

**Panel #2: Indian Child Welfare Act: Keeping Our Children  
Connected to our Community – 04/16/14**

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*Anita Fineday:*

Our panelists for Panel Number Two are, let's see, starting on the left, Jack Trope is Executive Director of the Association on American Indian Affairs. Terry Cross is the Executive Director of the National Indian Child Welfare Association. Chrissi Nimmo is Assistant Attorney General for the Cherokee Nation of Oklahoma. And Shannon Smith is the Executive Director and an attorney for the Indian Child Welfare Law Center. We thank all of you for being here today. We welcome you and we look forward to your testimony. We will begin with Mr. Trope.

*Jack Trope:*

Thank you, Anita and thank you to the panel for inviting me to testify and I want to say thank you for to Seminole Nation for welcoming us here and it's a privilege to testify before a panel of such respected and knowledgeable people.

I also would say I'm humbled to follow the first panel. The tribal leaders, what they talked about was so powerful and so moving and important and I only hope as I talk about some of the legal aspects of this, that some of what I'm about to say and the other panelists are about to say are helpful in thinking about possible responses to what you've heard now and in your previous hearings.

I also want to say just briefly, before I talk about ICWA, our organization's been around since 1922, governed by an all native board from around the country. And the areas that we've worked in have been youth and education. Also cultural preservation. And I was struck my President Scott's talking about the importance of preserving a way of life as a response to all of this and I just want to say as an aside that I hope that the panel will remember things like federal support for the preservation of language, protection of sake would sites and issues like that as an important part of the whole mix of things that need to be done to address this problem.

Our organization began to be involved in child welfare back in the 1960s. And we documented, through a number of studies the widespread removal of Indian children from their families, from their communities without any due process,

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without their tribes being involved, often without anybody knowing what had happened to the children that were being removed from the community.

And I would mention, by the way, part of our work back then was very much fighting against the boarding school system that people have mentioned as being a big source of some of the continuing trauma in Indian country today.

And so the Indian Child Welfare Act was passed in 1978 in response to this information to these widespread abuses that were taking place of Indian children and Indian families. And what it did, in a nutshell, and I know many of you know this as well, if not better than I do, is that it set in place a system applicable to state courts which said if you have an Indian child in a child custody proceeding the tribe needs to be notified, the tribe ought to be able to intervene, active efforts need to be made to preserve that family, high standards of proof have to be met before you place a child in foster care or terminate parental rights. And if you have to remove a child, then the first preference should be extended family, should be other tribal families, other Indian families. So those protections were put in place to protect Indian children and families.

Now obviously, you know, this is directly relevant to the issue of children who suffer violence in their own families and how the system should appropriately respond to that. And so I think that there's a few different ways that ICWA's directly relevant to that and I think the attorney general's initial report did identify some of those.

First of all, it provides a mechanism for state and county workers to respond to this, to try to, in a way, that tries to ensure safe environment within the family. Requiring active efforts, requiring outreach to tribes, requiring access to culturally appropriate services. All of these things which are active efforts when this is done correctly can be ways to help children who have been in a position where they have been suffering from abuse and help those families heal and get better and provide a safe environment for those children.

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The second way in which the act responds to violence in an important way is when children cannot stay with their birth parents. It provides for placement with extended family, it provides for placement with other tribal families. It emphasizes placing the child with grandma and grandpa, aunts, uncles, with the person down the street who's part of the same community and the same culture rather than sending them off to stranger families who don't understand where they've come from and the communities and cultures in which they live.

The third way in which ICWA is relevant is that it strengthens the role of tribal governments. Tribal governments are governments that are parents patriae for their children and for those of who are not lawyers, parents patriae means essentially the government steps into the place of the parents when the parents are not able to take care of the child appropriately. And often, I think state systems, even federal systems forget that tribal governments are parents patriae for their kids everywhere, wherever they are located. But the Indian Child Welfare Act recognizes that and recognizes the importance of the tribal role in addressing the incidents of violence that these children may have been subjected to.

So again, one of the questions that was presented and that was asked to address is what's the federal role in complying in ensuring that ICWA is complied with? We know ICWA has resulted in some progress in these sorts of cases, but we also know that its implementation is uneven across the country. And so I want to talk briefly about that. And we have three key agencies that you can look at. First at there's the Department of Interior. Obviously in the Indian Child Welfare Act, the Department of Interior was provided with the authority to implement the act, given the authority to implement regulations to further the purposes of the act. And so there's that authority.

Health and Human Services also has statutory authority relating to the Indian Child Welfare Act. As most of you

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know, HHS is the entity that oversees state child welfare systems and they provide the funding for those systems. And it's through that funding that they have the authority to oversee those systems. Well included in the HHS statutes is a provision that all state plans that are promulgated under Title 4E must include a description of how the state is going to comply with the Indian Child Welfare Act, developed in consultation with tribes. So clearly, as part of their statutes, there is a statutory authority for HHS to be concerned about ICWA compliance.

