Let us put our minds together and see what kind of life we can build for our children.
—Sitting Bull, Hunkpapa Sioux

In 1978 the U.S. Congress heeded the call of the great Lakota leader Sitting Bull by passing the Indian Child Welfare Act of 1978, Public Law No. 95-608, 92 Stat. 3069 (Nov. 8, 1978), commonly known as the ICWA (text set out in Appendix A of this handbook). Codified at 25 U.S.C. §§ 1901-1963, the law has had a substantial impact on the practices and procedures of state juvenile courts, state social services agencies, and private adoption agencies in this country. The law has not been universally welcomed, with some deriding it as an illegitimate usurpation of the traditional powers of state courts and agencies. An overwhelming majority of commentators, however, have praised it as requisite to eliminating the practices of state entities that had tended to remove an inordinately large number of Native American children.
from their homes without a full appreciation of traditional Native American child-rearing practices. The ICWA states its purpose as follows:

The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family programs.

Displacement of Indian Children

State Involvement

Before 1978, Congress noted that the wholesale removal of Native American children from their families and tribes by state social services agencies and courts was common. Surveys by the Association on American Indian Affairs found that in states with large Native American populations an incredible 25 to 35 percent of all Native American children were removed from their homes and placed in foster or adoptive homes at one time in their lives. In Minnesota, for example, one of every four Native American children under the age of one was adopted, usually by a non-Native American family. In South Dakota, the number of Native American children in foster care was, per capita, sixteen times greater than the rate for other children. In Washington, the adoption rate for Native American children was nineteen times greater than the rate for other children. What makes these statistics even more sobering is that in many of these states the overwhelming majority of Native Americans resided on reservations where ostensibly the
state courts and welfare agencies had no authority to order the removal of Native American children.

Federal Involvement
The displacement of Indian children was even more of a national outrage because of the federal government’s complicity in carrying out the destruction of Native American families. In 1971, 17 percent of Native American school-age children were removed from their homes to attend Bureau of Indian Affairs (BIA) boarding schools, where they were often isolated from their Native families and instructed by teachers who had very little understanding and appreciation of the children’s Native languages and traditions. In many of these boarding schools, children were punished for speaking their Native languages or practicing their religious beliefs. In others, children were sent so far away from their birth communities that contact between them and their extended families was impractical.

Grounds for Removal
Native American children were rarely removed because of physical abuse; instead, their families were routinely judged unfit by non-Native American social workers and judges because of alleged neglect or emotional mistreatment. A common ground for removal was that the natural parent had left the child with an extended relative for a prolonged period of time. To the non-Native American social worker ignorant of the traditional ways of child-rearing such behavior was unacceptable under Euro-American traditions. To Native American families, however, such methods of raising children were common because the notion of extended family included not only those in the nuclear family and blood relations, but also those related by marriage or by some other traditional bond.

Another commonly cited ground for removal was the abuse of alcohol. Although alcoholism was, and remains, a problem among Native American families, studies demonstrated that the number
of Native American children removed from their homes because of this malady was disproportionate compared to other families afflicted by the disease.\textsuperscript{20}

\textbf{Removal without Due Process}

Compounding the removal problem, in many states Native American children were taken from their families without a modicum of due process.\textsuperscript{21} Many of the children were removed from families dependent on the federal and state governments for financial support.\textsuperscript{22} Congress documented instances of state welfare agencies pressuring Native American families into signing away custody of their children to the state under threat of the termination of welfare benefits.\textsuperscript{23} State welfare departments often controlled the everyday lives of Native American people, and endearing oneself to non-Native American social workers was critical to financial survival.\textsuperscript{24}

The process provided in state courts was no more beneficial than the practices of state social services agencies.\textsuperscript{25} In most states, parents were provided with neither counsel nor interpreters, even if they spoke only their Native tongues; instead, parents relied on the same social workers who were seeking to displace the children.\textsuperscript{26} Non-Native American social workers, ignorant of the ways and traditions of the very people they worked with, were the “experts” who advised the courts that the abject poverty many Native American families struggled to confront prevented the families from properly parenting their children.\textsuperscript{27} Courts rarely received the expert testimony of Native people who could familiarize state judges with traditional child-rearing practices.\textsuperscript{28} The result was often the judicial countenance of abusive practices of state welfare agencies.\textsuperscript{29} As stated at 25 U.S.C. § 1901(5), Congress specifically found 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.”\textsuperscript{30}
Placement of Indian Children Away from Their Families and Communities and Outside of Their Cultures

