Indian Child Welfare Act Amendments

Wednesday, May 11, 1988

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 9:07 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.
Present: Senators Inouye, DeConcini, Evans, and Murkowski.

Statement of Hon. Daniel K. Inouye, U.S. Senator from Hawaii, Chairman, Select Committee on Indian Affairs

The Chairman. The committee will please come to order.

This morning, we gather to consider S. 1976, a bill to amend the Indian Child Welfare Act of 1978.

It has been ten years since this act was enacted. In oversight hearings on this act held in 1984, concerns were expressed that the full intent of the act was not being achieved. On November 10 of last year, this committee held additional oversight hearings.

From the testimony received at that hearing, it was clear that funding for programs authorized by the act has always been deemed inadequate and has grown worse over the years. Coordination between the Department of the Interior and the Department of Health and Human Services in complimentary programs under their respective jurisdictions has not been realized. Cooperative efforts between the States and the tribes have not been consistent. And divergent decisions among the State courts in implementing the provisions of the act have led to some legal uncertainties in interpretation of the act.

The committee received testimony from two witnesses in our November hearing recommending extensive amendments to the Indian Child Welfare Act. The recommended amendments represented long and hard work among persons active in the Indian child welfare field, including attorneys, Indian social service personnel, and State social service agencies.

While the proposed amendments did not have the support of all the witnesses testifying, it was clear that they represented a starting point for addressing many of the issues identified in our hearings.

On December 19, 1987, my distinguished colleague and vice chairman of the committee, Senator Evans, introduced S. 1976 along with nine co-sponsors, including myself. This is our first hearing on this bill, and I do not anticipate that this bill will move forward without amendments.
I would, however, note that there is very strong support for the basic concept of the Indian Child Welfare Act, and I believe it is important that the act be implemented as fully as possible.

We have a number of witnesses today, and our time is obviously limited. I urge each witness to summarize your statement to allow time for questions and answers. I would like to assure all that your full statements will appear in the record.

[The text of S. 1976 follows:]

100TH CONGRESS
1ST SESSION

S. 1976

To amend the Indian Child Welfare Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

December 19 (legislative day, December 15), 1987

Mr. EVANS (for himself, Mr. INOUYE, Mr. MCCAIN, Mr. HARKIN, Mr. DECONCINI, Mr. DASCHLE, Mr. BINGAMAN, Mr. PRESSLER, Mr. BURDICK, and Mr. WIRTH) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs.

A BILL

To amend the Indian Child Welfare Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

That this Act may be cited as the "Indian Child Welfare Act Amendments of 1987".

SEC. 2. REVISION OF INDIAN CHILD WELFARE ACT.

The Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.) is amended to read as follows:

"SHORT TITLE AND TABLE OF CONTENTS

"SECTION 1. This Act may be cited as the 'Indian Child Welfare Act of 1978'.
CONGRESSIONAL FINDINGS

"(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes' and, through this and other constitutional authority, Congress has plenary power over Indian Affairs;

"(2) that Congress, through statutes, treaties and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

"(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

"(4) that an alarmingly high percentage of Indian children are separated from their families and tribal heritage by the interference, often unwarranted, of their children from them by nontribal public and private agencies, and individuals, and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

"(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families;
“(6) that the Bureau of Indian Affairs, exercising federal authority over Indian affairs, has often failed to fulfill its trust responsibility to Indian tribes by failing to advocate rigorously the position of tribes with States and nontribal public and private agencies and by failing to seek funding and planning necessary for tribes to effectively fulfill their responsibilities to Indian children;

"DECLARATION OF POLICY

"SEC. 3. The Congress hereby declares that it is this Nation’s Policy to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards governing any interference with Indian children’s relationships with their parents, family or tribe; also by providing for the placement of Indian children in foster or adoptive homes reflecting the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. Furthermore, the Congress hereby declares its intent to protect the right of Indian children to develop a tribal identity and to maintain ties to the Indian community within a family where their Indian identity will be nurtured.

DEFINITIONS

"SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

“(1) ‘child custody proceeding’ shall mean and include any proceeding referred to in this subsection involving an Indian child regardless of whether the child has previously lived in Indian country, in an Indian cultural environment or with an Indian parent—

“(i) ‘foster care placement’ means any administrative, adjudicatory or dispositional action, including a voluntary proceeding under section 103 of this Act, which may result in the placement of an Indian child in a foster home or institution, group home or the home of a guardian or conservator;

“(ii) ‘termination of parental rights’ means any adjudicatory or dispositional action, including a voluntary proceeding under section 103 of this Act, which may result in the termination of the parent child relationship or the permanent removal of the child from the parent’s custody;

“(iii) ‘preadoptive placement’ means the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

“(iv) ‘adoptive placement’ means the permanent placement of an Indian child for adoption, in-
including any administrative, adjudicatory or dispositional action or any voluntary proceeding under section 103 of this Act, whether the placement is made by a public or private agency or by individuals, which may result in a final decree of adoption.

"The term ‘child custody proceeding’ shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime. Such term shall also not include a placement based upon an award of custody to one of the parents in any proceeding involving a custody contest between the parents. All other child custody proceedings involving family members are covered by this Act.