And finally, the Department of Justice—and all of this is summarized in more detail in my testimony but I'm trying to keep this to 10 minutes—but Justice Department as well has authority to enforce the Indian Child Welfare Act. We believe that the rights provided to Indian parents and children in the act are a civil right and fall into the civil right statutes.

I'd also mention that the Indian Child Welfare Act actually applies to juvenile justice proceedings that involve status offenses. So offenses that would not be crimes if they had been committed by an adult. And so that sort of brings into play OJJDP in justice and the oversight and involvement with the juvenile justice system. Boy, ten minutes sure goes quickly, Kathy.

So now I'm going to move into some recommendations along those lines. We know that the Department of Interior is looking at its guidelines right now and we applaud that effort. We know that serious consideration is being given as to whether we ought to be made into regulations. I know we're looking very closely at that legal issue as is the Department of Interior and hope to be able to share more with this panel and with the Department of Interior as our research develops. I will mention that Casey Family Programs has helped support that work, so thank you for that.

Secondly, we believe that there needs to be more resources and so we support efforts to increase money for child welfare

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through the Department of Interior as well. And then HHS. There's a few things HHS would recommend that they look at. First of all, this provision in Title 4E needs to have more teeth in it. There's this requirement that the plan include ICWA compliance in consultation with tribes. But there's not a lot of teeth in that requirement and plans get put through with very little consultation with tribes and with only the most minimal consideration of what it actually means to actually comply with ICWA. And HHS certainly is in a position to strengthen that and to not approve these plans unless there's been real tribal consultation and some really concrete recommendations that are then monitored on an annual base to see if they are complied with.

In addition through their process of child family and service reviews, when they review the functioning of these systems, compliance with ICWA needs to be a higher priority. There's more data that could be collected in specific to Indian children and ICWA compliance. There's also a closer look at more Indian cases to see if they're being handled appropriately and what the outcomes are for those children. And I only had one minute left so I'm real going to move through the rest of this quickly.

The other thing I think HHS needs to do is to make sure that tribal capacity is developed through access to resources. Through legislation enacted in 2008 tribes can now operate the Title 4E program. But the process by which they've been coming into that has been very difficult and onerous and I would say more inflexible than it needs to be or should be. And so that's something that needs to be addressed so that those resources can be made available to tribes as they were supposed to be.

And finally, the Justice Department, as I mentioned, I think that to the extent there are civil rights violations out there and we know that in the adoption industry for instance, there are people counseling non-Indian birth mothers to not talk to Indian fathers and their families during pregnancy if you want to place a child for adoption. And there are adoption agencies licensed by states that are playing into this. So

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there's some real civil rights violations that may be out there. And I saw my time is up so I'll just finish with two last points.

I think the Justice Department can also be helpful in making sure that ICWA is applied in appropriate juvenile justice proceedings, may provide some resources to make sure that that actually happens the way it's supposed to. And then I think over the long-term, I think there are legislative things that could be recommended addressing the Baby Veronica case through ICWA amendments. At some point, and I wouldn't say maybe right now is the time, but at the appropriate time, and that will be up to the tribes as to when they think that might be, but secondly, if Title 4E implementation needs an amendment so that there's more flexibility in the system, that ought to happen.

Tribes ought to have access to programs like Title 20 with social services block grant that provides a lot of child welfare funding for states. They're not currently eligible for that. So those are all changes that could be made. And as I said I've laid that out in my testimony in more detail and I very much appreciate the opportunity to appear before you.  
[APPLAUSE]

*Anita Fineday:*

Thank you, Mr. Trope. Mr. Cross, would you plead proceed?

*Terry Cross:*

Thank you. Well first of all I'd like to thank the task force for the invitation to provide testimony. It's a great opportunity. We really appreciate your commitment to this very complex and multifaceted set of issues with regard to children exposed to violence.

My English name is Terry Cross. My Seneca name is (Hanagano? @ 14:11\_APR160236AM). It means the one who watches out over water. I'm a member of the Bear Clan of the Seneca Nation. I am a licensed clinical social worker and I'm the founder and current Executive Director of the National Indian Welfare Association, also known as NICWA.

NICWA's provided over 30 years of experience of leadership in public policy with regard to Indian children and families.

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Tribal self-determination as it has to do with child welfare and children's mental health as well as advocacy on compliance with the Indian Child Welfare Act.

The topic of this panel, Indian Child Welfare Act, keeping our children connected to our communities is at the center of my very life's work. I want to address the issues of child wellbeing. At the request of the panel we've provided in our written testimony a great deal of data and those citations associated with that. So I'll just run through a few of those here today.

