civil rights of American citizens domiciled on reservations since the 1978 Supreme Court decision, *Santa Clara Pueblo v. Martinez*.

II. The Government of the United States has failed to provide for Indians living on reservations guarantees of those fundamental rights it is obliged to secure for all U. S. citizens living on territory controlled by the United States and under the laws of the United States.

A. In abandoning by act of Congress individual U. S. citizens to the indeterminate control of tribal governments without recourse to federal courts of judicature the United States thereby fails to provide the just constitutional claims for which all citizens may pray.
B. Federal legislation for tribes, as distinct from citizens, implicates the rights of citizens in other areas.

1. The Indian Child Welfare Act (ICWA) is a case study of rights imperiled by the process of legislating for tribes without regard to citizens.

    a. ICWA produces institutional child neglect and abuse without recourse to fundamental due process protections.[11]

2. Congress established the Legal Services Corporation to provide legal representation for indigent clients in civil cases. An exception to a general prohibition against uses of Corporation funds in criminal cases is provided where persons are charged with a criminal misdemeanor or less in a tribal court, 42 U.S.C. §2996f(b)(2); 45 C.F.R. §1613.4. In 1988, Corporation staff advised the Commission that the Corporation had allocated $7 million for all Native American legal services programs, of which 10 were reservation based and 22 were located near reservations. Discussions with Corporation staff indicated that many of these programs are overseen by boards of directors that include tribal council members, and that these programs frequently represent tribal governments in relation to state governments or the Bureau of Indian Affairs. The use of tribal council members as directors of the programs ostensibly set up to provide representation of indigent American Indians in litigation against tribal governments calls into question the integrity of these programs.

III. Enforcement of ICRA by tribal governments: The record of hearings and studies justifies the conclusion that tribal enforcement of ICRA has been at best uneven; sometimes reaching to customary levels of expectation among Anglo-American jurisdictions, often lacking altogether.

A. Among the explanations for, and examples of, the failures are a number of individual and systemic factors.

1. Claims of sovereign immunity.
2. Lack of autonomy in judicial offices.
3. Woeful lack of funding of tribal courts.
4. The Secretary of the Interior has failed to use statutory means (§450m of Public Law 93-638) to enforce the ICRA.
5. General allegations of illegal searches and seizures.
6. Widespread denial of the right to counsel.
7. Ex parte hearings.
8. Restriction of right to a jury trial.
9. Violations of freedom of the press.
10. Violations of due process and equal protection of the laws.
11. Cruel and unusual punishments.

**RECOMMENDATIONS:**

I.

A. That the "blueprint for a New Federalism" proposed in the "Final Report and Legislative Recommendations" of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate be enacted forthwith, including the four "indispensable conditions:"

1. The federal government must relinquish its current paternalistic controls over tribal affairs; in turn the tribes must assume the full responsibilities of self-government;

2. Federal assets and annual appropriations must be transferred in toto to the tribes;

2. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and

4. Tribal government officials must be held fully accountable and subject to fundamental federal laws against corruption or abuse of power.

B. A comprehensive guarantee of the natural and civil rights of American citizens of Indian descent demands that we resolve the constitutional ambiguity in the relation between individual Indians, their tribal governments, and the government of the United States; such a resolution will embrace the either/or choice of full sovereignty or citizenship.

1. A resolution on the side either of sovereignty or of American citizenship must entail the dissolution of the Bureau of Indian Affairs per se, acting as a caretaker or guardian for a conquered race. Certain functions of the Bureau could survive in the Department of State relative to those Indian communities following the path of sovereignty.

a. Wherever there has been within any tribe no express acceptance of American citizenship, and where continued territorial and administrative integrity of the tribe obtains, the United States should accord full and formal recognition of the independence of the nation on grounds mutually acceptable, such grounds being spelled out in a final treaty of peace between such independent tribe(s) and the Union.

b. Because it is sometimes unclear where American citizenship has been embraced and where it has not, and because the government of the United States may not withdraw accomplished citizenship, before steps toward independence can be taken, the United States is obligated to conduct a plebiscite among the members of affected tribes. The plebiscite should be carried out under the direct control of the federal government, with all rules and procedures subject to congressional authority.

C. 1.

a. The Indian Civil Rights Act should be repealed.

i. Where Indians constitute a thriving political society but do not choose independence from the United States, where they possess territorial integrity and material resources for the conduct of government, and where there is sufficient divergence of interest between them and the state(s) of the Union where they are located geographically, they should be empowered to petition Congress for independent status within the Constitution of the United States as states or territories or commonwealths.

ii. Tribes ineligible for independent political status within the Constitution by reason of size or circumstance, but which yet retain fealty to American citizenship, should be encouraged toward separate municipal status wherever possible.

iii. Congress ought, all other provisions failing, at least to enact a self-denying ordinance to the effect that it will attempt over Indian tribes the exercise of no municipal powers other than those generally established over states within the United States. This will leave the tribes as "states" without representation, save through the states within whose boundaries they lie.

D. While the reservation system and/or the custodial responsibility of the United States still subsists, it is recommended that a Board of Indian Judges be established within the Civil Rights Division of the Justice Department, there to propose and oversee the establishment of adequate mechanisms and resources to guarantee the enforcement of fundamental civil rights on reservations.

1. The purpose of the Board of Indian Judges shall be to recommend a system of Indian Regional Appellate Courts and appropriate criminal justice procedures to articulate within such an appellate structure.

a. Such courts may be based on existing regional judges associations and would be best organized according to the existing sympathies and common customs of the various tribes within a region.
b. Such courts should also be articulated within the structure of existing circuit courts of the federal judiciary.

2. Alternatively, and failing by some fixed date such a result as called for from the Board of Indian Judges, the Department of Justice in consultation with the Board of Indian Judges should recommend to Congress a means by which existing tribal courts may be brought directly within the appellate jurisdiction of the federal court system. This course implies necessarily amendment of the ICRA to fill in the gaps cited by the Martinez decision.

II. Congress would do better to replace the ICRA with legislation providing for the enforcement of the civil and constitutional rights Indians enjoy by virtue of their citizenship in the United States. Such legislation should specify de novo review by appropriate judicial bodies in civil rights actions brought by plaintiffs in tribal courts.

A. Such legislation would subordinate tribal governments to the Constitution of the United States and provide for a waiver of tribal sovereign immunity. Additionally, Congress should explicitly amend civil rights currently in force to include American citizens domiciled on Indian reservations.

B. Congress should not only reverse the Duro decision, but should extend the rule to establish general jurisdiction over all persons committing infractions on Indian reservations.[12]

1. Congress should repeal the Indian Child Welfare Act, and any similar legislation the consequences of which are to enracinate social pathologies.

a. Due process requirements mandated in particular civil rights areas ought expressly to be extended to all judicial procedures touching questions of life, liberty, or property.

2. b. Congress should amend 42 U. S. C. §2996(b) to clarify its intent with respect to use of funds by the Legal Services Corporation in providing funds for the representation of indigent clients, not governments, in tribal court proceedings.

III. A.

1. Within their own constitutions and without respect to their status, tribes should guarantee that sovereign immunity shall not constitute a defense against claims for injunctive, declaratory, or other equitable relief in fundamental civil rights pleadings.

3. Tribes should, further, provide judicial review by an independent judiciary. Moreover, Congress should amend the language in 25 U.S.C. §450n, which provides that "Nothing in this Act shall be construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.. ."

3. Congress should provide through the Department of Justice direct funding for tribal court systems commensurate with levels that obtain in comparable state or municipal systems.

a. Congress should appropriate and earmark monies for a criminal defense fund to be used to reimburse attorneys who represent indigents in criminal proceedings in tribal court. A voucher system should be established to pay these attorneys a pre-determined rate for their services. Alternatively, Congress should appropriate and earmark monies to pay for attorneys to be added to either the federal defender's office or the United States Attorney's office in every jurisdiction that contains a tribal court.

4. Title 25 U.S. C. §450m requires, *inter alia*, that certain language be included in contracts or grant agreements which the Secretary of the Interior enters into with tribal organizations. That language is to expressly provide that the Secretary may rescind and reassume such contracts or agreements where he determines that the tribal organization's performance thereunder involves the violations of rights. Unwise though this relationship be, while it persists Congress should amend §450m to specify that violations of the Indian Civil Rights Act, while it is in force, provide a basis for rescission of such contracts or agreements and to require certification by the tribe that

it is complying with the ICRA. This minimal level of enforcement should also provide a private right of action against the Secretary for persons whose rights are allegedly violated.

5-11. The Federal Judicial Center, an agency within the Judicial Branch of the United States, is mandated, *inter alia*, to conduct research on the operation of federal courts, to stimulate and coordinate such research by other agencies or persons, and to conduct programs of continuing education and training of judicial branch personnel including judges. Serious consideration should be given to using the Federal Judicial Center, alone or in conjunction with the Board of Indian Judges provided for above, to assist in the development of tribal courts through the provision of training and technical assistance. Such training and assistance should also be extended to tribal council members and police personnel.

a. Ideally, the Board of Indian Judges would take the lead in recommending ways and means of regularizing and insuring a fair administration of justice under tribal governments wherever necessary. In addition to direct funding by the Department of Justice, it should provide for mandatory trial by jury in appropriate cases, the incorporation of American citizens living on reservations within all civil rights statutes, including the Voting Rights Act of 1965 (with amendments), and some workable standard to ensure that the orders of courts will be obeyed by tribal executives and police.

## ENDNOTES

[1] All the present day inhabitants of North America can trace their origins to a history of primitive, unlettered barbarism. Nevertheless, Federal Indian law continues to be premised on the ignorance of the Indians. Indians, it is said, are in their pupillage; they are wards of the United States. It is essential first to understand this foundation of Indian law, before one can meaningfully address the Indian Civil Rights Act (ICRA) or entertain any serious discussion of what the United States Commission on Civil Rights should say about the ICRA.

Accordingly, it is important to note that the criticisms in this statement are not criticisms of the Commission staff who drafted the report and who in this as well as in other productions have exhibited a professional excellence beyond question. I here criticize an approach, in much the same spirit we have previously criticized the production of narrow reports by this commission. Before, we have insisted that an economic analysis, unleavened by historical sensitivity, was insufficient for the mission of the Commission on Civil Rights. Today I say that mere legal analysis is no more sufficient, alone, than mere economic analysis.

