United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

Honorable Teno Roncalio
House of Representatives
Washington, D.C. 20515

Dear Teno:

Throughout the course of this legislation the authors of this bill have been charged with having placed the interests of Indian tribes and the parents of Indian children above the interests of the child itself. I have always rejected this charge. The central concern of this legislation is the welfare of Indian children. Both the Senate and the House version are based on the assumption and indeed the finding that the interests of Indian children are best served by preserving their relationship with their natural family whenever possible, and when that is not possible, placing them with a family or in a setting which shares their own cultural values and heritage.

The recommendations of the Department of Justice and the Office of Managmenet and Budget falls prey to the very charge so often leveled at this legislation. The recommendations are aimed solely at the interests of the states and custodians of Indian children. Nowhere in the correspondence from Justice is the interest of the Indian child mentioned. The entire thrust of their remarks as aimed at access to state courts by non-Indian custodians of Indian children.

The recommendation that Section 102 be stricken in its entirety is simply appalling. It guts one of the three major elements of this legislation; it completely ignores the Hearing record established in the House and Senate which demonstrates continued failure of state judicial and social service agencies to provide adequate protection or services to Indian children or their parents; it baldly asserts that the Section is unconstitutional citing only a 1954 Law Review article to support its conclusion; it totally fails to address or take into account the excellent legal analysis provided in the House Committee report; and it fails to suggest an alternative approach which the overwhelming weight of evidence before the Congress shows to be serious and continuing affecting in some areas of the country more than 25% of all Indian children.

Section 102 is a composite of various Sections from S. 1214. The Constitutionality of the provisions of Section 102 was not questioned in the correspondence or testimony of Justice, Interior or the Department of Health, Education and Welfare given on S. 1214 in either the Senate or the House. It does not appear that this issue was raised by Justice until the letter of May 23, 1978, long after the Hearings on this legislation. If this issue is so glaring, why has Justice been so tardy in raising the question? And where is the research that supports their conclusion? And if imposition of procedural safeguards and evidentiary standards in Section 102 is Constitutionally suspect, what then is the status of Sections 105 providing for placement preference, 106 covering failed placements, 107 requiring access to information, 110 regarding illegal removals, 111 establishing minimum standards based alternatively on state or federal law, or 112 providing for emergency placement procedures? Each of these sections affect procedures, establish rights or provide standards to be applied in state court proceedings. And yet the Justice letter does not question these sections.

I frankly think the Justice Department's work on this question is both unjustifiably negative and slipshod. In its letter of May 23, 1978 (footnote 2, page 3) the Department stated that "As a policy matter ... the views of the States should be solicited..." before the standards in Section 102 should be enacted. This demonstrates a complete lack of familiarity with the record of this legislation. As early as October 1977, copies of S. 1214 were sent to the Governors and Attorney Generals of every state for comment. While technical issues were raised, nearly every state which replied supported the concept of S. 1214. The legislature of the State of California memorialized Congress to enact the bill. But even as late as May 23, 1978, the Department cautions the Congress that we should consult the states. Clearly they have not done their homework.

Turning to a second point, the Department of Justice suggests that a Constitutional issue "may" attach to the definition of "Indian child" as set forth in Sec. 4 (4)(b) of H.R. 12533 on the grounds that the current language might lead to a finding of racial discrimination. The language which presently appears in Sec. 4 (4)(b) requires that in addition to being eligible for membership in a Federally recognized Indian tribe, the child must also be the biological child of a member of a Federally recognized tribe. This language is considerably more stringent than that of S. 1214 which would have required only that the biological parent be eligible for membership -- not an actual member. The tightening of this definition was in response to the concern expressed by the Department of Justice in its letter of February 9, 1978, to Chairman Udall and the testimony submitted by that Department in April 1978.

The amendment to this definition now proposed by the Department of Justice appears far more likely to raise concerns about racial classification for it would deny the child his status as an Indian if for some reason he were in the custody of a person who was not a member of the tribe. Custody is not defined in the Justice proposal, and yet they would have custody determine the political status of the child as an Indian.