So as the indicators of child and family wellbeing really must be understood in the context of the historic trauma that the last panel discussed so eloquently. In that context, there's a legacy of colonization and forced assimilation. And you heard the term "cultural genocide" used. Native children fare far worse than their non-native counterparts in prenatal care, infant mortality, type 2 diabetes, special academic needs, mental health, substance abuse, and teen pregnancy.

Native children are more likely to be raised in a two-parent family but less likely than their non-native counterparts. Native families are more likely to be raised in grandparent families. Native families are more likely to live below the poverty line, to have an unemployed parent, to rely on TANF, food stamps and WIC than their non-native counterparts.

American Indian and Alaska native world view is also based on notions of harmony and balance. And so the negative statistics only tell half of the story. And I want to make sure that we talk about the strengths of American Indian families as well.

The research has become much more clear over the last several years. There's a number of cultural and family strengths that are associated with positive outcomes. Strong values of interdependence, collaboration and cooperation amongst extended family and kinship networks. Emotional and social supports through extended family and kinship

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ties. Community strengths through traditional customs. Pride in identity and culture. Resilience against hardship and oppression. It's a testament that we're still here after 500 years given what's, the attempts of annihilating our people.

Traditional healing and parenting practices persist. Talents in art and music and dance as well as service to community and military duty. All of these strengths help support our families. And the data now shows us clearly that the stronger these things are, the less delinquency, the less child maltreatment, the lower the incidents rates of substance misuse and suicide.

The Indian Child Welfare Act is designed to protect families from state systems that are all too likely to misinterpret our culture and find our very strengths to be deficits.

Native children in their own homes receive the care, nurturance that they need when those cultural factors are in fact. The Act also empowers tribes to run their own child welfare programs and that's an important part of reducing the number of children exposed to violence. When tribes can provide their own family support, their own family service and preservation programs the more likely the children can remain home.

NICWA plays a key role in responding to native children's exposure to violence in the home. It provides critical legal protections for native children. The most significant protections keep Indian children safely in their own homes and keep in mind that 75 percent of the referrals are child neglect and not abuse, not related violence in the home, but they're related to structural issues of poverty and unemployment and untreated mental health issues.

It is essential to remember that because of the historic treatment of native peoples, that the removal of a native child from their home unnecessarily is an additional form of violence, a form of trauma that far too many native children still face today. ICWA seeks to ensure that only when

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necessary for their safety that our children are exposed to this additional layer of trauma.

Where ICWA is followed, child welfare goals are met. Most child welfare professionals will agree and tell you that ICWA is just plain good practice. So the initial impact of ICWA was to reduce out of home placements and increase the involvement of tribes. But more recently the growing non-compliance with the Act, we're seeing an escalation and a number of children placed once again. Non-compliance is important due to a lack of oversight. There's inadequate education, training and requirements of ICWA. And there's even evidence as Jack indicated, that some practitioners are knowingly violating the law; training each other in fact, how to get around the Indian Child Welfare Act.

The effects of non-compliance are devastating to our children. Nationally our children are overrepresented in foster care two times more often on a national basis, but state by state, that looks much worse. Minnesota, 12 times overrepresentation. Washington State, five times. Alaska, three times. Due to non-compliance with ICWA children are exposed to disrupted placements. When people ignore the law, children are put at risk. Non-compliance causes these problems, not the act itself.

Non-compliance leads to disconnection with a positive culture identity; something that is shown in research to be one of the few protective factors known to help children who are exposed to violence. And let me repeat that. One of the top protective factors for our children is stripped away when children are unnecessarily placed outside of their homes, particularly in non-compliant homes. Native children experience psychological distress and trauma well into their adulthoods as we have heard at our conference from adult adoptees just in the last few days.

We have several recommendations to improve ICWA. I'll just name a few of those (inaudible @ 22:21\_APR160236AM) in our written testimony. Training and technical assistance are desperately needed. We need

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to improve the availability and quality of available training for state workers. ACF should contract with ICWA experts to perform a thorough review of ICWA compliance. There are a number of states that have state legislation that has really improved ICWA compliance.

Federal departments need ICWA experts to be able to have knowledge of the implementation of ICWA within key divisions of the Department of Justice and HHS and Department of Interior. In collection of data we need much better data collection sources. We need to revise things like the AFCARS, the Adoption Foster Care Analysis and Reporting System to include ICWA data, as well as tribal data in the (NCANS? @ 23:20\_APR160236AM) system.

We recommend that HHS provide tribes with greater opportunity to participate in the CFR process. The current process we sometimes refer to as consultation by stealth. We were surprised last year to learn that representatives of the Idaho Department of Health and Human Services attended an ICWA training and submitted it in their state plan as their consultation with tribes. We were sure surprised at that.