“(2) ‘domicile’ shall be defined by the tribal law or custom of the Indian child’s tribe, or in the absence of such law or custom by Federal common law applied in a manner which recognizes that (1) many Indian people consider their reservation to be their domicile even when absent for extended periods and (2) the intent of the Act is to defer to tribal jurisdiction whenever possible;

“(3) ‘family’ includes extended family members and shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, includes any person who has reached the age of eighteen and who, by blood or marriage, is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

“(4) ‘Indian’ means any person who is a member of an Indian or Alaska Native tribe (including any Alaska Native village), or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688–689), any person of Indian or Alaska Native descent who is considered by an Indian or Alaska Native tribe to be a part of its community, or for purposes of sections 107, any person who is seeking to determine eligibility for tribal membership;

“(5) ‘Indian child’ means any unmarried person who is under age eighteen and is—

“(a) a member of an Indian tribe, or

“(b) is eligible for membership in an Indian tribe, or

“(c) is of Indian descent and is considered by an Indian tribe to be part of its community, or, for purposes of sections 107, any person who is seeking to determine eligibility for tribal membership; if a child is an infant he or she is considered
to be part of a tribal community if either parent is so considered;

“(6) ‘Indian child’s tribe’ means—

“(a) the Indian tribe in which the Indian child is a member or eligible for membership, or

“(b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. For any of the purposes of this Act, the tribe with the more significant contacts may designate as the Indian child’s tribe another tribe in which the child is a member or eligible for membership with the consent of that tribe;

“(7) ‘Indian custodian’ means any Indian person who has custody of an Indian child under tribal law or custom or legal custody under State law or to whom physical care, custody, and control has been voluntarily transferred by the parent of such child;

“(8) ‘Indian organization’ means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

“(9) ‘Indian Tribe’ means any Indian or Alaska Native tribe, band, nation, village or other organized group or community of Indians recognized as eligible for the services provided to Indians or Alaska Native by the Secretary because of their status as Indians or Alaska Natives, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688–689), as amended, those tribes, bands, nations, or groups terminated since 1940 who maintain a representative organization, and for the purposes of sections 101(c), 102, 103, 104, 105, 106, 107, 110, 111, and 112 of this Act, those tribes, bands, nations or other organized groups that recognized by the Government of Canada or any province or territory thereof;

“(10) ‘parent’ means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. Except for the purposes of section 103 (c) and (d), 104, 105(f), 106 (a) and (b), 107, 301, the term parent shall not include any person whose parental rights have been terminated. It includes the unwed father where paternity has been established under tribal or State law, or recognized in accordance with tribal custom, or openly proclaimed to the court, the child’s family, or a child placement or adoption agency. For the purpose of section 102(a), it
also includes an unwed father whose paternity has not been so established, recognized or proclaimed.

“(11) ‘qualified expert witness’ means—

“(a) a member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; or

“(b) a person having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s tribe; or

“(c) a professional person having substantial education and experience in the area of his or her specialty and who has general knowledge of prevailing Indian social and cultural standards and childrearing practices;

“(12) ‘reservation’ means Indian country as defined in section 1151 or title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

“(13) ‘residence’ shall be defined by the tribal law or custom of the Indian child’s tribe, or in the absence of such law or custom, shall be defined as a place of general abode or a principal, actual dwelling place of a continuing or lasting nature;

“(14) ‘Secretary’ means the Secretary of the Interior; and

“(15) ‘tribal court’ means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

“TITLE I—CHILD CUSTODY PROCEEDINGS

“JURISDICTION OVER INDIAN CHILD CUSTODY PROCEEDINGS

“Sec. 101. (a) Notwithstanding any other Federal law to the contrary, an Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where concurrent jurisdiction over voluntary child custody proceedings may be otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive
jurisdiction, notwithstanding the residence or domicile of the child.

“(b) In any State court child custody proceeding involving an Indian child not subject to the exclusive jurisdiction of a tribe, the court, shall transfer such proceeding to the jurisdiction of the Indian child’s tribe absent an unrevoked objection by either parent determined to be consistent with the best interests of the child as an Indian, upon the oral or written request of either parent or the Indian custodian or the Indian child’s tribe: Provided, That the court may deny such transfer of jurisdiction where the request to transfer was not made within a reasonable time after receiving notice of the hearing and the proceeding is at an advanced adjudicatory stage: Provided further, That such transfer shall be subject to declination by the tribal court of such tribe and that an oral or written request to transfer must be expressly revoked for such request to be deemed abandoned: Provided further, That a parent whose rights have been terminated or who has consented to an adoption may not object to transfer.

“(c) In any State child custody proceeding involving an Indian child, and any State administrative or judicial proceeding to review the foster care, preadoptive or adoptive placement of the child, the Indian custodian of the child, the parent of the child, and the Indian child’s tribe shall have a right to intervene at any point in the proceeding. The Indian custodian, the parent, except as provided above, and the Indian child’s tribe shall also have a right to intervene in any administrative or judicial proceeding under State law to review the foster care, preadoptive or adoptive placement of an Indian child. The Indian child’s tribe may authorize an Indian organization or other Indian tribe to intervene on its behalf.

“(d) Whenever a non-tribal social services agency determines that an Indian child is in any situation that could lead to a foster care placement, preadoptive placement or adoptive placement and which requires the continued involvement of the agency with the child for a period in excess of thirty days, the agency shall send written notice of the condition and of the initial steps taken to remedy it to the Indian child’s tribe within seven days of the determination. The tribe shall have the right to examine and copy all reports or other documents involving the child. The State agency shall not be liable for any harm resulting from its release of information to the tribe.

“(e) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial
14 "(b) In any case in which the court or, in the case of an
15 administrative proceeding, the administrator of the State
16 agency determines indigency, the parent or Indian custodian
17 shall have the right to court-appointed counsel in any invol­
18 untary child custody proceeding. The court may, in its discre­
19 tion, appoint counsel for the child upon a finding that such
20 appointment is in the best interest of the child. Where State
21 law makes no provision for appointment of counsel in such
22 proceedings, the court or State agency shall promptly notify
23 the Secretary upon appointment of counsel, and the Secre­
24 tary, upon certification of the presiding judge or, where appli­
25 cable, the administrator of the State agency, shall pay rea­
reasonable fees and expenses out of funds which may be appro priated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13). The Secretary shall also pay the reason able fees and expenses of qualified expert witnesses retained on behalf of an indigent parent or Indian custodian.