This outlook was well expressed by Commissioner Mary Frances Berry, in the Commission meeting of November 17, 1989, when she declared: "I thought that the economics ought to be put into the context of the culture and social history of black women in this country so that we would have a fuller understanding of their status and that I also thought that there ought to be some discussion of the history of discrimination on the basis of gender in general with black women as a sub-context of that . . . I believe that that context, the history, needs to be put into the report so that people will more fully understand the economics that they read . . . I am considering [the report] from the perspective of a public who reads it. So, if we could separate criticism of what they have done from criticism of us as a

body publishing a study, then I think we will be getting somewhere . . . to give people these narrow answers doesn't make any sense and so I pleaded . . . that we put more about the history of black women and women in this country to flesh out the areas where we talk about the economics . . . the people who did the report are not professional historians and perhaps . . . it's not their fault that they're not and they weren't asked to do this and we need somebody to do it." Similarly, Commissioner Blandina Cardenas Ramirez observed that ". . . we have spoken about a need for, if you would, an interdisciplinary approach to these issues consistently every single time one of these economic status reports have come up . . ." With Commissioners Berry and Ramirez I have consistently emphasized an interdisciplinary focus. I remain consistent in underscoring its importance. We do not have the capability at the Commission at this stage of our development to provide that kind of breadth in our reports. Therefore, I now write, not to provide the comprehensive focus we need, but at least to suggest the scope of such a capability. In doing so, I take occasion to correct the most misleading, if unintentional, errors of the report now approved by the Commission.

[2] This Commissioner well remembers sitting in the office of Senator Inouye and responding to an inquiry concerning DOJ influence that our study was independent, only then to be confronted for the first time with the copy of a memorandum which clearly showed such a relationship. Needless to insist, I had been assured that we retained an appropriate arms' length relationship and my embarrassment was acute.

[3] The Commission's study into enforcement of the Indian Civil Rights Act of 1968 was begun in 1985, when the Commissioners adopted a written project proposal authorizing further development of the study. The investigations and hearings by the Commission subcommittee responsible for the study comprise the most extensive factfinding conducted on the status of civil rights on Indian reservations ever undertaken. In significant part, this factfinding is set forth in the hearing records noted in Part I, n. 2 of the "Report."

In all, one hundred and seventy-eight persons testified before the Subcommittee. Witnesses included numerous tribal judges and council members, Assistant Secretary for Indian Affairs, Ross Swimmer, and other representatives of the Department of the Interior, United States Attorneys from South Dakota, New Mexico, and Minnesota, Indian law scholars, lay advocates, and attorneys who practice before tribal courts. Included also were numerous private citizens who sought recourse to the Commission to complain of tribal government abuses of their civil rights, testimony essential to a legitimate examination of the status of civil rights in Indian Country.

The eventual selection of hearing sites conformed to the Commission's purposes. Rapid City was chosen for its proximity to the Rosebud, Cheyenne River, and Oglala Sioux Tribes, all of which were generally perceived to be experiencing difficulty properly enforcing the ICRA. Flagstaff, on the other hand, was selected for its proximity to the Navajo and Zuni Pueblo Tribes, and because the Navajo judicial system was reputedly the best in Indian Country. Later the Subcommittee added hearings in Portland, to receive testimony from numerous tribal judges in the Northwest (at their request); in Washington, D. C., to examine the ICRA enforcement efforts of the Bureau of Indian Affairs; again in Flagstaff to examine alleged ICRA violations and more fundamental issues arising out of Indian Child Welfare Act (ICWA) cases, allegations of threats to the independence of the Navajo judiciary, and recent amendments to the Navajo Tribe's sovereign immunity act; and, finally, in Phoenix, to receive testimony of three members of the Navajo judiciary on the issue of judicial independence.

[4] "A New Federalism for American Indians," November 1989, S. Prt. 101-60. It was the institutionalization of the benefactor to ward relation which transformed Indian policy from a democratic to an imperial one, and which seemed to take as its goal the transformation of Indians into subjects habituated to dependency. It is not too much to say that the Bureau of Indian Affairs (BIA) was the first welfare agency in our nation's history, and we should not be surprised if our first and longest lasting welfare program has had similar, and perhaps even more harmful, effects than those of recent vintage.

In our study we found it a particularly striking and revealing fact that the BIA was created on March 11, 1823 by then Secretary of War John C. Calhoun, who later became the greatest of all antebellum defenders of slavery. [Francis Paul Prucha, *The Great White Father*, vol. 1, p. 164.] Calhoun's influence on the development of Indian policy corresponded with a significant shift of emphasis, from treating Indians as friends and brothers in the early years of the republic, to treating them as children of the "Great White Father." It was Thomas Jefferson, in the sixth compact with the Cherokees (1803, unratified), who introduced the language of "father" which Calhoun later perfected as "great white father." Jefferson addressed the Indians as "their father the President of the United States," and also scripted their response, "our Father, the President." Washington's language had always, "my brothers," from the early 1750s through the end of his Administration. Calhoun's writings demonstrate an intention to civilize the Indians (caring for them in the meantime), and to do so under the slavish tutelage of the federal government. In other words, only by treating Indians unequally, i.e. as lower than human, will they become human. In embarking upon an enterprise to civilize a race by direct intervention and superintendence of their way of life, Calhoun involved himself in tyranny as much as he did in denying the possibility of civilization to the black race.

The following excerpt from a Calhoun report aptly summarizes the attitude: "Our views of their [the Indians] interest, and not their own, ought to govern them. By a proper combination of force and persuasion, of punishments and rewards, they ought to be brought within the pales of law and civilization . . . When sufficiently advanced in civilization, they would be permitted to participate in such civil and political rights as [the government] might safely extend to them . . . It is only by causing our opinion of their interest to prevail, that they can be civilized and saved from extinction." Statement submitted to Congress, December 5, 1818. *American State Paper: Indian Affairs*, 2:182-184. The logical conclusion of such sentiments is the constitutional and administrative tyranny which still serves as the linchpin of our Indian policy (plenary power and guardianship), and under which tribes still suffer.

[5] Singular misunderstandings about America's treaty relations with Indians, the status of tribes during this process, and the evolution of Supreme Court decisions touching these matters characterize this report. A cursory view reveals that the end of treaty making in 1871 is hardly a starting point for our analysis.

Nothing can be more incredible than the belief—nay, assumption—that as the Americans were changing the foundations of all their laws while they broke their dependence on Great Britain, they nevertheless borrowed and perpetuated the terms of England's relationship to the Indians. "The three types of colony—provincial, proprietory, and charter governments—exercised varying degrees of self-government. [ J. Story, *Commentaries on the Constitution of the United States*, §159, 1858.] By the time of the Revolution, however, all the colonies maintained that their authority to govern themselves derived from the British Crown. [Cf., Cambone, below, note 8.] Therefore, they argued, they were subjects of the King rather than of Parliament, which they claimed could not rightfully interfere with

internal affairs of the colonies." [B. Bailyn, *The Ideological Origins of the American Revolution*, 224-25, 1967]. [Kenneth W. Johnson, "Sovereignty, Citizenship and the Indian," 15 *Arizona Law Review*, n. 36, 980 (1973)]. Not only would borrowing their relationship to the Indians from England tend literally to undermine the justifications of American independence, but it would more importantly surrender the just claim to establish principles of right, newly enunciated and only then practically brought to bear upon human life.

In order, then, fully to appraise what in the way of right is yet owing to the American Indian, we must consider the American claim of right, in light of which alone it is possible to offer anything more than arbitrary power to regulate U. S. dealings with the Indians. The American Revolution on the basis of the theory that the land of the Indians belonged, not to the King of Great Britain (the colonies' sovereign) but to the Indians—a position that determined all American policy thereafter. The Indians, however, did not subscribe to this theory, with the exception of the Delawares. Accordingly, they became enemies to the United States, allied with the King of Great Britain. When the Americans vindicated their legal theory by force of arms, they then left Indian claims in limbo. Had those claims fallen along with the claims of the King? If not, were they left to the United States to define, as victor in war? Could it be that the U. S. had overthrown the King's claim of conquest over the Indians only to substitute one of their own?

Apologizing for dilating at length on matters well within memory, I insist only that, before we credit tales of customs and usages from time immemorial we must at a minimum establish an accurate recall of those events, laws, and usages that everyone knows. Who fails at relating what is well within memory must not be trusted in the pretense to recall time immemorial. The above-cited Senate Select Committee Report (1989) correctly reported George Washington's decision to treat with Indians as free and not as conquered nations. Using the pre-eminent case of the Cherokees and related tribes, Robert Cotterill demonstrated the eventual development and ultimate abandonment of that policy.

"The territorial claims of the Cherokees ran from the northward-flowing Tennessee on the west to the Kanawha, Broad, Edisto on the east; from the Chattahoochee, Coosa, and Black Warrior on the south to the Ohio on the north. Although none of those boundaries was conceded by their [immediate] neighbors, the Cherokees succeeded in transmitting their claims thereto into an ownership sufficient for sale." Thus, the great acquisitions by the United States were effectuated by purchase through treaties. During this period tribes such as the Chickasaws remained small and sustained their integrity through a policy of naturalizing alien people. The southern Indians in general had mated economic communism with individual liberty by means of maintaining a state so near anarchy that only "unanimous consent" could attain any practical purpose, and dissident minorities consequently did not exist.

Against this background, neighboring states, like Georgia, were often tempted beyond resistance to intrude on Indian holdings, with the result that the U. S. dealt as often and as much with American citizens as with Indians in attempting to maintain a stable policy. The failure to execute the Treaty of New York, concerning the drawing of boundary lines, effectively undercut efforts to restrain Georgia. This set up conflicts, for which the Chief McGillivray was also in part responsible.