We recommend changes in federal policy to help provide states with knowledge of ICWA and we are asking the Department of Justice to conduct an ICWA compliance investigation, particularly into civil rights and to those what we believe are fraudulent adoption practices. Thank you very much. [APPLAUSE]

*Anita Fineday:*

Thank you, Mr. Cross. Next we have Ms. Nimmo. Ms. Nimmo, would you please proceed?

*Chrissi Nimmo:*

O'-si-Yo'. I want to thank the committee for inviting me today. My name is Chrissi Nimmo. I'm a citizen and assistant attorney general for Cherokee Nation and I was lead counsel for Cherokee Nation in the case of Adoptive Couple v Baby Girl which most of you will know as the Baby Veronica case.

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My written testimony tells this committee why we need a narrow interpretation of the Supreme Court decision in *Adoptive Couple v Baby Girl* and provides by example the negative impact that we're already seeing. The Montana Supreme Court recently issued an opinion that applied the holding in *Adoptive Couple v Baby Girl* which was a private adoption case to a state-initiated deprive proceeding. It is well beyond what the court intended the decision to be, but we're already seeing that negative impact. We've also provided recommendations that we believe the executive branch of the US government can help strengthen compliance with the Indian Child Welfare Act.

What I plan to talk about today is to tell you a story. We heard from Chairwoman Vizenor, and Terry and Jack what the historic removal of Indian children look like. I'm going to tell you what the modern day forced removal of an Indian child from her family and her community looks like.

One definition of violence is intense, turbulent, or furious and often destructive act or force. What happened to Veronica Brown September 23rd of last year was violent. It started on September 20th after four years of litigation. Cherokee Nation and Dusten Brown, at about 5:00 on a Friday afternoon, signed what we believe to be a final agreement after a week-long mediation that would've given custody of Veronica to the adoptive couple and allowed for continued and substantial visitation with her father and her tribe.

We signed the document and left and thought that we had concluded an extremely difficult case. We got a call from the judge about an hour later that the adoptive couple refused to sign the agreement and we were ordered to return Monday morning.

That Saturday, at Cherokee Nation, in the presence of about 50 family and friends we celebrated the fourth birthday of Veronica Brown complete with a bounce house castle and cupcakes. We returned to the courthouse on Monday morning and we were formally dismissed from remediation.

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That afternoon we received word that a state court had provided a pick-up order that by any means or force necessary to return Veronica Brown to the custody of the adoptive couple, Matt and Melanie Capobianco. The Brown family had been staying on Cherokee Nation trust land in a guest house and our team quickly descended on the Jack Brown house. The Brown family was there, Veronica was there. Dusten's attorney, myself, the attorney general of the Cherokee Nation, various elected officials of the Cherokee Nation came and went. The Cherokee Nation marshal service. I sat on the floor and played a game of match with Veronica who was unaware of what was happening around her.

After several hours of talking and praying and crying, Dusten decided that he would comply with the state court order to turn Veronica over to the Capobianco's. We asked for two hours to allow the family to say good-bye to her and pack her belongings. The answer from the attorney for the adoptive couple was that we had one hour. So in one hour Veronica was told that she was going to live with the Capobianco 's. She packed two suitcases, one with clothes, one with lots of new birthday toys that she had received. And it was recommended by the adoptive couple that I be the one to physically transfer Veronica. Everyone agreed that the two families in the same room would probably not be a good idea. Veronica knew me and trusted me. So arrangements were made.

During this time, Veronica's grandfather, Tommy Brown had an episode. We believed at the time it was a heart attack. An ambulance is called. He was transported to the hospital. We thankfully later learned that the medical diagnosis was an anxiety attack, but we all know that it was a broken heart.

I went into the house and took Veronica from the arms of her father and carried her to a waiting car where we drove her half a mile down the road to deliver her to the adoptive couple. I told her that her dad loved her and that he would see her again.

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After almost two years of living with her father, her Cherokee family, in the heart of Cherokee Nation where she had attended pow-wows and stomps, where she had been given a name in a naming ceremony, where she was attending a child care facility run by Cherokee Nation and learning the Cherokee language, where she proudly showed me her Indian card, her photo citizen ID card and identified herself as a Cherokee, Veronica was being handed off to non-relative, non-Indian people simply because they wanted her.

The adoptive couple reported to the media that Veronica didn't cry that night and that is false. I saw what a broken-hearted child looks like. This four-year-old sat in my lap with her head down. Many of us who have seen four year olds who are upset and they make a lot of noise and throw their arms and feet around. Veronica simply sat still with her head bowed as tears rolled down her cheek.