"(c) Each party in any child custody proceeding under State law involving an Indian child shall have the right to examine and copy all reports or other documents involving the child who is the subject of the proceeding. The State agency shall not be liable to a party for any harm resulting from its release of information to the tribe.

"(d) Any party seeking to effect a foster care, preadoptive or adoptive placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active, culturally appropriate efforts, including efforts to involve the Indian child’s tribe, extended family and off-reservation Indian organizations, where applicable, have been made to provide remedial services and rehabilitative programs designed to prevent such placement or termination of parental rights and that these efforts have proved unsuccessful. Except for emergency placements pursuant to section 112 of this Act, in any case involving a non-tribal social services agency, no foster care, preadoptive or adoptive placement proceeding shall be commenced until the requirements of section 101(d) of this Act have been satisfied.

"(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The clear and convincing evidence and qualified expert witnesses requirements shall apply to any and all findings which the court makes which are relevant to its determination as to the need for foster care, including the finding required by subsection (d) of this section.

"(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The beyond a reasonable doubt and qualified expert witnesses requirements shall apply to any and all findings which the court makes which are relevant to its determination as to the need to terminate parental rights, including the finding required by subsection (d) of this section.

"(g) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence or evidence beyond a rea-
sonable doubt that custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. To meet the burden of proof, the evidence must show the direct causal relationship between particular conditions and the serious emotional or physical damage to the child that is likely to result from the conduct of the parent or Indian custodian.

"(h) Any order for the foster care placement, termination of parental rights, preadoptive placement or adoptive placement shall protect the children's future opportunity to learn their tribal identity and heritage, and to take advantage of their tribe's cultural resources, including, to the extent possible and appropriate, provision for continued contacts between the children and their parents, family, and tribe.

"VOLUNTARY PROCEEDINGS"

"Sec. 103. (a)(1) Where any parent or Indian custodian voluntarily consents to a foster care placement, termination of parental rights, or adoption under State law, such consent shall not be valid unless executed in writing and recorded before a judge of a court with jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent and the relevant provisions of this Act were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that the parent and Indian custodian, if any, fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.

Any consent given prior to, or within ten days after birth of the Indian child shall not be valid.

"(2) At least ten days prior to any State court proceeding to validate a voluntary consent where the State has jurisdiction to validate the consent, the court shall notify the Indian child's tribe, and the non-consenting parent, if any, by registered mail, return receipt requested, of the pending consent validation proceeding, of their right to intervene in the validation and any subsequent child custody proceeding, and of their right to petition or request the court to transfer the case to tribal court. A request for confidentiality shall not be reason to withhold notice from the tribe. The court shall also certify that active, culturally appropriate efforts, including efforts to involve the Indian child's tribe, extended family and off-reservation Indian organizations, where applicable have been offered remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful.

"(3) Consent to a foster care placement, termination of parental rights, preadoptive placement or adoptive placement shall not be deemed abandonment of the child by the parent or Indian custodian. Such consent by a parent or Indian custodian shall not affect the rights of other Indian relatives to custody under tribal law or custom of this Act. Any volun-
tary consent pursuant to this section shall not be admissible as evidence in any proceeding under section 102 of this Act.

“(4) The Secretary of Health and Human Services shall take appropriate action to ensure that all Indian Health Service personnel are informed of and comply with the provisions of this section.

“(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned immediately to the parent or Indian custodian unless returning the child to his or her parent or custodian would subject the child to a substantial and immediate danger of serious physical harm or threat of such harm by such parent or Indian custodian. The pendency of an involuntary child custody proceeding shall not be grounds to refuse to return the child to the parent or Indian custodian.

“(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent or Indian custodian may be withdrawn for any reason at any time prior to the entry of a final decree of adoption, and the child shall be immediately returned to the parent or Indian custodian unless returning the child to his or her parent or Indian custodian would subject the child to a substantial and immediate danger of serious physical harm or threat of such harm by such parent or Indian custodian. The pendency of an involuntary child custody proceeding shall not be grounds to refuse to return the child to the parent or Indian custodian.

“(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding based upon a preponderance of the evidence that such consent was obtained through fraud or duress, the court shall vacate such decree of adoption and return the child to the parent. Unless otherwise permitted under State law, no adoption may be invalidated under the provisions of this subsection unless the parent or Indian custodian has petitioned the court within two years of the entry of the final decree of adoption.

“CHALLENGES BASED ON VIOLATIONS OF ACT

“SEC. 104. (a) In any child custody proceeding under State law, the Indian child, any parent, any Indian custodian from whose custody the child was removed, or the Indian child’s tribe may (i) move to vacate or set aside any aspect of the proceeding which may have violated this Act, or (ii) bring an independent action to invalidate the proceeding in any court which has jurisdiction over the parties. Any member of the Indian child’s family shall have the right to intervene in a proceeding pursuant to this section. In case of an alleged violation of section 105 of this Act, any member of the child’s
family shall have standing under this section to bring an independent action to challenge the placement.

"(b) Notwithstanding any law to the contrary, Federal courts shall have jurisdiction to review any final decree of a State court which is alleged to be in violation of this Act, upon a petition for writ of habeas corpus brought under section 2254 of title 28, United States Code or an independent action brought by any party withstanding to pursue such an action pursuant to section (a).

"(c) The court shall, upon request, hear any motion or action brought under this section or any appeal from a decision in a child custody proceeding on an expedited basis.

"PLACEMENT GOALS IN STATE COURT PROCEEDINGS

"Sec. 105. (a) All placements of Indian children shall seek to protect the right of Indian children as Indians and the rights of the Indian community and tribe in having its children in its society.

