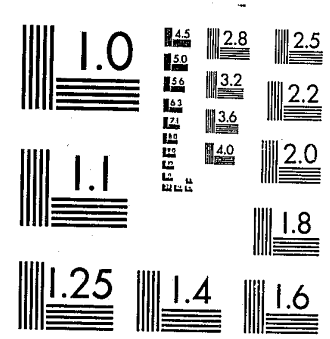

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JURISDICTION ON INDIAN RESERVATIONS—PART 2

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2832

TO ESTABLISH A SPECIAL MAGISTRATE WITH JURISDICTION
R FEDERAL OFFENSES IN INDIAN COUNTRY

AUGUST 11, 1980

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U.S. GOVERNMENT PRINTING OFFICE
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JURISDICTION ON INDIAN RESERVATIONS—PART 2

MONDAY, AUGUST 11, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Billings, Mont.

The committee met, pursuant to notice, at 10 a.m., in the Federal courtroom, Federal Building, Billings, Mont., Hon. John Melcher (chairman of the committee) presiding.

Present: Senator Melcher.

Staff present: Peter Taylor, special counsel; and Jo Jo Hunt, staff attorney.

Senator MELCHER. Good morning.

This is a public hearing on S. 2832 by the Select Committee on Indian Affairs of the Senate. S. 2832 is a bill that I introduced, after a number of discussions with Federal, State, and tribal government representatives. The committee held a 3-day hearing on Indian jurisdiction issues in March of this year in Washington, D.C., and after a number of persons had reviewed the first draft of the bill and had made comments on that first draft, we revised the bill, and I introduced it on June 16 of this year.

Prior to that, we had two of the staff from the Senate Indian Affairs Committee make a presentation on the first draft of the bill and solicit comments at the May meeting in Helena, Mont., of the Commission on State Tribal Relations, a group of State legislators and tribal leaders sponsored by the National Conference of State Legislators. The National Conference of American Indians also helped sponsor that meeting, as did the National Tribal Chairman's Association. My former colleague from the Montana Senate, Senator Caroll Graham, and Allen Rowland, chairman of the Northern Cheyenne Tribe, served on that committee.

Although a number of individuals were consulted during the drafting of this bill, our Indian Affairs Committee in the Senate is committed to holding extensive hearings on the bill to solicit the views of a wide range of people affected by this legislation.

I have had concerns for some time about the situation that now exists on some Indian reservations. Many times, the State and tribal authorities have tried to work together to prevent the breakdown of law and order on an Indian reservation area; however, with the complex jurisdiction scheme on a reservation that has resulted from Federal statutes and court decisions, the States and/or the tribes do not have the jurisdiction over many occurrences on the reservation. There are a lot of things that fall through the cracks because one side cannot take jurisdiction and enforce law and order.

Now, Government, under Federal law, has jurisdiction over a great many of the crimes committed on the reservation, but they, unfortunately, have not provided the necessary law enforcement personnel to enforce the law and to punish those persons who are committing the crimes. We do not have adequate personnel to effectuate justice and to protect the safety and well-being of all the people who live on the reservation, whether they are Indian or non-Indian. The fact that we do not enforce the law and the criminals can go unpunished is no deterrent to further breaches of the peace, and damages of property and to persons, of people who live on the reservation.

This bill, S. 2832, would help solve some of the problems of law and order on the reservation, but the bill, in the form that we presented, is not in its final form. But, I believe it is a starting point from which we can work to develop a piece of comprehensive legislation to effectively deal with what has been a serious shortcoming—a shortage of true law and order to protect the people who live on the reservations.

The bill would place the Federal Government in a little more prominent role in the area of law enforcement. It does not exchange existing law governing jurisdiction on a reservation. The bill adopts many of the provisions of the Federal Magistrate Act by reference and provides other special provisions designed to meet special concerns and problems on the reservation that are needed because of a general lack of law enforcement because of the structures now in place. The bill is designed to strengthen those structures by providing a clear and simple procedure for processing and disposing of Federal misdemeanor offenses which now go unpunished. These misdemeanor cases are minor in nature as compared to the number of crimes which the U.S. attorneys must handle, but they create great tension between the Indian and non-Indian communities in the reservation areas. I believe we can develop such effective legislation from what we have started with in S. 2832, and I am therefore very interested in your comments on the bill.

I will now place a copy of S. 2832 into the hearing record.

[The bill follows:]

II

96TH CONGRESS
2D SESSION

S. 2832

To establish a special magistrate with jurisdiction over Federal offenses within Indian country and to authorize tribal and local police officers to enforce Federal laws within their respective jurisdictions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 12), 1980

Mr. MELCHER introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To establish a special magistrate with jurisdiction over Federal offenses within Indian country and to authorize tribal and local police officers to enforce Federal laws within their respective jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Reservation Special Magistrate and Law Enforcement Act of 1980".

SEC. 2. Title 28, United States Code, is amended by adding immediately after chapter 43 thereof, the following new chapter:

"CHAPTER 44—INDIAN RESERVATION SPECIAL MAGISTRATES

"§ 650. Appointment and tenure

"(a) The President, by and with the advice and consent of the Senate, shall appoint special magistrates as may be necessary to serve each Indian reservation and such additional areas as are within the Indian country as defined in section 1151, title 18, United States Code, and over which the United States exercises criminal jurisdiction under the provisions of chapter 53 of title 18, United States Code.

"(b) No person may be appointed or reappointed to serve as a special magistrate under this chapter unless such person is and has been for at least five years a member in good standing of the bar of the highest court of the State (or one of the States) in which he or she is to serve.

"(c) In any case in which the President finds that a United States magistrate who meets the qualifications of this Act is already reasonably available, the President shall give preferential consideration to such sitting magistrate for appointment as special magistrate under this Act.

"(d) The appointment of any individual as a special magistrate shall be for a term of eight years and his or her reappointment shall be subject to the requirements of subsection (a) with respect to the advice and consent of the Senate.

"(e) Upon appointment and confirmation, the special magistrate shall reside within the exterior boundaries of the reservation to be served or at some place reasonably adjacent thereto.

"(f) Persons appointed as special magistrates under this chapter shall be appointed as full-time magistrates and shall receive compensation at the rates fixed for full-time magistrates under section 634 of this title: *Provided*, That whenever, in the discretion of the President, it is determined that the position to which the special magistrate is being appointed will not have a sufficient caseload to warrant appointment as a full-time magistrate, then such special magistrate shall be appointed as a part-time magistrate and shall receive compensation at the rates fixed for part-time magistrates under section 634 of this title, the level of compensation to be determined by the President.

"(g) Except as otherwise provided herein, the provisions of sections 631 (c), (g), (h), (i), and (k) of this title, relating to limitations on employment, oaths of office, recordation of appointment, removal from office, and leaves of absence shall apply to special magistrates appointed under this chapter.

"(h) Expenses of special magistrates shall be paid in the same manner as provided in section 635 of this title for payment of expenses for magistrates.

"(i) The provisions of section 632 of this title describing the character of service to be performed by full-time and part-time magistrates shall apply to any person appointed as a special magistrate under this section.

"§ 651. Jurisdiction and powers

"(a) Each special magistrate serving under this chapter shall have, within the territorial jurisdiction prescribed by his appointment—

"(1) all powers and duties conferred or imposed upon United States Commissioners by law or by the Rules of Criminal Procedure for the United States District Court.

"(2) the power to administer oaths and affirmations, impose conditions of release under section 3146, United States Code, of title 18, and take acknowledgments, affidavits, and depositions; and

"(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section except that the special designation provided for in subsection 3401(a) of title 18, United States Code, shall not be required, and the provisions of section 3401(b) of title

18, United States Code, extending to a defendant the right to refuse trial before a magistrate and elect to be tried before a judge of the district court for the district in which the offense was committed, shall not be applicable to trials before the special magistrate.

"(b) Each such magistrate so serving under this chapter shall have any other duty or power which may be exercised by a United States magistrate in a civil or criminal case, to the extent authorized by the court for the district in which he serves.

"§ 652. Remand of custody

"(a) If the special magistrate determines there is no Federal jurisdiction over an offense brought within his court, he may direct that custody of the defendant be remanded to the appropriate law enforcement officials.

"§ 653. Practice and procedure

"(a) Except as otherwise provided in this section, the practice and procedure for the trial of cases before magistrates serving under this chapter, and the taking and hearing of appeals to the district courts, shall conform to that set forth in section 3401, title 18, United States Code, and in rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code, and section 636(c) of title 28, United States Code.

"(b) Any defendant appearing before a special magistrate may be assisted by a lay spokesman of his or her choice, and assistance by such spokesman, whether paid or voluntary, shall not be considered the practice of law. Assistance by such lay counsel shall not waive the right of the defendant to appointed counsel in any case in which he or she is entitled to such appointed counsel.

"(c)(1) In any case in which the defendant requests a trial by jury before the special magistrate, only persons who actually reside within the reservation in which the offense is alleged to have been committed shall be eligible to serve on the jury panel.

"(2) The special magistrate, in consultation with tribal authorities and county and municipal officials, shall develop and maintain for purposes of jury selection a list of persons residing within the reservation over which the special magistrate has jurisdiction. Such list shall be developed or compiled from lists of persons eligible or registered to vote in State, county, municipal, or tribal elections. In developing such list, the special magistrate shall take care that such list fairly reflects a cross section of the population within the reservation.

"(3) In any case in which the defendant requests a trial by jury before the special magistrate, such jury shall be composed of six persons whose names appear on the jury selection list prepared by the special magistrate.

"(4) Except as provided in this section, the rules of the district court pertaining to the selection of jurors and juror eligibility for trial before magistrates shall be applicable.

"(d) Tribal police officers, Bureau of Indian Affairs police officers, and Federal, State, and local law enforcement officers, acting within the geographic areas in which they have jurisdiction under the laws of their respective governments, are authorized to execute any warrant for arrest, or warrant for search and seizure, or any other summons, subpena, or order which the special magistrate is authorized to issue in criminal cases arising within the Indian country, or under the general rules of Federal Criminal Procedure or the Federal Rules of Procedure for the Trial of Minor Offenses before the United States Magistrates.

"(e) The provisions of the Court Interpreters Act of 1978 (Public Law 95–539; 92 Stat. 2040) shall apply to trials before the special magistrate.

"§ 654. Contempt

"(a) In a proceeding before a special magistrate, any of the acts or conduct described in section 636(e) of this title as constituting a contempt of the district court when committed before a magistrate shall constitute a contempt of court when committed before a special magistrate, and the procedures

provided in section 636(e), of this title, for prosecution of such contempt shall govern prosecutions for contemptuous conduct when committed before a special magistrate.

"(b) All property furnished to any special magistrate shall remain the property of the United States and, upon the termination of his or her term of office, shall be transmitted to the successor in office or otherwise disposed of as the Director orders.

"(c) The Director shall furnish to each United States special magistrate appointed under this chapter an official impression seal in a form prescribed by the conference. Each such officer shall affix his seal to every jurat or certificate of his official acts without fee.

"§ 656. Training

"(a) The periodic training programs and seminars conducted by the Federal Judicial Center for full-time and part-time magistrates as provided in section 637 of this title, shall also be made available to special magistrates appointed under this chapter. This shall include the introductory training program offered new magistrates which must be held within one year after their initial appointment. The cost of attending such programs shall be borne by the United States.

"§ 657. Authorization of appropriations

"(a) Beginning October 1, 1981, there is hereby authorized to be appropriated such sums as may be necessary to carry out the purpose of this Act.".

Senator MELCHER. I call for the first witness, Senator Caroll Graham of the Montana State Legislature and, of course, a member of the commission that I spoke of earlier, the commission set up in relationship with other State legislatures, the Commission on State Tribal Relations.

STATEMENT OF HON. CAROLL GRAHAM, SENATOR, MONTANA STATE LEGISLATURE

Senator GRAHAM. Senator Melcher and members of your committee, I am happy to be here today to talk about and probably get behind this bill, S. 2832, because this is perhaps one of the things that will put a stopgap in some of the things that are going on now.

I guess probably in my position that I get at least three calls a week from people that are dissatisfied with the law enforcement as it is today, not only non-Indians, but also Indians. I get lots of calls from Indians that are disturbed at the way the law enforcement is being handled.

As I said, I've gotten lots of calls, probably an average of three a week, from Indians and non-Indians, and like some problems that have arisen within the exterior boundaries of the reservation, jurisdiction probably is part of it. The county law enforcement officers probably do not have the right, under many cases, to arrest an Indian, or the Indian does not have the right, unless it has something to do with the tribe, to arrest the non-Indian. But I think one of the main problems that we've had is after the arrest has been made and taken into the court—wherever, tribal court, perhaps—that nothing much is ever done with it. Maybe a little rap on the knuckles, but even a pretty serious crime beats you back home. So I think this is not good.

Of course, we have all been disturbed because some of the major crimes that we think probably should have been handled by the U.S. attorney's office are declined. They have the reasons why. Maybe the evidence got cold. Maybe the FBI did not get there quick enough to collect the evidence, and maybe there was no case. But apparently they do not recognize any evidence other than that collected by the FBI. I may be wrong on this, but this is my understanding, and if Mr. O'Leary is here today, maybe he can straighten us out on this fact.

I realize that this bill, if it is passed in its present form, and I surely hope it is not amended, would take care of some of those. At least the cases would be reviewed and come before somebody. If they needed punishment, maybe there would be some punishment there, and I think this is one of the things that has broken down the law enforcement on the reservation.

I remember years ago when I was a young fellow, they had a curfew, and we had in the little town of Lodge Grass an Indian cop, Mr. Pease. I'll tell you when they blew that whistle, Indians and non-Indians got in off the street.

It got so bad here a few days ago, or a few weeks ago, that tribal council down at Crow Agency passed a curfew law. I do not know how well it is working. I do not know if they are enforcing it, but I was proud that they did pass the curfew law which will help, if it is correctly enforced. It will prevent a lot of the vandalism that is occurring.

We have had a terrible time in Lodge Grass trying to keep our school

houses together. The windows are being continuously broken out. I do not know, but the glass breakage is probably $3,000 a month. I cannot blame every single bit of this—and I am not going to attempt to—on Indian children, because I realize white children are also doing some of the vandalism. But the thing is when we do catch them, we can do something with them. We do something with the non-Indian children if we catch them in this vandalism. But nothing ever happens in the Indian court with them, and this is bad.

It is a terribly expensive thing to try to keep up these replacements. We finally fenced the school at Lodge Grass, and, of course, it was immediately torn down. It was a big high fence with barbs on top of it like you use around a prison. They took cutters and cut holes in it. So it is a terrific proposition to keep this all together. We think we should have schools and good schools, but it is a hard proposition to try to keep anything together with the law enforcement we have.

In cases of vandalism on the school grounds, you can call the sheriff's department down there, and you have the evidence there, and who did it. He says, "I have no jurisdiction to arrest an Indian."

You call the Indian police, and they say, "Well, that is on school property. We do not have any jurisdiction there, either." So that's the way it goes.

I gave this out because I think this is reason enough to have some type of a bill like you have proposed here, and I do think it is a good one. I think that maybe some of these things will be handled. You know, if there is no punishment involved and you do not take care of these crimes as they come along, there is no deterrent to many, many more of them. If this should become law, I think the Indian would be a lot happier if these cases are taken care of. I think the law enforcement end of it would straighten out.

You know, it is a pretty discouraging thing for Indian police or anybody else who is a law enforcement officer to do something, make an arrest and take the criminal down there one time after another—and nothing is done about it. They beat you back home. So I think maybe if we had something going like this, I think maybe the police officers would take courage again and go ahead and do the job which they were hired to do.

I have only one little comment on your bill, Senator Melcher, and I went through it pretty thoroughly. In the proposal on the magistrate, I think it would be better if he had a shorter term. Once in a while, you can get a bummer, one way or another, and I think it would be better if they were nominated or appointed for a 4-year term instead of an 8-year term.

In going through the whole bill, that is the only thing that I would take a little bit of issue with. It may be not highly important, but if a guy did a good job in the first 4 years, he sure would deserve a new appointment. But when you put an 8-year appointment, I think maybe, it is probably too long.

That is about all the comments I have, and I know we are limited on time. There are a lot of people here to testify. I will be available later if there are questions that you would like to ask.

Thank you very much for allowing me to testify at your hearing.

Senator MELCHER. Well, Caroll, just a moment. The 8 years that is carried in the bill for the appointment of the magistrate is the same

as the Federal magistrates. It is the Federal magistrate system. Now, we do not know if that is good or bad, but that is the reason it is in the bill. We will look at that, because 8 years is quite a long time.

Senator GRAHAM. Senator Melcher, maybe it has not worked too well. Maybe that is the way it is with the Federal magistrate. Maybe it is not too good.

Senator MELCHER. I do not know. We will do some research where they use Federal magistrates for other purposes. We will see if there are any comments on that, good or bad, for that length of time.

The situation that you cited—the sheriff's office with no jurisdiction on the reservation at Lodge Grass and then the feeling of the tribal police officers that they do not have jurisdiction on the school property—is what I describe as law and order falling between the cracks. Now, whether or not that is the complete answer—that tribal police ought to have jurisdiction on the school grounds—the fact that they feel that they do not does impede decent law enforcement.

You are so right. If a law enforcement officer is not backed up—they are out in front trying to maintain law and order—if they are not backed up by the law, by the community, it makes their job very difficult. I think their job is very difficult on the Indian reservation, and that is part of the purpose of the bill, hoping to resolve some of that difficulty.