In 1785-86 three Treaties of Hopewell were signed, one with the Cherokees (November 28), one with the Choctaws (January 3), and one with the Chickasaws (January 10). That with the Choctaws contained an acknowledgment of American sovereignty (although the 31 signators had been inundated with liquor). At New York, July 21, 1790, McGillivray appeared on Washington's invitation to form a treaty in

which he "refused . . . acknowledgment of United States sovereignty except over those Creeks living within the limits of the United States." Here is where the connection between land cessions and sovereignty began to be formed. Only the day after McGillivray arrived at New York President Washington signed an Act for Regulating Trade and Intercourse with the Indian Tribes. The Act was founded on continuing nationhood for Indians, save as explicitly surrendered in treaty. This had the effect of obligating the United States to defend established Indian land claims. By 1802, however, a new "Intercourse Act" carried with the political promise (a Compact with States) to extinguish Indian land claims!

The healthy policy unravelled in subsequent years. Return J. Meigs, Indian agent, reporting Cherokee resistance to surrender land and identity, wrote to the Secretary of War, April l6, 1811, "I have ever been of the opinion that the Indians have not the right to put their veto on any measure deliberately determined and decreed by the Government." On August 9, 1814 Andrew Jackson exacted the "Treaty of Fort Jackson" to close the Creek War of 1813-1814. This largely despoiled the Creeks of all land and set Cherokees and Choctaws in an impossible position from which they would never recover—despite an apparent respite won by the Cherokees on March 22, 1816, when two treaties acknowledged their land claims south of the Tennessee at the price of cession of all their South Carolina claims. The very concept of the "Indian Agent"—at once an ambassador but also a factor—worked against Indian claims of sovereignty. Nevertheless, tribes often demanded the appointment of such an official.

The treaties of March 22, 1816 were dead by fall, replaced by separate treaties liberally defended by the eloquence of bribery, with Cherokees, Chickasaws, and Choctaws. These were followed immediately by calls for "removal" and further demands for cession. By July 1817, and under coercion, Cherokees had agreed to swap land in Georgia and Tennessee for that territory in Arkansas on which a few voluntary emigrants already lived. This "Calhoun Treaty" announced the arrival and the policy of the newest Secretary of War. In March of the same year President Monroe had declared that Indians should no longer be dealt with by treaties but rather by legislation—a goal finally accomplished in 1871.

Yet another respite for the Cherokees occurred in the negotiations of 1819, which included clauses that foreshadowed Cherokee citizenship and permanent inhabitancy. In fact, however, this only set up the ultimate confrontation, although it bought a decade's quasi peace. By December 1, 1824 Americans who negotiated with Creeks announced (in a timid echo of a claim made to the Cherokees in 1823) that "they [Creeks] had been conquered in the Revolution and had since held their land as tenants at will . . . ," holding only by the forbearance of the United States. This explicit renunciation of the original policy fostered by George Washington is the immediate cause of the entire tragedy of Indian history in the United States since that day. At the very same time the fraudulent "Indian Springs Treaty" had the Creeks abandoning all claims and agreeing to removal! The treaty was subsequently abrogated by President Adams, but it had in fact been ratified by the Senate, clearly indicating the disposition of official opinion in the United States toward Indians.

This brief history is culled from many sources, but principally Robert Spencer Cotterill, *The Southern Indians: The Story of the Civilized Tribes Before Removal* (Norman, OK: Univ. of Oklahoma Press, 1966[1954]), pp 5, 7, 12, 85, 174, 188-89, 196, 202, 203, 207, 215, 217-18, 220, 234. Additional material is found in Kirke Kickingbird, et al., *Indian Treaties* (Washington, D.C.: Institute for the Development of Indian Law, 1980); Francis Paul Prucha, ed., *Cherokee Removal: Selected Writings of Jeremiah Evarts*, 1980; and Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 *Stanford Law Review* 1969.

[6] A longer statement would be warranted by the record but would ill fit the limited dimensions of the approved statement. For the sake of propriety, therefore, I abbreviate my own statement.

[7] Felix S. Cohen, *Handbook of Federal Indian Law*, 1942 edition (Albuquerque, NM: Five Rings Corporation, 1986) Reprint with Foreword by Robert Bennett and Frederick Hart. The authority on the subject of "plenary power" has long been taken to be Cohen's compendium. Nevertheless, a critical reading of Cohen's work reveals that there is no fundamental basis for the claim; it results merely from the positive assertion whether of the Court or of Congress (most recently at the head of the Indian Child Welfare Act). The opacity of presumed "plenary power" law in the 20th century was silently reveled by Cohen, showing the entire idea to be a cruel hoax perpetuated by lawyers and jurists. At p. 42 Cohen defers discussion of Congress' power to legislate over Indian affairs to Chapter 5, sec. 2. But in chapter 5, sec. 2, he observes that "all the scope of the obligations assumed and powers conferred has been discussed in chap. 3," (where the original reference to chapter 5, sec. 2 is found!) "and need not be rexamined at this point." This empty explanation is amply explained by Johnson at 988 and 1001: "Exclusive federal jurisdiction over Indian affairs is predicated upon the Indian's nonparticipation in our constitutional system of government and the concomitant recognition of a tribal right of self-government." In other words, "plenary power" is just a mistranslation of "exclusive jurisdiction," which properly applies to the federal government only as against the states. And the price even of that "exclusive jurisdiction" is non-inclusion and liberty for Indians, exactly the reverse of "plenary power." That is why it is ultimately impossible to found federal concern for the civil rights of Indians on "plenary power." "In no other area of constitutional law does there exist a doctrine recognizing the preservation of cultural autonomy as a justification for limiting individual civil rights. Even disregarding notions of inherent tribal sovereignty, the actions of the tribe which affect individual civil rights still constitute the kind of governmental action found by the Supreme Court in arguably private actions performed in an environment of state inaction or merely nominal governmental support."

[8] Johnson misconstrues the relevance of this finding by interpreting it as militating against the Indian's claim of self-government while maintaining citizenship: "the 'grant' of citizenship to Indians, who still owe at least partial allegiance to the pre-constitutional sovereign tribes, is at odds with the framers' concept of membership in the American political community. Nor does it accord with the fourteenth amendment's prerequisites for citizenship. Congressional and judicial reluctance to attach the emotion-laden label of 'non-citizen' to the first Americans probably explains why challenges to this obvious contradiction have not met with success. It is nonetheless clear that, to the extent he asserts an inherent right of tribal self-government, the Indian has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution." Johnson, 1001-02. This error is not, as Johnson conceives, to be laid at the feet of the Indian. Rather, the contradiction falls to the responsibility of the United States government, which has operated with respect to the Indian *outside the limits of the Constitution*.

A more serious error than Johnson's is the underlying rationale of the Report of the Commission on Civil Rights, namely, that the Constitution does not apply to Indian tribes. Johnson has shown why that is inconsistent with a fulsome reading of the law. Nevertheless, there looms still more importantly an anachronistic reading of the law, the significance of which ought to broached here for the sake of future clarity about the constitutional status of the rights of American citizens who are Indians. Initially, let us

observe that Alexander Bickel is simply incorrect to depreciate the relevance of citizenship: ". . . emphasis on citizenship as the tie that binds the individual to government and as the source of his rights leads to metaphysical thinking about politics and law, and more particularly to symmetrical thinking, to a search for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other. Such thinking bodes ill for the endurance of free, flexible, responsive and stable institutions . . " ["Citizenship in the American Constitution," 15 *Arizona Law Review* 387 (1973)]. Bickel's erroneous view subtends nevertheless the views of the Commission's Report, that "the Bill of Rights does not restrict tribal governments. The seminal case in this area is *Talton v. Mayes* [163 U.S. 376 (1895)]." At p. 4.

Without entering into the substance of *Talton* we may yet readily discern the error in this reading. *Talton* was decided *prior* to the decisive constitutional readings which affect the decision of this question and has *never* been reviewed in light of those developments. Two such developments, among others, are key: The general grant of citizenship in 1924 and the decision in *Bolling v. Sharpe* (347 U.S. 495 [1954]) that held the federal government to a standard not less than that to which the states were subject. Even if it were the case that the fourteenth amendment did not in its terms convey citizenship to Indians born in naturalized in all territory subject to the direct jurisdiction of the Constitution (and I believe that is not the case), it would nevertheless be true that these subsequent decisions had brought Indians within the ambits of the comprehensive protections of the Constitution. The result is that tribes would become akin to private associations for constitutional purposes. Accordingly, the Commission's anachronistic reading leads to a decisive misinterpretation which is decidedly unfriendly to the rights of Indians.

We must delve more deeply into the basis of this strange and anachronistic reading. Kenneth Johnson described this effect in the context of decision shortly following *Talton*: In *United States v.Wong Kim Ark*, the Supreme Court was presented with the question whether a child born in the United States of noncitizens was a citizen of the United States by virtue of the fourteenth amendment. Neither the majority nor the dissenting opinion appear to have accepted the fourteenth amendment alone as being dispositive of the issue. Rather (and unfortunately), both opinions chose as their reference point not concepts of sovereignty or consent to be governed but whether after the Revolution the common law or international law was to be utilized in construing the Constitution. *The majority relied upon the common law of Britain* [emphasis added, note omitted]. The very concept of sovereignty, embodied in the common law of citizenship, which was denied by the colonists in order to legitimize their demands for internal self-government was applied by the United States Supreme Court to identify natural born members of this nation's ultimate sovereign [note omitted]." Johnson, 992.

This points us properly toward the crucial historical error that has produced the anomaly of reading Americans citizens who are Indians out from under the protections of the Constitution. It is only partially, and not most importantly, the reliance upon the common law of citizenship though is closely related to the error. The error is a misconstruction of the international law of "discovery" as it applies to the status of Indians, an error the Commission's Report has followed uncritically. Cohen, at 45, remarked that "some time after the end of the treaty-making period [] the federal government [did] take the ultimate step of asserting jurisdiction over offenses committed by Indians against Indians within Indian Country." In light of our earlier discussion, this clearly was only an elaboration of a power that had long been at least tacitly assumed. But Cohen, at 47, introduced his thesis that Victoria had elaborated the moral basis for these relations with Indians. He attributed to these principles the main

influence in deciding *Johnson v. McIntosh* (8 Wheat. 523 [1823]) and *Worcester v. Georgia* (6 Pet. 515 [1832]). But Victoria was never cited by Justice Marshall, and Emmerich de Vattel, given minor notice by Cohen, was cited by Marshall. Cohen does cross-reference, from this chap. 3, sec. 4, to his chap. 15, sec. 4, in which the same theme, "aboriginal possession" or title is treated in detail, and in which Vattel is properly cited. Still, Cohen's main argument relies on Victoria. ". . . the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights." Not only did Vattel not rely on Victoria; he disagreed with Victoria's analysis, as I will show.

