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TO : Senate Select Committee on Indian Affairs
Attn: Peter Taylor

FROM : American Law Division

SUBJECT : The Power of Congress to Regulate Custody Proceedings Involving Indian Children and to Dictate State Court Procedures in Such Cases.

H.R. 12533,to be called the Indian Child Welfare Act, establishes standards for the placement of Indian children in foster or adoptive homes. Title I regulates child custody proceedings involving Indian children in tribal and state courts. Questions have been raised regarding congressional power to provide for exclusive tribal jurisdiction of custody proceedings in particular situations and to prescribe certain procedures and standards for state court adjudication of custody cases involving Indian children. It has been argued that the breadth of the definition of "Indian child" goes beyond Congress' constitutional power to "regulate Commerce...with the Indian Tribes." Art. 1, Sec. 8. Furthermore, the argument continues that the reach of the Act to embrace non-reservation Indian children and parents not members of any Indian tribe makes the regulation of state court custody proceedings involving such persons offensive to principles of federalism and an interference with State sovereignty.

The Act would establish standards and regulate those custody proceedings which involve an "Indian child". Sec. 4(4) defines "Indian child" as "any unmarried person who is under eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." With respect to an Indian child who resides or is domiciled within an Indian reservation, the tribal court is to have exclusive jurisdiction of custody proceedings involving the child. Section 101(a). In any state court proceedings involving a non-reservation Indian child, the Act would require that such proceedings be transferred to the tribal court of the tribe in which the child is eligible for membership, "in the absence of good cause to the contrary" and "absent objection by either parent" upon the petition of either parent, the Indian custodian of the child, or the child's tribe. Section 101(b). The remainder of Title I prescribes procedures and standards to be applied in Indian child custody proceedings which are heard in state courts. These include the right to court appointed counsel (to be financed by the Secretary of Interior if state law makes no provision for such appointments), the right of all parties to examine documents filed in the proceeding, the requirement that foster care placement of an Indian child and termination of parental rights be supported by "clear and convincing evidence" and evidence "beyond a reasonable doubt", respectively, requirements surrounding consent to custodial arrangements and withdrawal thereof, and preferences as to placement of Indian children. See, Sections 102-110.

The Act can therefore be applied in cases in which all direct parties to the proceeding are non-tribal members. The regulation of state

court proceedings also takes place in the context of parties who do not reside on an Indian reservation and, while an Indian child must be involved, the child need not be a member of a tribe and his custodians may not only be non-tribal members but could be non-Indians. The assertion of congressional power over non-tribal members both in the form of requiring exclusive tribal court jurisdiction on the reservation and prescribing standards and procedures for state courts in off-reservation situations has been questioned as being beyond Congress' power to regulate Indian affairs and as transgressing state sovereignty.

I.

Congressional power over Indian affairs derives principally from Article 1, Section 8 of the Constitution which vests in Congress the power to "regulate Commerce...with the Indian Tribes." Provisions of H.R. 12533 are questioned on the basis that they purport to regulate custody proceedings involving, as immediate parties, persons who are not members of an Indian tribe. An Indian child need only be eligible for membership to qualify for the Act's protection and the custodians need not even be Indians to come within the reach of the Act. However, it can be argued that the Act does indeed involve members of Indian tribes. Alternatively, the argument can be made that congressional power over Indian affairs is not confined to tribal Indians and their activities. Under either argument, the Act can be sustained as a valid exercise of congressional power.

The purpose of H.R. 12533 and the significant, if not primary, tribal focus of the child welfare proposals, is demonstrated in the House Report on the bill: [1/]

> The purpose of the bill...is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by estabilishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

The report notes that the "wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." [2/] The report describes the frequent conflicts between Indian and non-Indian social systems which operate to undermine Indian tribal customs and practices with respect to child-rearing. [3/] The findings contained in sections 2 and 3 of H.R. 12533 also make clear that a primary purpose of the Act is to "promote the stability and security of Indian tribes and families" and declares "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe." (Sec. 2(3)). Furthermore, Congress finds

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1/ H.Rept. No. 1386, 95th Cong., 2d Sess. 8 (1978).
2/ Id., 9.
3/ Id., 8-12.