I think, also, it is very difficult with the current structuring of the law and the court decisions for a sheriff's office and the tribal police officers to have a good working relationship, and that does not benefit anybody. When they cannot have a good working relationship and interchange of responsibilities, it really is self-defeating. So the bill does strive to bring the framework through the Federal magistrate system, through the special magistrate, to allow the magistrate to designate that working relationship and to use both sides.

Senator GRAHAM. Senator Melcher, I have one more little comment to make if time will allow, and I will be brief.

We have held numerous hearings all over the United States with the Indian tribes. The commission that I am on, the Special Commission on Indian Affairs, is made up of seven Indians and seven non-Indians. The Indians have been very good to work with. They can see the problems, and I think the whole commission is really good. We are getting ready to put out the recommendations, and it purely is recommendations. One of the things that we discovered—and we have taken up a lot of things, law enforcement among them—was that some of the tribes have seen fit to consolidate their law enforcement with the local sheriff's department, and this has worked very well on some of the reservations. The tribes have updated their laws to coincide with the State law and the Federal law, and their experience has been very good. In other words, if an Indian police officer were going down the highway, or anyplace else, and he saw something that wasn't right, even though it was a non-Indian, he would have the right to detain this person until he could call the proper authorities, which, in this case, would be the sheriff. Or if the sheriff saw something going on with an Indian that was not right, whether it be a breakin or whatever, then he would have the right to call the Indian police and detain this person until the Indian police got there. Now, this is the way that it works in some of the States, Washington being one of them. This is

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a purely voluntary thing. We researched the whole United States, every State with every tribe; there will be a book on this and the agreements that they have made and how they are working and if they are working well. It will tell you that.

So I think if there can be some cooperation here, plus this bill, if it should become law, I think that would help straighten this mess out.

Senator Melcher. We think this bill would do that. We think the Federal magistrate could vest the authority in the sheriff's office or the tribal police officers, and at the same time, that they could—through the power of the magistrate, through the authority of the magistrate—deal with the citation, whatever is necessary in order to maintain law and order, regardless of whether it was the sheriff's office or the tribal police. That is section 653(d).

I don't know if you are familiar with the regular magistrate system; but in the regular magistrate system, if you are called before a magistrate, you can refuse. Any citizen can refuse to have anything to do with a magistrate and then be bound over to a district court, or answer to a district court. This bill does not allow that option. This bill says that the magistrate does have that authority, and I think that is basic. If you are going to leave it up to the individual when he goes before a magistrate, "Do you really want it before the magistrate or would you rather not?" I think in most instances people would say, "I'd rather not," and then take their chances on nothing ever happening from then on.

Senator Graham. I would agree with that wholeheartedly, and I like the part in here where you have a jury process also that you can request.

I like the way you have written the process drawing the jury. It gives you an option. If you need a jury trial, that is fine, and if you do not want to take your chance before a judge, maybe you need a jury trial, and it does provide for this.

Senator Melcher. Caroll, have you looked at that bill that would deal with the grievance between the tribes and the State?

Senator Graham. Yes, I have, but I am not familiar with it. There have been several bills drawn in the past. I do not know how far they got, and I really do not know which one you are talking about. We have one and are preparing another in the State to allow the State, the county, or the local government, such as the city, to enter into agreements with the consent of the attorney general of the State, and which also if a tribe would enter into an agreement, the bill that I have read, the agreement would have to be agreed to by the Department of the Interior. Is that right?

Senator Melcher. I think that is one of the formats of the bill that we have seen on this subject for some time, is it not?

Senator Graham. That gives protection on both sides so you do not enter into some agreement without someone having a handle on it. I think that would work. If we do go into agreements like this, I would want the attorney general of the State of Montana to approve the agreement.

Senator Melcher. I think we are going to get some testimony—some written testimony—from the Montana attorney general's office. I do not think we have a witness present today on that.

Thank you very much, Caroll. I very much appreciate your testimony.

Now, we are going to call Jack Plumage, who is chairman of the Fort Belknap Community Council, because Jack has an appointment this afternoon. Francis Lamebull, tribal attorney, is accompanying Jack.

STATEMENT OF CHARLES "JACK" PLUMAGE, CHAIRMAN, FORT BELKNAP COMMUNITY COUNCIL, ACCOMPANIED BY FRANCIS LAMEBULL, ATTORNEY

Mr. Plumage. Thank you, Senator Melcher, for the consideration. We do have a very important meeting this afternoon that we have to attend.

Senator Melcher. I would like to take this opportunity to thank the Senate Select Committee on Indian Affairs and you, as chairman, for holding hearings on S. 2832, a bill to establish a special magistrate with jurisdiction over Federal offenses within Indian country. If possible, the tribal government of the Gros Ventre and Assiniboine Indian Tribes would like to keep the record open in order that we may submit a written statement of our views on S. 2832.

There are several things in the bill which concern not only Fort Belknap but other Indian tribes which go directly to undermining self-government and eroding the power of tribal courts.

No. 1, section 651, jurisdiction and powers. Subsection (a)(1) indicates that "all powers and duties conferred or imposed by U.S. commissioners." It is our understanding that U.S. commissioners have been phased out by chapter 43, 28 U.S.C. 631–639. So is that particular subsection, (a)(1), conferring all the power and duties of chapter 43 upon the special magistrate?

No. 2, under subsection (2), there is reference to conditions of relief pursuant to 18 U.S.C. 3146 which would appear to further expand the jurisdiction of the magistrate over Indian country.

No. 3, pursuant to subsection (3), it is unclear as to the limitations of jurisdiction of the magistrate's court. It appears that the reference to 18 U.S.C. 3401(a) would allow the magistrate to exercise jurisdiction over minor offenses without any special designation from the U.S. district court. The question arises, does this also apply to tribal law, or does it preempt existing tribal laws? Such a provision would have a far-reaching effect upon the erosion of tribal courts and the ability of tribal governments to enact laws for the purpose of regulating conduct of Indians on Indian reservations, thereby causing a further erosion of tribal sovereignty and self-determination. Further, this certainly would not clarify jurisdiction over non-Indians who commit crimes prohibited by tribal laws.

Subsection (b) would also appear to be an expansion of jurisdiction in both civil and criminal areas.

Essentially, section 651 of S. 2832 does not specifically designate who falls within the jurisdiction of the special magistrate. Criminal jurisdiction on Indian reservations is extremely complex under existing law, and this particular provision would further confuse the extent of Federal jurisdiction in Indian country.

Section 651 of S. 2832 would also appear to be in conflict with 18 U.S.C. 1152 in that the General Crimes Act is not applicable and does not extend to offenses committed by one Indian against the person and property of another Indian, nor to any offenses which may be left to the jurisdiction of the tribal government.

No. 4, section 652, remand of custody. Subsection (a) states that the special magistrate, in instances where he has determined there is no Federal jurisdiction over an offense, may direct that custody of the defendant be remanded to the appropriate law enforcement officials. That particular provision is unclear with regard to which offenses may not be brought before the special magistrate. It would appear that the only offense which the special magistrate may not have jurisdiction over would be one perpetrated under customary tribal law.

In the case of an Indian, the tribal court would have jurisdiction. But assuming he is a non-Indian, who would be the appropriate law enforcement official in light of *Oliphant*, unless the offense could be interpreted to fall within 18 U.S.C. 3401, Minor Offenses, Application of Probation Laws.

An example would be a situation where you may have a religious site that tribal codified or customary law may prohibit an individual from approaching during certain times because of its religious significance. If a non-Indian who is rock hunting disturbs the area and takes certain artifacts from the religious site, there is no Federal enclave law, nor is there a State law which would fall within the purview of the Assimilative Crimes Act. The question would be, who would prosecute the non-Indian for violating tribal law?

No. 5, section 653, practice and procedure. Subsection (a). This provision provides for the practice and procedures to be followed by the special magistrate which also includes those provisions set forth in 18 U.S.C. 3401, 3402, and 28 U.S.C. 636(c). It is unclear as to the extent of civil jurisdiction which the special magistrate may exercise within Indian country.

Section 653, subsection (d) of this particular provision is very distressing to tribes because of its far reaching authority by State and Federal officers to execute any warrant of arrest or warrant of search and seizure, or any other summons, subpena, or order of the special magistrate which, in effect, would be having State law enforcement officers enforcing Federal law on Indian reservations. The provision of "acting within the geographic area in which they have jurisdiction under the laws of their respective governments" is unclear as to why that particular provision was placed within this section. It would seem to us that it would be sufficient to authorize the tribal police to enforce all laws falling within the purview of any statute of this nature.

It seems to us that there should be some perimeters established as to the extent of jurisdiction that may be vested in the special magistrate by district court. It must always be remembered that Indian reservations, although similar to Federal enclaves, are not like a State park. There are Indian tribes who reside upon Indian reservations who exercise internal sovereignty and self-government.

Senator, these are a few of the exceptions which the tribal government of the Fort Belknap Indian community take with regard to S. 2832. It is our opinion that S. 2832 would further confuse the already complex issues of criminal jurisdiction on Indian reservations.

The enactment of S. 2832 is not going to solve the problems, on which you commented in the Congressional Record, with regard to problems on Indian reservations associated with law enforcement and prosecution of crimes on Indian reservations. It would seem to us that S. 2832 is an unwarranted intrusion and expansion of Federal jurisdiction on Indian reservations designed to further erode tribal self-government of Indian tribes.

A more productive approach to solving the lack of prosecution by the U.S. attorney and law enforcement on Indian reservations is a comprehensive jurisdictional statute which would vest Indian tribes with criminal jurisdiction to the extent that it would rectify the problems created by the *Oliphant* decision. Primarily, the existing Federal criminal law is in place but only needs to be enforced by the appropriate authorities. An alternative would be to vest the law enforcement and investigative authority over Federal crimes in Indian tribes and at the same time, increase the prosecutorial capability of the U.S. attorney's office.

The U.S. attorney's office in Montana appears to place crimes committed on Indian reservations on a very low priority. The declinations received by the BIA special officer from the U.S. attorney's office would sustain that statement.

The primary problem under the existing system appears to be the lack of financial resources of the Federal Government and Indian tribes. The Congress needs to appropriate necessary funds in order to staff their investigative arm and provide funds to Indian tribes to enforce Federal law on Indian reservations. It should be pointed out that Indian tribes have the capability to investigate and enforce Federal law as long as that authority is clearly spelled out and the necessary funds are provided to Indian tribes for that purpose.

Although there are some serious problems with S. 2832, we generally feel that it is a step in the right direction to the extent that hearings can be held to provide Indian tribes the opporunity to present input on legislation which could have an enormously detrimental effect upon tribal sovereignty. However, there are several alternatives to S. 2832 that the Senate Select Committee on Indian Affairs could explore with the input and assistance of Indian tribes.

Thank you very much, Senator Melcher, and we would like to have you keep the record open so that we could submit in depth, a more comprehensive written statement.

I would like to answer any questions that you happen to have at this time.

Senator MELCHER. We will keep the record open for 2 weeks because we do solicit comment. I hope you keep your record open, too, because we are going to comment on your allegations on what is in the act. You know, lawyers are lawyers are lawyers, and we have a couple right here who talked to a lot of lawyers who are lawyers who are lawyers in the Justice Department and in the BIA and at every level. So, it is good to have these lawyers talk about what the law is and what the law is not. It is a very useful exchange. So please keep your record open for our lawyers to relate their views to what your views have been expressed from your lawyer's comments.

There are a couple of points I want to bring out. You were talking about 651. Very definitely, all the powers and duties conferred or im-

posed upon the U.S. Commissioners by law, or by the rules of criminal procedure for the U.S. district court, are included under this authority for the Federal magistrate.

You know, Jack, we have heard this for a long time from officials, tribal officials from your reservation, your tribe, and from, I think, almost every tribe in Montana, on the lack of funds to enforce the law. Now, you talk about what is wrong with the U.S. attorney and how we need to have more funds for them, but under *Oliphant*, you know as well as I do that there is no way for your tribal policemen to arrest a non-Indian.

Mr. PLUMAGE. Senator, let me comment on that.

Senator MELCHER. Yes.

Mr. PLUMAGE. We can arrest.

Senator MELCHER. All right. Then you are going to arrest them, and then what happens?

Mr. PLUMAGE. That is the problem.

Senator MELCHER. Nothing. You can not go beyond that; is that right, Francis?

Mr. LAMEBULL. Yes, Senator. I guess basically you can not punish under *Oliphant*.

Senator MELCHER. If *Oliphant* said anything to me as a Member of Congress, it said that only Congress has the authority to say what is going to happen, and Congress has not said. So what we are attempting to do is to find out whether this bill—which does not expand the Federal jurisdiction—can provide the means for not only the arrest but for a trial. I think it does that. I do not think you argue that this does not provide the means for a trial after the arrest, do you?

Mr. PLUMAGE. We are not saying that, Senator. We are saying that the structure is already there if the Congress, and what you are talking about in their powers that only Congress has, would give those powers to the tribal courts and to the tribal law enforcement officers. We are not asking treatment of Indian people being any different than the treatment of other citizens in the United States. We subject ourselves to the jurisdiction of non-Indians once we leave the reservation. We feel that you subject yourself—you know, maybe not yourself as Senator, but, for instance, Jo Jo——

Senator MELCHER. I have not found much that I am immune from.

Mr. PLUMAGE. But Jo Jo submits herself to Montana jurisdiction once she enters the State.

All we are saying is that the structure is already there, but the findings——

Senator MELCHER. I do not think that *Oliphant* felt that structure was there without the act of Congress. This is an attempt to have an act of Congress to straighten that out, and in the process, to be fair to both sides. But there is obviously a very serious breakdown. How we correct it or how we arrive at that correction by an act of Congress is open for discussion, and, of course, that is what our hearing is about.

Now, we are going to have to have, really, more constructive discussions than just throwing the money at it, because if the money is thrown there, you cannot get around the fact that the act of Congress has to come into play. It just is not enough to say, "Well, we're going to get some more money in there." If the act of Congress is not there to permit a correction of the flaw that the *Oliphant* case pointed out,

why, then, we have not done anything except spend an awful lot of extra money. I agree; an awful lot of extra money would help, but I do not think it would solve the whole thing.

Mr. PLUMAGE. Senator, all we are saying is that we would like to have the chance again to show the U.S. Congress that Indian tribes are capable of administering a judicial system. Again, 2832 tells me that Congress is saying, "You are not capable of taking jurisdiction and trying offenses created by non-Indians on reservations. We are going to come in, and we are going to do that for you," when, in fact, we do have a court structure, and we have a law enforcement structure that is already in place there.

Senator MELCHER. To be very practical about it, Jack, I think what you are suggesting is that the people who are not Indians who live in Wolf Point, would be subjected to the tribal council or to the tribal police court of the tribe there. We are saying we do not think that will work. We just do not think it will work and that both the Indian and non-Indian can have justice delivered through a Federal magistrate system. I am not trying to quarrel with what you are saying, but I am being, I think, a little more practical about it in saying that. There are many examples—and Wolf Point is a good one—where we don't think it would work for the law enforcement officers in Wolf Point—the city police—to apprehend somebody and take them to be tried before the tribal court at Poplar.

Mr. PLUMAGE. Well, Senator, in your line also, not trying to be argumentative, but trying to put some light on the total complexity of the entire problem, the same arrangements that you give me concerning Wolf Point, I could give you concerning the Indian people in Harlem, Mont., in their JP court system there. That situation does not work. So, like you say, there has to be a lot of light shed on the area.

Senator MELCHER. Well, you may be right, but why wouldn't this be a better arrangement for you?

Mr. PLUMAGE. Why wouldn't this?

Senator MELCHER. Is Harlem on the reservation?

Mr. PLUMAGE. No; it is just off the reservation, so it would not apply.

Senator MELCHER. Well, I am sorry. I cannot comment on that, Jack. I recognize the point. When I was there in Forsyth, a lot of people did not like the justice of the peace in Forsyth, did not like the police officers. We recognized that. I think that is a broader problem that goes beyond Indian or non-Indian, or Indian versus non-Indian. I think the failure of confidence in the justice of the peace system is pretty broad among a lot of people in Montana, and maybe it is justified. I hope it has been improved in the last few years. I don't know. We always thought it needed improvement. I say that as a former mayor involved with our police officers arresting people and having them brought before the justice of the peace.

Mr. PLUMAGE. Thank you, very much, for the chance to comment today, Senator.

Senator MELCHER. Thank you, Jack and Francis, very much. We appreciate it. We will be looking for more comments from you.

At this point, I am going to introduce a very short letter in the record from Cranston Hawley, chief judge of the Fort Belknap Reservation.

[The letter follows:]

FORT BELKNAP COMMUNITY COURT,
FORT BELKNAP AGENCY,
Harlem, Mont., August 5, 1980.

Re Senate Bill S-2832.
To Senator John Melcher.

MR. MELCHER: I suggest the following Amendment to S-2832.
Add the following paragraph (C) to Section 651.
In the event of Federal and Tribal Concurrent Jurisdiction over any persons or subject matter within the territory of the Reservation, the Tribe shall have the first opportunity to accept or decline jurisdiction in any Civil or Criminal case.

CRANSTON HAWLEY,
Chief Judge, Fort Belknap Reservation.

Senator MELCHER. Is Earl Old Person here? I do not see him. We have him on our witness list.