In addition to the flawed process by which Native American children were dislodged from their homes, the fate of the children after removal gave Congress pause. In 1969 a survey of sixteen states revealed that approximately 85 percent of Native American children in foster homes were living in non-Native homes. Some 90 percent of nonrelative adoptions of Native children involved non-Native Americans adopting Native children. This led to the alienation of many Native American children from their unique cultural values and mores, a trend that would have continued unabated without intervention by Congress. Psychological and sociological studies have suggested that Native American children brought up in non-Native homes often suffer from a variety of adjustment disorders once they discover their unique ancestral and cultural identity. These children have a foothold in the dominant society’s world, but eventually long to discover their indigenous roots. This longing can result in maladaptive behavior by them, contributing little to either the dominant society or the Native traditions.

Federal Policy behind ICWA

By 1978, preserving the unique nature of Native traditions and values was more important to Congress than promoting the assimilation of Native people into the dominant Euro-American culture. Although this Congressional objective has been subject to unpredictable shifts since the turn of the century, an understanding of it as a motivation behind the ICWA is key to understanding certain provisions of the Act. Congress clearly felt that maintaining Native American children in homes that reflect the children’s unique Native cultures and values would be in their “best interest.”
During the same period the ICWA was enacted, the federal government was promoting Native American self-determination through a series of legislative enactments, including the ICWA. At one of the hearings that led to the enactment of the ICWA, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen’s Association, spoke of the destructive effect of the “massive removal of their children” on tribal survival and tribal sovereignty.

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Although concerns about involuntary removals by state agencies were a major impetus for the ICWA, it is clear that “voluntary” adoptions of Indian children were likewise of concern to Congress based upon the evidence it considered. Congress recognized that children could be lost through this mechanism, and that there was a great demand for Indian children for adoption and evidence that adoption agencies only rarely utilized Indian families for placement.

Overview of Provisions of the ICWA
There are both procedural and substantive provisions of the ICWA. Both are designed to accomplish three primary objectives: (1) to eliminate the need to remove Indian children from their families, both nuclear and extended, particularly when based upon cultural bias and ignorance, and to provide services to keep them together
whenever possible; (2) to assure that Indian children that need to be removed for their own protection be placed with their extended families, or alternatively in foster and adoptive homes that reflect their unique cultures and backgrounds; and (3) to encourage tribal court adjudication of child custody proceedings involving Indian children.43

The ICWA applies to state court “child custody proceedings” involving “Indian children.”44 A child custody proceeding under the ICWA is defined as a foster care placement, termination of parental rights proceeding, preadoptive placement or adoptive placement of an Indian child.45 The ICWA does not apply to custody disputes between parents if custody is to be awarded to one of the parents, either as part of a divorce or nondivorce proceeding, nor does it apply to delinquency proceedings involving Indian children who commit acts that would be criminal if committed by an adult.46 It is important to note that the child custody proceeding need not involve some state action, such as the removal of an Indian child by a state or county child protection entity, in order for the ICWA to apply.47 The ICWA applies to private placements and adoptions as well as those initiated by state and county agencies.48

An “Indian child” is defined under the federal law as an unmarried child under eighteen who is a member of a federally-recognized Indian tribe or eligible for membership in a federally-recognized tribe and the biological child of a member of an Indian tribe.49 The ICWA recognizes the inherent sovereign right of Indian tribes to determine their own membership and a state court must defer to a tribal determination of membership.50 In any child custody proceeding in state court where a party believes or has reason to know that the child involved is an Indian child, there is an affirmative obligation on the part of all parties, and their attorneys, to report such to the Court so that notice may be given to the Indian child’s tribe.51 A few states have carved out an exception to application of the Act to certain Indian children, commonly referred to
as the Existing Indian Family Exception, and held that the Act’s purposes to prevent the breakup of Indian families are not met by applying the Act to an otherwise qualified Indian child who has not lived with an Indian family or with an Indian family with few or no ties to an Indian tribe. The language of the Act does not support such an exception; however, US Supreme Court cases have at least implicitly rejected such a limitation, and the ICWA regulations reject this interpretation of the ICWA. Most states rejected this limitation even before the regulations were issued, and in other instances state legislatures have taken action to repeal the judicially-created exception.