Vattel, in *Le droit des gens, ou principes de la loi naturelles, appliqués à la conduite et aux affaires des nations et des souverains* [edition of James Brown Scott, The Classics of International Law, (Washington, D.C., Carnegie Institution, 1916), vol. I], discussed several titles to aboriginal holdings and their relations to the colonists in North American. At Bk. I, §81 he arrayed the cultivation of the earth against nomadic and other forms of existence, concluding that "the establishment of several colonies in the continent of North America, while restricting itself to just limits, can only be very legitimate" since it brings cultivation and more intense usage to the land. Additionally,
"the peoples of these vast lands rather wander than dwell in them."

There is, then, a preference in natural law for cultivation over forage when it comes to possession of land. Nevertheless, Vattel does not proceed from this finding to a law of conquest. He recognizes rather (Bk. I, §207-09) that "all men have an equal right" to those properties that don't already belong to someone. Accordingly, possession falls to the first occupant of any uninhabited territory. Nor is the mere sign of possession (such as a landmark) sufficient. Rather, evidence of a clear intention to inhabit and cultivate must follow. When the discoverers located deserted territories and claimed them in the name of their sovereigns, that produced a "title that has been respected, provided that a real possession followed shortly thereafter." By contrast, it is a serious question whether a nation can possess in this manner territory that it does not actually occupy, and Vattel concludes that "it is not difficult to decide that such a pretense would be absolutely contrary to natural right. For nature has intended all the earth for the common needs of mankind and extends a right to particular men only to the extent that they may benefit, not in order to obstruct others. Accordingly, "when the sailors have come across deserted countries in which folk from other nations had erected some landmark in passing, they wasted no more time over that vain ceremony than over the papal dispositions which parceled out a large part of the world between the crowns of Castille and Portugal." Not discovery, then, but discovery and use conveys legitimate title, and that without respect to the conventions of Europe.

Beyond even this observation, however, is the intriguing question raised by the discovery of the new world; namely, whether a people can legitimately occupy a *portion* of a vast territory "in which one finds only some nomadic peoples, incapable by reason of their small numbers of inhabiting the entire land." Here Vattel returned to the reasoning of §81, namely that there was an obligation to cultivate the earth and that no one could claim exclusive power over land that neither needed nor were in a position to dwell in and cultivate. Further, the European peoples were "too crowded" at home and could "legitimately occupy" and establish colonies in such portions of that territory as the native peoples had no particular need for. "Nous l'avons déjà dit, la terre appartient au Genre-humain pour la subsistance: Si chaque nation eut voulu dés le commencement s'attribuer un vaste pays, pour n'y vivre que de

chasse, de pêche & de fruits sauvage; notre globe ne suffiroit pas à la dixième partie des hommes qui l'habitent aujourn'hui."

While this view may rightly seem to depict a justification of European expropriation of Indian territory, its significance for our purposes is rather the contrary. For despite this natural license that Vattel accorded the Europeans, he immediately added the important reflection that "one must praise the moderation of the English Puritans, who first established themselves in New England. Although furnished with a charter from their sovereign, they purchased from the savages the land that they wished to dwell in. This praiseworthy example was followed by William Penn and the colony of Quakers that he led into Pennsylvania."

Vattel, therefore, recognized in the principal American settlers a disposition to deal with the Indians as "owners" despite any liberty nature may have accorded them to view the Indians as interlopers. Nor was this qualification of the claim of conquest vis-a-vis the Indians on the part of the Americans the only important observation Vattel made. Immediately thereafter he reflected that "a nation which establishes dominion over a distant country and sets up colonies in it, that country, although distant from the mother country, constitutes a natural part of the latter, entirely like its ancient territories. Whenever the political laws or treaties make no explicit difference between, all that one may say about the nation's own territory must also apply to its colonies."

Interestingly, these seventeenth century views were directly echoed in the American Revolution (and also in *McIntosh and Worcester*, though later commentators have misunderstood this relation), while the sixteenth century views of Franciscus de Victoria played no role at all, Felix Cohen to the contrary notwithstanding (Cf., "Original Indian Title," in *The Legal Conscience*, ed. by Lucy Kramer Cohen [New Haven: Yale U. Press, 1960], p. 289).
Victoria's work simply dealt with a different question [See, *The First Relection of the Reverend Father, Brother Franciscus de Victoria, On the Indians Lately Discovered in The Classics of International Law*, ed. by Ernest Nys (Washington, D.C.: Carnegie Institution, 1917)], namely, what relations could legitimately subsist between the Spanish and the Indians in the new world. The title of the "Second Section" is "On the Illegitimate titles for the reduction of the aborigines of the New World into the power of the Spaniards." In discussing these illegitimate titles of *sovereignty* Victoria indicates "discovery" as one of the seven formal and an eighth informal title. To be sure, he discussed the Indians ownership of their land and of themselves in this review, but his primary focus was not on the possession of the land.

Discovery was the third of Victoria's titles: "Accordingly, there is another title which can be set up, namely, by right of discovery; and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be adequate title because those regions which are deserted become, by the law of nations [jus gentium] and the natural law, the property of the first occupant [Inst; 2,1,12]. Therefore, as the Spaniards were the first [among Europeans] to discover *and* occupy the provinces in question . . . Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant. . . And so, as the object in question was not without an owner, it does not fall under the title we are discussing. [138-39]." Thus dismissing discovery, which at most only distinguished European claims, without considering what it means "to occupy" a country, Victoria could well conclude that "the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war. . . [163]—that is, conquest. Conquest, in turn, can derive only from just war. Accordingly, the non-offending Indians

could not be brought under Spanish sovereignty. Victoria's work aims to defend free intercourse under the *jus gentium*. Victoria dismissed a sixth title without much ado, namely, the consent of the majority of the natives. Then, after the "seventh and last title," he discussed "another title which can indeed not be asserted;" namely, the natural right to assume control over barbarians for their own good, and to set up rulers over them. Surely, this could by nature only be done, once, by the first discovers or occupiers, so to speak. Thus, following Victoria, neither discovery, conquest, nor the ward or pupillage theory could justify sovereignty over the Indians. This could not, then, have informed the American position toward the Indians.

Victoria's theory, however, makes little contact with the claims enunciated by Vattel, which concerned themselves far less with sovereignty over the Indians than with the colonists sovereignty over themselves. The question for the Americans turned rather around their relations to Indian nations than to Indian subjects and this for important political reasons as well as reasons of international law. Nor was control of the land of immediate consequence, as Vattel correctly foretold. The land sold to Europeans was to the Indians often as much a gewgaw as were to the Europeans the trinkets and jewelry used to acquire the land. *Jurisdiction* was the genuine interest transferred, as is reflected in the treaties by the use of "cede" rather than "sell." Indians could not integrate within tribal jurisdictions Europeans who retained or wished to retain possessory interests within tribal jurisdictions, although on their own terms they generally and freely integrated within tribes Europeans and Africans. Indians sold the jurisdiction both because it mattered little to them and because they received valuable consideration, besides gewgaws, in return, namely, the promise of protection. Still, they could have sold land without jurisdiction. That is, they could have welcomed Europeans within their own jurisdictions. They did not, for they could not. They knew only the territoriality of the tribe, not the individual. Possession is indeed nine-tenths of the law; unfortunately, it is not that tenth part that makes the law, jurisdiction, and without which possession is only use, only waste or consumption. There must be actions before there can be *choses en action*.

The Indian perspective is not alone sufficient for our purposes, however. We must also consider what the Americans aimed to accomplish in elaborating their complex relations with the Indians. In this respect, nothing is more important than the constitutional claims of the Americans in their struggles with Great Britain. They had debated the law of discovery and the law of conquest with the Crown long before they employed the terms in their dealings with Indians. To sustain their own just claims, they had to refute the claims of the Crown, reflected in Blackstone's *Commentaries*, that the lands of the colonies were conquered lands, carrying with them the absolute dominion, or "plenary power," of Great Britain—a meaning Blackstone elaborated in the observation that "sovereignty and legislature are indeed convertible terms; once cannot subsist without the other." [Blackstone 46]. This sovereignty, to be distinguished from the jurisdiction described by Vattel as travelling with colonization, Burlamaqui observed to be conveyed by conquest. [*The Principles of Natural and Political Law* (5th ed., 2 vols. in 1, Dublin, 1791), II, Pt. I, chap. viii, secs. 1-3, 230]. By contrast, the discovery of deserted land and the insertion of a colony thereinto carried corporate standing under the constitution of the mother country. [The full discussion of the significance of this constitutional argument is presented in Stephen A. Cambone, *Noble Sentiments and Manly Eloquence: The Suffolk Resolves and the Movement for Independence* (Ann Arbor: University Microfilms, 1980), pp. 7-75.] This reasoning was familiar to the Americans from the case of the Irish (See, James Wilson, *Lectures on Law*, Appendix, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," 1774, at 532. The

Americans, then, articulated a principle of discovery, a constitutional principle, which was essential to the attainment of their independence and in accord with which it was necessary for them to maintain that America was not conquered but rather freely settled. This meant, in turn, that their relations with the Indians could not have been the relations of conquerors to conquered, if they were to maintain consistency with their revolutionary claims.

The principle of discovery that surfaced in *McIntosh* and was present by implication in *Worcester* (and *Cherokee*) bore strong marks of the constitutional debate through which the Americans had so recently come. That is why it is incautious at best simply to relate it to the theory of Victoria. It bears far more the marks of Vattel, including his praise of American sensitivity to the Indians. Perhaps the authoritative reading of this period of jurisprudence is that preserved to us by Justice Story, first in his *Commentaries*, written just after the landmark decisions of the early 1830s, and finally in his 1859 abridgment of that work for student readers. In the first work he reported the law as the Supreme Court had decided it, although indicating along the way that the history did not justify it. By 1859, however, he was sufficiently removed from the controversies of the 1830s that he could rewrite the sections dealing with Indian law. What he did then was to reassert the version of American history that is recorded here.