Mr. PLUMAGE. Senator Melcher, Daniel Gilham, the vice chairman of the Blackfeet is here.

Senator MELCHER. Daniel Gilham, Sr., the vice chairman of the Blackfeet Tribal Business Committee is here.

STATEMENT OF DANIEL GILHAM, SR., VICE CHAIRMAN, BLACKFEET TRIBAL BUSINESS COMMITTEE

Mr. GILHAM. My name is Daniel Gilham, and I am vice chairman of the tribal business council.

Senator Melcher and members of the Senate Select Committee on Indian Affairs, the Blackfeet Tribal Business Council has carefully reviewed the Indian Reservation Special Magistrate Law Enforcement Act of 1980, Senate bill 2832, and although we have questions, we generally support the contents of the bill.

I think it sets a couple of precedents. In fact, one thing; it establishes a Federal court on the extreme boundaries of the reservations. Also, the jury selection procedure that is spelled out in the bill is something that is to be beneficial in carrying out the bill.

I think another thing is to correct a series of voids we have at the present time in regards to prosecuting non-Indians that are not felony cases. At the present time, county attorneys are unable to or do not wish to prosecute non-members for these crimes. The result is that crimes are being committed, and there is no action. Persons are allowed to commit these crimes with no prosecution whatsoever. I think this addresses that pretty well. It is not going to solve all the problems but will be beneficial, I think. We need some immediate relief in that area because there are a lot of problems, and those problems are gradually building up to where they are of a serious nature, kind of an explosive situation in those areas.

One of the questions I have is, who will be defendants? Who can be defendants as a result of the bill if it is enacted? Can Indians as well as non-Indians be defendants?

Senator MELCHER. If an Indian commits a crime against or is alleged to have committed a crime against a non-Indian, he can be a defendant, and vice versa.

Mr. GILHAM. If a crime was committed against one member of the tribe by another member of the tribe, would that be true?

Senator MELCHER. That would be tribal court unless it is a major offense, and then it becomes Federal. But the question of an Indian offense against an Indian would be handled in tribal court.

Mr. GILHAM. It relates to non-Indian committing a crime against an Indian, or an Indian against a non-Indian, misdemeanor in nature.

Senator MELCHER. And a non-Indian against a non-Indian. That would be State. Well, the magistrate would be dealing with both the tribal police and the sheriff's office. The magistrate would refer. If the special magistrates determine there is no Federal jurisdiction over an offense brought within his court, he may direct the custody of the defendant to be remanded to the appropriate law enforcement official. Now, in that instance, he refers more or less as an umpire, but he would direct the offender who is apprehended—whose alleged offense was Indian against Indian—to tribal court. The opposite; non-Indian against non-Indian, he would remand that to a State court. Now, he does serve a purpose, as I see it, but only as sort of an umpire and a director of what happens after the police officers have issued a citation or are going to issue a warrant under his direction.

Mr. GILHAM. OK. Another thing I think the bill should address and does not is prosecutor, because the present system, prosecuting crimes on reservations, for some reason, receives low priority from the U.S. attorney's office.

Senator MELCHER. You are talking about a major crime?

Mr. GILHAM. Yes; and I do not see a change here unless they have some prosecutor prepare these cases and see that they are prosecuted.

Senator MELCHER. We would feel that after the police officer filed the complaint with the magistrate, that the magistrate would make sure that the U.S. attorney came in to it immediately and, of course, would do some of the preliminary work for the U.S. attorney. But again, this is part of what we feel falls through the cracks, because there is no focusing, no drawing the attention of the U.S. attorney. "Well, here is a crime, or an alleged crime, and it is a major crime, and it will demand your action and will relate itself to the district court right here, the Federal district court."

What we do believe is that the magistrate is the proper person to receive the evidence and protect it and start preparing whatever is necessary for the U.S. attorney. We see him fulfilling that function.

Mr. GILHAM. Well, at the present time the U.S. attorney is unwilling to really cooperate to that extent with the tribal police officers.

Senator MELCHER. They are unwilling?

Mr. GILHAM. Yes. They do not really have that good cooperation.

Senator MELCHER. Dan, are you currently serving in a law enforcement capacity?

Mr. GILHAM. No. I retired as a special officer from the Bureau of Indian Affairs.

Senator MELCHER. You were a special officer for the Bureau of Indian Affairs for how many years?

Mr. GILHAM. Oh, 12, 15 years.

Senator MELCHER. Well, your experience lends a lot of weight to your judgment on the bill. Do you have any more comments on it?

Mr. GILHAM. No, I do not. Those are the two things that I would like to grasp, but I still feel that we have got to get somebody to listen and

cooperate more fully than they have with the special officers, because the FBI is not fulfilling that function now at the present time. They are in there so late. You have heard testimony, I am sure, to this many times during the course of the hearings.

Senator MELCHER. Dan, do you know whether the practice in Montana, on alleged crime on the reservation and major crime, is that the FBI is the only one who is making the investigation?

Mr. GILHAM. Well, there are a lot of delays, and I think time is one of the most important elements in crime. You get the evidence while it is still there for you to get and not come in a week later or 3 or 4 days later. Right at the present time, I know some cases that are over a year old that have not even been presented yet to the U.S. attorney for prosecution. How can you get somebody to prosecute cases like that? They sit on them, you know, and do not really——

Senator MELCHER. We are going to listen to the U.S. attorney this afternoon when he is here to testify on this bill.

I tell you clearly that my intent is that the magistrate would be the focal point on the reservation, and the magistrate can use BIA special officers, can use the sheriff's office, can use the tribal police officers—all of them—and direct them to either serve citations or serve warrants and collect evidence. If this bill does not outline that very clearly, I want it to outline that. We hope it does, because I am sure if we have to wait a week after a crime is committed for the FBI to move on something, a lot of the evidence will be dissipated.

Mr. GILHAM. My question concerning that is, the U.S. attorney could utilize those people right now, and he does not. This is what I would like to see the magistrate do. I would not like to see the bill be reached and go into law, and then have the same problem just compounded from what it is right now.

Senator MELCHER. Well, very candidly, Dan, it is not easy to pass a bill in Congress now that it is going to set up an additional cost. This sets up an additional cost—paying these magistrates—but in my view, my argument to pass it is that under the existing structure of U.S. attorneys, who are supposed to be out doing all this work on the reservation in case of a major crime, you just can not get it done. The U.S. attorney is not necessarily located anywhere near the reservation. Billings is not too bad in relationship to Crow and Northern Cheyenne, but Fort Peck is an awful long ways from here. Fort Belknap is an awful long ways from here. Do we have a U.S. attorney's office in Great Falls?

The REPORTER. I do not believe so.

Senator MELCHER. I do not think we do.

Mr. GILHAM. We have a court system established there, and the U.S. attorney uses it at times.

Senator MELCHER. Anyway, my argument on what it costs is that the money will be well spent because the only alternative you have is to increase the U.S. attorneys and the U.S. marshals. Then you will have better service, better justice on the major crimes, but it still will not get at the misdemeanors. So this bill will help, I believe, in saving money or in providing justice on the major crimes by collecting the evidence, by spotlighting what is absolutely essential for the beginning stages for the U.S. attorney in bringing the case before a Federal district court on major crime. And then on misdemeanors, the law and order stuff of a lesser nature, lesser than major crimes, the magistrate

will be able to save property and protect the well-being of individuals, both Indian and non-Indian, and so the money will be well spent.

That is my argument, and I agree with you completely that on major crimes, the U.S. attorney could move in and should move in, but unfortunately it is not done, and a lot of the evidence gets away.

Your testimony is to the effect that the evidence, when it is not gathered quickly, dissipates, and it is very much a general complaint of many Indian reservations across the country.

Mr. GILHAM. But the Blackfeet do generally support the bill.

Senator MELCHER. We are very glad to hear that, and we appreciate your comments, particularly in light of your past experience.

Mr. GILHAM. Thank you.

Senator MELCHER. Thank you, very much.

Our next witness is Caleb Shields, member of the Fort Peck Tribal Executive Board, Poplar, Mont.

STATEMENT OF CALEB SHIELDS, MEMBER, FORT PECK TRIBAL EXECUTIVE BOARD; ACCOMPANIED BY WALTER CLARK AND BONNIE CLENCHER

Mr. SHIELDS. Good morning, Mr. Chairman.

Senator MELCHER. Good morning, Caleb.

Mr. SHIELDS. My name is Caleb Shields, tribal councilman of the Assiniboine and Sioux Tribes, and accompanying me in the audience is the chairman of the Tribal Reservation Safety and Law and Order——

Senator MELCHER. Would you like to have him come up here to the witness table?

Mr. SHIELDS. Yes; his name is Walter Clark. Also, because it is such a matter of critical importance to the tribes and enforcement of reservation safety, we also have with us the editor of the tribal newspaper, Miss Bonnie Clencher.

Senator MELCHER. Bonnie is also welcome up at the witness table.

Mr. SHIELDS. On behalf of the Fort Peck Tribes, we welcome the Senate Select Committee on Indian Affairs to Billings, Mont., and we appreciate the opportunity to give testimony to support expansion of the role of U.S. magistrates in Federal law enforcement on Indian reservations, with some brief comments.

First, Mr. Chairman, in line with some of the previous testimony, there was some discussion on declinations of cases by the Federal Bureau of Investigation in your hearing report from March 17, 18, and 19 in Washington, D.C., of your select committee. There were 83 pages in this book on task force on Indian matters by the U.S. Department of Justice, and there is a large section in there in relation to why the FBI says—you know, all this declining of cases and improper and inadequate investigations of criminal matters on the reservation. And also, I think the U.S. attorney's recommendations are in here and the problems involved with that.

I found this book very enlightening in seeing all of the stuff in print. I think the report was given in October 1975, and yet the problem still exists. So I think, with the tribes and everybody concerned with law enforcement, it would do them well to see what is in that report so we are not reinventing the wheel again.

Senator MELCHER. I would like to comment that the committee would like to have a disclaimer to that report, that the views of the Justice Department do not necessarily reflect the views of the committee.

Mr. SHIELDS. Yes; there are a lot of things in there to which they took exception.

As you are no doubt aware, on many Indian reservations, Federal law enforcement has been seriously deficient. In cases where a non-Indian commits a crime against an Indian on a reservation, neither the State nor the tribes has jurisdiction to prosecute. Only the United States has jurisdiction over such offenses. See 18 U.S.C. 13, 1152. However, except for the 13 major crimes, 18 U.S.C. 1153, jurisdiction is not generally exercised over offenses committed by non-Indians against Indians. The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances. In large part, this is because the necessary Federal resources have not been allocated to meet the law enforcement needs of Indian reservations. Existing Federal law enforcement is generally too distant from reservations. U.S. attorneys, Federal courts, and FBI agents are frequently several hundred miles away. In addition, U.S. attorneys often have more work than they can handle and typically assign a very low priority to the prosecution of offenses on Indian reservations. As a consequence, the crimes with which we are concerned are committed virtually without fear of prosecution or punishment. This is an intolerable situation.

Under existing laws, U.S. magistrates are already authorized to try minor offenses committed by non-Indians upon the person or property of an Indian on an Indian reservation, 18 U.S.C. 3401. But because most magistrates are part time only, they are limited in their assignments and seldom devote time to Indian reservation matters. Because their jurisdiction depends on the consent of each defendant, magistrates as they exist today have not been an effective law enforcement presence on reservations. We wholeheartedly support Senator Melcher's suggestion that an expanded role for U.S. magistrates would help remedy this problem.

The Fort Peck Tribes feel that the present bill, S. 2832, would alleviate our stated concerns. However, we do have several comments which incorporate the following points.

First, the Judicial Conference of the United States should be directed to determine which reservations have a sufficient Federal caseload to warrant a full-time magistrate. For reservations with a smaller caseload, a part-time U.S. magistrate should be assigned to the reservation, or full-time magistrates could be assigned to ride circuit between two or more reservations in an area.

Another possibility is that tribal court judges could be assigned as part-time U.S. magistrates. Many tribes have highly qualified lawyers serving as their judges. In any event, Congress should make clear its intention that U.S. magistrates be assigned to Indian reservations in sufficient numbers to handle the Federal criminal caseload and should authorize the necessary funds.

Second, since a magistrate cannot operate without a prosecutor, a Federal prosecuting attorney should be assigned full time to work with each magistrate. If possible, the prosecuting attorney should not be an

additional assistant U.S. attorney, since such an assistant would soon find himself delegated to other work. By law, his duties should be limited to prosecutions on Indian reservations. Again, tribes could be authorized to recommend that qualified tribal court prosecutors serve in this capacity, or full-time Federal prosecutors could ride circuit along with the magistrates.

Finally, funds should be made available for attorneys for indigents and for court reporters and transcripts.

Final legislation along these lines would benefit both Indians and non-Indians living on reservations. For too long, since 1888, nearly a century on the Fort Peck Indian Reservation, there has been a major vacuum instead of effective Federal law enforcement on Indian reservations. The Assiniboine and Sioux Tribal Executive Board and all Indians residing on the Fort Peck Indian Reservation welcome the committee's efforts to seek to change this deplorable situation, and we strongly urge the committee to give this matter priority consideration.

Thank you, Mr. Chairman, and I would like to submit this testimony for the record and also for a possible statement from our tribal chairman, Norman Hollow, who was unable to attend here today, but I am sure he would like to submit a statement.

Also, I think Thursday there was a hand-carried statement from the Montana Intertribal Policy Board in support of the Federal magistrate bill. It was delivered to your office here, and I would like to have that submitted also for the record.[1]

Senator MELCHER. The record will remain open for 14 days, and that will permit Chairman Norman Hollow, or anyone else who so desires, to submit testimony.

I do not believe that we have seen the statement of the Montana Intertribal Policy Board, but we will welcome that and make it part of the record.

I do want to comment on a couple of points. We do contemplate, on cases of a minor nature, that the police officer will be allowed to testify and to make the presentation of the evidence. I am advised that under Federal case law, it has been found to be constitutional, and, I believe, a practice in the National Park Service. The National Park Service now is using that sort of procedure to allow their employees, who are trying to uphold the regulations in law, to make the presentation in a minor crime or minor violation.

Mr. SHIELDS. Do you envision, if that is the case, Mr. Chairman, that there will be funds available for training, for tribal officers or city officers, to be effective prosecutors?

Senator MELCHER. Well, we do not want them to be the prosecutor, but we want them to be able to present the evidence. But it still goes to the point: Are there going to be sufficient funds available? We hope so. The current BIA budget does have funds available for training police officers and paralegals, which are people trained in law but not holding law degrees.

Mr. SHIELDS. Not qualified.

Senator MELCHER. Not holding a law degree or admitted to practice law.

Now, I think your testimony is very constructive. I want to make one comment about whether or not the Judicial Conference of the United

[1] See p. 154.

States should be directed to determine which reservations have sufficient Federal caseloads to warrant a full-time magistrate. That we cannot tell, but I do think the commission could either, because we think with the Federal magistrate there, there is going to be more caseload in terms of misdemeanors. Much more, and I suspect if we pass this legislation, we are going to have to have a period of trial and error to determine which reservations really do want a full-time Federal magistrate present. I think your idea that they could ride circuit may be a likely outcome. I think we would want to try that, too, on the reservations that are close, because we do envision that the Federal magistrate will be a very highly qualified, experienced person, having a law degree, of course, and practical experience, I think, of 5 years practicing law so that we are not talking about a person who could be hired for peanuts. In fact, I think that the way it is drafted, it would be about $48,000 a year for full time. So we would want to—if we can—use them on more than one reservation, which, I assure you, that is exactly what we will do.

Thank you very much, Caleb, Mr. Clark, and Bonnie.

Our next witness is Jerry Schuster, who is a Federal magistrate from Wolf Point, Mont.

STATEMENT OF GERALD M. SCHUSTER, U.S. MAGISTRATE, WOLF POINT, MONT.

Mr. SCHUSTER. Good morning, Senator.

I am Jerry Schuster, the present part-time U.S. magistrate of Wolf Point, as you know. I am also the deputy county attorney for Roosevelt County and the city attorney for Wolf Point. It seems like in the smaller areas, one must wear many hats. I have served in these capacities for approximately 7 years. I have been U.S. magistrate there for 6 years.

It has come to my attention, at various times, that there are a certain number of crimes that are simply not prosecuted on the Fort Peck Reservation. I am sure that this is true on other reservations. A certain number of offenders are not brought before any justice system to answer charges which would normally be brought against them.

It is easy, I believe, to simply say we have jurisdictional problems and let the complaint go at that. This attitude, however, has fostered a kind of general feeling of disrespect for any system of criminal justice. It would seem to follow that if minor crimes are not brought before the justice system and prosecuted, then other minor crimes and even the major crimes would be encouraged.

The most common example I can cite from my experience on the Fort Peck Reservation is a complaint brought for assault by or against a tribal member, by or against a nontribal member on the reservation. Where is the complaint filed? Not in State court, since the Federal Government has exclusive jurisdiction over offenses committed by or against the Indian persons within the exterior boundaries of the reservation. Not in tribal court, because that court does not have jurisdiction over the nontribal person.

It is clear that the Federal court system is the correct forum for such complaint. However, due to the already heavy caseload of more serious offenses at the Federal level, often there is not sufficient resources to fully process such complaint through the Federal court system, and authorization to file such complaint must be declined.