The procedural requirements of the ICWA are contained generally at 25 U.S.C. §§ 1911 and 1912. Section 1911 distinguishes between the jurisdiction of state and tribal courts in child custody proceedings involving Indian children. The exclusive jurisdiction of Indian tribal courts over child custody proceedings involving Indian children resident or domiciled on Indian reservations is recognized, as is exclusive jurisdiction over children who are wards of tribal courts. This rule applies in all states, except to the extent that Public Law 280 (P.L. 83-280) has been interpreted to provide states with concurrent jurisdiction along with tribal courts over child custody proceedings involving Indian children resident or domiciled on an Indian reservation. For Indian children domiciled off reservations, state courts can exercise jurisdiction over child custody proceedings, but the exercise of that jurisdiction is subject to a transfer of jurisdiction to the tribal court of the Indian child’s tribe. In general, the ICWA favors a transfer of jurisdiction of a child custody proceeding involving an Indian child to a tribal court unless certain findings are made by the state court judge. The parent of an Indian child can always veto a transfer to a tribal court and the tribal court can decline a transfer of jurisdiction to its court. Although tribal jurisdiction is preferred, however, it is not unusual for an Indian tribe to not transfer jurisdiction over
the majority of child custody proceedings involving its children, often because the tribe lacks the resources to provide for its children that state and county agencies can access.\textsuperscript{62}

Notice is a vital component of the ICWA. The Act requires any party to an involuntary child custody proceeding involving an Indian child to give notice to the child’s parents, Indian custodian (if one exists), and to the Indian child’s tribe of the commencement of the proceeding.\textsuperscript{63} Notice is triggered when a court or agency has reason to know that a child is an Indian child and any tribe with possible affiliation must be given notice.\textsuperscript{64} Some courts have ruled that the failure to give notice under the Act deprives the state court of jurisdiction, although others have developed a practice of remanding the proceedings solely to determine whether notice would result in a finding that the child/children involved are Indian, and disposing of the appeal if that remand does not change the result.\textsuperscript{65} In many cases, more than one tribe must be given notice because of differing or uncertain tribal affiliations among the parents.\textsuperscript{66} If a party cannot determine with which tribe the child is affiliated, notice may be given to the BIA, which is then charged with the responsibility to help identify relevant tribes.\textsuperscript{67}

Other procedural requirements of the ICWA govern the weight of the evidence and type of evidence necessary to sustain an involuntary foster care placement or involuntary termination of parental rights.\textsuperscript{68} In order to achieve an involuntary placement of an Indian child outside of his or her home, the party seeking removal must establish by clear and convincing evidence, supported by the testimony of a qualified expert witness, that the child would suffer severe emotional or physical harm if left in the child’s home.\textsuperscript{69} The moving party must also establish that active remedial and rehabilitative services were offered to the family in an attempt to avoid removal.\textsuperscript{70} To sustain a termination of parental rights, the Court must find beyond a reasonable doubt that these requirements are shown.\textsuperscript{71} The requirement that a qualified expert witness’
testimony support removal or termination is an attempt by Congress to assure that a person with specific knowledge of Indian child-rearing practices testifies to the cultural propriety of removal or termination.\textsuperscript{72} The need to demonstrate that active remedial and rehabilitative services are provided to Indian families is similar to the reasonable efforts requirement found elsewhere in federal law,\textsuperscript{73} although most courts have concluded that the active efforts requirement places a stronger obligation upon agencies than the reasonable efforts requirement,\textsuperscript{74} the recently adopted regulations include requirements that appear to exceed the reasonable efforts requirement,\textsuperscript{75} and, unlike the reasonable efforts requirement in general federal child welfare law, the ICWA does not include an aggravated circumstances exception.\textsuperscript{76}