What happened on that night was forced removal. It wasn't physical force but that was only because Dusten Brown chose to comply with a court order. It was legal force. And it was opposite everything that the Indian Child Welfare Act was intended to prevent. A four-year-old Cherokee child was taken away from an unquestionably fit Cherokee father from the middle of her community, surrounded by hundreds of tribal members, and placed in the home of a non-Indian, non-relative couple, again, simply because they wanted her and the law allowed that to happen.

I believe that we could've kept Veronica on Indian country that night. Maybe for a day. Maybe for a year. Who knows. But what we couldn't have done is kept her father from going to jail and having possibly very likely additional felony charges pressed against him. And he made a decision that was in the best interest of his child. He was really the only person who was concerned about what was in Veronica's best interest.

I think it's important that this committee and that the executive branch know that when we hear about children being forcibly removed from their families, that this is not just

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historical accounts. This is not the boarding schools, this is not the state and federal government-supported adoption plans. This is modern day and this is but one example of hundreds and thousands of children every year that are being taken away from their families and their tribes.

I hope this committee and ultimately the executive branch of the federal government will take the recommendations that they've heard today and strengthen the Indian Child Welfare Act. I believe that it is one of the most important tools that we have to keep Indian children with their families and keep them safe.

In the minute that I have left I would like to veer a little off topic and just echo the comments that were made earlier by President Cladoosby about the need for a federal law to be able to prosecute those who commit violence against Indian children in Indian country.

As a tribal prosecutor, I have had cases that have repeatedly been denied for prosecution by the US attorney's office where a non-Indian has committed an act of violence against an Indian child. The only person, the only entity who could prosecute that person is a federal government. The tribes can't prosecute them because they're non-Indian, the states can't prosecute them because the event takes place on tribal land. The only authority that can prosecute is the United States Attorney's Office and they have the discretion to simply deny prosecution. We need a law, similar to VAWA that allows us to prosecute those who harm Indian children on Indian country. Wado. [APPLAUSE]

*Anita Fineday:*

Thank you, Ms. Nimmo. Ms. Smith, you're next, if you would please proceed.

*Shannon Smith:*

Thank you. My name is Shannon Smith and I'm the director of the ICWA Law Center located in Minneapolis, Minnesota. We provide direct legal representation to Indian families who are impacted by the Indian Child Welfare Act.

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I have worked at the law center for almost 15 years. And in that time we have represented thousands of families. The majority of the clients that I've represented have been moms. And we recognize that when ICWA works, ICWA works because it's premised on a fundamental understanding of the importance of the connection of a child to their family, a child to their tribe. ICWA works when tribes, when counties, when families can collaborate in regards to recognizing that that is what is in the best interest of the child.

In regards to families. When ICWA fails it is when issues such as active efforts are not followed, when there's not compliance with providing services to the family, when the placement preferences are failed to be filed.

In regards to the Indian Child Welfare Act, in thousands of cases in representing parents we see where it fails because there is not compliance with active efforts. Oftentimes we see things in cases not like the situation with Dusten Brown, but where families are struggling. Where a mom will come to me and say, "Look, I'm addicted. I am struggling with heroin," which is a huge problem in Minneapolis right now. She acknowledges it. She wants help. It doesn't mean she doesn't love her child. More than anything, she wants to be healthy, she wants to get well, and she wants that connection to her child.

The response in regards to a system that fails is a system that does not embrace active efforts but in turn becomes punitive, and punishes her for her addiction, punishes her because she is not living up to the way that the system thinks a mom should be.

Removal of that child permanently from that family, again, is violence. That child suffers immense trauma if they're removed. Sometimes there is a need for immediate removal in order for mom to get well, to get healthy, for the services to be put in place. But ICWA requires that family be looked at. And oftentimes the placement preferences are not acknowledged or not embraced.

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Oftentimes in the county or in our state, what we is we're doing it because of the need for permanency. This idea that somehow the adoption, say Family Act is saying that we have to create permanent families, not looking at the family where the child is coming from.

I was recently at a meeting among many leaders in the Minnesota area talking about what are we doing well. And the very first thing they talked about was how many kids we have moved to permanency and what those numbers looked like and that was touted as a success. We had done so many great things because all of the sudden we had these families that we had created permanently. Knowing and representing these families I know how many of these kids come home. And it's very simple now for them to do it in the sense of they have Facebook. I'll ask my clients, "How did they find you again?" And it's things like Facebook. It's like connections with family. Somehow they are going to figure out a way where their mom is. And we see it all the time.

In regards to permanency, there's such a push in regards to so many of the county systems to look at what permanency means. And permanency is equated as something good without looking at anything beyond what it really means.

So for example, in Minnesota, statistics, they look at it and they say, "Hey, we've accomplished something because we've terminated parental rights. That's a good thing." Instead of saying, "Hey, that's a horrible failure in regards to what that impact is going to have on that child, what that impact is going to have on that family."