I believe the special magistrate bill would help to remedy this most troublesome problem. It would allow the local law enforcement agencies to process the filing of complaints before the U.S. magistrate. Reference section 653(4)(d). This, I believe, is the most useful part of the bill. When persons on the reservation learn that such offenses will receive prompt local processing, this should be a good deterrent to crime. When offenders know that they will have to appear locally to answer such charges and that any jury trial will be before the local residents, this should be a deterrent to crime. When the special magistrate can impose sentence and follow the enforcement of that sentence at the local level, this should discourage repeat offenders.

In my opinion, too, it is helpful that the bill provides that there be no election to be tried before the district court in such cases. Again, the emphasis must remain on prompt local processing of the complaint. Not many witnesses are willing to travel to district court from Wolf Point or Poplar for a minor offense trial.

In conclusion, I support the passage of the special magistrate bill. While it will not cure all problems existing on the reservation, it will tend to insure that crimes committed on the reservation will be brought before the criminal justice system. As mentioned above, I believe the main advantage of the bill would be to serve as a deterrent to crime.

I would also like to comment, Senator, on one portion of the bill. There was a little bit of discussion on it this morning, and that is Section 652: Remand of Custody. In reading that over, in my own experience as the magistrate and as the prosecutor and city attorney, I am not sure how that would work. I know if I were the magistrate and had to make that determination, it might be difficult. I think the general practice, if the magistrate would determine that there is no jurisdiction, that he would simply dismiss the case before the court at that time.

It is a little bit unusual, I think, that the magistrate would then direct custody of the defendant remanded to the appropriate law enforcement officials. It seems to place quite a burden on the magistrate at that point, and I am just speaking from my own experience if I had to make that determination. It may, in particular instances, be quite a difficult determination to make.

I would note, however, that the language of the bill says "may direct" and is not drafted in terms of "must direct," so that is certainly helpful. That is the one section of the bill that I think may need a little review.

Thank you, Senator. That is the end of my prepared comments, if you have any questions.

Senator MELCHER. Jerry, the authority of tribal or State police under current policy, or initiated prosecution, under current policy, seems to require that there be an FBI investigation and an acceptance of the case by the U.S. attorney before a case is processed. This policy does not seem to apply to the U.S. Park Police in Federal parks, at least with respect to minor offenses. S. 2832 contemplates that tribal, sheriff's office, and local police could take cases directly to the special magistrate's court, and, in minor cases, present the case informally

through the police officer instead of the U.S. attorney's office. Now, what problems, if any, do you foresee if the FBI investigation and acceptance by the U.S. attorney is eliminated?

Mr. SCHUSTER. Well, Senator, I think one of the main advantages of the bill would be that there would not be a requirement that the FBI actually enter into the case. I think, there again, the local officials would be able to investigate the crime if they felt a complaint should be filed. They would not, as I understand the bill, have to obtain authorization from the U.S. attorney's office.

Senator MELCHER. That is correct. Under the bill, they would not.

Mr. SCHUSTER. Right. I think that is a good point of the bill, from my own experience on the Fort Peck Reservation. After all, we are talking about the minor offenses here, and, of course, we still have the authorization on the major offenses, but it is the minor offenses which seem to be the ones that are getting things out of hand on the reservation. If these complaints can be brought by city police, by sheriff's officers, and by the tribal police directly to the magistrate, I believe that this will certainly help the reservations.

Senator MELCHER. Assuming that the bill was passed and was in effect, what impact would that have on the caseloads that the U.S. magistrates, such as yourself, currently have in Montana?

Mr. SCHUSTER. I think it would have considerable impact, and I am just basing that on my experience on complaints that have been brought through our office, either myself as deputy county attorney or Mr. McCann as county attorney. We receive these complaints and are not able to do anything with them. I think the tribal officials experience the same frustration. I think we are going to see a considerable number of complaints filed before the special magistrate.

Senator MELCHER. Well, that is exactly what we want to happen. We do not invite the misdemeanors, but we want someplace where—if there are misdemeanors—they can be brought before a court. That is exactly what we want to happen. We want the special magistrate to have business because now, it is falling between the cracks.

Mr. SCHUSTER. Yes; as I understand it, I think a lot of people on the reservation are generally of the opinion that minor offenses such as these would not be prosecuted, and, therefore, there is certainly no deterrent or no reason not to permit them. I think at first we would see a substantial number of complaints being filed, and then maybe later on when the system got to working and there were some local processing and sentencing at the local level, then maybe they would drop off, hopefully.

Senator MELCHER. On major offenses, what is the current practice regarding presentation of the case to a U.S. magistrate to determine probable cause to hold a defendant for tribal police or to establish bail?

Mr. SCHUSTER. The present process, as I experience it on Fort Peck, is that the U.S. attorney's office authorizes the filing of the complaint. In other words, a complaint on the major offenses, which is filed before myself, is always presented by an FBI agent. They have previously obtained authorization to file that complaint, and that is the present practice. I have never experienced a complaint for a major offense filed by anyone, except as authorized by the U.S. attorney's office.

Senator MELCHER. In all cases, in all instances, must the U.S. attorney present the case?

Mr. SCHUSTER. Yes, that is correct. On the local level, I generally have what is called an initial appearance where the FBI agent brings the defendant before me. I inform him of the offense, inform him of his rights, for example, to a preliminary hearing, and set bail as recommended by the U.S. attorney's office. Now, at that stage of the proceedings, generally, there is not a prosecutor present from the U.S. attorney's office. However, I have usually requested that when we do have a preliminary hearing, that someone from the U.S. attorney's office come up. I have had experiences before where the U.S. attorney's office has been unable to send someone up, and it places the magistrate in the uncomfortable position of having to question the witnesses. You might say, he is kind of a prosecutor at the same time as being the magistrate. My recent practice has been that we do have a preliminary hearing, and I always request that someone from the U.S. attorney's office come up.

Senator MELCHER. Thank you very much, Jerry. Your testimony is most helpful to us because of your years of experience right on the firing line trying to make a magistrate system work.

Mr. SCHUSTER. Thank you, Senator. I would also like to present to you a written letter from James McCann who is the county attorney of Roosevelt County. Briefly, he does support the passage of the bill, and I would submit that to you.

Senator MELCHER. Thank you, very much. We appreciate having Jim McCann's written testimony. Without objection, it will be made a part of the record at this point.

[The letter follows:]

COUNTY OF ROOSEVELT,
OFFICE OF COUNTY ATTORNEY,
Wolf Point, Mont., August 11, 1980.

HON. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate.

MR. CHAIRMAN: I am James McCann, County Attorney of Roosevelt County at Wolf Point, Mont.

Approximately two-thirds of the area of Roosevelt County lies within the exterior boundaries of Fort Peck Indian Reservation.

Also, approximately one-fifth of the people in Roosevelt County are enrolled members of the Sioux-Assiniboine Tribes.

In 15 years in office I have found that one of the most perplexing impediments to effective criminal justice is the lack of consistent, fair and impartial law enforcement caused by problems of jurisdiction.

In my opinion, on reservations that do not have concurrent jurisdiction between state and tribal law enforcement agencies, state, local and tribal law enforcement agencies desperately need a forum to present those minor complaints that now go unprosecuted because of jurisdiction problems.

An example of such a complaint is one brought by a tribal member against a nontribal offender for an assault within the reservation.

Such a complaint cannot be filed in state court because the Federal Government has exclusive jurisdiction over offenses committed against Indian persons within exterior boundaries of a reservation.

The case cannot be brought in tribal court because that court does not have jurisdiction over the person of the non-tribal offender.

Proper jurisdiction is before the federal court system. However, unless the complaint is for a serious offense or some other aggravation exists, the office of the U.S. Attorney and the federal court machinery are simply too overloaded and cumbersome to be bothered with the case, and justice is denied.

The remedy for cases such as this is to provide a forum within the federal system that can take jurisdiction of a case and dispose of it as the evidence and

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justice dictate and which forum is open to state, local, tribal or federal officers to present a complaint for minor offenses without prior reference to the U.S. Attorney.

I therefore highly recommend passage of the bill to establish a special magistrate for Indian Reservations.

Respectfully submitted.

JAMES A. MCCANN,
Roosevelt County Attorney.

Senator MELCHER. Next, I want to call James R. Halverson, chairman of the Roosevelt County Board of Commissioners of Wolf Point, and R. J. Neumiller, chief of police of Wolf Point. Will you gentlemen please come to the table.

Mr. HALVERSON. Good morning, Senator.

Senator MELCHER. Good morning, Jim. Good morning, Chief.

STATEMENT OF JAMES R. HALVERSON, CHAIRMAN, ROOSEVELT COUNTY BOARD OF COMMISSIONERS

Mr. HALVERSON. For the record, my name is Jim Halverson. I am a county commissioner of Roosevelt County.

Roosevelt County is in northeastern Montana, a county in which two-thirds of the land base is within the boundaries of the Fort Peck Indian Reservation.

I am not here today to comment on the benefits of the bill pro or con. I will leave that up to the lawyers, the lawmakers, and the law enforcement people. I have one short point, and maybe one a little bit longer.

One part of the bill states that the special magistrate will live on or near the Indian reservation. My point is I think it should be imperative that he live on the reservation so that he live amongst the people that he is to serve and has firsthand knowledge of the problems and what-have-you dealing with his job.

The other point that I would like to bring up at this time would be cost to the local taxpayers of the reservation area. I refer to the Roosevelt County area where I am from. Our county is—populationwise, I would say—at this time, 60 percent nontribal members and 40 percent tribal members. Tribal members are exempt from local taxation. At this time—especially in our area and other reservation areas like ours that were open to homesteading to the white man, as was the State of Montana and other parts of the Western United States as we know it today—basic services are provided in these counties and in these reservation areas by the local property taxpayers, tribal members being exempt from this taxation.

I am kind of concerned. I hope that if this is made into law that there would not be an added burden on the local taxpayers by the actions of this special magistrate. I recall a section of the law which says that there will be moneys provided, but still in the future, actions by the magistrate could cause a burden on the taxpayers. Let's put it this way, I hope that is not the case.

That is really all I have today, and I commend you, Senator, for your work on this bill, and I support it.

Thank you.

Senator MELCHER. Thank you, Jim.

Now, Chief?

STATEMENT OF R. J. NEUMILLER, CHIEF OF POLICE, WOLF POINT, MONT.

Chief NEUMILLER. Thank you, Senator.

Senator Melcher and members of this committee, I am Bob Neumiller. I was born and have lived most of my life in Wolf Point, Mont. In June 1965, I joined the police force in Wolf Point and have been a police officer since; 13 years of that time, I have been chief of that organization.

Serving in the capacity that I hold, I am in constant contact with Federal, State, city, and tribal laws and law enforcement. I have dealt with the maze of laws confronting law enforcement resulting from the dual jurisdiction problem unique to an Indian reservation.

Wolf Point is centrally located on the Fort Peck Indian Reservation on the southern boundary. The city police department handles calls within the city limits, as well as the housing areas adjacent to the city limits that are predominently Indian dwellings. Our time spent in the enforcement of tribal laws, Federal laws, and public services to Indian persons takes up about 80 percent of our total work within the department. We do work in the capacity of tribal police, on those occasions required, and do serve the tribal court stationed in Wolf Point. City officers are also active in investigations of crimes of a felony nature within and adjacent to Wolf Point. The Roosevelt County Sheriff's Department has a primary responsibility in the county for investigations and enforcement of State felony violations, but they, as we, do most of their work on investigations involving crimes by Indian persons.

So far this year, there have been at least 117 cases of burglary, theft, aggravated assault, car theft, arson, robbery, and vandlism in which damages are serious. Our crime rate is completely out of proportion to the size of our community and would fit a community five or six times our size. The impact of this high crime rate falls directly on the community and the reservation. Both white and Indian persons are victims, and the crime rate is steadily on the increase. Fort Peck tribal police, Roosevelt County sheriff's officers, and Wolf Point city police have manpower geared to budgets that the respective governments can afford instead of being geared to stopping our crime problem. It is wholly inadequate.

Our largest problem is with respect to the jurisdiction of the Federal courts and with respect to the prosecution of felony cases on the reservation in which Indian persons are involved. Neither the city police, sheriff, nor the Fort Peck tribal police have the authority to present a case before the Federal court. This must be done by the FBI. Therein lies the crux of our problem.

While locally we have many trained and experienced persons to work felony cases to a successful conclusion on all levels—city, tribe, county—none of our officers can present the findings of hundreds of hours of work to the Federal court system by presenting a case to the U.S. attorney for prosecution. We have to rely on the FBI, and in most cases the FBI simply is not there. Agents stationed in Glasgow, 50 miles distant, are not close enough to initiate an investigation of any kind when something happens in Wolf Point. Consequently, the evidence, interviews, and all other facets of the investigation are done

locally, then handed over to the FBI when they get around to getting to Wolf Point. This is quite seldom. If agents do open a case on our information, they usually redo the work already done and present the case to U.S. attorneys.

Out of 10 felony-type cases of the theft or burglary or assault nature, we may get prosecution on 1. One of our biggest problems now is that FBI agents are not around to present cases, and when they do arrive, there is such a huge number of cases that only the most serious are considered. This leaves a huge number of cases and victims of these crimes simply up in the air and hundreds of man-hours of work down the drain. The most frequent response we get from Federal authorities is to take the case to tribal court. Tribal courts are not equipped to deal with felony cases of any nature.

Burglary is quite common on the reservation. It is a felony offense that should be taken by U.S. attorneys. If local officers do enough work to solve the case, recover property, and determine that an Indian person committed the crime, the FBI will open a case, maybe, if the amount stolen is of a great monetary value. Usually the case of burglary is declined for tribal prosecution. The tribes do not have a burglary statute. Consequently, a person found to be involved in a burglary has to be charged with a simple crime of theft, a crime which is completely different than burglary. The result is that a known burglar is frequently given a light sentence and is free to resume his activities. This is done with no record of any type of conviction being entered into either a Federal court or State court record. This cripples our efforts in that a many-time offender will receive a much lesser sentence and/or probation when he is finally convicted of a crime in Federal court due to no prior record of his crimes. When we have repeat offenses, we also have repeat victims.

The use of a magistrate on the reservation as presented by S. 2832 does solve some of the problems faced by law enforcement on an Indian reservation. While the total problem lies in having two sets of laws, it is nevertheless a tool which would prove of great benefit while we are under the dual jurisdiction system. I believe it would bring a measure of equality to the enforcement of laws. I believe it would also serve to dispel some of the apathy toward the Federal court system shown by white and Indian persons alike. Not having to rely on the FBI for handling of many of our cases would certainly strengthen our ability to reduce crime. Defendants should have had, long ago, the right of a speedy trial by a jury of their peers. This is not done in Federal court.

While I have addressed the problems unique to law enforcement, there are other problems that a bill of this nature could solve, such as the help that could be made available to all law enforcement and local court systems working together for the betterment of our community as a whole. I have previously testified before the committee on State/trial relations and have given testimony which is quite lengthy, and I do have statistics and special cases documented that I will make available to this hearing panel upon request.

Senator MELCHER. Chief Neumiller, we would like to request that right now. We think it would be most helpful. I do not mean to read it now, but to submit it for us to make it a part of the record.

Chief NEUMILLER. Yes, sir. In conclusion, I do favor the passage of S. 2832. I do appreciate the invitation to attend this hearing, and I offer this letter of support to this panel.

I thank you.

Senator MELCHER. Thank you, very much. We appreciate the testimony of both of you.

Chief Neumiller, what about cross deputization of State and sheriff's office and local police officers, such as the city of Wolf Point, and tribal police authorities? I know it has been used sometimes with success. Other times, it has been used, it has broken down and does not seem to work right. What is your experience with it?

Chief NEUMILLER. Senator, for years, we have had, I would call it, an informal State cross deputization. Presently, the city police department officers or interested tribal personnel, can take that person to tribal court. Also, the tribal police officers can arrest a white person and take him to city court. While we have no formal proceedings, we have found that basically it is the tribe and city governments, for our part, working together, that has made this work, and probably more out of necessity than anything else because we have to have something. This policy has been used for several years and is still being used.

We recently have had meetings with the tribe, and, in fact, have had a legislative meeting with the State concerning cross deputization on a formal basis. So far, as far as I know, we are still working on the legalities of such an agreement.

Senator MELCHER. Now, Jim, I want to ask you the same question, speaking for the county sheriff's office. What is your experience with cross deputization?

Mr. HALVERSON. I do not believe the county ever really had, in the past, any formal agreements, but the working arrangements have been all right. I guess what it amounts to is if a tribal law enforcement individual saw an incident, he could detain or what-have-you. I suppose it would be, more or less, the same as a citizen's arrest. I think we would all welcome somebody curtailing the problem. We have never had, to my knowledge, any formal agreements, but the law enforcement people have worked quite well together in the past.

Senator MELCHER. Well, the bill would formalize and legalize—if not directly, certainly it would encourage it. That is the whole sum and substance of the bill, to bring that about.

Do you believe that is advantageous, that the magistrate could use and coordinate local sheriffs and city police? In your instance, Chief Neumiller, it would be the sheriff's office, and the tribal police, to use any or all of them for serving citations, making arrests, and what-have-you?

Chief NEUMILLER. I think what the advantage would be is that the work done jointly by the city and the tribal police—which we do now, particularly on investigations—if this could be brought before a local system, in this respect it would be of great advantage regardless of whether the city or tribe, or both together, were in on an investigation and saw the crime. We would have the ability jointly to present this crime there in Wolf Point.