Indian parents and custodians are also entitled to the appointment of counsel in ICWA cases.\textsuperscript{77} If a state would otherwise not appoint counsel in a particular matter, but does because of the mandate of the ICWA, that state can apply to the BIA for reimbursement for the expenses of court-appointed counsel.\textsuperscript{78}

The ICWA recognizes that Indian tribes have unique rights that must be preserved in litigation regarding the placement of their children.\textsuperscript{79} To protect these rights, the Act explicitly gives an Indian tribe the right to intervene at any stage of a foster care or termination of parental proceeding and also vests in the tribe the right to request a transfer of the proceeding to a tribal court.\textsuperscript{80} Tribes are also given additional time to prepare for litigation after notice is provided and they also have a fairly unlimited right of discovery in ICWA cases.\textsuperscript{81} Lastly, Indian tribes are given an independent right to discover the placement location of their tribal members and are also given the right to collaterally challenge actions taken by state courts and entities in violation of the ICWA.\textsuperscript{82}

The most important substantive provisions of the ICWA are the placement preference provisions contained at 25 U.S.C. § 1915. These provisions are designed to assure that Indian children who
are removed from their homes are placed with their relatives and, if that is not possible, then they should be placed in homes that reflect their unique cultures.83 There are separate placement preference provisions governing foster care and adoptive placement preferences.84 Both recognize that Indian tribes should have the right to alter the placement preferences by enacting their own preferences for placement of their children.85 Absent that, state courts are directed in the case of foster care to place Indian children first with their extended families (which in the case of a child of both Indian and non-Indian parents would include the non-Indian family members), second with a home licensed by the tribe, third with an Indian foster home approved by a nontribal agency, and fourth with a tribally operated or approved facility.86 In the case of adoption, the first placement preference is again extended family, followed by members of the child’s tribe and other Indian families.87 Only when good cause is present should a child be placed outside of the preferences.88 Despite this mandate of the ICWA, many Indian children continue to be placed predominately with non-Indian foster and adoptive families, partially due to the failure of some states to recruit sufficient Indian foster and adoptive families.89

Post-ICWA Legislative and Regulatory Developments

Congressional Activity
Although Congress has never seen fit to amend the language of the ICWA since its passage in 1978, there have been unsuccessful efforts to amend the ICWA. In 1988, Senator Dan Evans (D-WA) introduced a bill that would have addressed some of the court decisions that interpreted the ICWA in a manner that supporters of the ICWA believed were contrary to the legislative intent.90 In 1995, Rep. Deborah Pryce (R-OH), in response to a California case involving an Ohio couple seeking to adopt Indian twins,91
sought to amend the ICWA to exclude any Indian child, member or not, whose parents did not have sufficient political, cultural, or economic ties to the tribe. The bill passed the House of Representatives after a contentious battle on the House floor, which then gave rise to an alternative consensus bill developed by tribal leaders and adoption attorneys that was sponsored by Senator John McCain (R-AZ). That bill would have, inter alia, amended the Act to impose deadlines for tribes to intervene and object to voluntary adoption proceedings, while at the same time vesting tribes with the explicit right to notice in voluntary proceedings. The McCain bill passed the Senate and neither bill was ultimately enacted. For a number of years thereafter, the last time in 2003, bills similar to the McCain bill were introduced, the most recent iterations by Rep. Don Young (R-AK). None of those bills moved out of committee.

The only legislative enactment specifically mentioning the ICWA since 1994 (excluding appropriations bills that have included ICWA grants authorized by Title II of the ICWA) was enacted by Congress in 1994. Title IV-B of the Social Security Act, which provides child welfare funding to states and tribes, was amended to require state Title IV-B plans “to contain a description, developed after consultation with tribal organizations (as defined in section 5304 of title 25) in the State, of the specific measures taken by the State to comply with the ICWA [25 U.S.C. 1901 et seq.]”.