Story wrote in the *Commentaries* [2:41, §1099 & 43, §101] that America had inherited from the British Crown a prerogative power in dealing with the Indians. This would have depended upon a right of conquest as opposed to that form of discovery the Americans had asserted in the Revolution. Nevertheless, this was precisely the argument the Court had developed in the series of cases from *McIntosh*. He went on to observe that this required viewing tribes as "distinct political societie[s], capable of self-government." This tracked with the Court's opinion, which went on to distinguish this political societies as nonetheless not foreign states, and instead "domestic dependent nations" (there is no comma in the text, as the Report emends!). On this reading, the relation of the tribe to the United States is that of a "ward to a guardian." Justice Story, still sitting on the Court, stopped just there, simply quoting the majority opinion in *Cherokee* from which he had dissented!

The reason the Court seemed to have backed into this position derived from Justice Marshall's wrestling with the problem of Indian title. He wrote, "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." [Quoted at 1 Story 15] The problem, however, is that if the Indians had no such absolute and complete title, the Americans had no basis for their Revolution! After Story quoted Marshall's McIntosh opinion at length, presenting the history of "conquest or treaty" that led to European domination of Indians, and in the very few mentions of Indians at all—New Haven, Rhode Island, Pennsylvania, all counter to the thesis—one gets a picture of ready and easy accommodation, punctuated by the generosity of William Penn. In short, Story comes very near to certifying the "desert land" point of view, reducing the notion of European discovery to nothing more than a polite fiction of realpolitik.

Then, in his chapter sixteen, following the history, Story gives the analysis whereby, like Wilson, he refutes Blackstone's claim that colonies were conquered lands! [1 Story 101] "There is great reason to doubt the accuracy of this statement in a legal view." He continued that, at the time of the leading grants from the Crown, there had been no "conquest or cessions from the natives." The Indians were not overcome by force and were not considered as "having any regular laws, or any organized government." They were subjected to obedience "as dependent communities, and no scheme of general legislation over them was ever attempted." Indeed, they were generally regarded as at liberty

to govern themselves, so long as "they did not interfere with the paramount rights of the European discoverers." The implication that the "discoverers" acquired no rights over the Indians was then affirmed by Story in the declaration, "as there were no other laws there to govern them, the territory was necessarily treated, as a deserted and unoccupied country, annexed by discovery to the old empire and composing a part of it." This shows clearly that the theory of discovery does not undergird the notion of a "domestic dependent nation" and cannot, therefore, constitute the foundation of a wardship or pupillage. [Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols., (Boston: Charles C. Little and James Brown, 1851), 2d edition].

If this reading of Story's famous work seems too subtle, it will perhaps add further credence if we consider at least the critical portion of his subsequent work: *A Familiar Exposition of the Constitution of the United States*, Reprint of the 1859 edition (Lake Bluff, Illinois: Regnery-Gateway, Inc., 1986). At chapter one, p. 28, Story uses a different voice to describe the Indian situation.

> At the time of the discovery of America...the various Indian tribes, which then inhabited it, maintained a claim to the respective limits, as sovereign proprietors of the soil. They acknowledged no obedience, nor allegiance, nor subordination to any foreign nation whatsoever; and *as far as they have possessed the means*, they have ever since consistently asserted this full right of dominion, and have yielded it up only, when it has been purchased from by treaty, or obtained by force of arms and consent. In short, *like all civilized nations of the earth*, the Indian tribes deemed themselves rightfully possessed, as sovereigns, all the territories, within which they were accustomed to hunt, or to exercise other acts of ownership, upon the common principle, that the exclusive use gave them an exclusive right to the soil, whether it was cultivated or not.
>
> It is difficult to perceive, why their title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries. How, then, it may be asked, did the European nations acquire the general title. . .? The only answer which can be given, is their own assertion . . . that their title was founded upon the right of discovery. . .
>
> The truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil. They might convert them to Christianity; and, if they refused conversion, they might drive them from the soil, as unworthy to inhabit it. They affected to be governed by the desire to promote the cause of Christianity, and were aided in this ostensible object by the whole influence of the papal power. But their real object was to extend their own power and increase their own wealth, by acquiring the treasures, as well as the territory, of the New World. Avarice and ambition were at the bottom of all their original enterprise.

This Justice Story no longer sits on the Court and no longer defers to the "settled rule of law.

When Story accepted Marshall's reliance on Spanish and Portuguese experience, instead of distinguishing the U. S. from the other America, his voice changed, and he blasted the foundation as a hypocrisy: "The right of discovery, thus asserted, has become the settled foundation . . . and it is a right which, under our governments, must now be deemed incontestable, however doubtful in its origins, or unsatisfactory in its principle." [at p. 30] What this means, then, is that the principle of discovery yields

the occupation of the territory of North America, and perhaps even jurisdiction over it, but can by no means yield "plenary power" over either individual Indians or tribes. Yet, one fears that the Commission Report accepts precisely this result as incontestable, without seeing how doubtful and unsatisfactory the principle is.

In light of this review, it is no longer possible for responsible policy makers to accept the last two of Felix Cohen's "four basic principles" of federal Indian law: (1) The principle of the legal (sic) equality of races; (2) the principle of tribal self-government; (3) the principle of federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians. ["Spanish Origin of Indian Rights," *Legal Conscience*, p. 232].

[9] Cohen's discussion of the development of the ward status in the recent era illustrate the problem. In 1 Cohen 16 we find an explanation of the mounting pressure to end treaties with Indians as a response to defections and attempts to treat with the Confederacy during the War of American Union. Cohen quoted interior Secretary Caleb Smith in 1862 to the effect that a conscious choice was to be made: "A radical change in the mode of treatment of the Indians should be adopted. Instead of being treated as independent nations they should be regarded as wards of the government . . ." Smith said it had been mistaken theretofore to treat tribes as "quasi-independent nations," since they lacked all of "the elements of nationality." Even though the formality of consent was acknowledged through treaties, in fact the Indians always yielded to irresistible force. In 1869 Interior Secretary Parker repeated the recommendation [1 Cohen 18] and observed along the way that the government had injured Indians "in deluding this people into the belief of their being independent sovereignties, while they were at the same time recognized only as its dependents and wards." In fact Parker called them "subjects," assimilating their status to that of a people governed by relationships not derived from consent. Actually, however, the argument for independence was made most forcefully as early as 1828, when Attorney General William Wirt maintained three criteria for tribal independence: government by their own laws; absolute power of war and peace; and inviolable territory and sovereignty. None of Wirt's three criteria apply to tribes in the United States of 1990, of course. To apply the term, sovereign, to them in their present state is a cruel and inhuman pun—for they are capable of none of the essential attributes of sovereignty. It is an extreme aggravation of the joke, therefore, to deny Indians at the same time the essential protections of citizenship. Nor does Cohen lighten the Indian's burden by his happy ejaculation, "the special status of the Indian is, by and large, something that he has bought and paid for and that he can relinquish whenever he chooses to do so." [ "Indians Are Citizens!", *Legal Conscience*, at 257]. One might have expected better of Cohen, since the burden of his argument is actually to insist upon full rights of citizenship for Indians, a point he reiterated in "Indian Wardship: The Twilight of A Myth," [*Legal Conscience*, 328]: ". . . the courts have held that Indians are not wards under guardianship, but on the contrary are full citizens of the United States and of the states wherein they reside, and are entitled to all the rights and privileges of citizenship." The catch, of course, is that this claim is not understood to apply to the tribes, where Indians may be no less completely members than they are citizens in the United States, but where their United States citizenship is of little value to them. Cohen concluded the article with the hopeful anticipation that we will eventually dispel the "lingering legend of wardship," whether of individual Indians or of tribes. That surely will not be accomplished for so long as the so-called special "government to government" relationship persists.

[10] The Constitution of the United States prescribes no criteria for legitimacy in government, other than the republican. Tribal heritage may be a legitimate basis of government, but it is not one known to

the Constitution. It may operate, therefore, only independently of the Constitution. Tribal governments—pre-constitutional and prerepublican—have always been at a disadvantage trying to find a secure space under and within the Constitution of the United States. They are in fact tolerable under the Constitution only to the extent that they may be treated as private associations. Cf., Johnson, at 985.

[11] Cf., *Indian Child Welfare: A Status Report*, "Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980," prepared by CSR Incorporated (Washington, D. C.) and Three Feathers Associates (Norman, OK) for the Administration for Children, Youth and Families, U. S. Department of Health and Human Services and the Bureau of Indian Affairs, U.S. Department of the Interior, April 18, 1988. This must come as no surprise to any who have regarded closely the results of the ICWA. The abuses which I have personally documented, received innumerable complaints about, and seen reflected in official testimony and reports, are all too apparently the natural concomitants of the systemics liabilities of this approach to cultural preservation. Considering the five leading consequences of the ICWA to date:

1. Fewer adoptions, coupled with increasing resistance to termination of parental rights.
2. Concerns about a lack of tribal accountability which undermines even potentially positive enforcement of the act.
3. A not insignificant absence of tribal courts in many places and, hence, adequate due process.
4. Federal-level efforts to communicate performance standards and to monitor or enforce compliance have been limited.
5. No reduction in the flow of Indian children into substitute care has resulted, coupled with a dramatic shortage of Indian foster homes, and a decline in adoption rates spells disaster for Indian youths.

The fact is, the ICWA is a blunderbuss where a rifle was called for; pinpoint accuracy in addressing human suffering is a moral necessity, not a mere budgetary luxury. Of the many concrete cases of abuse that have resulted, perhaps none is more compelling than the story of the child with 20:500 vision, who loves to read and who was restored to her tribe, only to be deprived of the prosthetic her foster parents had provided and subjected to physical abuse as well! This tragedy resulted in significant measure as a consequence of the ICWA.