"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." (Sec. 2 (5)).

Thus, Indian tribes and tribal relations are sought to be protected by the Child Welfare Act. Tribal interests in their offspring have prompted congressional concern with the procedures and criteria governing custody proceedings involving Indian children. While non-tribal member minor children and custodians may be the immediate parties to a custody proceeding regulated under the Act, the purpose of the Act is to insure the protection of the important tribal interests at stake. It is clear that Congress' power in matters which involve Indian tribes may extend to jurisdiction over non-tribal members and non-Indians both on and off Indian reservations. Perrin v. United States, 232 U.S. 478 (1914) (regulation of traffic in liquor among non-Indians on non-reservation land sustainable if "essential for protection of Indians residing upon the reservation."); Dick v. United States , 208 U.S. 340 (1908).

Furthermore, the Act's prescriptions are applicable only to proceedings involving a child who is either a tribal member or was born of Indian parents and is eligible for membership in a federally recognized tribe. The children involved are thus Indians and while they may not, in some instances, technically be members of a tribe, it cannot be said that Congress has lost control of them through formal termination. They were born of members of federally recognized Indian tribes. It is up to Congress to

determine when its guardianship role over Indians ceases and this would seem particularly true in cases of minor Indian children. See, United States, v. Antelope, 430 U.S. 641, 647 n.7 (1977); Tiger v. Western Investment Co., 221 U.S. 315 (1911). Minor Indian children who are not enrolled members of a tribe may be deemed subject to special protection by Congress because of concern that the child's options with respect to his tribal Indian heritage be preserved and that the tribe's interest in the future of its offspring be vindicated.

It might also be argued that Congress' power over Indian affairs does not necessarily depend on the involvement of or connection with an Indian tribe. Congress may utilize all "necessary and proper" means to effectuate its power to regulate "Commerce...with the Indian Tribes." This power over Indians is to be liberally construed and the Supreme Court has not squarely held that it is confined to Indians who are members of a tribe. See. e.g., Morton v. Ruiz, 415 U.S. 199, 211 (1973); United States v. Antelope, supra. Most recently, the Court in United States v. John, 57 L. Ed 2d 489 (1978), quoted approvingly from the provisions of the Indian Reorganization Act (IRA) in countering the argument that Congress did not have the power to apply the Act to the Mississippi Choctaws, who at the time were not considered a formal tribe of Indians. The court noted that the IRA not only applies to

all Indians who are members of federally recognized tribes but also to "all other persons of one-half or more Indian blood." 25 U.S.C. 479, cited at 57 L. Ed. 2d at 500. 4/

It is not necessary to determine the furthest reaches of congressional power over Indians in the case of the Child Welfare Act provisions. The above discussed tribal involvement aside, the act regulates proceedings directly affecting the welfare of minor Indian children who are eligible for membership in a federally recognized tribe. Given the broad scope of the federal power, congressional interest in children of tribal members who themselves are eligible for membership would not seem too attenuated to justify the congressional regulation under the Constitution.

II.

Assuming Congress has the power to regulate custody proceedings involving Indian children, do the means chosen by Congress, particularly the dictation of standards and procedures in state courts hearing such cases,

4/ See also, United States v. McGowan, 302 U.S. 535 (1938); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 88 (1977). The court in Maynor v. Morton, 510 F. 2d 1254, 1256 (D.C. Cir. 1975) found "unpersuasive" the government's argument that the IRA could not constitutionally confer benefits on non-reservation Indians. In Dillon v. Montana, 451 F. Supp. 168 (D. Mont. 1978), enrollment in a tribe was not deemed necessary to enjoyment of tax exemption on a reservation. Eligibility to be a member of a tribe or recognition as a ward of the United States was seen as sufficient for qualification. 451 F. Supp. at 176, 179. Furthermore, the court seemed to imply in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) that Congress could regulate the tax status of Indians off the reservation. 411 U.S. at 148-149 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.") (Emphasis added).

nevertheless trench impermissibly on the sovereign status of states and their court systems? Congressional exercise of power under the Commerce Clause may, under some circumstance, invade sovereign prerogatives of state governments to such an extent as to be invalid under the Tenth Amendment and our system of federalism. National League of Cities v. Usery, 426 U.S. 833 (1976).