The last significant Congressional action took place in 2005, when, after conducting a two-year study at the request of House Majority Leader Tom Delay of Texas, the US Government Accountability Office (GAO) issued a report concerning the implementation of the ICWA in the states. The GAO Report examined: (1) the factors that influence placement decisions for Indian children, (2) the extent to which delays, if any, have occurred in the foster or adoptive placement of children subject to the ICWA due to issues related to the implementation of the ICWA and how any such delays have
affected children’s experiences in care, and (3) the federal government’s role in overseeing implementation of ICWA by the states. The GAO surveyed child welfare officials in all fifty states and the District of Columbia regarding their implementation of the ICWA and their views on the ICWA’s provisions. The GAO found that data collected from four states that could identify children subject to the ICWA showed “no consistent differences when comparing the length of time they spent in foster care compared to Caucasian or other minority children who exited foster care.” It also found, inter alia, that information received by the Administration for Children and Families (ACF) from its Child and Family Services Reviews (CFSRs) supplied insufficient and sporadic information on ICWA implementation efforts within the states. In ten out of fifty-one child and family service review reports, mostly from states without significant populations of Native Americans, there was no discussion of ICWA implementation within the state. Further, the GAO found that many state welfare agencies expressed concerns that its agents did not have adequate training or guidance in implementing the ICWA’s provisions. In its final significant finding, thirty-two states had concerns with regard to ICWA implementation within their states. The report recommended, first, that the Secretary of the US Department of Health and Human Services (HHS) direct the ACF to review ICWA implementation information from its CFSRs and require states to incorporate improvements on ICWA implementation in their program improvement plans, and second, that ACF use the information on ICWA implementation to “target guidance and assistance to states in addressing any identified issues.”

**Executive Branch Activity**

Shortly after enactment of the ICWA, the US Department of the Interior issued regulations pertaining to notice in involuntary proceedings, payment for appointed counsel, and ICWA grants.
It also issued guidelines in 1979 addressing how certain provisions of the Act should be interpreted and implemented. The guidelines were nonbinding and advisory.

In February 2015, the Department of the Interior issued a revised set of guidelines. Its stated purpose was to promote uniformity of the law and to address interpretative and implementation issues that had arisen during the 35 years since the original guidelines were issued. The guidelines were much more comprehensive than the 1979 guidelines. These guidelines have since been superseded by another set of guidelines issued in December 2016 that are tied to new regulations promulgated by the Department of the Interior.

Over the years, courts have often cited the guidelines to support their decisions on certain issues, but courts have also occasionally rejected the guidelines on a given issue finding that they were not binding and contrary to that court’s interpretation of the law.

In June 2016, the department took the most significant action in terms of compliance with and interpretation of the ICWA by issuing binding regulations that took effect on December 12, 2016, for any proceedings commenced after that date, including any subsequent proceedings (but not pending proceedings) in existing cases involving the custody or placement of an Indian child. The regulations are based upon the authorization in the ICWA for the Secretary to “promulgate such rules and regulations as may be necessary to carry out the provisions of the Act.”

Although questions were raised in the comments received in response to the draft regulations about the authority of the Department of the Interior to issue regulations, the department discussed in great detail the basis for its conclusion that it had the authority to issue the regulations. Under Chevron v. NRDC, a court considers two questions in considering whether to defer to and accept an agency’s regulation interpreting a statute. First, the court asks whether Congress has directly spoken to the issue before the court. If it has, that is the end of the inquiry. If the statute is silent
or ambiguous, however, then the question is whether administra-
tion of the statute was delegated to the agency and whether the
agency’s interpretation was based upon a permissible construc-
tion of the statute. In the recent case of City of Arlington, Tex. v.
FCC, the court specifically held that the principle of deference
applies even to agency determinations of its own statutory author-
ity. In short, if the agency concludes that it may act to fill in a
“regulatory gap” in the statute, the Court will defer to the agency’s
exercise of authority if it is based upon a permissible construction
of the statute.