"(b) Any adoptive placement of an Indian child under State law shall be made in accordance with the order of placement established by the child’s tribe by resolution, or in the absence of such resolution, with the following order of placement: (1) a member of the child’s family; (2) other members of the Indian child’s tribe; or (3) other Indian families, except as provided in subsections (d) and (e).

"(c) Any child accepted for foster care or preadoptive placement shall be placed (1) in the least restrictive setting which most approximates a family and (2) within reasonable proximity to his or her home. Except as provided in subsections (d) and (e) below, any foster care or preadoptive placement shall be made in accordance with the following order of placement unless the child’s tribe has established a different order of placement by resolution:

"(i) a member of the Indian child’s family;

"(ii) a foster home licensed, approved, or specified by the Indian child’s tribe;

"(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

"(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.

"(d) Any placement established under subsection (b) or (c) of this section may be varied, so long as it remains consistent with subsection (a) of this section, where (1) the child is at least age twelve and of sufficient maturity and requests a different placement; or (2) the child has extraordinary physical or emotional needs, as established by the testimony of expert witnesses, that cannot be met through a placement within the order of placement, or (3) families within such order of placement are unavailable after diligent search has...
been completed, as provided for in subsections (f) and (g), for
a family within the order of placement.

"(e) A placement preference expressed by the Indian
child’s parent or Indian custodian, or a request that the con-
senting parent’s identity remain confidential, shall be consid-
ered so long as the placement is made with one of the per-
sons or institutions listed in subsections (b) or (c), or one of
the exceptions contained in subsection (d) applies. A request
for confidentiality shall not be grounds for withholding notice
from the Indian child’s tribe, provided that notice of the pro-
ceeding shall include a reference to the request.

"(f) Notwithstanding any State law to the contrary, the
standards to be applied in meeting the placement require-
ments of this section shall be the prevailing social and cultur-
al standards of the Indian community in which the parent or
family resides or with which the parent or family members
maintain social and cultural ties. If necessary to comply with
this section, a State shall promulgate, in consultation with
the affected tribes, separate State licensing standards for
foster homes servicing Indian children and shall place Indian
children in homes licensed or approved by the Indian child’s
tribe or an Indian organization.

"(g) A record of each such placement, under State law,
of an Indian child shall be maintained by the State in which
the placement was made, evidencing the efforts to comply
with the order of placement specified in this section. Such
efforts must include, at a minimum, contacting the tribe prior
to placement to determine if it can identify placements with
the order of placement, notice to all family members that can
be located through reasonable inquiry of the parent, custodi-
an, child and Indian child’s tribe, a search of all county or
State listings of available Indian homes and contact with
local Indian organizations, the Department of Interior’s
Bureau of Indian Affairs and nationally known Indian pro-
grams with available placement resources. The record of the
State’s compliance efforts shall be made available at any time
upon the request of the Secretary or the Indian child’s tribe.

"SUBSEQUENT PLACEMENTS OR PROCEEDINGS

"SEC. 106. (a) Notwithstanding State law to the con-
trary, whenever a final decree of adoption of an Indian child
has been vacated or set aside or the adoptive parent’s paren-
tal rights to the child have been terminated, the public or
private agency or individual seeking to place the child, in
accordance with the provisions of section 102(a), shall notify
the biological parents, prior Indian custodians and the Indian
child’s tribe of the pending placement proceedings, their right
of intervention, and their right to petition for return of cus-
tody. The court shall grant the petition for return of custody
of the parent or Indian custodian, as the case may be, unless
there is a showing, in a proceeding subject to subsections (e)
and (f) of Section 102 of this Act, that such return of custody
is not in the best interests of the child. Whenever an Indian child who has been adopted is later placed in foster care, the Indian child's tribe shall be notified and have the right to intervene in the proceeding.

“(b) In the event that the court finds that the child should not be returned to the biological parents or prior Indian custodian, placement shall be made in accordance with the order of placement in section 105. For the purposes of this section family shall include the family of the biological parents or prior Indian custodian.

“(c) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, or when review of any such placement is scheduled, such placement shall be in accordance with the provisions of this Act, including prior notice to the child's biological parents and prior Indian custodian, and the Indian child's tribe, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

“TRIBAL AND FAMILY AFFILIATION; DISCLOSURE BY COURT

“SEC. 107. An adopted Indian individual who has reached the age of eighteen, the Indian child's tribe or the Indian child's adoptive parents, may apply to the court which entered the final decree of adoption for the release of information regarding the individual's biological parents and family and their tribal affiliation, if any. Based upon court records or records subject to court order, the court shall inform the individual of the names and tribal affiliation of his or her biological parents. The court shall also provide any other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

“REASSUMPTION OF EXCLUSIVE TRIBAL JURISDICTION

“SEC. 108. (a) Any Indian tribe which became subject to State concurrent jurisdiction over voluntary child custody proceedings pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume exclusive jurisdiction over all voluntary child custody proceedings. Before any Indian tribe may reassume jurisdiction over voluntary Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

“(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider among other things:

“(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
"(ii) the size of the reservation or former reservation area which will be affected by retrocession or reassumption of jurisdiction by the tribe;

"(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

"(iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation or geographic area.

"(2) In those cases where the Secretary determines that full jurisdiction is not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise exclusive jurisdiction over voluntary placements in limited community or geographic areas without regard for the reservation status of the area affected.

"(e) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval. The Indian tribe concerned shall resume exclusive jurisdiction over all voluntary placements of all Indian children residing or domiciled on the reservation sixty days after publication in the Federal Register of notice of approval.

"(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act or as otherwise provided in the notice of the Secretary.

"AGREEMENTS BETWEEN STATES AND INDIAN TRIBES

"SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes. Nothing in this section or in section 108 of this Act shall be construed as in any way diminishing or altering the inherent powers of Indian tribes over children’s proceedings.