I've often asked courts to look at would we look at a case differently if we started talking about the termination of a child's rights? A child's right to their family, a child's right to their connection to their family, a child's right to their connection to their tribe versus talking about termination of a parent's right. And how if we shift that and if we talk about that, what does that really mean?

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I've also had an honor to represent children. And I have never had a child tell me they don't want to be connected to their parent. I've had a child tell me, "You know what, I don't know that it's safe for me to go home right now, I want to go to Grandma." Or "I don't know if it's safe for me to go right now, I want to go with my auntie." But never have I had a child tell me I want nothing to do with my family. They know where they come from. They want to be a part of that family.

So while our system has come to a point where we often recognize violence, oftentimes we fail to provide a meaningful response. We understand that through research, through literature, that things like trauma-based therapy is a positive. Yet in Minneapolis, the services are minimal. We understand that certain chemical dependency programs have a very high success rate in regards to working with families. It maybe is a program where the child can be part of the treatment. Maybe it's a program where a baby can continue to be with their mom. Yet those services are incredibly limited.

We understand that housing is an important component of families being together, yet housing is often limited, it's expensive and simply not available for clients who come in.

We recognize that while a lot of different services, a lot of different things can be put in place in order to strengthen a family, that if those don't exist, we start to look at removal. We start to look at permanency. And at that point, if the county offers a case plan to a family, oftentimes there's an incentive. Instead of really looking and instead of really trying to heal, instead of understanding for a family come from, to simply check off a list in order to show case plan compliance simply as a function of time.

The Adoption and Safe Family Act often awards being quick in regards to making decisions and not understanding the complexities, not understanding really what is best in regards to a family. If you have a mom that is hurting, you have a child who is hurting. And in order to address and to make sure that services are provided to the family, the entire

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family has to have an opportunity to take advantage, to have services offered to them.

I also recognize that while we know a lot of things that can really be important in a child's life, that oftentimes we assume certain things are good. So for example, in Minnesota and throughout the nation, we're required to send children to school. And it makes sense. Education is touted as a good thing. Sometimes though we need to listen, actually always we need to listen, in regards to what the family's saying.

So for example, I recently had a situation where mom was subject to a child petition because she wasn't sending her child to school. And everyone's saying, "Send the child to school. Send the child to school." Started talking to that mom, what was going on at school? The child was being bullied. Extremely, to the extent that the child was curled up in the fetal position at night begging his mom not to send him to school. The reaction of the court was he has to be in school.

We need to look beyond what is going on in education and education itself is not enough. It needs to be education that is meaningful. Education where a child is safe. Education that embraces who the child is.

In regards to services. Offering and punishing a mom for her use of chemicals is not the answer. It's embracing that mom and making sure that she has an opportunity to heal from whatever is causing her to be where she's at and embracing her as a mom and acknowledging that permanently depriving her of her right, permanently taking a child's right away to be a part of her life is not the answer.

In regards to what ICWA does, ICWA says that we have to provide active efforts. ICWA says that we have to follow placement preferences. And my recommendation would be that we enforcement behind those pieces. That we have enforcement in regards to when placement preferences are not followed, that there is a consequence.

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I certainly support all the recommendations of everyone on this panel. I thank you for your time. And I'm very humbled for the opportunity to share with you today. [APPLAUSE]

*Anita Fineday:* Thank you. I want to thank the panelists for your testimony today. And at this time I would like to turn this back over to the advisory committee for questions for the panelists. Mr. Broderick?

*Eric Broderick:* I'm going turn my time to President Keel.

*Anita Fineday:* President Keel?

*Jefferson Keel:* Thank you. I have a question for Chrissi. And I want to thank you for your work on the Baby Veronica case. But there's something, there are two things that you mentioned in your comments. One had to do with the declination rates of US attorneys and what you mentioned was they have the, I guess the discretion to either decline or prosecute cases within Indian country.

And you know, my understanding is that the US attorneys, they do have a tremendous caseload. But if we're going to follow the letter of the law, ICWA is a federal law. And if we're going to follow the law then obviously, you know, it went all the way through the system to the Supreme Court. And so my question then becomes—I've heard the statement about the system failed, the baby was returned to a non-Indian parent. But ICWA was not damaged. And somehow that just doesn't ring true to me because if the law was followed, if ICWA was truly followed, then we would not have had that outcome. So can you comment on how ICWA still is valid in light of that?

*Chrissi Nimmo:* Sure. I also don't agree. I agree with you that ICWA was damaged. It wasn't completely disassembled but it was damaged. The court said that if a parent never had custody of the child and the child was removed, then that parent is not protected by the active effort provisions, that we heard Shannon talk about, or the heightened burden of proof which

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is required to terminate parental rights in an ICWA case. The Supreme Court also said that for the placement preferences to apply in ICWA the law states that if a child is not with a parent, they should be with a member of the family, a member of the child's tribe, or a member of some other tribe.