Thus, legislative intent is critical. In that regard, it is probably
most important that the ICWA regulatory language is general in
scope. The statute provides that “the Secretary shall promulgate
such rules and regulations as may be necessary to carry out the
provisions of this Act.” The Supreme Court has frequently rec-
ognized this type of language as a broad delegation of authority.

The main authority that could be viewed to the contrary are
some lower court cases that have held that if the interpretation of
a statute is left to the courts, then an agency’s actions to imple-
ment the statute are not entitled to deference. This is similar to
the argument made by the Department of Interior in 1979 when
it decided to issue guidelines, rather than regulations. However,
the Supreme Court emphasized in Mississippi Band of Choctaw
Indians v. Holyfield that the ICWA was designed to “curtail
state authority” by establishing “minimum federal standards” in
ICWA to be applied in state child custody judicial proceedings
(25 U.S.C. § 1902). Recognizing this, the department determined
that divergent interpretations of a number of ICWA provisions by
state courts could be viewed as undermining Congress’ intent to
create consistent minimum federal standards, an express purpose
of the regulations. In addition, no court has thus far found the
general imposition of ICWA requirements upon state courts to
be unconstitutional, a fear that appeared to underlie some of the
BIA’s caution regarding whether to move forward with binding regulations in 1979.126

Under *Chevron*, if the administration of a statute is delegated to an agency, then the agency’s interpretation should be upheld if it is based upon a permissible construction of the statute and not “arbitrary, capricious, or manifestly contrary to the statute.”127 For that reason, we have incorporated the requirements of the regulations into our analysis of the ICWA.

Another significant executive branch activity involved HHS. In 2016, HHS revised the requirements for the Adoption and Foster Care Analysis and Reporting System (AFCARS), data that must be submitted by all states and tribes that operate Title IV-E, to include a number of data elements specific to the requirements of the ICWA and the new ICWA regulations, including information about whether the state had reason to know the child is Indian, the child was determined to be a member or eligible for membership in an Indian tribe, the ICWA was applied, the Indian tribe was notified, the case was transferred to tribal court, active efforts to prevent the breakup of the family took place, ICWA standards of proof for a foster care placement or termination of parental rights were applied, and the placement preferences were followed.128

“Best Interest” of Indian Children

A significant reason that the ICWA exists is because it is in the best interest of tribal children to be raised by their families and extended families, whenever possible, and to be strongly connected to their tribal communities and cultures. These principles have been recognized as the “gold standard” of child welfare practice by national child welfare organizations that should be applied to all children.129

The Department of Interior recognized these principles in the commentary to the new regulations. It noted that it “finds compelling the views of child-welfare specialists who opine that ‘the cornerstone of an effective child-welfare system is the presumption
that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely . . . Among the most important components of a sound child-welfare system is the requirement for agencies responsible for children’s well-being to be vigilant in striving to keep children in their families; to remove them only when necessary to protect them from serious harm; and to work diligently to assist families with overcoming obstacles to children’s safe return.”¹³⁰ In fact, there have been many recent studies documenting the trauma of removing children from their parents unnecessarily.¹³¹

Similarly, in terms of the preferred placement of children with relatives when a parent is unable to care for a child, the department quoted national standards and research supporting the conclusion that for all children, “[a]n appropriate relative who is willing to provide care is almost always a preferable caretaker to a nonrelative.”¹³² In fact, federal child welfare law pertaining to all children has now adopted this concept.¹³³ The department also noted that seeking placements within a child’s community is also a principle applicable to all children.¹³⁴

Thus, the principles that are central to the ICWA are not only mainstream, but broadly supported by the child welfare community and the underlying research.

Despite this recognition of the universal applicability of ICWA concepts, these policy objectives have sometimes clashed with the theory of the “best interest of the child” that has often been utilized by social workers and courts alike. The genesis for this divergent idea of best interest is most popularly derived from a work by Joseph Goldstein, Anna Freud, and Albert J. Solnit in their often-cited book Beyond the Best Interest of the Child. The theory emphasizes the importance of a child’s psychological bonding with at least one adult who is perceived by that child as his or her psychological parent.¹³⁵ The book essentially speaks of the need for a psychological parent in universal terms—not acknowledging in