"(b) Such agreements may be revoked by either party upon one hundred and eighty days’ written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

"IMPROPER REMOVAL OF CHILD FROM CUSTODY

"SEC. 110. (a) Where any petitioner in an Indian child custody proceeding before a State court has improperly re-
moved the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

"(b) In any instance where a child has been improperly removed or retained by an individual or entity, the parent or Indian custodian from whose custody the child was removed and the child's tribe may petition any court with jurisdiction for return of the child in accordance with this section.

"HIGHER STATE OR FEDERAL STANDARDS TO APPLY"

"Sec. 111. (a) An Indian parent or custodian may not waive any of the provisions of this Act.

"(b) In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child then the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

"EMERGENCY REMOVAL AND PLACEMENT OF CHILD"

"Sec. 112. (a) Regardless of whether a child is subject to the exclusive jurisdiction of an Indian tribe, when a child is located off the tribe's reservation nothing in this title shall be construed to prevent the emergency removal of an Indian child from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. Wherever possible, the child shall be placed within the order of placement provided for in section 105 of this Act.

"(b) No later than the time permitted by State law, and in no event later than three days (excluding Saturday, Sunday and legal holidays) following the emergency removal, the State authority, agency or official must obtain a court order authorizing continued emergency physical custody. If the Indian child has not been restored to its parent or Indian custodian with ten days following the emergency removal,

"(1) commence a State court proceeding for foster care placement if the child is not resident or domiciled on an Indian reservation and is not a ward of the tribal court, or

"(2) transfer the child to the jurisdiction of the appropriate Indian tribe if the child is resident or domici-
Notwithstanding the filing of a petition for a foster care placement of the child, the State agency, authority or official shall continue active efforts to prevent the continued out-of-home placement of the child. No emergency custody order shall remain in force or in effect for more than thirty days without determination by the appropriate court, in accordance with section 102(e) of this Act in the case of a State court, that foster care placement of the child is appropriate:

Provided, That in any case where the time requirements in section 102(a) do not permit a child custody proceeding to be held within thirty days, the emergency custody order may remain in force for a period not to exceed three days after the first possible date on which the proceeding may be held pursuant to section 102(a).

Emergency removal under this section shall not impair the exclusive jurisdiction of the tribe.

"EFFECTIVE DATE"

"Section 113. None of the provisions of this title, except section 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, readoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent pro-

"ABORIGINAL PEOPLES OF CANADA"

"Section 116. (a) Except as provided by this section, the provisions of sections 101(c), 102, 103, 104, 105, 106, 107, 110, 111, and 112 of this Act shall also apply to the aboriginal peoples of Canada and their children."
"(b) The ‘Indian child’s tribe,’ in the case of aboriginal peoples of Canada, shall be the child’s Indian Act band or, if neither the child nor its parents are members of any band, the aboriginal government or most appropriate regional aboriginal organization with which the child’s parents are connected by their origins or residence.

"(c) Indian Act bands, other aboriginal governments, and regional aboriginal organizations may by resolution designate aboriginal organizations in Canada, or Indian tribes or Indian organizations in the United States, as agents for the purposes of this Act. Resolutions to this effect shall be delivered to, and promptly acknowledged by the Secretary, who shall publish a list of such designations annually in the Federal Register.

"(d) For the purposes of section 102(a) of this Act, notice shall also be given to the Minister of the Government of Canada who is responsible for Indians and lands reserved for Indians.

"(e) In any State court child custody proceeding involving an aboriginal Canadian child, the court shall permit the removal of such case to the aboriginal, provincial, or territorial court in Canada which exercises primary jurisdiction over the territory of the child’s tribe, upon a petition, and absent unrevoked parental objections, as is provided for in other cases by section 101(b) of this Act.

"TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

"GRANTS FOR PREVENTIVE PROGRAMS ON OR NEAR RESERVATIONS

"SEC. 201. (a) The Secretary shall make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs, in accordance with priorities established by the tribe, may include, but are not limited to—

"(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

"(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

"(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, cultural and family-enriching activities and respite care;

"(4) home improvement programs;
“(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

“(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

“(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

“(8) guidance, legal representation, and advice to Indian families and tribes involved in tribal, State, or Federal child custody proceedings.

“(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act of any other federally assisted program. Placement in foster or adoptive homes

“(c) In lieu of the requirements of subsections 10, 14 and 16 of section 491 of the Social Security Act (42 U.S.C. 671 (10), (14) and (16)), Indian tribes may develop their own systems for foster care licensing, development of case plans and case plan reviews consistent with tribal standards.

“GRANTS FOR OFF-RESERVATION PROGRAMS

“Sec. 202. The Secretary shall also make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which, in accordance with priorities set by the Indian organizations may include, but are not limited to—

“(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
appropriated by Congress to carry out the provisions and purposes of this Act shall be awarded to tribes or Indian organizations.

"INDIAN' DEFINED FOR CERTAIN PURPOSES

"Sec. 204. For the purposes of section 202 and 203 of this title, the term 'Indian' shall include persons defined in section 4(c) of this Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1402).

"TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

"STATE REPORTS

"Sec. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary and the Indian child's tribe with a copy of such decree or order together with such other information as may be necessary to show—

"(1) the name and tribal affiliation of the child;

"(2) the names and addresses of the biological parents;

"(3) the names and addresses of the adoptive parents; and

"(4) the identify of any agency having files or information relating to such adoptive placement.

"No later the one hundred and twenty days after enactment of this bill, the administrative body for each State court

funding of Indian child and family service programs, both on and off reservation, the Secretary shall enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized and directed to use funds appropriated for similar programs of the Department of Health and Human Services for such purpose.

"(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. In addition, Congress may appropriate such sums as may be necessary to provide Indian child welfare training to Federal, State and Tribal judges, court personnel, social workers and child welfare workers, including those employed by agencies licensed by a State.