[12] The problem aimed at by the "Duro-fix" did not originate with 1950s self-determination nor even the 1934 "Reor-ganization Act," as the Report implies. Like so many *other* evils it originated in the paternalism of the early 19th century. 1 Cohen 2-3 offers a compelling account of its early origins. A primitive version of "self-government" policy was contained in the 1834 Trade and Intercourse Act: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: *Provided*, the same shall not extent to crimes committed by one Indian against the person or property of another Indian" [note omitted]. In short primitive "self-government" was nothing but a federal license for Indians to abuse one another, even if it did convey by implication a kind of racially construed "sole and exclusive jurisdiction" to tribes themselves. Since U. S. jurisdiction must follow the power to punish crimes by whites aginst Indians and crimes by Indians against whites, clearly the tribes cannot have "sole and exclusive jurisdiction" within their territory however construed. This comports with Cohen's definition of "Indian Country" at p. 5 as "country within which Indian laws and custom and federal laws relating to Indians are generally applicable." Thus, they receive the concession to handle crimes of Indians against

Indians, meaning that their jurisdiction is as to race alone. That will remain true unless the proposed "Duro-fix" extends a truly general jurisdiction.

End

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Spirit Lake Health Center
Indian Health Service
P.O. Box 309
3883 74th Ave. NE
Fort Totten, NO 58335 (701) 766-1600

4/3/2012

LETTER OF GRAVE CONCERN

To: Ms. Sue Settle
Chief, Division of Human Services
Bureau of Indian Affairs

From: Michael R. Tilus, PsyD, MP
Director, Behavioral Health
Spirit Lake Health Center

Through: Mr. Timothy Q. Purdon, JD
The United States Attorneys Office
District of North Dakota

Subject: LETTER OF GRAVE CONCERN
Spirit Lake Tribal Social Services Grievances

STATEMENT OF CRISIS: I believe the children of the Spirit Lake Reservation are not safe due to the unchecked incompetence of the Tribal Social Services (TSS) to operate within established professional standards of social service practice.

NEED: As our sister agency on the reservation, the Behavioral Health Department (BHD) of the Spirit Lake Health Center (SLHC) Indian Health Service (IHS) depends on the TSS to adequately, legally, and ethically investigate, assist the court to adjudicate, and case manage to protect the abused and neglected children that are reported on formal #960's by this BHD and other mandatory reporting agencies.

CONTINUAL DANGEROUS MALPRACTICE HISTORY OF SPIRIT LAKE TRIBAL SOCIAL SERVICES:

## Legal and Regulatory Violations

- Over the past five years, the BHD has witnessed dozens of cases where TSS did not follow tribal law; autonomously removed children from their home or dwelling; did not follow through with the proper tribal court authorization establishing temporary legal guardianship; BHD is aware Of parents who have had their children illegally removed for upwards of 12 months or more without filing for tribal temporary legal guardianship.

- TSS has presented many of these cases to BHC), representing themselves as the new temporary legal guardian, requesting BHD services, therapy, evaluation, or psychopharmacotherapy. After multiple cases in which the BHD discovered that in fact, no legal documents had been filed with tribal court authorizing TSS as legal guardians. After reviewing these cases with TSS, it is clear to me that TSS intentionally misrepresented themselves and lied regarding proper legal and regulatory violations. As these cases involved minors, the ongoing dangerous malpractice violations of TSS directly jeopardized the BHD's practice guidelines, legal mandates, and professional liability of licensed behavioral health providers.

- Often, due to the close and very supportive professional relationship the BHD had with the Spirit Lake Tribal Court, and principally, Associate Judge Molly McDonald (Since she handled juvenile court matters), BHD often discovered the failings of TSS to secure proper legal authorization to remove minors from their situations. The failure to obtain legitimate custodian orders is egregious conduct, given the fact that the existing tribal court was very approachable, concerned, engaged, and demonstrating active close oversight in judicial activities related to the wellbeing of children. Access to the court was in no way a valid defense for the failure to obtain appropriate legal documentation and orders.

- TSS "Child Protection Services" (CPS) investigator, representing herself as the current temporary legal guardian of a minor, attempted to maneuver and then intimidate me into prescribing atypical antipsychotics for a child she had determined needed something to control his "anger." When I refused, informing her that in my practice, all patients, especially children, will be given a full psychological and psychopharmacological evaluation prior to any possible medication trial. Furthermore, all children would also need to be medically evaluated by a primary physician to rule out any organic cause of these symptoms. After this CPS worker was unsuccessful with me she brought the child to the walk-in at SLHC, again attempting to get this minor child medicated without the parents present; without it being a true psychiatric or medical emergency. The physician refused to medicate as well. In investigating this CPS's claim, I was informed by tribal court that no actions had been filed by the TSS for any temporary guardianship of this child. • TSS CPS staff came to BHD office requesting I interview a young female adolescent she had recently removed from the reservation high school because she "heard" this adolescent had been sexually molested, and because she herself had been molested as a girl she "knew" this girl was a victim. When the girl's mother called TSS staff to protest her being removed and interrogated, TSS staff threatened to have the mother arrested by tribal police for interference in her "investigation." Teenager was transported by tribal police With TSS staff to my office. TSS staff informed me this teenager was under the temporary legal custody of TSS and she requested I evaluate her for her alleged sexual abuse. TSS staff also hinted at possible suicidal ideation.

- In my interview, I found no clinical evidence to suggest sexual abuse or any other pathological condition. When I informed TSS staff of my findings, or lack thereof, TSS staff informed me that she still believed teenager had been molested. When I attempted to get TSS to sign proper paperwork for me authorizing treatment assessment, TSS staff informed me that she has authority to remove and place any child When she deems fit; with that understanding, this teenager was "in fact" under TSS guardianship. At that time I realized I had been lied to and had

been complicit in evaluating a minor without the proper authorization of her legal guardian. I informed the TSS staff of my anger and disbelief that she would misrepresent herself and this patient to me in this way. In order to protect myself and staffs licenses, I needed to make an administrative decision that the BHD would not accept any more referrals from TSS unless they were truly suicidal. Ultimately, this teenage was still removed without any properly authority and no court documents were filed by TSS to authorized temporary legal guardianship and custodial care. Unfortunately, this type of scenario was repeated constantly over the past five years.

- Accepting a few cases from TSS over the phone proved problematic. TSS tended to not present during the intake; did not complete the legally required Intake Documents with parents or legal guardian's authorization for psychological services. With promises to "get it to you", BHD waited for weeks while attempting to case manage acute cases without proper authorization or information, and on some occasions never received anything returned. Often after a few cases were begun, BHD discovered that in fact, TSS did not have temporary legal guardianship of these children, and the BHD was essentially providing illegal care. If the minors were not suicidal, at that time I informed all BH staff to terminate their therapy immediately, pending full legal authorization for treatment of a minor from either their authorized parent or legal guardian. During many of these TSS cases we accepted, BHD therapist/doctor attempted to contact the TSS case manager to discuss acute needs and gather collateral information. Calls would be made multiple times, on multiple days, without response. Parents of the removed children complained about the same problem of being unable to ever reach a TSS case manager and if they did, were treated with disrespect and annoyance. Eventually, BHD also gave up on attempting to reach TSS case managers as this appeared to be a never ending lesson of "no response."
- In ongoing efforts of attempting to work With TSS and the recent Associate Juvenile Judge Molly McDonald, it was apparent to both the court (Judge Molly McDonald) and BHD that TSS staff misrepresented themselves in court, lied about fact finding, and had serious boundary violations in their professional work.

- I consulted with my supervisor, Dr. Candelaria Martin-Arndt, Clinical Director, of SLHC, and with the SLHC Administration on multiple occasions. These legal and regulatory issues were directly impacting the safety of the most vulnerable patients on the reservation- the children. They were also exposing the BHD and the SLHC to significant risk hazard for compliance with unethical, illegal, action towards minors in the malpractice delivery of professional services.
- As the Director of the BHD, I discussed my concerns With multiple TSS CPS staff; I met with the previous TSS Director Kevin Dauphinais on multiple occasions, informing him Of my grave concerns and problems working with him and his staffs behavior. He denied problems; vaguely promised change; informed me on another occasion that I simply "didn't understand the Indian people"; or informed me that he and his staff knew the family far better than I did and there wasn't any concern for my filed #960s. Unfortunately, these legal and regulatory problems continued,

- Extensive case management activity began to clearly fall by the wayside as TSS reckless and random behavior continued. Since many of these minors were BHD patients, I began instructing

the only other full time BH provider this department has (a LCSW) that we would have to extend our efforts at doing critical case management activity to ensure our patient's wellbeing, safety, and coordinated care. This has added an exhausting element to the BHD staff that are already overwhelmed with reservation need and lack of resources and staff.

- In 2011, as the Director of Behavioral Health, I made the administrative decision to refuse accepting any more referrals from TSS due to these ongoing professional misconduct and legal irregularities. Services were therefore limited to emergency assessment of suicidal risk where confidentiality and legal authority are waived for patient safety. It was frankly too dangerous professionally to work alongside with TSS. I feared TSS behavior could, or would, expose them, and by complicity BHD, to possible FBI investigation for child abduction, child endangerment, and potentially felony neglect.

Public Safety

- Of a major concern to the BHD is growing public health hazard that untold #960s have apparently never been investigated. Child abuse is epidemic in our society and is unfortunately a public health disaster in Indian country. During one fairly recent three week time period the BHD filed approximately ten #960s. Shortly after this time, the TSS CPI staff member was fired. To date, we are not aware of any follow up on any of these filed allegations of potential child abuse. After calling TSS to get an update on these #960's, we were told they had no record of them, and no paper trail to refer any new TSS staff too. No TSS staff had knowledge of anything.
- To date, in many of our BHD therapy cases involving minors where we have filed #960s When BHD has attempted to gain clarification with new TSS staff (previous TSS staff are not working there any more), new TSS staff report they have no record of the #960 documentation; are not aware of the situation; and have no knowledge if anything has been done. Acting TSS Director Dennis Meyer recently informed BHD staff that often the information we were recently inquiring about "is too old" (less than a year in our records), and therefore "can't be followed up any more" concerning a current patient who previously filed #9605 and then went to court to secure her grandchildren due to domestic violence in her daughter's home.