The court in National League of Cities struck down the extension of federal minimum wage and maximum hour provisions to public employees employed by the state and their political subdivisions. The court noted that an "undoubted attribute of state sovereignty is the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions" [5/] and that this power is "essential to separate and independent existence." [6/] The imposition of the federal wage and hour standards was seen as "displacing...the states in the area of what are without doubt essential governmental decisions..." [7/] and significantly altering or displacing "the States' abilities to structure employer-employee relationships" in areas of essential governmental services. [8/] The court concluded that "Congress may not exercise [its commerce power] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." [9/]

The ramifications of National League of Cities are not entirely clear. However, the degree of intrusion on traditional state governmental

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5/ 426 U.S. at 845.
6/ Id.
7/ 426 U.S. at 850.
8/ 426 U.S. at 851.
9/ 426 U.S. at 855.

activities would not seem to be of the same nature and scope in Indian child custody regulation. The Act does not constitute a "forced relinquishment of important governmental activities" [10/] but merely requires certain procedures and evidentiary standards to be applied by state courts when adjudicating cases involving Indian children. It would not seem to "significantly alter or displace" [11/] integral state governmental functions nor "operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions." [12/] The state's relationship to its own employees is different than its relationship to its Indian citizens. With respect to the latter, state power has always been deemed concurrent with primary federal power and, more often than not, displaced completely by congressional regulation or implications arising from federally recognized tribal sovereignty. See, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1976).

The Child Welfare Act provisions do not preclude state decision-making in an admittedly important area of governmental service but merely require certain adjudicatory procedures and standards. The states will not be required to structure provision of essential governmental services in a "manner substantially different from practices which have long been commonly accepted among" state and local governments. [13/] State court judges

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10/ 426 U.S. at 847.
11/ 426 U.S. at 851.
12/ 426 U.S. at 852.
13/ 426 U.S. at 850.

are simply being required to apply the law as outlined in a statute, a familar judicial exercise. Choices as to placement of children are not displaced nor significantly altered by the requirements imposed on state courts in the Act.

State courts are frequently required to adhere to federally imposed requirements. The Federal Employers Liability Act, for example, provides a remedy for employees injured in the course of railroad employment in interstate commerce. Prior to enactment, state courts heard such personal injury cases. However, various judge--made defenses which often insulated employers from liability prompted Congress to enact the FELA and displace state personal injury law in this area.[14/] The FELA abolished the fellow servant rule and established a federal rule regarding burden of proof.[15/] State pleading requirements and jury practices were also struck down as interfering with the federal requirements.[16/] A similar displacement of state law occurs in the Jones Act which provides a remedy for injured seamen and supplants state personal injury and death statutes.[17/] The court in National League of Cities did not indicate that these cases were limited by its decision.

The provisions of the Indian Child Welfare Act respecting state court procedures are arguably more analagous to the FELA and Jones Act cases

14/ See, Second Employers' Liability Cases, 223 U.S. 1 (1912); Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J. Concurring).
15/ Central Vt. R.R. v. White, 238 U.S. 507 (1917).
16/ Brown v. Western Ry of Alabama, 338 U.S. 294 (1949); Dice v. Akron, Canton and Youngstown R.R., 342 U.S. 359 (1952).
17/ Lindgren v. United States, 281 U.S. 38 (1930); Gillespie v. United States, 379 U.S. 148 (1964).

than to the wage and hour regulations struck down in National League of Cities. Congress' power over dependent Indians (in this case, truly dependent minor children) and its interest in preserving viable tribal entities would seem to justify the regulation of Indian child custody proceedings. The constitutional power over commerce with the Indian tribes and the absence of significant displacement of state decisionmaking or disruption of the provision of essential state governmental services would seem to provide sufficient constitutional authority for the Act.

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