"(c) Indirect and administrative costs relating to a grant awarded pursuant to this title shall be paid out of Indian Contract Support funds. One hundred per centum of the sums appropriated pursuant to the provisions and purposes of this Act shall be awarded to tribes or Indian organizations.

"(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

"(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

"FUNDS FOR IMPLEMENTATION OF ACT

"Sec. 203. (a) In the establishment, operation, and

"operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

"(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

"(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

"(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
system shall designate an individual or individuals who will be responsible for ensuring State court compliance with this Act. All information required by this subsection relating to decrees of adoption entered after May 8, 1979, shall be compiled and forwarded to the Secretary and Indian child's tribe no later than January 1, 1989. Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall be not subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

"(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or any Indian tribe, the Secretary shall disclose such information as may be held by the Secretary pursuant to subsection (a) of this section. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting that their identity remain confidential and the affidavit has not been revoked, the Secretary shall provide to the Indian child's tribe, where the such information about the child's parentage and other circumstances of birth as required by such tribe to determine the child's eligibility for membership under the criteria established by such tribe.

"RULES AND REGULATIONS

"SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act. In promulgating such rules and regulations, the Secretary shall consult with national and regional Indian organizations and with Indian tribes."

SEC. 3. CONFORMING AMENDMENTS TO RELATED ACTS.

(a) Section 408(a) of title IV of the Social Security Act (42 U.S.C. 608(a)) is amended—

(1) by striking out at the end of subsection (2)(A) the word "or"

(2) by adding after subsection (2)(B) the following clause "or (C) in the case of an Indian child, as defined
by subsection 4(4) of the Indian Child Welfare Act (25 U.S.C. 1903(4)), the Indian child's tribe as defined in subsections 4(5) and (8) of that Act (25 U.S.C. 1903(5) and (8))”,

(b) Section 422 of Title IV of the Social Security Act (42 U.S.C. 622) is amended by adding after and below clause (8) the following new clause:

“(9) include a comprehensive plan, developed in consultation with all tribes within the State and in-State Indian organizations (with social services programs), as defined by section 4(7) of the Indian Child Welfare Act (25 U.S.C. 1903(7)), to ensure that the State fully complies with the provisions of the Indian Child Welfare Act.”

(c) Section 471 of title IV of the Social Security Act (42 U.S.C. 671) is amended by adding after and below clause (17) the following new clause:

“(18) provides for a comprehensive plan, developed in consultation with all tribes within the State and in-State Indian organizations (with social service programs), as defined by section 4(7) of the Indian Welfare Act (25 U.S.C. 1903(7)), to ensure full compliance with the provisions of the Indian Child Welfare Act. As part of the plan, the State shall make active efforts to recruit and license Indian foster homes and, in accordance with section 201 of the Indian Child Welfare Act (25 U.S.C. 1931), and provide for the placement of

1 and reimbursement for Indian children in tribally licensed or approved facilities.”

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect ninety days after enactment.

SEC. 5. NOTICE.

Within forty-five days after enactment of these amendments, the Secretary shall send to the Governor, chief justice of the highest court of appeal, the attorney general, and the director of the Social Service agency of each State and tribe a copy of these amendments, together with committee reports and an explanation of the amendments.

SEC. 6. SEVERABILITY.

If any of these amendments or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.
The CHAIRMAN. Our first witness this morning is the Honorable Ross Swimmer, the Assistant Secretary for Indian Affairs of the Department of the Interior.

STATEMENT OF HON. ROSS SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. SWIMMER. Thank you, Mr. Chairman.

I appreciate the opportunity to appear today, and I appreciate the committee's and especially the chairman's concern about Indian affairs and the issues in Indian country. I do have a statement which I will submit for the record. In lieu of summarizing the statement, however, and getting directly to questions, I would like to present to the committee a letter from the Secretary of the Interior that was given to me just this morning to read to the committee and to the witnesses here, and I think it expresses the concern of the Administration and the views. Perhaps after that, we can get into the questions and answers.

The letter is addressed to the Honorable Daniel K. Inouye:

DEAR MR. CHAIRMAN: I am extremely alarmed over the provisions of S. 767, a bill to amend the Indian Child Welfare Act. My concerns are such that I have asked Assistant Secretary Swimmer to request permission of the chairman to incorporate this letter in the record when he testifies on the bill.

The three branches of the Government of the United States are called upon to deal with the complex issues which arise when Indian tribes, States, and the Federal Government each seek to exercise sovereignty over matters of persons of Indian blood. The reasonable balancing of interests between such entities, always bearing in mind what is in the best interests of the Indians as individuals and human beings, is not always easy.

I believe strongly that it is clear that this bill fails the test of reasonable balance. It would skew the balance in a manner which is wholly unacceptable to the Department of the Interior and should be unacceptable to any persons who are concerned about human rights issues, especially including the human rights of children.

Although there are multiple flaws in the bill, we call your attention to three fundamental objections:

First, the bill is anathema to the salutary constitutional principle that legislation cannot stand if it makes classifications and distinctions based on race. If enacted, this bill would subject certain Indian children to the claim of jurisdiction of an Indian tribe solely by reason of the child's race. For example, under section 101(b) of the bill, if a tribe seeks transfer of a child custody or adoption case from State court to the tribe, the parents' objection to such transfer will be unavailing unless the objection is "determined to be consistent with the best interests of the child as an Indian." The provision ignores all other aspects of the child's status as a human being. That, in my view, is pure racism.

The Fourteenth Amendment to the Constitution was adopted to protect the rights of the individual against classifications based on the individual's race. This bill cannot be reconciled with that guiding principle. It is not enough to say but this is Indian legislation. Indians are, and certainly should be, entitled to the basic protections of the Constitution even when those protections would be denied by Indian legislation.