- Previous TSS CPS staff has attempted to solicit, triangulate. and set up a formal "evaluation" from BHD to determine if a child had been potentially sexually abused. This is directly the responsibility of the TSS CPS, not the BHD. On several of these attempts, the CPS staff person informed me that "she kneW' this child had been molested, because "I just know these things." No other evidence was presented; but the child was removed regardless.

- Parents who have informed us about potential child abuse reported back to BHD staff after months, if not more than a year, that they have never been talked to by TSS CPS on any #960s that they, or we, filed.

- Many parents who were themselves either patients, or parents of minors who were patients, reported they were unable to reach their assigned TSS staff by phone or in person after weeks and weeks of trying. This was the BHD experience as well.

- One previous TSS CPS staff was herself convicted Of felony child abuse and still was hired by the TSS Director Kevin Dauphinais who acknowledged this fact when confronted with it. Yet, Director Dauphinais hired this staff person anyway, as a CPS officer.

- An example of one case is included as an attachment (with the identity safely screened) gives the times and dates of BWs efforts to collaborate and file #9605 on behalf of our patients, with the ongoing lack response and regard from TSS for this minor's safety and the public safety. This is but one of our minor patients that the BHD is intensely concerned about.

- As a result of this ongoing problem, BHD now routinely file three #960's: I) TSS with limited information; 2) full account with FBI; and 3) full account with previous Tribal Juvenile Court Judge Molly McDonald.

Professional Misconduct

- Since June Of 2007, I have yet to receive one paper document from TSS on a formal CPI investigation finding, a case management report, a SOAP note, or any crisis note. I personally suspect TSS does not keep legal documentation of their efforts.

- Patients have complained to me that on occasion when they went to TSS, there were faxed reports, #96(Ys, and other documentation "lying around where anybody could see it." State, federal, and professional health organizations like the American Medical Association or the American Psychological Association generally require maintenance of appropriate professional documents in compliance with HIPPA and Privacy Act standardS. I suspect the BIA has some kind of formal standard on this as well.

- Over the past five years, unfortunately, the majority of TSS staff who has been hired, fired, or left have not been licensed or credentialed by any state or national professional behavioral health agency or board. As such, TSS staff do not have to uphold a Professional Code of Ethics Professional Practice Standards as dictated by these regulatory agencies. They are not accountable for their professional behavior or lack thereof, to their licensing or credentialing boards. This is a disservice to the Spirit Lake Nation, as these licensing and regulating agencies are by nature, designed to protect the public and ensure the safe practice of your skill.

- Patients have reported to BHD that TSS have on occasion used them (a minor), while under TSS temporary legal guardianship, to "babysit" TSS children While TSS staff attended a social eventrodeo.

- Recently, a TSS case manager whom was transporting a minor for therapy at BHD stated that they stopped off at Warrick bar to "pick up a pizza". When BHD inquired as to the status of this child's case and future plans of her placement, the TSS case manager reported she knew nothing about it, and only "transported them."

- BHD has several cases where minor children were autonomously removed from successfully placed foster care off the reservation and brought back to an unsafe, substance abusing, violent

environment because "the Director said all the kids need is here on the rez" (patients parents words). Subsequent to this forced return, one minor child was raped without legal/police investigation or involvement due to obscure reasons. Minor was previously already a sexual victim and was removed from this environment due to that sexual abuse. Minor's depression and substance abuse increased, resulting in 2 more substance involved date-rape incidents. Within about six months minor ran away to another state. TSS remained uninvolved.

- Multiple reports from multiple sources and patients allege intimate sexual boundary violations between the previous TSS staff.
- TSS staff have used professional names and titles unethically, i.e., calling themselves a "Social Worker" when they had not earned the academic degree or had the license.

Gross Mismanagement and Oversight

- Over the past five years, there have been multiple attempts by many parents who were BHD patients, tribal court officials, BHD SLHC, and other agencies both on and Off the reservation, protesting the lack Of involvement of TSS With the Spirit Lake Suicide Coalition. Previous Director attended 2, maybe 3, meetings in the 5 plus years, and brought an authoritarian and hostile attitude to the meeting. This lack of active involvement in the reservation wide suicide prevention coalition is, in my opinion, a major failing of the previous Director of TSS. This lack of involvement is also a major loss in the ongoing efforts of all suicide prevention coalition members to have a seamless wrap around service for suicidal people on the Spirit Lake reservation.
- Unfortunately, in my professional opinion, the Spirit Lake Tribal Council (SLTC) failed in their direct oversight of the TSS program and their willingness to tolerate gross mismanagement. In addition, BIA Superintendent Mr. Rod Cavanaugh failed in his federal BIA administrative and #638 fiscal accountability oversight of the TSS program.
- Additionally, in my professional opinion, previous TSS Director Kevin Dauphinais malfeasance is inexcusable with ongoing tragic consequences to many Spirit Lake children.
- In August of 2008, Sister Joanne Streifel and I had already identified this critical problem and discussed potential areas of intervention with TSS. We decided to have Sister Joanne author a "letter of concern" discussing the lack of confidence and grave concern we had with then Director Kevin Dauphinais' misleadership of the TSS and the concern we felt for the abuse and neglected children of the reservation. We felt that since Sister Joanne was both a LICSW professional working at the Indian Health Service, had worked for multiple agencies on the reservation, and is a registered member of the Spirit Lake Tribe, her professional letter might have some influence. This letter was personally sent to then Chairperson Myra Pearson and every Council Member. The BHD and Sister Joanne received no response or inquiry.

Result

- I and most Of the Other agencies on and off the reservation that work together around child welfare have no confidence in the TSS leadership or program, BIA Superintendent, or Spirit Lake Tribal Council to provide safe, responsible, legal, ethical, and moral services to the abused and neglected children of the Spirit Lake Tribe.
- As the Director of the BHD, I have no confidence or trust in filing a #960 with TSS that they will operate ethically, legally, or with the best interests of all the various parties- the child's, the parents', and the Spirit Lake Nation. I have lots of reasons to believe that #960s will not be investigated; lost; misfiled; or handled by TSS themselves autonomously at their own discretion.
  - TSS has not, and does not operate by a professional code of conduct or ethics; they do not have licensed and credentialed Child Protection Service Investigators or therapists trained for this work; and historically, they have had reckless and random professional misconduct. The #960 document is potentially the most confidential and revealing with allegations Of possible child abuse or neglect of a minor. TO release #960s to this department may in fact violate good practice standards for the BHD.
- The children, elderly, and vulnerable populations on Spirit Lake Reservation are at great risk of increased abuse, neglect, and harm due to unchecked incompetence.

RECOMMENDATIONS: I recommend the BIA DIVISION OF HUMAN SERVICES close the current TSS program with all its staff and begin a thorough program review. I do not believe it is possible to patch up problems or appoint a new Acting Director to the TSS. The problems are too systemic and acute.

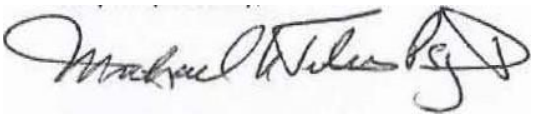
I would encourage the BIA to conduct a decisive leadership review of previous Director Mr. Kevin Dauphinais and current BIA Superintendent Mr. Rod Cavanaugh for their gross dereliction of duty and professional misconduct Of the TSS program.

In addition, I would encourage the BIA, and request the North Dakota State Board Of Social Work Examiners, review current Acting Director of Tribal Social Service Mr. Dennis Meier's for his leadership complicity Of these identified ethical, legal, and professional irregularities. Mr. Meier worked alongside previous Director Mr. Kevin Dauphinais for an extended period of time and has been the Acting Director of TSS since Dec 2011 to present. As a professionally trained and licensed LSW (Licensed Social Worker) in the State Of North Dakota, Mr. Meier carries an additional professional responsibility and code Of ethics to uphold.

Finally, I would request the BIA to re-establish an outside reservation Tribal Social Services program with qualified, credentialed, culturally competent, and appropriately licensed professionals who would work ethically, legally, and morally to protect the Spirit Lake reservation children, elderly, and disabled from abuse and neglect.

It is my professional opinion that with this systemic unchecked incompetence, the abused and neglected children on this reservation face repeated traumatic life altering consequences without an end, ever cycling them through repeated suicidal attempts with increasing grave risk for suicidal completions.

Very respectfully,



Michael R. Tilus, PsyD, MP
Director, Behavioral Health
COMMANDER, U. S. PUBLIC HEALTH SERVICE
Enclosure: I (Case Study)
cc: Sister Joanne Streifel, LICSW
Indian Health Service (retired)

Spirit Lake Suicide Prevention Coalition Members
Fort Totten, ND

Mr. Doug Boknecht, LICSW, BDC
Assistant Regional Director,
Lake Region Human Service Center: Region Ill
Devils Lake, ND

Ms. Molly McDonald
Associate Juvenile Judge Spirit Lake Tribal Court (previous)

Ms. Arlene de la Paz, Chief Executive Officer
Spirit Lake Health Center Indian Health Service

Mr. Dennis M. Meier, LSW
Acting Director, Spirit Lake Tribal Social Services

Mr. Rod Cavanaugh
Spirit Lake BIA Superintendent

Ms, Shirley Cain, J.D.
Chief Judge, Spirit Lake Tribal Court

Mr. Rodger Yankton
Chairperson, Spirit Lake Tribal Council

Dr. Vickie Claymore-Lahammer, PhD
Deputy Area Director, Behavioral Health
Aberdeen Area Indian Health Service

Mr. Weldon B. Loudermilk

BIA Regional Director
Great Plains Regional Office

Ms. Jeannie Thomas
FBI and FBI Victims Advocate
FBI Bismarck Field Office
North Dakota State Board of Social Work Examiners
PO Box 914
Bismarck, ND 58502-0914

North Dakota State Board of Social Work Examiners
AITN: Complaints
PO Box 914
Bismarck, ND 58502-0914

Center for Native American Youth
Ms. Erin Bailey, Director
US Senator Bryon Dorgan (Founder)

Behavioral Health Department
Spirit Lake Health Center

[*Attachments to Dr. Tilus' letter follow*]

4/3/2012

## Case Example

Names and privacy data have been removed for confidentiality. This is one of dozens of cases we have attempted to manage with Tribal Social Services over the past four plus years. (DrT)

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Comments from Sister Joanne Streifel, LICSW: Suicide Case Manager:

This young lady had had multiple threats ofsuicide and one attempt. We have worked with the court and school and TSS over two years ago to try and get this young lady into a residential treatment center because of the major dysfunction within her family. Her parents are divorced. Each parent now has a SO in their homes which is very upsetting to this young lady. The custody has shifted back and forth to the father and mother. This young lady was moving from house to house, including her grandmother's home when I first got involved in her treatment. She was acting up in school swearing at teachers and threatening to harm the principle at the time. She was hospitalized at Prairie St. John's. At discharge it was recommended that she be placed at a residential home for intense treatment however TSS did nothing to help with her placement, but only returned her to the dysfunctional home where again she is moving from father's home, where she does not get along with the SO and has threatened in the past to harm their new infant, to mother's home where she is faced daily with alcohol and marijuana usage.