And the Supreme Court said in order for those placement preferences to apply, someone in that preferred order has to formerly position for placement. And that was a new rule. No state court, no other federal court had ever given that opinion.

And I personally think that the decision on placement preferences by the United States Supreme Court is the most damaging part of the opinion. And there are recommendations from the people on this panel to what can be done to make sure that those placement preferences are followed even after the opinion of the United States Supreme Court.

*Jefferson Keel:*

Just one quick follow up. I'll try not to use all the time of the panel. But in doing that, does that require legislation? In order to re-strengthen or strengthen ICWA, do we require legislation? We go back to Congress to amend ICWA?

*Chrissi Nimmo:*

I think at some point we may want to approach that. I believe that maybe Jack and Terry both commented that this may not be the appropriate time to do so. We know that as much as we want to strengthen ICWA, there are folks out there who want to weaken ICWA. And if it's opened for change, we may not prevail in the changes that we want and we could wind up hurting it more than helping. So in the meantime I think there are non-legislative ways to strengthen the enforcement of ICWA without actually changing the law. I think we're going to have to see a big swing in Washington before we feel like it's a safe place to open up amendments to the Indian Child Welfare Act.

*Anita Fineday:*

Yes, Mr. Broderick?

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*Eric Broderick:*

This is a question for anyone, actually. We heard earlier in the week sort of repeated and numerous references to non-compliance. Are there any data—and you talked about the need for data—I don't know if there are existing data that have looked at state compliance heretofore and would allow the folks who I think, Jim talked about, who had responsibility in the federal sector for enforcement to look to to focus on states to help them comply more fully with ICWA?

*Terry Cross:*

In about 2005 there was a GAO study on ICWA compliance. They found that the most difficult problem was with identification of the American Indian and Alaska native children so that if you don't upfront determine that a child is Indian and then not apply the Act, you end up down the road with problems. But they found general non-compliance with the Act. And so there is some data though that's not very good.

I think one of the things that I would point out however, is that there is no mechanism for enforcement under the act. The act was passed without any oversight, without any compliance requirements, nobody loses their funding. There's no threats if it's not followed. And the only measure of compliance comes down the road with the case that's disputed and it ends up the child and the family are the one whose pay the price.

And you know, ICWA is one of the few places in federal law today that actually deals with prevention or protection of our children from exposure to violence. And it seems that the failure to enforce it, the failure to fund it and the failure to deal with willful violators and hold them accountable amounts to government being complicit in violence towards children. So I really think that it is extremely important that those compliance provisions be changed.

*Jack Trope:*

If I could just add a little bit to that too. There isn't at much data as there should be. And you know, you have lot of data that's collected routinely through the systems that HHS requires state child welfare systems to use, and yet not a lot

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of data collected concerning the elements of the Indian Child Welfare Act that are specific to Indian children and that protect them. And so I think one of the things this panel can recommend is that they collect that kind of data. You know, are tribes be notified, are children being placed with their families with other tribal families? I mean these are indicators of wellbeing for that child that are just not being tracked the way they should be and that ought to really be included in the system.

*Anita Fineday:*

Thank you. We have a question from Ms. Davidson.

*Valerie Davidson:*

So thank you. Terry you mentioned that there was—I'll call it a shameful state, I sure it won't be named—who didn't quite meet up to the consultation requirements. And we had a similar situation in another realm with the Centers for Medicare and Medicaid services.

Under the Affordable Care Act and under laws, there's a requirement for states to consult with tribes before CMS will approve their state plan amendments. And one of the challenges we've had is that they've been encouraged to do a consultation before and we heard a couple of things from states. One was "we don't know how. It's too hard," to which my response was, "Even when my children were in first grade and third grade, if they said they can't do their homework because it's just too hard, wasn't an adequate reason for not getting it done. They just had to work a little bit harder to meet the requirement." So the same holds true for states.

The other was for us saying that it needed happen was helpful, but to a limited degree. But the first time that CMS advised a state, that it was about to decline their state plan and provided them with an opportunity to withdraw that state plan so that they could do that adequate consultation, things changed dramatically, not just for that state, but for tribes everywhere, for states everywhere who were challenged with providing adequate consultation with tribes. And so I guess I'm wondering in that realm, what are the opportunities that the federal government has for taking that kind of a

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stand when states demonstrate their inadequate tribal consultation opportunities?