Second, the bill is contrary to what I believe is sound prevailing public policy in this country. In adoption and child custody cases, it is the interests of the child which are of paramount importance. This bill subordinates the best interests of the child to that of the tribe. While we all can agree that a child's knowledge of his or her cultural heritage can be a vital and valuable aspect of the child's personality and value system, it is wrong to elevate that concept to a point where it overrides virtually every other concern bearing on the fundamental well-being of the child.

Third, at least the current act limits the jurisdictional claim of the tribe to children of tribal members. Such membership typically is obtained by voluntary enrollment or at least can be terminated by the Indian's voluntary act, thereby creating a situation where the tribal member arguably may be said to have consented to application of tribal law.

This bill, however, extends the jurisdictional reach of the tribe to children whose parents need not be tribal members. Indeed, the parents and other ancestors of the child may have had no connection with the tribe perhaps for years or even generations.

In such circumstances, it seems to me that the State in which the parents and child are domiciled does have a proper and overriding interest to see to it that its processes, not those of the tribe, are invoked to assure that the child custody or adoption proceeding will result in protecting the best interests of the child.

The bill does substantial violence to important constitutional principles and to sound public policy. Mr. Chairman, you may wish to inquire of Assistant Secretary Swimmer about the accusations frequently leveled against the United States for its treatment of Indians when the issue of human rights within the Soviet Union arises. Enactment of this bill in the name of Indian legislation simply will provide significant fuel to that fire. The bill should not be enacted.

Mr. Chairman, I share the concerns of the Secretary. I think that the bill strikes a racist type policy that this committee would not want part of. I believe that it is wrong that we extend jurisdiction, especially in those cases where an individual may, through happenstance, be eligible for membership in a tribe but have never had anything to do with that tribe and yet be forced onto that reservation.

I can think of numerous examples which I won't go into, but there are obvious ones involving tri-racial marriages, inter-racial marriages where an individual, by reason of Indian descent who may have features very distinctively not Indian could be forced to be placed in an Indian reservation environment where discrimination would surely affect their progress and development.

I don't believe that this bill should be made law. I believe that the work that is being done now under the Indian Child Welfare Act that was passed is progressing. We are making changes, and things are improving in Indian country.

We believe there are some changes that could be made in the act. We would like to have time to submit those to the committee for its consideration.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Swimmer appears in appendix.]

[Letter from Secretary Hodel appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Secretary.

I must say that I am a bit surprised with the tone and tenor of the letter and your prepared remarks, but I think you have done an excellent job of conveying your concerns and your remarks, but I think you have done an excellent job of conveying your concerns and your prepared remarks.

In combination, the Indian Child Welfare Act and the Adoption Assistance and Child Welfare Act provide a number of safeguards and protections to ensure that Indian children are not separated from their families and the jurisdiction of their tribes unnecessarily and that they receive child welfare services focused on achieving permanency.

I would also note that your own budget submission for fiscal year 1989 refers to the grant program authorized under Title II as follows:

These grants are designed to maintain the integrity of Indian family life and thus avoid the unwarranted placement for adoption or foster care of Indian children.
What do you have to say about that?

Mr. Swimmer. I fully support those principles and those objectives that are included that you just read. I think it is important that on Indian reservations where an Indian family is having trouble that may in fact lead to the removal of an Indian child from that family that we should use all of our efforts to seek, in the best interests of the child, a placement that is going to be satisfactory to that child and that in 99 times out of 100 or maybe 100 out of 100 it is going to be with an Indian family as available on the reservation where that child is now living.

This bill, though, doesn't do that. This proposed bill, these amendments, go way beyond that. That is our primary objection. It—

The Chairman. How does it go way beyond that?

Mr. Swimmer. For instance, in my own tribe, a Cherokee family in California, an Indian and a non-Indian, an Indian father and non-Indian mother decide that they reach the point where they are unable to care for the child and the State claims that there has been neglect of the child. That child and these people have never been to the Cherokee Nation in their lives. They don't even know it exists. Yet, they are eligible for membership in the Cherokee Nation. That child would go under the jurisdiction of the Cherokee Tribe either in Oklahoma or North Carolina.

I think that is far too reaching. It then takes away the opportunity for the State courts to have anything to say about that.

That is extreme example. Another example which may be extreme or may not be is I think the case exists of an inter-racial marriage of black and Indian where the child has predominantly black features. He would be sent to a reservation although neither parent had ever been close to a reservation in their lives.

We are subjecting Indian children who may have no interest nor their parents ever have any interest in being Indian or being on or near a reservation of being sent to a reservation or sent to an Indian environment in which they did not grow up and do not want their children raised in.

It also takes away a lot of the opportunity that the courts are already infringing on of the voluntary-ness of an adoption or placement, saying that, in effect, the natural mother is not capable of determining what the best interests of the child are.

The bill tends to subject the interests of the child to the interests of the tribe. My only concern in this whole legislation—and I think that the legislation can be summed up in one phrase, and that is that it is incumbent upon the United States of America to see that the best interests of the Indian child is protected, period. It—

The Chairman. That is not our interpretation.

Mr. Swimmer. Well, maybe we can make that clear that as long as that child is not under the jurisdiction of the tribe that they are not subject to the jurisdiction of the tribe.

Under the current act, children in my tribe who are out of State, out of Oklahoma and away from the tribe's jurisdiction but who are members of the tribe are brought under the jurisdiction of the act, of the existing act. They must report and notify the tribe, even if it is a Cherokee in California. They must advise the tribe that this child is being adjudicated one way or the other, and the tribe has the option of intervening.

We have seen this situation recently that got headlines from the Navajo Tribe exercising its jurisdiction in California to bring a child home that had been adopted there through a voluntary adoption by its natural mother. We have seen case after case of this happening under the current law.