The concern of the Department of Justice apparently relates to the provisions of Section 101 (a) which recognizes exclusive jurisdiction of Indian tribes over Indian children residing within an Indian reservation. Nowhere else in the bill is there any provision which would "restrict access" to state courts. I do not believe amendment of the definition of Indian is a proper solution to the problem Justice perceives for this would affect application of all other provisions of the legislation. Furthermore, I reject the notion that jurisdiction of tribal courts should be premised on the custodians membership in the tribe. In my own state of South Dakota there are eight reservations occupied by different bands of Sioux. There are many close family ties between the members of the various tribes. Under the Justice proposal the tribal court at Pine Ridge or any other reservaton would be denied jurisdiction over a child residing on the reservation and eligible for membership in that tribe if the custodian of the child were a member of any other tribe. This would include aunts, uncles, grandparents, etc., who may be a member of a different tribe. If the tribal court at Pine Ridge is denied jurisdiction, whose law then applies? The child is an Indian, eligible for membership in the tribe occupying the reservation where resides, and as such he or she is exempt from the application of the laws of the State. The Justice proposal would result in a total jurisdictional void. The Justice recommendation for amendment of Sec. 4 (4)(b) is not only bad law, it is bad policy and it should be rejected.

The third recommendation of the Department of Justice is that Sec. 101(b) be amended "to permit a non-tribal member custodian of an Indian child or the child himself (if found competent by the state court), to object to transfer of the proceeding to the tribal court." As drafted Section 101(b) provides that a state court "... in the absence of good cause to the contrary, shall transfer such proceeding to the jursidiction of the tribe, absent objection by either parent, upon ..." the filing of a petition for such transfer. A statutory right to object is not given to any custodial party, whether they be members of the tribe or non-members, Indian or non-Indian. Nor is a statutory right given to the Indian child who is the subject of the

proceeding. The language does however authorize a denial of transfer if there is a showing of good cause not to. This provides latitude for the court to consider the wishes and views of the child and its custodian, but is does not provide an absolute right to bar transfer. I believe this Section is well drafted to accomplish its purpose. The Justice Department contention that this provision is of "questionable constitutionality" rests on the same foundation as its other statements and is completely unsupported.

Turning to the Technical Problems noted by Justice, their first recommendation is that references in Section 3 to the "special responsibility and legal obligations to the American Indian people" be stricken. I suggest that if there is no "special responsibility" or "special legal responsibility" to the American Indian, then there is no foundation for the statutes Congress has been enacting over the past 200 years. The concern of the Department appears to be directed at the possibility a court might find the United States financially liable in excess of the apparent intent of the bill. In testimony before the Senate on similar language in another bill (S. 2502 The Tribal-State Compact Act) the Department acknowledged that its objection to this language was given in an excess of caution. I frankly believe the language is no more than a restatement of a relationship well recognized over the years. I believe the language is harmless, but its deletion will not affect the substance of the legislation.

The second recommendation of Justice under Technical Problems is that Sec. 4 (10) be stricken from the definition. This will affect the substantive application of the Act. This language was included in S. 1214 for the specific purpose of reinstating jurisdiction of tribes over Indian child welfare matters in areas affected by recent judicial decisions holding that allotment and opening statutes enacted at the turn of the century had diminished the boundaries of an Indian reservation or had terminated its status as a reservation.

The Justice Department criticism of this language is that it could result in the establishment of tribal jurisdiction over Indian child placements "without taking into account the impact on the residents in the areas to be affected." It is my opinion that the reverse is occuring at this time. The judicial decisions are upsetting jurisdiction previously recognized to be in the tribe, and these decisions are premised not on the impact they may have on the residents of the areas affected but rather on the meaning to be accorded legislation or negotiations which occured nearly 80 years ago. The purpose of the second sentence in Section 4(10) is not to enlarge the jurisdiction of Indian tribes, but rather to preserve what has until now been recognized to lie in the tribe.

In my own state of South Dakota the language continues to have important value. As noted, two tribes, Sisseton-Wahpeton and Rosebud, have recently been adversely impacted by judicial decisions holding that reservation boundaries long recognized by the Bureau of Indian Affairs were in fact invalid. Three other tribes in my state are presently involved in similar litigation questioning boundaries also long recognized by the Bureau. The language in Sec. 4(10) was intentionally drafted in a general fashion so that it could have prospective application to protect the jurisdictional base of Indian tribes over their own people in areas which to this time have been recognized to be within the boundaries of a reservation.