Senator MELCHER. Right there at the time.

Chief NEUMILLER. This would be of the greatest advantage to all of the agencies in this area.

Senator MELCHER. Thank you both, very much. We appreciate your coming down here to testify today.

[Subsequent to the hearing the following information was received for the record.]

POLICE DEPARTMENT,
CITY OF WOLF POINT,
Wolf Point, Mont., November 6, 1979.

RILEY OSTBY,
Mayor,
City of Wolf Point.

DEAR MAYOR OSTBY, I have spent quite a bit of time on research of our criminal cases here in Wolf Point since you requested information regarding time spent in investigations of crimes by this department. I have broken down the types of major crimes we've encountered since the first of the year. Next I have taken four of our recent burglaries which are typical of cases we work and will give you a summation of the cases.

It is interesting to note that approximately 90 percent of the cases we solve involve Indian persons who live here in Wolf Point. Almost every case involves a repeat offender for the same or similar crime. Where felonies are involved on the reservation the FBI or the BIA supposedly work the case. Although we are deputized by the Ft. Peck tribes as tribal officers, we cannot make felony arrests without the permission of the U.S. Attorney's office in Billings after the case is presented by the FBI. Herein lies our biggest problem. We often apprehend a person in the commission of a felony crime and have to charge this person in tribal court with a disorderly conduct or liquor violation charge until an FBI agent can be contacted to rework the case, present the case to the U.S. Attorney, and get the go ahead to arrest the man. This process sometimes takes several days. FBI agents are not available on a daily basis here in Wolf Point. They sometimes are out of the area on other reservations or doing other things when something happens here. If a person is arrested on a tribal charge he is often out the same day. From that point until he is rearrested and charged with the felony there are many things that can happen—witnesses can be influenced, property can be hidden, alibis can be created, or any number of things that will make it harder to recover stolen property or get a conviction. I have no way of knowing how many times this has happened but I do know we have a hard time recovering stolen property and when we do it is often in someone else's hands. In short we can work a crime of a felony nature, solve it, turn it over to the FBI, and from that point we have nothing to say about how this case is handled or when. The prosecution on our cases in Wolf Point comes out of Billings. The U.S. Attorney's office gets second hand information from the FBI on the cases we work. I have never seen a report the FBI hands to the US Attorney's office on which he makes his decision as to prosecute or not. Quite often he does not. It is rather ironic that most of the felony crimes that happen in Wolf Point are turned over to FBI agents from out of town, who turn the case over to the US Attorney's office in Billings, and if the case goes to trial it will go to Great Falls. These federal cases are taken completely out of our hands and also the hands of the sheriff's department.

Listed below are the cases of a felony nature that have happened within our jurisdiction since January 1, 1979. These cases do not include bike thefts, misdemeanor type thefts, or vandalisms of a minor nature.

Burglaries: The unlawful entry by forceable means into any structure with intent to commit a felony thereon—24.

Thefts: The taking of property by means other than burglary and these cases involved property of over $100.00—32. Robberies included here.

Assaults: Cases involve attacks by knives, guns, or beatings that have caused injury of a serious nature—12.

Forgeries: Writing fictitious checks to obtain money—4.

Stolen vehicles: Vehicles stolen from owners and do not include joy riding or misplaced autos—13.

Vehicle burglaries: Cases in which vehicles have been broken into and property stolen from them of substantial value—13.

Homicides: The taking of a person's life by deliberate means—1.

Rape: Sexual assault upon a person without consent—2.

Vandalism: The destruction of property, these cases to a major extent and do not include damages due to burglaries, etc.—28.

Gas, car parts, battery thefts: Mostly in $20 to $200.00 range—15.

Child beating:—1.

I have not listed numerous cases of a misdemeanor nature which we also investigate and these cases are handled through our local tribal or city court. These cases alone make it nearly a full time job for two officers to investigate and handle without the massive felony loan.

Of these cases worked by our department and the sheriff department, several have been solved prior to being opened by the FBI. The reason is this: Unless the FBI has information that a crime has been committed by an Indian person on the reservation they will not open a case and work it. Usually by the time we determine an Indian person actually did the offense we know who it is, have obtained a confession, and have gotten some property back. Then the FBI opens the case and it is a simple matter to turn our work over to the U.S. Attorney for prosecution. In some cases they reinterview persons or go over some stuff that is left to do, but most is done locally. In murder investigations the FBI does enter a case faster, sometimes without knowing an Indian person is actually involved, but as a general rule unless we come up with an Indian suspect the FBI does no active ground investigations. A profile of four of our recent cases will point out the time consumed by myself and the department on cases which we have no jurisdiction.

9–5–79—Person(s) broke into the Hart motor warehouse by the city shop area doing damages to window and inside. Stolen was a 12 speed bicycle worth app. $150.00 and the owner did not know exactly what else. At the time this happened there had been several more cases of vandalism and other break ins in the area and we questioned over thirty people, mostly juveniles with parents present, in connection with this case. The BIA and FBI were aware of these cases but there was not clear evidence an Indian person was responsible. I finally managed to uncover parts of the bicycle that was burgled at the home of the tribal juvenile officer and found out the names of the kids that gave them the bike parts and on October 11, 1979, I turned the case over to the FBI and gave them the names of the persons responsible for the burglary. About half of the bicycle was recovered. Time spent by myself and officer Ron Wilson was about 80 to 90 hours. To date I have not heard if there is going to be prosecution or not. It is also to be noted that these same boys were part of a gang that beat up another boy with a baseball bat and put him in the hospital and this bunch was jailed under tribal charges twice for curfew, liquor, and assault charges. They are out.

9–21–79—Keith Johnson motors was burglarized and calculator, tools, and radios were taken. In connection with this we interviewed eight or nine people throughout the next three weeks and came up with the name of a woman that observed a local man, Indian, going into the garage on that night. Subsequently we managed to get a full confession from this person and we did get radio and calculator back. The radio had been sold to someone else and the tools also. At this point the FBI came into the case as they had an Indian suspect. Also at this point the case was solved. Since then I have heard nothing. The radio was turned over to FBI for evidence as well as the written confession. We probably spent about 100 hours altogether on this case. I let the FBI know where the stolen tools were—so far they have not been recovered.

9–26–79—The Farmers' Union elevator was burglarized and a window smashed out and several hundred dollars taken from a safe. Sheriff and police officers pulled a crime scene investigation and we obtained a unique set of foot prints at the scene. Work by the SO and police after that went on with interrogations, printing, chasing down shoes that had been bought with that print, and other things that consumed 40 hours of our time approximately as well as the SO working the case. The case was solved on:

10–10–79—City police noticed one of the windows open in the basement of the PV elevator and investigated at night time. They found the place broken into and burglarized and they did apprehend a male Indian subject on the premises. He was taken to jail but only booked on a DC charge although we knew he committed the burglary and in fact had several articles from the PV elevator on his person. Night officers left reports for the day men to work and we did. The next day, the 11th of Oct., we found out that this same person had burglarized the Farmer's Union elevator. We got a written statement of confession the forenoon of the 11th that this person had burglarized the Farmer's Union and PV elevators, we got the stuff from the elevators, except for the money which was spent, and he was released from custody in the afternoon by tribal judges for the liquor charges he was being held on. This person was also on federal pro-

bation. He had been involved in at least 10 prior burglaries. And we could not arrest him. On the 11th the FBI opened a case on this person, and as you can see, there was not much work left for them. There is a chance the subject involved may be returned to federal custody for parole violation, but so far I haven't heard anything on a prosecution for these cases.

We are a six man department and two of us function in the capacity of investigators, although we have no official investigative unit. The other men are school trained as well as having years of experience on this department. We all work felonies. We have to or many of the crimes would go completely unsolved. The sheriff's office have three men who actively work cases but they extend county wide and into Poplar, Culbertson, Froid, Bainville, as well as rural areas. We could use about six more men to do nothing but pull investigations just to keep up with the crime rate on felonies. The FBI and BIA investigators have so many cases they do paperwork most of the time and are not usually around more than once a week for a few minutes to pick up what we have. They come more often for murder investigations but while that is going on everything else pretty much slides, unless we do it. If we take a felony report, turn it over to the FBI, and do no follow up, it will not get done. Most of their time is spent in paperwork and preparing cases to present to the US attorney's office. I have suggested several times letting the local law officials present our cases directly to the US attorney after being reviewed for correctness by the US magistrate stationed here in Wolf Point. The sheriff also advocates this and has spoke to the US attorney's office about this. All to no avail. A great deal of our felony cases wind up being taken as misdemeanors and may result in a minimal fine. There is not much deterrent here. Our crime rate is bad and could be much worse if we did not work cases. A couple of FBI agents stationed here in town would help as they would at least work with us. Possibly some interest would be generated toward getting repeat offenders prosecuted quickly and get them into custody to stop repeat performances. I don't know how much money it would save the city as our work would go on but it would save the city itself a lot of dollars in decreased thefts.

We are in a unique situation where the city is paying for law enforcement officers to work without having the jurisdiction to follow up on their most important cases. The situation is ridiculous and to my knowledge no one has ever come to Wolf Point to view this situation first hand. Eighty percent of all our activities involve Indian persons yet there is no reimbursement from and tribal or government agency to the city for this work. If we don't do the work it is left undone and the city suffers. My department and the sheriff's department has files, records, and any information you would want in the event you wish to pursue this matter.

R. J. NEUMILLER,
Chief, Wolf Point Police Department.

COUNTY OF ROOSEVELT,
Wolf Point, Montana.

This report is submitted to the Roosevelt County Commissioners by the Roosevelt County Sheriff's Office. An attempt has been made, by file checks, to break down the number of Tribal related responses to white related responses. The figures arrived at are probably not all conclusive as in some cases no suspect was developed.

These totals are developed from the fiscal year 1977–1978.

Incidents involving reports to law enforcement. These reports involve some type of follow-up investigation.

Total reported	333
Tribal related	230
Percent tribal	69
White related	103
Percent white	31

Incidents reported to Dispatch. These calls have resulted in some type of law enforcement response.

Total reported	6,719
Tribal related	3,651
Percent tribal	54
Tribal arrests	801
White related	3,068
Percent white	46
White arrests	200

Last fiscal year this department had a total budget allocated of $185,801.21. This includes those items budgeted for by the Commissioners. In figuring the two areas totaled, we arrive at the following dollar figures:

Incidents involving follow-up:	
Tribal	$128,202.69
White	85,468.31
Incidents reported to dispatcher:	
Tribal	$128,202.69
White	85,468.31

DONALD L. CARPENTER,
Roosevelt County Sheriff.

Senator MELCHER. The committee is going to recess now until 2 o'clock. At that time, our first witness will be Forest Horn—I don't see Forest here—but Alex Laforge and Urban Bear Don't Walk are representing the Crow Tribe. They will be our first witnesses after we recess.

The committee is in recess until 2 o'clock.

AFTERNOON SESSION

Senator MELCHER. The committee will come to order. We will resume our public hearing on S. 2832, the Federal special magistrates bill.

Our next witnesses are, I believe, Alex Laforge and Urban Bear Don't Walk. Now, is Forest Horn here? I haven't seen him.

A VOICE FROM THE AUDIENCE. No; he isn't.

Senator MELCHER. Alex, please proceed.

Mr. LAFORGE. Good afternoon, Senator.

Senator MELCHER. Good afternoon.

STATEMENT OF ALEX LAFORGE, SR., CHAIRMAN, TRIBAL LAW AND ORDER COMMISSION, CROW TRIBE; ACCOMPANIED BY URBAN BEAR DON'T WALK AND ALVIN HOWE, CHIEF, CROW TRIBE

Mr. LAFORGE. My name is Alex Laforge, Sr. I am a member of the Crow Tribe, and I serve as the chairman/director, and have for the last 5 years, of the Crow Law and Order Commission.

With me today, and I will take the liberty to introduce them, are, on my right, Urban J. Bear Don't Walk, a member of the Crow Tribe and one of the few Indian attorneys in private practice. Urban serves as the in-house Crow Reservation attorney. On my left, I have Chief Alvin Howe with the Crow Reservation Police Department.

Since the Crow tribal representatives have opted to offer testimony as a group instead of singularly, I respectfully request that the 10-minute time limitation be waived. I believe that we will be able to conclude our testimony within 20 minutes.

First, on behalf of the Crow Tribe, I would like to express sincere appreciation to the Senator and staff for being invited to participate in this hearing. Further, I believe the Senator should be complimented for the efforts he is making in the area of Indian affairs.

If the Senator pleases, may I proceed?

Senator MELCHER. Yes, please proceed.

Mr. LAFORGE. Evidently, the Select Committee on Indian Affairs held hearings regarding jurisdictional issues affecting Indian reservations in March of this year. The Crow did not attend those hearings. However, it is our understanding that from these hearings, Senate bill 2832 was conceived.

In introducing S. 2832, the Senator's comments regarding the need for this bill were, and I quote:

> The vast majority of the testimony was directed toward problems associated with law enforcement:

And:

> Mr. President, many of the complaints of Indians and non-Indians relate to lack of enforcement of laws or hardships imposed on defendants, witnesses, and families arising from the distance of Federal courts from reservation areas.

In our opinion, the problem regarding enforcement, or lack of enforcement, is real regarding violators, both Indians and non-Indians, of Federal criminal laws within Indian country. However, we do not feel that Senate bill 2832 offers an appropriate solution or remedy. Further, Senate bill 2832 has little, if any, bearing on the hardships mentioned by the Senator above, endured by Indian people who are brought before Federal district court for violation of a major crime, and, therefore, this issue will not be discussed further.

The Crow Tribe's major concern regarding Senate bill 2832 is the substantive criminal law that will be made applicable to Crows and other Indians within the Crow Indian Reservation. In talking with members of other Indian tribes regarding Senate bill 2832, many seemed to be of the opinion that Senate bill 2832 would only have application to non-Indians. The Crow do not read the bill as applying to only non-Indians, and the fact that Indians will come within the gambit of this bill is made clear by the Senator's comments regarding Indian defendants being represented in this special magistrate's court by paralegals. I will make additional comments regarding representation by paralegals at a later time.

If Indians, like non-Indians, are subject to this law, the question is what substantive criminal law or crimes committed by an Indian or non-Indian will come within the jurisdiction of this special magistrate's court? Section 651 of Senate bill 2832 provides that the special magistrate's court will have the power to conduct trials under section 3401, title 18, United States Code. Section 3401, of the same title and code, provides that any U.S. magistrate shall have jurisdiction to try persons accused of misdemeanors committed within that judicial district. If it appears that the answer is misdemeanors, and this is obvious, one's research into the hodgepodge of Indian law is just beginning.

Very briefly, if an Indian commits one of the major crimes under 18 U.S.C. 1153 and the situs of the crime is Indian country as defined by 18 U.S.C. 1151, he or she is subject to being prosecuted in Federal court under the Major Crimes Act, originally enacted into law in the 1880's as seven major crimes but subsequently amended so that there are 13 or 14 major crimes.

In addition, theIndian who commits a crime within Indian country may be subject to the tribal law and order code. The acts or omissions made criminal by tribal codes generally fit within the misdemeanor

category of non-Indian crimes. The Federal and tribal criminal laws, often working in tandem, are pretty well understood by Indian people.

The general Federal criminal laws referred to in 18 U.S.C. 1152, and how this applies to Indians within Indian country, not only puzzles Indian people, but has Federal district judges disagreeing. The confusion, it seems, is created by the so-called Assimilative Crimes Act, 18 U.S.C. 13, made applicable to Indian reservations via the General Federal Crimes Act, referred to above.

In essence, the Assimilative Crimes Act allows the Federal Government to apply State law—in our case, this would be Montana State law—to Indian reservations if the Federal Government has no law to cover the act or omission. For example, the Crow Tribe, as far as I know, does not have any laws regarding gambling and betting that may occur involving arrow games, horseracing, hand games, or other traditional games. Does this mean that the State of Montana gambling laws will apply via the Assimilative Crimes Act and prosecution will go forward with the special Federal magistrate's court?

Senator MELCHER. I am going to answer your questions here. You are posing questions to the committee, and they deserve to be answered in the context of your question.

The answer to that is no; no more than would apply now. In my judgment, no State law applies to the Crows on the matter that you just described.

Mr. LAFORGE. Thank you.

As far as I know, the Crow Tribe does not have laws regarding the selling of raffle tickets for certain prizes or bingo games. Would the same thing happen?

Senator MELCHER. In our judgment the answer to that would be "No."

Mr. LAFORGE. OK.

Perhaps the concern regarding application of State regulatory schemes to the Crow tribal members or others within the Crow Tribe's jurisdiction is overstated, since the wholesale application of State regulatory schemes has not occurred. Evidently, the right of self-government has been the dominant factor regarding the issue of whether or not intrusion should be made within the tribal structure, and this should continue.

The creation of a special Federal magistrate's court will have the tendency to usurp the Crow Tribal Court's jurisdiction regarding the handling of criminal matters.

Indian tribes, particularly those who know that a different decision would probably have been reached if the matter arose on another Indian reservation, still have a bitter taste regarding the U.S. Supreme Court's decision in *Oliphant* v. *Suquamish Indian Tribe*. The Court held that Indian tribes do not have jurisdiction over non-Indians absent affirmative delegation of such power from Congress, and it rendered Indian tribes somewhat defenseless unless the State or Federal Government would fill the void.