So, I don't know. It is my opinion that the amendments even go further than the current law does, and I know the current law requires notice of the member's tribe, regardless of where that person lives.

The Chairman. But in the case of the Navajo, didn't the Navajo court give jurisdiction and award custody of the child to the non-Indian adoptive petitioners?

Mr. Swimmer. I think ultimately they did. I am not sure if the outcome has been determined. I think, as I recall reading the case, it was an open—it would be classified as an open adoption, however, with visitation rights of the—

The Chairman. By your statement, one would assume that the Indians just grabbed hold of the child because the child was Indian. In both cases which were highly publicized, the child was awarded to the non-Indian adoptive parents.

Mr. Swimmer. I think in one case, they were not allowed to adopt but only to have custody. In the recent case, I believe they were being permitted the right to adopt under an open adoption.

The Chairman. The only thing that they gave the biological parents was visitation rights.

Mr. Swimmer. Well, that is true, and in this case, it might be appropriate. In other cases, it might not be, and I don't think that the requirement of having all open adoptions is necessarily good.

The Chairman. They can always object to the transfer, can't they, the parents? Under the law?
Mr. Swimmer. The right of the tribal court prevails over the right of the natural parent.

The Chairman. But not in the case where the State has invoked jurisdiction.

Mr. Swimmer. Well, the State is not going to be able to invoke jurisdiction if the tribal court takes jurisdiction of the case. If the State takes jurisdiction of the case, it has to decide the case along the lines of the Child Welfare Act.

The Chairman. I have been advised that the tribe can request jurisdiction but either parent can object. Isn’t that correct?

Mr. Swimmer. That the tribe can request jurisdiction but the parents can object?

The Chairman. Yes.

Mr. Swimmer. It is my understanding that is possible but that the tribe would survive. The tribe’s request for jurisdiction over the child is predominant and would dominate.

I will check that out with our legal people as far as that is concerned, but if that is an issue that can be resolved, that would be helpful to be sure that the natural parent has the right to object to tribal jurisdiction. If we can write that into the act, it will go a long way, at least in that provision.

There are other provisions in the act that are, I think, just as onerous. One of them is the removal of alcohol abuse and non-conforming social behavior as a reason to remove a child from a home.

I don’t know what the intent of that is, but I am afraid that being in a home with an alcoholic situation that would result in a case worker recommending removal of the child and saying that can’t be used as an excuse would be extremely harmful to an unhappy infant.

We see cases on a regular basis of child abuse in Indian country, and particularly those of alcoholic families. I don’t think we can justify it and simply say because alcohol in certain cases is prevalent in an area that that should be removed as an excuse.

But that is just one of our objections. As I said, Mr. Chairman, I don’t want to take the time of the committee. I would be happy to give you example after example of how we believe this bill can be very detrimental to the best interests of Indian children—and that is our objective here.

I have no reason to oppose any effort by this committee or this Congress or this administration to seek the best interests of the Indian children. However, I do object when it gets into this idea of creating a bureaucracy of lawyers, consultants, social workers, proposal writers, and everybody else spending money on everything but what appears to be the best interests of the Indian children. I think that is the way we are going.

I think we need to address what is going on at the reservation. We need more social workers out there. We project the possible cost just of the amendments is going to be $7 or $8 million. I would take that money and add social providers out there and people who could work directly with families, who could help remove some of the problems that we see out there on a regular basis with families.

We don’t need to put people into courts, and we don’t need to put lawyers arguing over who has custody of this or that. We need to put people out there on the reservation where they can be working directly with families trying to build and construct a family structure on that reservation that is now in danger of being lost totally because of alcoholism and—

The Chairman. If that is the case, why doesn’t the BIA recommend additional funds for just what you have described?

Mr. Swimmer. The problem that we have in the budget generally is what I described before, Mr. Chairman. It is difficult for us to say that on top of the $1 billion that we have, we can justifiably come up here and say, well, but we are not getting this problem done and we need some more when I cannot justify to the committee that the $1 billion we spend is being spent well.

Yet, if I make a proposal that some of the things that we think would be much lower priority should be changed to put money into Indian child welfare, we immediately, of course, are chastised by the Indian community and the special interests that have that pot of money.

I think we do have to reach the point, though, where we begin prioritizing where our money goes, because there is not an unlimited supply. We see this in our school systems where we are spending an average of $8200 per student. Yet, we are not getting the quality education.

Yet, when we go out and talk about changing the structure of education, we see that it is basically an employment program. We don’t get support on it. We say, well, where are those people going to work if we hire teachers instead of teacher aides.

It is a complex. Oftentimes, we find that putting more money in on top of money that is being spent poorly isn’t going to help the situation, and part of that is what we have here.

I think we need to redirect some of the funding that we do in the child welfare area. We are spending money now. These grants that we give out, the $7.5 million that we give now, are given out competitively based on who can write the best proposal and who can include all of the right words in that proposal. Oftentimes, that money goes off reservation to urban Indian groups serving children who are not even on the reservation or affected by the reservation.

Yet, we see tribes coming to me regularly appealing this, because they say we are not getting the money out here on the reservation.

The Chairman. Who is making the grants now, your office?

Mr. Swimmer. The Bureau of Indian Affairs makes the grants.

The Chairman. Aren’t you supposed to see if these applications are proper?

Mr. Swimmer. We check them with a fine toothed comb. We go over them and we give as much weight as we can to the tribe, and sometimes they just don’t have as good a proposal writer.

Congress has mandated that these be competitive, not where the need is, but where the competition is best, who can write the best proposal. That is who gets the money.

The Chairman. Well, you can assist them to write good grant applications.

Mr. Swimmer. We do that. We even give them help with the deadlines and the time lines, and oftentimes, we will get a late application by two or three days. Yet, everyone else has theirs in on