In conclusion I would say that the recommendation for amendment of Sec. 4(4) and Sec. 101(b) and the deletion of Sec. 102 are extremely detrimental to this legislation and I would hope they would be rejected by the House. The recommendation to amend Sec. 4(10) will have a negative impact and I would hope that that too will be rejected. With best regards, I am

Sincerely,

James Abourezk, Chairman
Senate Select Committee
on Indian Affairs

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United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

Honorable Thomas P. O'Neill, Jr.
Speaker
House of Representative
Washington, D.C. 20515

Dear Mr. Speaker:

I am writing in response to a letter you recently received from the Department of the Interior regarding H.R. 12533 (The Indian Child Welfare Act) which is now pending floor action. The Interior letter follows by 24 hours a letter from the Justice Department to Congressman Teno Roncalio urging numerous amendments in the House bill. It is clearly a concerted effort orchestrated, in my opinion by the OMB to bring about total defeat of this legislation. I have written directly to Mr. Roncalio in response to the Justice letter.

The Department of the Interior recommends that Title II (one of four Titles in this bill) be eliminated entirely. This Title provides authorization for expenditures by BIA to support Indian tribes in their operation of family service programs, including counseling, legal services, and child support in placement situations. Title II authorizes funding of such programs on-reservation, off-reservation, in urban areas and for tribes and Indian organizations which are eligible for services under the Indian Health Care Improvement Act.

The Department urges deletion of this Title on the grounds that "Many of the authorities granted by Title II are troublesome or are unnecessary because they duplicate authorities in present laws". The Snyder Act, enacted in 1921, does authorize the Bureau to expend funds on behalf of Indians throughout the United States for a broad variety of purposes. However, testimony on the Senate and House bill reflects that the Bureau is not now funding any programs such as those contemplated in this legislation, either on or off Indian reservations.

It is more than cynical for the Bureau to oppose this Title on the grounds of adequacy of authority. Despite the scope of the Snyder Act the Bureau has traditionally refused to fund programs for the benefit of Indian people outside the boundaries of a reservation. As recently

as 1974 it required a Supreme Court decision to compel the Bureau to provide welfare benefits to a tribal member residing within 15 miles of the reservation. Morton v. Ruiz, 415 U.S. 199 (1974).

It is equally erroneous for the Department of HEW to argue as they did in the Hearings that they presently have authority to operate such programs in urban areas or among non-Federally recognized tribes. It is true that the Department has funded a limited number of demonstration projects in recent years. The testimony given shows that these have been an unqualified success. But the scope of those programs is not as broad as those authorized in this legislation and, more critically, HEW funding is limited to three years. That funding is now expiring and there are no plans for any further funding. Source of the most compelling testimony on this legislation was received from these program groups which are now facing expiration.

The Interior letter also criticizes the provisions of Sec. 201(b) which permits funds appropriated under this authority to be used as the non-Federal matching share in connection with other Federal funds. This language was added in the House bill to provide a means for tribes to meet the matching funds requirements of child welfare programs administered by the Department of HEW. The inability of tribes to meet matching fund requirements has previously been recognized by Congress. The Revenue Sharing Act of 1972 specifically authorizes Indian tribes to use funds received under the Act as a match to obtain other Federal program monies. The addition of this provision in the House bill will provide tribes with greater flexibility in the operation of child welfare and family development programs authorized under this legislation. I would certainly support retention of this provision.

The provision in Sec. 102 (b) requiring appointment of counsel to represent indigent Indians in proceedings in state court is also new. Testimony before the House Subcommittee on Indian Affairs strongly supported inclusion of such a provision. I think it's an excellent addition to the bill and I strongly support retention of this provision.

Finally, Interior recommends a one year grace period before Title I of this beill takes affect to allow states time to establish necessary procedures to implement the provisions of this Title. The basic jurisdiction frame work has already been established through judicial decisions. A short delay to allow states to become familiar with this legislation would not appear to create any problem. I do, however, feel that one year may be excessive. I would think six months, say June 1, 1979, might be more appropriate.

The legal basis for enactment of this legislation is well established in the analysis of the House Committee report; the need for this legislation is well documented in the Hearings held before both the House and the Senate; and the policies set forth in the legislation have received strong endorsement of the Indian community and general approval of the states.

I hope you will urge your colleagues to support this very important legislation. This is clearly an Act whose time has come. With warm regards, I am

Sincerely,

James Abourezk, Chairman
Senate Select Committee
on Indian Affairs

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