Pursuant to the decision in *Oliphant*, on March 23, 1978, to be exact, a meeting was held between representatives of the Crow Tribe and representatives from the Federal Government and representatives from the State, including the highway patrol, sheriff, and county at-

torney. Big Horn County's position was summed up by the county attorney, who said he could do it in 25 words or less, and the position was that he planned to do nothing different after the decision in *Oliphant* than what had been done previously. Big Horn County's contribution to law enforcement on the Crow Indian Reservation, an area of 2.28 million acres in size, is one deputy sheriff. Non-Indians outnumber Indians.

Pursuant to the decision in *Oliphant*, on January 5, 1979, the Crow Tribe convened a meeting in Billings, Mont. with Robert T. O'Leary, U.S. attorney, regarding the prosecution of non-Indians for trespass on Indian land. Obviously, the Crow Tribe had concern after the decision in *Oliphant*.

Perhaps what occurred after the passage of the 1968 Indian Civil Rights Act, and the number of cases being brought before the Federal judiciary by Indians and others, should be a lesson. In our opinion, Indian people were too eager to run to the Great White Father to have internal disputes decided. We can see Indian tribal justice systems abdicating their responsibilities to the special magistrate.

The Crow tribal representatives seriously question the efficacy of the proposed solution or remedy. If, in fact, the problem is lack of enforcement, and this has been clearly demonstrated by testimony here today and testimony in March 1980, the solution is not the creation of a special court, but the hiring of additional enforcement personnel such as law enforcement officers and prosecutors.

Another solution would be a delegation from Congress to Indian tribes of jurisdiction over non-Indians regarding minor crimes committed within Indian country. We may speculate as to why the non-Indian justice system is not enforcing laws on Indian reservations, but speculation has no place in this hearing.

The qualifications that a person must have to be eligible to qualify for one of the special magistrates position makes the chances of an Indian person receiving an appointment extremely small.

Section 650(b) provides that no person may be appointed or reappointed to serve as a special magistrate under this chapter unless such person is and has been for at least 5 years a member in good standing of the bar of the highest court of the State, or one of the States, in which he or she is to serve. In Montana, for example, of the approximately 1,850 attorneys, there are less than 10 Indian attorneys who could qualify for a special magistrate's position. This causes great concern because it is extremely important that a member of the Federal judiciary have proper attitudes regarding Indian people.

Finally, there is some concern that Indian people, or even non-Indians, will not receive effective representation if they rely too heavily upon paralegals who will be permitted to practice law in the special magistrate's court.

It is true that many Indian tribes have developed outstanding paralegal programs and have been in the forefront in this area. However, Indians, as should others, have to understand the functions of paralegals, and, therefore, paralegals are able to function well within their limits. Indian people, I am afraid, expect paralegals to be lawyers, and this has caused concern.

If a person is faced with the maximum penalties that can be meted out by the special magistrate, and we understand this to be 1 year in

jail or a fine of $1,000, or both, then the Indian person should be entitled to appointment of counsel if that person is indigent. Any person who is prosecuted for a violation of one of the major crimes and who comes to Federal court and who is indigent is entitled to appointment of counsel. Many of these persons are extremely well represented by very able counsel here in the Billings, Mont. area.

In conclusion, it is respectfully submitted that instead of establishing a special magistrate's court, consideration be given to: No. 1, enforcement; and, No. 2, if the non-Indian criminal justice systems will not enforce its laws, then vest jurisdiction with Indian tribes.

Senator, if you would like to ask us questions, I would like to have Mr. Bear answer your questions.

Senator MELCHER. OK. First, I would like to ask Alvin a question.

If I understood Alex's testimony, he says that based on testimony that we have heard so far today, that it is obvious that there has been a lack of law enforcement on the reservation on occasion. Do you have any comments to make on that, Alvin?

Chief HOWE. Yes; I do, sir. I was interested in the testimony given this morning by Mr. Graham in reference to the enforcement and jurisdiction and so forth on the reservation. He cited a number of examples that I feel were unfounded examples, but since he wanted to put them in the record for your meeting here, I thought I better refute some of them to a certain extent.

We do have enforcement on the Crow Reservation. We have law enforcement through the Crow tribal police. There are 14 policemen on our reservation hired under the 638 contract. We provide protection, 99 percent of all law enforcement, on the reservation, ours, along with the Bureau of Indian Affairs officers. The county, Big Horn County sheriffs, provide one law enforcement officer on the reservation itself. The rest of their officers work within the city of Hardin.

Senator Graham said this morning that schools were vandalized in Lodge Grass and no one responded. I beg to differ with him in that we, last year, prosecuted, through the Bureau of Indian Affairs investigating, along with our officers, four major break-ins up there. My office has investigated a number of other incidents at the school. Those who were tribal members were brought into our tribal court and were prosecuted.

The jurisdictional problem becomes one, again, because of the *Oliphant* decision where we are not able to bring any non-Indians into our courts. So, therefore, a non-Indian committing a crime on the school grounds or anywhere on the reservation usually is not brought into court because of the fact that we have a lack of enforcement on our reservation by the Big Horn County Sheriff's Department.

Senator MELCHER. What authority are you saying that the sheriff of Big Horn County has on the reservation?

Chief HOWE. Of the 2.28 million acres of land on the reservation there, I think approximately half of it is deeded land belonging to non-Indians at this point in time. He has full enforcement on that land, any deeded land that happens to be with non-Indians.

Senator MELCHER. I don't think the Crow Tribe is saying the sheriff's office, under existing law, has any authority over an Indian on the reservation.

Chief HOWE. Over an Indian, no. Over non-Indians, yes.

Mr. BEAR DON'T WALK. It seems to me that some of the confusion is that State jurisdiction, as far as criminal matters are concerned, stops at the reservation boundaries. That, of course, is not true, and held by very old cases. *Draper*, *McBratney*, et cetera, held that as long as the victim was a non-Indian, that the State could and does prosecute and take jurisdiction over those matters.

Senator MELCHER. All right. What about an Indian offense against a non-Indian?

Mr. BEAR DON'T WALK. An Indian offense against a non-Indian?

Senator MELCHER. On the reservation.

Mr. BEAR DON'T WALK. If it falls within the major crimes, then, of course, it should be prosecuted by the U.S. Attorney and go to Federal court.

Senator MELCHER. Should or must?

Mr. BEAR DON'T WALK. I said, should.

Senator MELCHER. Now, do you envision, Urban, a situation where it would not have to come to Federal court?

Mr. BEAR DON'T WALK. No; not necessarily, and all, perhaps, do not. It depends on whether or not the U.S. attorney will take it up. If they will, then that falls within major crimes. If the U.S. attorney, and that is why we mentioned it in our statement in regards to working in tandem, then it is generally relied upon the tribal court to prosecute as a misdemeanor. We can prosecute. We are limited to 6 months, $500, or both. So that is where we see them working in tandem.

Senator MELCHER. Urban, I know this is confusing, but I want to get it on the record, and I want your testimony on this point on the record. Where the alleged crime is a non-Indian against an Indian, you are not contending in any way that that has anything to do with State jurisdiction, are you?

Mr. BEAR DON'T WALK. Yes; I am. I would make that contention.

Senator MELCHER. Would you?

Mr. BEAR DON'T WALK. I think that should be subject to prosecution——

Senator MELCHER. Well, we will ask the U.S. attorney the same question.

Mr. BEAR DON'T WALK. I think that should be subject to the prosecution by the State of Montana, Big Horn County. I do not think they make any distinction with regard to the victims, whether or not they be Indian or non-Indian. That could also constitute a Federal crime.

Senator MELCHER. The Justice Department feeling, which is rather new, is that if there is a threat to the person or the property of an Indian by a non-Indian, that it could be tried under State jurisdiction. This is, as you well know, under litigation right now and has not been resolved. I do not want to put words in your mouth. I think you know that theory, do you not, Urban?

Mr. BEAR DON'T WALK. I am not familiar with the case, no.

Senator MELCHER. I am advised by these attorneys that it is under litigation now, and it is a rather new theory on the part of Justice.

Mr. BEAR DON'T WALK. Then if it is up in the air, none of us have a very definitive answer.

Senator MELCHER. That is true.

Mr. BEAR DON'T WALK. It seems to me that the answer in regards to those so-called victimless crimes—when Alex posed the question in

regards to gambling—my understanding is that there has been some prosecutions which have occurred on Indian reservations via the Assimilative Crimes Act, which is brought into play by the General Crimes Act, 1152. We think the State of Montana has been very reasonable about this, but, if, in fact, there is a handy special magistrate's court located quite close to the reservation, then we feel that it is imperative upon them to come in and prosecute. This would be the U.S. attorney under Federal law.

Senator MELCHER. Urban, we are going to correct something here. We are going to make it straight in our record, and I hope we correct your impression.

Alex has been saying that, and we are going to try to make it clear, that this bill does not change what the existing situation is, and it does not—as you imply right now, or Alex has implied—set up a different situation that changes the law on that. It does not change the law. Under something that really is a major crime and should be before the Federal court, it provides that some preliminary procedures can take place. Setting a bail, for instance, could take place under the jurisdiction of the magistrate, but it does not bring a major crime before the magistrate.

The Crow Tribal Court, after *Oliphant*, really has no authority over non-Indians, and Alex and Chief Alvin Howe are seeming to say on the one hand that there is some lack of enforcement; and on the other hand, it is not so bad. But the fact remains that after *Oliphant*, there is not any question but what you can not bring a non-Indian into a tribal court. So to suggest, first of all, what you need is more money for the U.S. attorney to become more active is one thing, in major crimes, but really this does not get to the basic point of the *Oliphant* decision that you can not put a non-Indian into tribal court.

So then, Alex gets to the point. He suggests another delegation of authority by Congress, but he clarifies this, which, as I understand the *Oliphant* case, is the sum and substance of it. It says, "Well. Congress has never given that authority to a private court, and so there is no such authority." So this bill is an attempt to delegate some authority.

Now, if this is not the right way to get at it, that is one thing, but we want it clearly understood that what this bill does is to grant some authority to a special magistrate to utilize, without confusion, a sheriff's office, or the city police like in the case of Wolf Point, or the BIA officers, or the tribal police, and to see that law and order has a chance.

Now, Alvin, you have stated the case rather well. The episode was stated by Caroll Graham; nothing much is done on the school grounds. You say, "Well, you only have one sheriff's officer covering all the reservation down in Big Horn County." Well, they do not have too much authority anyway in some instances. They are not doing much, and you say you lack authority in some instances. So it is falling between the cracks. We do not think it ought to.

There may be better ways at arriving at this than what we have proposed in this bill.

Mr. BEAR DON'T WALK. If I may, Senator?

Senator MELCHER. Yes. Let's go ahead on that basis.

Mr. BEAR DON'T WALK. I am not too sure that I would be satisfied with the categorical answer that no, assimilative crimes are not a problem. I think that probably needs to be looked into. Yes, we Indian

people are confused. Also, the Federal judges are confused, and also, the city attorneys are confused. It is very difficult. If, in fact, the bill does not change anything as far as prosecution of non-Indians, then we are saying, "Why not enforce the law instead of setting up a special court?" It seems to me that this court becomes too handy for prosecution of Indian people, and it seems clear that Indian people are going to be prosecuted as defendants within that court, and that is our concern; the efficiency, if you will, of setting up an additional court, if, in fact—and Indian people do not cry too loudly on some of these things—if the U.S. attorney, for whatever reason, is not prosecuting what should be a major Federal crime, there is a certain price that has to be paid for self-government.

We do not, in essence, want a police state. We do not want countless FBI people on the reservation. We do not want another Pine Ridge-Oglala type situation. Certainly, the enforcement could be almost perfected. The enforcement could be there. There could be additional law enforcement officers, and I think there is a certain price for self-government. Thus far, we have been willing to pay it, since the U.S. Congress said we were not capable of handling major crimes back in the 1880's, as Mr. Laforge has mentioned. So if it changes now, the only change I can see in analyzing this for quite a while is that it is going to become more handy and perhaps more Indian people will be prosecuted underneath these laws which we all admit we do not understand.

If that could be clarified, or if it should apply to just non-Indians, that would be a different position. But at this point, if the non-Indian Anglo justice system, if they are going to talk about the law, write beautiful laws on books, get revised codes in Montana, United States Codes, if they are not going to enforce that, then we think the logical step in *Oliphant* says that Congress cannot enforce that in Indian tribes. We think that is a logical step. Taxpayers' dollars go down to help run the Crow Tribal Police Department and Crow Tribal Court.

Senator MELCHER. Urban, I do not think this is a question of restoring, by an act of Congress, that authority to an Indian tribe over a non-Indian. It seems to me that *Oliphant* has said that that authority never existed by an act of Congress and that if it is going to be there, it has to be an act of Congress. Is that correct? Do you read it the same way?

Mr. BEAR DON'T WALK. That is how I read it. Not necessarily restore it, but it could be placed there. We are looking at that.

Senator MELCHER. If you agree that there should be an act of Congress on this, then the question comes up: "What kind of an act of Congress do you want?" This is just one proposal. Specifically, what would be the act of Congress that you would recommend?

Mr. BEAR DON'T WALK. I think it would be—if we are talking specifically about the Crow Tribe—to allow the Crow Tribe with its self-government, inherent power of self-government, to have jurisdiction of any persons who come within the reservation boundaries; for criminal matters, for the protection and welfare of the society down there, the protection and police powers of the Crow Tribe. I think that should replace it.

Senator MELCHER. You think it should be enacted?

Mr. BEAR DON'T WALK. I would like to see that enacted, certainly. I think that is an alternative. Whether or not this is the time and the

congressional feeling in regard to Indian people—I think we have the same concerns in regards to why the blacks are rioting in Miami and Chattanooga. We question some of the justice. We have the same concerns, and I think it was especially important in regards to the attitudes that a magistrate holds against Indian people. I think it is very important, very important in regards to the process they go to select a U.S. Supreme Court judge or any other judge. I think they have to be examined very closely.

Senator MELCHER. I will make the same comment I made this morning, and that is that what we have is not satisfactory; the situation we have. I do not believe that it is very practical to have an offense by a non-Indian in such a situation as Wolf Point be tried in the tribal court at Poplar.

Mr. BEAR DON'T WALK. May I ask why?

Senator MELCHER. Because the vast majority of the people in Wolf Point are non-Indians, and that is the situation that we face.

Mr. BEAR DON'T WALK. Senator, I come to this court, and I have a great deal of respect for it.

Senator MELCHER. They have a city police court. They have their own. They are under State jurisdiction over a great amount, and I do not think your recommendation will sell. I do not think it will wash, and I am wondering whether—if my assessment is correct—this system is a help.

Mr. BEAR DON'T WALK. Well, I go across the street to State court, and I have a great deal of respect for Judge Luedke and all the judges there; Judge Wilson. I have a great deal of respect. I am wondering why—why is it different when a non-Indian is subject to sitting before an Indian tribal judge? That is my question. Politically impractical? Maybe that would sum it up.

Senator MELCHER. Well, if you mean that in its broadest sense; in that the people in an area ought to have the authority, as much as possible, to work out their own sort of system of justice which will work for them, I will say yes, politically impractical.

Mr. LAFORGE. Senator, may I elaborate a little further?

Senator MELCHER. Surely.

Mr. LAFORGE. If you recall, a couple of years ago, I testified before a Senate select committee, of which I think you are a member, on that tribal/State compact bill. We have something similar going on here in the State of Montana. We have a legislative body that has been meeting with different people, and I went to some of these meetings. We are working this very area. But the difficulty is in jurisdiction that we just cannot get together on. I see this thing working down the road, years, maybe 5 to 10 years. But for the time being, I do not see how it is going to work; this matter of jurisdiction, and I believe the Montana Intertribal Policy Board has also enforced the same stand.

In fact, right on the local level, we cannot even work with our county attorneys and county police officers. Where we have academy-trained police officers, and on the other side, they do not have that training at all; then they say our police officers are not well trained. We now have a mandate that our police officers have to go to the police academy for a 10- to 12-week course. Then during the weeks, they have in-service training continuously, and we have a very superb police department and very streamlined judicial system.

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Senator MELCHER. You were referring to the Montana Intertribal Policy Board; their position on what? The cross-deputization?

Mr. LAFORGE. No. The law enforcement part, yes.

Senator MELCHER. Well, we were advised this morning that the Montana Intertribal Policy Board endorses this bill as a proper step.

Mr. LAFORGE. This bill here?

Senator MELCHER. That is what we were advised by—whom, Caleb Shields?

Mr. BEAR DON'T WALK. Yes. Caleb Shields did say that, Senator, and for the record, since we have taken an adverse position and we do not endorse the bill, I think we should withdraw the support given on that bill. I do not know whether or not the Crows were in attendance when the Montana Intertribal Policy Board took that up, but I was not aware of it, Senator.

Senator MELCHER. Yes; but this bill is different than cross-deputization because we believe, as it exists now, under cross-deputization, you would still have the same problem——

Mr. LAFORGE. I understand that, sir.

Senator MELCHER [continuing]. That this bill seeks to correct. That is, to provide the focal point for the minor, the misdemeanor, the Federal misdemeanors to be brought before a magistrate for action; and the authority of that magistrate to utilize the services of all the law enforcement agencies available to carry out, issue citations or serve citations, issue citations or subpenas or warrants or what-have-you. So cross-deputization would not, in effect, perform what we think is the key role of this bill under the Federal special magistrate.

Did you have something more, Alvin?