Below is a list ofthe times that we have assessed her to be suicidal:

1. 3/30/10
2. 6/30/10
3. 9/23/10
4. 9/29/10
5. 10/20/10
6. 12/29/10
7. 11/18/11
8. 1/20/12- attempt by cutting
9. 3/05/12

#960's filed:

1. 8/31/09
2. 4/12/10
3. 4/15/10
4. 9/25/10
5. 1/25/12
6. 2/29/12

7. 3/5/12

Spirit Lake Behavioral Health's attempts to follow up recommendations of the court:

4/7/10 Contact with TSS

4/15 /10 Contact with TSS

4/15 School calls /pt out of control 4/16/10 Mtg with school, court,

MH, TSS, Law enforcement and parents

4/22/10 case given to Jessica at TSS

5/7/10 BH called TSS — no response- court received no response

5/19/10 Contacted court — still no word from TSS

6/8/10 Contacted court — no response from TSS

6/30/10 Suicide assessment

7/6/10 No response from TSS

7/8/10 TSS wanting to send pt to Prairie St. John in Fargo- Pt admitted there

7/21/10 TSS wanting to send pt to State Hospital because of Mental retardation

8/6/10 — Pt roaming back and forth from home to home.

8/31/10 TSS reports no group home will accept pt because GAST is 60

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Therapist Ms. Joni Hem•y's. LCSW: Comments:

XXX was first introduced to me due to an alleged suicide attempt on 1/21/12 where she was sent to Mercy ER due to a cutting episode after getting into a verbal altercation with her father's SO. The cuts were ruled by the Crisis worker as superficial and the pt was placed back into her mother's care. Since then I have had 7 sessions with XXX. Throughout our time working together I have filed four 960's which pertained to the following incidents:

1/25/12: Upon the verbal altercation with her father's SO she went to her mother's home. On 1/24/12 XXX and her mother were asked to leave her mother's SO home, while the SO was under the influence of ETOH and possibly marijuana. Mothers SO has a history of being physically and verbally abusive toward the mother.

2/29/12: Pt stated that she was slapped by her mother in the head and in the arm to get up for school. Later that morning she got into a verbal argument with her mother and her mother's SO. Later at school she received a text from her mother stated that she cannot go back to the

house, which left her without a place to stay. Pt had planned to go to her father's home but was uncertain if she was allowed to go there, pt was not looking forward to having to stay with her father due to not getting along with her father's SO which resulted in an alleged suicide attempt on 1/12/12.

Pt also stated that she has been dealing marijuana to "survive". Pt stated that she "needs to deal marijuana in order to help provide for her family" pt stated that her mother and father are both aware that the pt deals drugs and "they are okay with it."

3/5/12: Pt disclosed that she was staying with her father again due to an incident that occurred where she was hit in the head by her mother and again asked to leave the her mother's home due to getting into another verbal argument with mother and mother's SO. Pt further stated that her father abuses marijuana and "pills." Pt further mentioned that she continues to struggle with chronic passive suicidal ideation and live in a chaotic environment that involves chronic alcohol and substance abuse, domestic violence, and other chaotic situations.

3/12/12: Pt disclosed that as a young child she was physically beating with a broom, wire clothes hangers, fly swatter, belt (where the buckle is located), and her father would griper her by her arm and leave bruises where his finger prints were. Pt stated that she continues to be threatened by her parents.

We have had several concerns ofXXX and numerous # 960s have been filed on this child in reference to allegations of sexual molestation, being exposed to ETOH and drugs within both parents' homes, child abuse, and child neglect. Pt has been diagnosed with MR and has cognitive limits so she is a very vulnerable minor and at very high risk to being further taken advantage of by others. Pt continues to be at extreme high risk of harming herself; she has an extensive history of suicidal ideation and one attempt.

Case Management: Contact with Spirit Lake Tribal Social Services:

1/31/12: Jackie Bavaro from TSS contacted provider and stated that she had received the 960 in regards to pts safety. She is planning on starting the investigation this week if time permits. Jackie stated that she will continue to keep SLBH updated with the results of the investigation.

2/14/12: pt was expected to have an appointment with provider but pt was a no show/ no call for scheduled appointment, BH staff attempted to contact the school to transport pt, however pt was not in school today.

Provider attempted to contact pts mother, however mother was recently hospitalized in Grand Forks and was unable to talk. Mother was not aware where pt may be and why she was not in school today.

Provider attempted to contact TSS Jackie Bavaro in reference to the 960 that was previously filed. However, provider was unable to reach TSS case worker.

2/15/12: I contacted Jackie Bavaro (TSS) to flu on the 960 filed on pt last month. Jackie states that if time permits she plans on flu with family later this week. Informed her of the seriousness of this situation and the need to start working on possible placement. Jackie states she will further investigate this matter.

2/21/12: F/u with TSS in reference to 960s (Jackie Bavaro, TSS case manager was unable to f/u with family.)

2/28/12: Continue f/u with TSS in reference to pts placement and the recent concerns about pt selling drugs. (No response from TSS in reference to recent 960).

As of today there has been no further response from Tribal Social Services in the Month of March. Pts "current TSS case manager/investigator was no longer working at TSS". We have not received any further response from TSS since 2/28/12 in reference to XXX. Another 960 was filed on 3/5/12 and 3/12/12.

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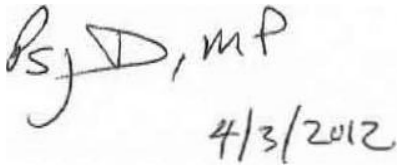
Respectfully,




Michael R. Tilus, PsyD, MP
Director, Behavioral Health

Multi Disciplinary Organizational Meeting
Fort Totten Mental Health Building
Spirit Lake Indian Reservation
March 9, 2010

Present: Janice Morley, Justin Wendland, Jeff White, Aaron Kellerman, Jeanne Thomas,
Bette Flynn, Julie Hough, Joe Vetsch, Ray Cavanaugh, Sr. Joanne A. Streifel, Kevin Daphinaus, Glen Delorme, Jr., Dr. Michael Tilus

Assistant U.S. Attorney Janice Morley began the meeting with introductions and outlined the purpose of having a multi disciplinary team (MDT) on Spirit Lake Indian Reservation. She explained that each member will receive a Memorandum of Understanding (MOU) that must be signed by their department head in order to participate in the MDT.

Confidentiality was stressed as an important factor of being a member since details of the investigation of felony crimes will be discussed. Each member will have a role during the investigation of cases discussed at the meeting.

The primary investigative agency for the MDT will be the Federal Bureau of Investigation (FBI).

There was conversation about having more of a federal presence on the reservation and what the possible outcomes would be. A federal "hands-on" approach was discussed and how that approach would affect the prosecution Of felony crimes on Spirit Lake Indian Reservation,

There was also discussion about cases that are investigated but not prosecuted, victim recantation, false reports, training, custody motivated claims, and a more proactive approach on the reservation.

FBI Victim Specialist Jeanne Thomas gave an update on the Children's Advocacy Center in Grand Forks.

It was decided that the group would meet every six weeks at the Mental Health Building in Fort Totten at I .•OO p.m. The next meeting will be on April 7, 2010.

Submitted by:
Julie A. Hough
Victim Witness Specialist
U.S. Attorney's Office
District of North Dakota

# SPIRIT LAKE TRIBE

PO. Box 359 • FORT TOTTEN. ND 58335 • PHONE 701-766-4221 • FAX 701-766-4126

MEMORANDUM

April 5, 2012

TO: Michael R. Tilus, PsyD, Director, Behavioral Health Arlene
de la Paz, CEO SLHC, HIS
Dennis Meier, SLT SS Acting Director
Shirley Cain, J.D., Chief Judge SLT Court
Peggy Cavanaugh, Director, Tribal Health
Linda Duckwitz, Youth Services Director
Rod Cavanaugh, Ft. Totten Agency Superintendent

Michael T. Alex, Administrator

RE: Social Services MANDATORY MEETING
Conference Room 4-11-12 9:00 AM

The Tribal Chairman has directed me to schedule a mandatory meeting regarding social
Services within the Spirit Lake Tribe. The Tribal Chairman is very concerned for the safety Of the children of the Spirit Lake Tribe especially the abused, neglected, and suicidal children.

The well being and safety of our children is the highest priority of the Tribal Council. The Social Services issues are of the highest priority of this administration. We are very thankful for the concerns of the agencies that provide services to our children. The Tribal Council wants to ensure that we have a cohesive effort amongst all professional service providers on the Spirit Lake Tribe to address the corrective action with the Spirit Lake Tribal Social Services.

The Tribal Council, along with the administration has been working with the ND Department of Health and Human Services and with the BIA Great Plains Regional Office

Social Service officials on compliance issues, Program Improvement Plan and Best Practices pursuant to the League of Social Services.

I would like to thank all of you in advance for your attendance of the mandatory meeting. Any questions or comments please contact me at 766-1714 or 351-1987.

cc: Tribal Council