*Terry Cross:*

Well I think you've hit on two of them. One is that it would be very beneficial for the federal government to lay out criteria as to what meaningful consultation means. It's not a call to the receptionist at the tribal office asking questions about child welfare. And the other thing is to use the opportunities they do have—and Jack mentioned in his testimony the requirements under 4B that states have to file a plan similar to Medicare and Medicaid. And if state resources were threatened, so it would make a huge difference in the way that states were complying are ICWA. So ACF currently has a great deal of authority to make this better, they're just not using it.

*Valerie Davidson:*

So just one follow-up is in our conversations with CMS, we have encouraged them to make small edits either in policy or in legislation that they're proposing. So anywhere that says, "and states may," add a comma, and add "tribes, tribal organizations," so that money doesn't have to go through states, it can come directly to tribes because we all know that having a pass-through is not the most efficient way to be able to get resources where they're needed.

The other comment or suggestion I might provide is that whenever we have a new grant program or a new requirement that happens, there's all this emphasis on resources made available for technical assistance grants. So how can you hire consultants, how can you do all of these things to satisfy the technical assistance requirements?

And I guess one of the things we should all ask ourselves in the first place is: Why are these becoming so much more increasingly complicated that that kind of technical assistance is required? Because if the resources are going to provide that technical assistance, that means those are resources that are not going to families, that are not going to communities and that are not going to tribes. And so I would just challenge all of us to look at what truly are the

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requirements and are those really necessary? Or can those resources be made more available to tribes. And I guess I would be curious if you could think of opportunities where there might be more resources that could go to tribes that are currently going to technical assistance?

*Terry Cross:*

Well I think this is an issue in many different locations but there's a balance between technical assistance and what's available. And I think it has more to do with what's the quality of the technical assistance. And I think for example, tribal access to Title 4E of the Social Security Act that we gained access to just in 2009, the quality of the technical assistance to date from the federal government has been pretty dismal.

And even though \$3 million a year was appropriated under the statute, that those technical assistance dollars were fractured by the children's bureau and given to nine different resource centers and creating a tribal center that then was told in its first year it couldn't even provide technical assistance at all. Technical assistance had to go through others. In our minds, it was an intentional derailing of tribes being able to get access to that money because we believe that people at ACF did not believe that tribes should've gotten access and so they simply weren't going to make it very easy for tribes to get the dollars.

*Anita Fineday:*

I think, Kathy, where are we with time? Okay, we're out of time. Dee?

*Dee Bigfoot:*

I have a question. Maybe not necessarily a question as much as a comment. And of course this probably should be directed to tribal leaders but I think that if we could have a better understanding of how this has, in terms of the implications, and what it means when our children are displaced in another setting, one of the big concerns I have is the tribal decisions in which families are disenrolled. And what means for our tribal unity and recognizing that not everything is perfect in tribal communities. I mean we could look at our national government and see that things don't go well.

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But I think that when we think about a child being taken out of a home, and that we heard the comment that a child should be able to connected to their family, should be connected to their tribe, should be connected to their communities, that we also see where families are being disenrolled, and what that means for tribal identity, what that means for tribal populations, what that means for lack of services and what it means for being able to not have lateral violence within our communities. And this is what we're talking about is lateral violence.

So as we think about programs, and I realize that you're strictly addressing—well you're not strictly—but you're bringing to our attention much of the non-compliance with ICWA. But the purpose of that was to be more united in protecting our children, but yet we have many, many, many tribes, based on various decisions that they make that are not allowing or are disenrolling whole families or whole clans or whole bands. So how do we look at this presence of lateral violence and help to address and help to bring that same kind of unity that we have with all of the different entities that supported the Cherokee tribe and Dusten Brown and his effort to retain his biological daughter, how do we do this so that our children aren't disenrolled?

*Chrissi Nimmo:* I will agree with you that that's a question for tribal leaders. [LAUGHS] We're ICWA practitioners.

*Dee Bigfoot:* But I think that we have to say what are the implications for that.

*Chrissi Nimmo:* I agree. And the one thing that is important that I can comment as far as ICWA, if a parent is disenrolled, if a family is disenrolled. So the parents' disenrolled and because they're disenrolled the child's not eligible for membership, it takes that child out of ICWA protections as well. So if that child is taken into custody by state courts or if there's an adoption proceeding, because the tribe has disenrolled that family, that child may not be entitled to the protections of ICWA. So even though they may not be

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formal members of the tribe, the tribes may still want to protect those children, but they lose that ability if they take away their membership. So I think as far as ICWA is concerned, there is a direct impact on whether or not tribes can protect those children if they are disenrolled.

*Dee Bigfoot:*

I guess it seems so contradictory that we made this huge effort nationwide to be able to retain our children, but yet this is another way that we're throwing them away.

*Anita Fineday:*

Please join me in thanking the panelists for their comments. [APPLAUSE] At this time we will take a 15 minute break and we'll reconvene at about ten minutes after four.

[END PANEL #2]