Chief HOWE. Yes, Senator. I think one of the areas—and I do not know how clear it has come out here—but one of the main objections the Crows have to this bill is the fact that under the bill, it is not clear, but it indicates that Indians will be taken into Federal magistrate court.

Senator MELCHER. In a case involving an Indian with a non-Indian, but not an Indian with an Indian.

Chief HOWE. OK. I think that the main objection the Crows have to this bill is the fact that we do already have our own laws, and we are also subject to Federal law. If a Crow goes off the reservation, for instance, he is then subject to State law. So, this puts us under three different jurisdictions that we are subject to as members of the United States. The reason that the Indians are still crying and smarting about the *Oliphant* decision is due to the fact that the non-Indian is not subject to those three laws as we are. They can come on our reservation and do pretty much what they please and get away with it. We cannot take them into court. Now, under that basis, I, for one, would be, if it is clarified to where a non-Indian only could be brought into the U.S. magistrate court, then I think I would have to say it is a good thing. But to subject Indians to more courts to do the same job that we are doing now in our own court, I think, is a waste of money.

Earlier this morning, I heard you say that a Federal magistrate would get something like $48,000 a year. My figures show that for the State of Montana alone, just for magistrates, that is $336,000. That is not counting the magistrate support staff, court clerks, what-have-you, that are going to have to be put under him to enforce these court decisions. Why not put some of that money—that $336,000 that you are talking about in the State of Montana alone—toward extending this thing and making a study out of it and see if we cannot bring it around to where it would be more to a benefit over the next 5 years?

Senator MELCHER. Did you say a study?

Chief HOWE. Yes.

Senator MELCHER. I want to put this in the right context. First of all, we do not know—and we have had discussion about this here this morning. We are glad to have your point of view on it, too. We do not know whether one magistrate, full time, could handle one reservation or whether it could be split between two reservations. We do not know whether in each instance it would be a full-time magistrate. We are researching it. We are asking for comments. We do not know whether it should be a full-time magistrate, but I think in all fairness that when you testify as you have already testified for the Crows—as Alex has—where we ought to have better enforcement which would mean more U.S. attorneys or more FBI or more U.S. marshals, that either way, you should realize that you are asking for quite a bit of money. I would dare say that if you are talking about more U.S. attorneys, more U.S. marshals, more FBI, you are talking about more money than what we are talking about in this instance.

But we are not sure whether this should be a full-time magistrate for the Crow Reservation or whether it should be part time or whether a full-time magistrate should have two reservations; such as split the time between Northern Cheyenne and Crow. We are searching for suggestions on that. So on the money part of it, I do not think that we are going to spend any more money this way, if we go into it, than if we would try to pursue it through more U.S. attorneys and more Federal judges, too, as far as that goes.

Mr. BEAR DON'T WALK. Senator, could I make one final comment?

Senator MELCHER. Yes.

Mr. BEAR DON'T WALK. I did get somewhat concerned, and although perhaps it was not explicit, in regards to the functions and duties of a magistrate. I understand the importance of a prosecutor. Prosecutors have a great deal of experience, and I hope that we are not even thinking about the U.S. magistrate, if, in fact, this bill goes through, acting in that capacity. There is no way that a Federal magistrate, which I would assume would be a judge, who has to determine guilt or innocence, should in any way deal with things outside his courtroom that would constitute a case against any individual. I was concerned about that because we are talking about saving money, or at least not spending money. But justice is very expensive, and I think we realize that, not only in our Federal system, but we are also starting to realize that in our tribal system. That is also probably true in the State system.

When the 1968 Indian Civil Rights Act was passed Senator Sam Ervin said that Indian people, vis-a-vis their tribal governments, should have all the rights that non-Indians enjoy, vis-a-vis the U.S. Government or vis-a-vis the State government. When it came to appointment of attorneys for indigents, he said:

> Yes, you Indians can have attorneys to defend you in tribal court. As a matter of fact, you should. But you are going to have to pay for those attorneys yourselves.

Now, it seems to me that we got rather—I do not want to use the word "cheap"—pennypinching, perhaps, when it came to that right as far as Indians are concerned. I hope I am not hearing that, nor do I say we are, in regards to utilization of prosecutors who can wash out cases and save money in many cases if they decide not to prosecute. We are not getting magistrates to even think about the prosecution end because they have to be fair and impartial. They have to render justice.

Thank you.

Senator MELCHER. No, Urban, the bill does not say or imply in any way that magistrates be prosecutors. That would defeat the whole purpose, as you pointed out.

Anything more, Alex?

Mr. LAFORGE. One last question, Senator. Our Crow Fair starts Thursday. If your busy schedule allows you to come on down and spend a day with us, we would be delighted to have you.

Senator MELCHER. Thanks a lot for the invitation.

Our next witness is Robert O'Leary, U.S. attorney for the District of Montana.

STATEMENT OF ROBERT T. O'LEARY, U.S. ATTORNEY FOR THE DISTRICT OF MONTANA

Mr. O'LEARY. Thank you very much, Senator.

I hadn't anticipated being here today. I was in Seattle over the weekend, and I flew in this morning. But I had prepared that statement to be submitted to the Senate committee in connection with your Senate bill, and if you would like, for the record, I could read it now, Senator, or we could pass through it and begin questioning.

Senator MELCHER. Well, I think it would be helpful if you would read your testimony, because we have not had a chance to look at it yet.

Mr. O'LEARY. All right.

I am pleased to accept the invitation of Senator John Melcher, chairman of the Select Committee on Indian Affairs, to submit this statement on behalf of the U.S. attorney's office in Montana concerning S. 2832.

There are approximately 42,000 enrolled members of the 7 Indian tribes who have reservations within the State of Montana. One tribe, the Flatheads, elected State criminal jurisdiction a number of years ago and are not presently affected by general Federal criminal jurisdiction. They have approximately 6,000 enrolled members.

With respect to the other tribes, a large number do not live within the exterior boundaries of the tribal reservation, although they are enrolled members.

The FBI has investigative jurisdiction of offenses under title 18 of the United States Code, and this includes the violations of 18 U.S.C. 1151 through 1165, as well as violations of the Assimilative Crimes Act, 18 U.S.C. 13.

The U.S. attorney's office has prosecutive discretion with respect to all offenses which may be violations of the above sections. As of July 15, 1980, there was approximately 200 criminal cases and matters pending in the office. It is estimated that between 60 and 70 percent

of the criminal cases and matters handled during the year involve crimes on the Indian reservations.

The concept of special Federal magistrates on Indian reservations with jurisdiction over minor Federal offenses is very interesting. The testimony and statements submitted at the hearings on this proposed legislation may establish a need for such magistrates.

In Montana, there are presently Federal magistrates serving either on or adjacent to each of the six Indian reservations. These magistrates have authority to conduct trials of minor offenses in conformity with 18 U.S.C. 3401 and, additionally, the magistrates in Great Falls and Billings have greatly expanded authority in both criminal and civil cases. A copy of the order of the court dated November 23, 1979, is attached hereto for the committee's information.

Following the Supreme Court decision in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, which held that tribal courts do not have jurisdiction over non-Indians, our office became quite concerned over the effects of this decision on law enforcement and the prosecution of minor offenses by non-Indians against Indians on the reservations. Prior to *Oliphant*, only one tribe in Montana had attempted by ordinance to subject non-Indians to tribal court jurisdiction, but in reality, local county or city law enforcement authorities investigated and prosecuted offenses by non-Indians against Indian persons, property, or tribal interests.

Offenses committed by non-Indians against non-Indians on Indian reservations are within the exclusive jurisdiction of the State. *United States* v. *McBratney*, 104 U.S. 621.

Minor offenses and those other crimes not specifically set out in 18 U.S.C. 1153 committed by Indians against Indians are within the exclusive jurisdiction of the tribal courts.

Since the *Oliphant* decision, *supra*, there has been no change in the handling of minor offenses by State and local authorities in cases where the defendant is a non-Indian and the crime involves Indian persons, property, or tribal interests.

The question of whether or not the Federal Government has exclusive jurisdiction over such offenses committed by non-Indians on the reservations has been the subject of intensive study by our office and the Department of Justice since the *Oliphant* decision. On March 21, 1979, John Harmon, Assistant Attorney General, Office of Legal Counsel, provided an opinion to then Deputy Attorney General Benjamin Civiletti, which in essence concluded that the States, not the Federal Government, have exclusive jurisdiction over those crimes by non-Indians that do not pose a direct and immediate threat to Indian persons, property, or tribal interests, and that the States have concurrent jurisdiction with the Federal Government over offenses committed by non-Indians that do involve a threat to these Indian interests. A copy of that opinion is attached hereto.

As far as Montana is concerned, the foregoing opinion merely reaffirmed the policy which had been followed for a number of years, at least back into the early 1960's when I was an assistant U.S. attorney.

Jurisdiction of special magistrates under the proposed legislation would be limited to minor offenses committed by non-Indians against Indian persons, property, or tribal interests, and in Montana at least,

jurisdiction of those offenses is already concurrently vested in the State and Federal governments.

I have no doubt there are and have been cases on all Indian reservations which should have been prosecuted in either tribal, State, or Federal court and were not. The reasons are many, and I am sure some would say, including declination judgments made by my office.

There has been a very significant improvement in the quality of law enforcement on the reservations in recent years. However, the major problem in cases falling through the cracks is not, in my opinion, due to inadequacies in the present tribal, State, and Federal court systems, but rather to the need for more trained, professional law enforcement officers on the tribal, local, and Federal, BIA level, and more effective cooperation between them and all prosecutors.

It is unfortunate, in my opinion, that all minor offenses committed by either Indian or non-Indians on the reservations could not be handled by a single special magistrate using the combined resources of the tribe, State, and local and BIA officers and a local prosecutor. I believe this would result in more effective investigation and prosecution of those offenses which most immediately touch the lives of most residents.

I agree with the aims and purposes of Senator Melcher's bill, but I do believe that in Montana, those aims and purposes are presently being served by the existing tribal, State, and Federal court systems, including the present magistrates.

Senator MELCHER. Well, Robert, I have some questions here to propose and ask of you.

What are the current arrest authorities of tribal police?

Mr. O'LEARY. The present arrest authorities of the tribal police are limited to the arrest of Indian persons, and they do not have authority to arrest non-Indian persons unless they are cross-deputized with the local county where the reservation is located. Now, that does occur in some limited instances, but there has not been, to my knowledge, widespread cross-deputization between tribal police and the local deputy sheriffs and the city police where cities are located on the reservation.

Senator MELCHER. In the case of cross-deputization where the tribal police officer would have authority to arrest a non-Indian, where would the arresting officer bring that non-Indian to court?

Mr. O'LEARY. The non-Indian person presently goes to the justice of the peace when he is arrested by the local authorities. Or, where cross-deputization exists, by the Indian tribal police, brought before the justice of the peace, and in some cases where cooperation exists between the Indian tribal police and the local authorities, the Indian police officer signs a complaint before the justice of the peace to bring that person to the justice court.

Senator MELCHER. What authority does the Indian police officer have to arrest a non-Indian for a Federal offense?

Mr. O'LEARY. Ordinarily, the tribal officer does not have the jurisdiction to arrest a non-Indian for a tribal offense.

Senator MELCHER. What about a Federal offense?

Mr. O'LEARY. For a Federal offense, correct. I will say that it does happen in quite a few cases, because of the lack of the presence of either a BIA officer or an FBI agent in the area when the offense is committed. Usually, then, the person is held by the tribal police with the

tribal court system, pending the arrival of the FBI or the BIA to conduct the investigation and determine whether or not the elements of offense that occurred should be prosecuted, and usually in the Federal court at the district court level.

Senator MELCHER. Do you think it is clearly authorized for the tribal police officer to do just what you have described?

Mr. O'LEARY. When we are speaking of arresting a non-Indian for a Federal offense, I do not think it is clearly authorized. It does happen.

Senator MELCHER. So in that regard, this bill would be helpful?

Mr. O'LEARY. In that regard, the bill would be helpful.

Senator MELCHER. Because, despite the presence of the Federal magistrate or the broadening of the Federal magistrates in Judge Battin's court, clearly, there is no clear authority for the tribal police officer in case of a non-Indian to do as you described?

Mr. O'LEARY. That is correct.

Senator MELCHER. Now, the BIA police officers, of course, have little broader authority, do they not?

Mr. O'LEARY. Yes. They have arrest authority over Indians and non-Indians who commit Federal violations on the Indian reservation.

Senator MELCHER. Now, in the case of offenses committed within an Indian reservation by non-Indian against Indians, would the sheriff's office have authority?

Mr. O'LEARY. Yes.

Senator MELCHER. And, by Indians against non-Indians?

Mr. O'LEARY. No.

Senator MELCHER. No. So that this bill, then, would be helpful in that regard?

Mr. O'LEARY. Senator, I may be misreading the bill, and if I do, I am sorry, but it is my understanding that the bill only addresses those situations where non-Indians are committing offenses against Indians, and the bill would address itself to the jurisdiction of the magistrate's court in those instances only, not where the Indian is committing an offense against a non-Indian, which is a minor offense.

Senator MELCHER. We think it applies to that situation. It is intended to apply to that situation. We do not mean to have any suggestion on that portion of the language.

Mr. O'LEARY. I may be misreading it because I read it very carefully to determine if that was the intent of it, and if so, I do believe there is a problem because of tribal sovereignty, the Indian person committing the misdemeanor or the minor offense.

I also believe it is covered, perhaps not adequately in practice, but at least in theory, under the Assimilative Crimes Act.

Senator MELCHER. You think it could be covered under the Assimilative Crimes Act?

Mr. O'LEARY. Yes.

Senator MELCHER. Now, as to the tribal and BIA police and Federal officers regarding that, is it necessary to confer Federal officer's status to tribal police in order to establish a Federal offense when such an officer is assaulted in the line of duty?

Mr. O'LEARY. Senator, I don't believe——

Senator MELCHER. That is a Pine Ridge problem.

Mr. O'LEARY. OK. I do not believe it is a Federal offense presently for any individual to assault a tribal officer, at least if it is——

Senator MELCHER. Should it be?

Mr. O'LEARY. I think it should be, yes.

Senator MELCHER. You think it should be?

Mr. O'LEARY. It is in the line of duty and his duty involves the enforcement of some Federal law, whether it is directly related to the Indian Reservation or Indian persons or not, if it has some direct relationship.

Senator MELCHER. I do not think our bill, as drawn right now, addresses that problem, but we have a witness from the Oglala Sioux, from Pine Ridge, and we are anticipating that he might make such a suggestion.

Should the establishment of Federal status be coupled with some training requirements or certification? Well, I guess that is a rhetorical question. Of course it should. Can you give us some suggestions along that line?

Mr. O'LEARY. Are you speaking now of the Federal status for police organizations?

Senator MELCHER. Yes, Federal status, for tribal police.

Mr. O'LEARY. I believe someone like Alex Laforge has testified that most, if not all, of the Indian police officers are required to attend the national police academy. I think the minimum period is 10 weeks.

My problem and concern, both now and in the 1960's, was not necessarily the quality of training of the Indian police officers; it was the fact that they are subject too directly to the change in administration of the tribal governments and do not have professional status. By that, I mean the permanent appointment, the retirement benefits, that a professional police organization should have. I believe that that, in and of itself, would give autonomy to most of the Indian tribal police organizations. They would function, at least in my experience, far better than they do, and it is not a question of training; it is a question of being more autonomous, having an independence from the tribal political system as much as possible.

Senator MELCHER. That is helpful. We are glad to have your views on that.

The current policy seems to require the FBI investigation and acceptance of a case by the U.S. attorney before a case is processed. We do not see that policy applying to, park police, for instance, in Federal parks in regard to minor offenses. Now, what we envision or contemplate in S. 2832 is that tribal and local or sheriff's office police officers could take cases directly to the special magistrate's court, and in minor cases, present the case informally through the police officer instead of going through this other procedure of the FBI and U.S. attorney's office.

How do you view that? Do you view that the proper utilization of a magistrate's court?

Mr. O'LEARY. I do not really have any great problem with the concept of that, Senator. We do it by agreement with the National Park Service on the minor offenses, which are primarily traffic, public intoxication, minor drug use within the park. We do it in Flathead on

the Flathead Reservation with respect to the Indian hunting and fishing violations, which are a violation of section 1165, and we trust the judgment and discretion of the law enforcement authorities if the case is of a more serious nature and seems to have aspects to it that would require maybe some prosecutorial discretion that they will refer them to us.

I think my problem with the whole idea is that we went back through our records, and in my office, could only find one instance in approximately 3 years where a case had been referred to us for prosecution of a minor offense before a magistrate under the Assimilative Crimes Act from an Indian reservation. We get no complaints whatever directly to our office, at least probably some that we do not get about lack of prosecution of minor offenses by either the State authorities or the BIA or the tribal police. So I guess I will have to say I do not have enough experience, strange as that may sound, because we just simply do not get the complaints.

We know from listening to some of the tribal officials that cases do fall between the cracks. The State does not handle them, for one reason or another, and neither does the tribe. They do not get to us, so I cannot really comment on what the bill would do, although I have a feeling that—if I am correct—that it only applies to the non-Indian violators; not to Indian violators; that there would be very few cases where it would be presented to a special magistrate unless things dramatically change.

Senator MELCHER. Can you tell us, and maybe you'll have to supply statistics for the record, the number of cases that were referred to the U.S. attorney for consideration, the number prosecuted, and the number declined?

Mr. O'LEARY. I do not have those at my finger tips, but we do keep records on all matters and cases that are referred to us and the declinations that are made. We keep a record of that. We also keep a record, of course, of the prosecutions and the results of the prosecutions, so I could supply that to the committee. It will probably take me a few days to assemble the information.

Senator MELCHER. The record will be open for 14 days, and we would very much appreciate having those.

Mr. O'LEARY. What period of time would you like it for, Senator?

Senator MELCHER. For the past 2 years. I think that would be long enough.

Mr. O'LEARY. Yes, I am sure we can do that.

[Subsequent to the hearing the following information was received.]

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY, DISTRICT OF MONTANA,
Butte, Mont., August 22, 1980.

Hon. JOHN MELCHER,
Senate Office Building, Washington, D.C.

DEAR SENATOR MELCHER. In accordance with your request during my testimony before the Senate committee in Billings on August 11, 1980, I am enclosing the statistics on Indian cases during the past two years.

I have noted the general reasons for dismissals but due to the fact that statistics on reasons for declinations were not separately kept until the Department of Justice instituted such a policy in November 1979 it would be a very time consuming effort to go back through every file and set out the reasons for declinations.

However, in general prosecutions are declined for the following reasons:
(a) Evidence insufficient.
(b) Referal to tribal and/or court jurisdiction because offense not serious enough to warrant felony prosecution.
(c) Pre-trial diversion or other non-criminal disposition.
(d) No federal jurisdiction.
(e) Joint offenses and joint subjects and prosecution authorized on major subjects only.
(f) No substantial federal interest served by prosecution which includes these considerations:
(1) Federal law enforcement priorities;
(2) the nature and seriousness of the offense;
(3) the deterrent effect of prosecution;
(4) the person's culpability in connection with the offense;
(5) the person's history with respect to criminal activity;
(6) the person's willingness to cooperate in the investigation or prosecution of others; and
(7) the probable sentence or other consequences if the person is convicted.
(g) Grand Jury testimony by witneses inadequate to justify prosecution and thus declination rather than submit proposed Indictment to Grand Jury.

Senator, I appreciated the opportunity to testify before the committee and if you should want any additional information please let me know.

Best regards,

Yours sincerely,

ROBERT T. O'LEARY,
United States Attorney.

Enclosure.

Indian statistics for the District of Montana from approximately June 12, 1978 to the present time are as follows:

Prosecuted	154
Cases dismissed [1]	60
No bills	2
Transfers to other districts	7
Declined	430
Total	499
Cases pending	66
Grand total, cases presented	719

[1] Reasons for Dismissals:
(1) Technical defects and re-charged.
(2) Defendant prosecuted on other charges.
(3) A number of co-defendants and 1 or more dismissed in return for testimony and cooperation in trial of major subjects.
(4) Evidence not sufficient at time of trial to convict.
(5) Reversal on appeal.
(6) Deferred prosecutions (placed on probation for a year and if successfully completed then charge dismissed).
(7) Pleas to lesser included offenses and dismissal of original charge.
(8) Witnesses fail to appear at time of trial.

Senator MELCHER. One more question. Considering the major crimes, is there any reason why a tribal or State investigator should not be able to bring a case directly to the U.S. attorney instead of going through the FBI? As is so often brought to our attention, there is a delay, waiting for the FBI to appear on the scene? We have had, in this morning's testimony, at least two or three witnesses stressing the delay, waiting for the FBI. I can assure you, and I think you can vouch for it, too—you have heard plenty of complaints that this is a long, time-consuming process when the FBI is not on the scene and some of the evidence is less than fresh when collected.

Mr. O'LEARY. Well, to directly answer your question, I believe that the statute has to be changed because the FBI now has exclusive investigative jurisdiction over title 18 offenses unless Congress has vested concurrent jurisdiction for the investigation with other law enforcement agencies or eliminated the FBI from that investigative authority.

Senator MELCHER. We got a different impression from the March hearings, and if the statute needs to be changed, would you recommend that it be changed in such a format as we are proposing here in this bill?

Mr. O'LEARY. Well, No. 1, while occasionally there is some delay before the FBI agent arrives on the scene and begins his investigation, our experience really is that the local tribal authorities, police officers, and BIA officials and officers where that is involved, do a good job because of their training in preserving the crime scene, gathering evidence, securing names of the witnesses. We do not find, at least in our experience, and I would like to know of specific cases if there are some where there is a delay in prosecution of any major offense because of a delay of an FBI agent getting to the scene.

We all know that the FBI has limited resources, limited resources in Montana. The major part of their work in Montana is devoted to enforcement of the law on Indian reservations. We also have, of course, a different situation now because of the Speedy Trial Act where we are not nearly as hasty to arrest, unless it is absolutely necessary, and hold a person in custody because of the fact that under the Speedy Trial Act, the time starts running as soon as they are brought before the magistrate on a charge. So, unless the situation is such that it demands that the individual be arrested, held in custody, transferred to Great Falls, Butte, Billings, wherever, we prefer in most cases to make sure the investigation is completed with the cooperation of all three of those agencies and presented to us. We like to hold them for grand jury because then we know that we have the case ready to go, and when the indictment is returned, the time starts running on the Speedy Trial Act, which, it puts us within a parameter that the State officials are not in. So, we cannot afford to horse around and get ready for the case after the arrest is made. Now, I am talking about the major crimes. So we usually prefer, unless it is necessary, to go through the investigation.

I do not frankly find any problem with the BIA police officers on the tribal level cooperating with the FBI agents. They have their problems, of course, from time to time, and they do not always agree on the way the investigation should be conducted, and they do not always agree with the results of the investigation and sometimes do not agree with our office. But, I think it is pretty well known throughout the State, Senator, that if there is a disagreement upon prosecution decision, that the tribal officers, chief, BIA people, I think, come to our office or the assistant, whoever it might be, and ask him to reconsider, take another look at it, give them the benefit of some additional information or insight they may have, because we do not run a closed ship.

Senator MELCHER. Well, my question was more to the point of whether the FBI had to investigate first, and testimony last spring in Washington was to the effect of whether or not the FBI had to investigate first, in the case of a major crime, and the answer by Mr. Gow was that there was no such requirement.

Mr. O'LEARY. I do not think so, either.

Senator MELCHER. That is the point. There is no requirement of investigating first?

Mr. O'LEARY. Not that I know of.

Senator MELCHER. Then the question is would—getting back to my original question—would it be advantageous to have tribal investigators bring a case directly to the U.S. attorney without the presence of the FBI? I guess the answer to the question, then, or the answer you gave to that question, is still correct. In your viewpoint, it is under existing statutes. The FBI would still have to be involved.

Mr. O'LEARY. They would still have to be involved, I believe, and the way it works, in reality, is that the FBI, generally speaking—I'm not saying in all cases—but generally speaking, works well with the locals. The locals do a large part of the investigation. Without them, there couldn't be any real enforcement of the Major Crimes Act on the Indian reservations.

Senator MELCHER. It is the local people that are complaining, and they are not satisfied.

I have to say that at least one or two State district judges have told me that they feel that on some of the major crimes such as rape that the investigation is slow, and that many cases are never prosecuted, nor is a serious attempt made to prosecute, because they feel that the collection of evidence will be very incomplete and that that is one of the major crimes that is not being satisfactorily addressed under the current system. I suspect maybe you have heard it too, but I think it is rather serious that we get that type of comment from district judges.

Mr. O'LEARY. Senator, that may be true, but I have not had any district judge call me, or any member of an office that I know of, and make such a complaint. In a rape case, the most vital period of time in the investigation is as soon as it is reported. Due to the nature of that type of case, the victim has to be examined, the evidence has to be secured, the witnesses who may or may not be available have to be interviewed almost immediately because of the fact that memories grow dim as the grass grows high. They are the toughest types of cases. No question about it.

Senator MELCHER. You understand, I said district judges in the State judicial system.

Mr. O'LEARY. I see.

Senator MELCHER. Not Federal.

Mr. O'LEARY. I have not had any of them call me about rape cases, either.

Senator MELCHER. It is not under their jurisdiction so maybe they do not want to call you, but I know at least two who have taken the trouble to tell me about it.

Mr. O'LEARY. Sure.

Senator MELCHER. The Crows have testified that the State is not prosecuting crimes of non-Indians against Indians, yet the Justice Department is attempting to say that that is a procedure that could and should be followed. What are your comments on that?

Mr. O'LEARY. Well, Senator, that is the position of the Department. My view, of course, is that there is concurrent jurisdiction and if those cases, they feel, are not prosecuted, they should be reported to the BIA or to the FBI agents who are working the reservations. If the cases have merit, we do not have any problems with prosecuting them under

the Assimilative Crimes Act, but they simply are not being reported to us. That is our view on it, anyway.

Senator MELCHER. Thank you very much, Robert. I very much appreciate your coming over here to testify, and I think your testimony has been most helpful to us.

Mr. O'LEARY. Thank you, Senator. I would like to introduce Frank Meglen, who is an assistant in my office here in Billings. Frank is sitting with me here today. He kept track of the testimony this morning so that he could tell me what had gone on and how much heck we had gotten.

Senator MELCHER. Thank you very much for being here all morning, Frank.

Mr. MEGLEN. Thank you, Senator.

Senator MELCHER. I would like to call up for the next witness, Joseph Gray, area special officer, and Kathy Fleury, area judicial services officer, Billings Area Office, Bureau of Indian Affairs.

STATEMENT OF JOSEPH GRAY, AREA SPECIAL OFFICER, BILLINGS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

Mr. GRAY. I want to thank you, first of all, for the invitation to be here and to testify.

I would like to make just one remark concerning the evidence of district judges, the remark apparently that was made to you, before I forget about it. I do not know where the judge got his information, sir, but we do not normally submit cases to them for consideration, to the tribe, or bureau, or FBI, so I am not sure where they got their information.

Senator MELCHER. Pardon me, Mr. Gray. Of what judge are you speaking?

Mr. GRAY. I do not know what judge you were talking about, sir. It was a district judge. Comment was made that the evidence was lost by tribal or bureau officers, or misplaced, or whatever. I cannot recall a case being submitted to a State district judge for consideration, so I do not know where he is getting his information.

Senator MELCHER. No, I am not speaking of a case being submitted.

Mr. GRAY. Oh, OK.

Senator MELCHER. On a major offense, he has no jurisdiction anyway. He is just commenting as a citizen.

Mr. GRAY. Oh, I see.

I would like to make just one comment on Mr. O'Leary's testimony, and that is his interpretation of the jurisdiction on the bill. The longer I sat here today, the more confused I became on the exact jurisdiction that is purported to extend to the Indian country. It would be our recommendation that the jurisdiction over the Indian committing an offense against a non-Indian remain with the tribal court. This has been historic. They have exercised this jurisdiction for years, and I think it is pretty well established in law through the Federal courts that the tribes do have this jurisdiction, and we would recommend it remain there.

Senator MELCHER. The Federal court also has that jurisdiction.

Mr. GRAY. Yes, sir. Well, it has the jurisdiction over the major crimes for the Federal offenses.

Senator MELCHER. They also have the jurisdiction over the minor crimes, too, the misdemeanors by an Indian against a non-Indian.

Mr. GRAY. I think the tribes have that jurisdiction when a crime is committed anywhere on the reservation. It is being adjudicated that way now.

Senator MELCHER. It is our impression that that is not the case, but that the Federal Government does retain jurisdiction of a crime committed by an Indian against a non-Indian, if they want to exercise it.

Mr. GRAY. Well, sir, I would not argue it.

Senator MELCHER. We will research it, and we will be glad to compare notes with you on that.

Mr. GRAY. OK. We recommend it remain with the tribe, in any case.

I have one comment on the authority of the tribal, State, and Bureau of Indian Affairs police on the reservation wherein the bill would authorize the State, as well as tribal and Bureau officers, to enforce the Federal laws and to serve a summons and process. Right now, the machinery is there, and we do have officers on the reservation, Bureau officers, as well as tribal officers, who are commissioned special officers who have the authority to service process on the reservation. I am not sure that the need to authorize all county and State officers is there.

I would question the need for that, but here again, I would not argue it at this point because I think we already have the machinery. We have certain qualification standards, and we do have, in our manual requirements, certain procedures that have been approved by the Secretary of the Interior, certain qualification standards. So I do not know if that is a real need. That might be something to consider somewhere down the road.

When we received notice of this hearing from your office, sir, we did send inquiries to the reservations to try to determine the extent of the problem since *Oliphant* in dealing with non-Indian offenders. Probably, because of the time limits set and the closeness of the hearings, we did not get response from all of the reservations.

From what we are able to determine, we have estimates from reservations, and I could give you copies of the questionnaire that we sent out, if you would like. We have estimates that range between 50 cases a year and perhaps 400. We do not really know at this point how many cases would be brought before the special magistrate. I would give the opinion that on my experience over the last couple of years since *Oliphant* that it is not a big problem, although we do have certain circumstances that arise occasionally on the reservations that do develop into a situation, very sensitive situations, between Indians and non-Indians, so that there are some problem areas. Whether it would warrant full-time magistrates on every reservation, we could not say at this time.

Under the practice and procedure, section 653(4)(d), page 7, it would be suggested that you include, after BIA police officers, that you insert right there, "special officers or criminal investigators." Sometimes the term "police officer" to some people does not include special officers or criminal investigators, so there would be no doubt in anyone's mind that the BIA criminal investigator or special officer would be included in that definition.

Concerning the police officers giving and appearing as witnesses and giving evidence, this is certainly a part of an officer's duty. We would recommend, however, that they not be required to prosecute cases, that they not be required to cross-examine or to give rebuttal or to give opening and closing arguments. It is our belief, and my past experience, that particularly where a defendant has an attorney, that it would not be fair to the Government or to the police officer to require him to act as a prosecutor. I think in cases where the defendant either hires an attorney or has one appointed that the United States should be required to furnish an attorney for the Government's side of this.

I guess that will conclude my testimony unless you have questions. Kathy Fleury has some remarks to make.

Senator MELCHER. OK, Kathy.

STATEMENT OF KATHY FLEURY, AREA JUDICIAL SERVICES OFFICER, BILLINGS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

Ms. FLEURY. Thank you, Senator, and the Committee on Indian Affairs.

My name is Kathy Fleury, and I am in judicial services. I am an attorney.

I have a few comments concerning some of the legal questions I have about this bill. Senate bill 2832 is generally viewed as a solution to prosecuting minor criminal offenses committed by non-Indians within the exterior boundaries of the Indian reservations. It would seem that the intent should be made clear as to who will be considered defendants under this bill. I think generally from the survey that I have taken from Indian reservations, the biggest concern is that this bill is not clear as to who it will apply to, and it is viewed as an infringement, or if it includes Indian defendants, then it is viewed as an infringement on tribal sovereignty.

The majority of misdemeanors committed by non-Indians—from a survey taken that Mr. Gray and myself have requested tribal reservations to submit to us—are traffic violations, trespass and assault, in which tribal courts do not have jurisdiction over non-Indians.

Those reservations who have favored this bill are those that—or maybe I should explain that to make this a little more clear. Those who have opposed it, it is because it seems to include minor criminal offenses committed by Indian people, and the intent, generally, for those who are in favor of it, that it is going to fill in that gap of jurisdictional problems that *Oliphant* left and wherein tribal courts do not have jurisdiction over non-Indian offenders who have committed criminal offenses on the reservation, and this would not include offenses committed by Indians against non-Indians on the reservation.

Many of the reservations have, in their codes, minor criminal offenses over which they now have jurisdiction, and, in fact, I believe they do have inherent jurisdiction unless it is expressly taken away from them. I do not believe that there is anything that says minor criminal offenses are now handled under Federal jurisdiction, and that would have to be expressed by Congress.

And I view this, and the tribes do also, that the fact that minor criminal offenses, if not expressly not including Indian people or In-

dian tribal members, that it would be a divestment of criminal jurisdiction over their members.

Senator MELCHER. Kathy, before you get too far away from the point you were making, we want to explain that it is our viewpoint that the Federal Government does retain jurisdiction over minor offenses of an Indian against non-Indians, that this does not change that, that that is the way the law is now. The policy of allowing the tribal court to exercise their authority over a crime committed by an Indian against a non-Indian does not change the authority of the Federal Government if they want to exercise that authority. It is a concurrent authority, and we are not creating a new one. It is already there.

Ms. FLEURY. Well, I guess that is arguable.

Senator MELCHER. I am giving the viewpoint of our attorneys.

Ms. FLEURY. Yes; well, I guess the viewpoint of tribal governments is that they retain all the——

Senator MELCHER. We are referring to 18 U.S.C. 1152, and there are cases where if the tribe has exercised jurisdiction, then the Federal prerogative is excluded, and there is evidence clear that some treaties establish particular inherent rights because of the treaty, but in general, we are referring to this section of the Code.

Ms. FLEURY. Senator, I think that this is where the tribes view it, as those who oppose it, as a conflict, because if they have in their law and order code, if they have minor criminal offenses already defined and they are already prosecuting those cases with tribal members, that then it becomes a question of who has jurisdiction, the magistrate or the tribal court. If it involves an Indian person committing a minor criminal offense against a non-Indian, what court would have jurisdiction? Right now, tribal courts have exclusive jurisdiction over their members.

Some have opposed the appointment, also, of a full-time magistrate residing on the reservation inasmuch as there really are not enough cases to substantiate this need, and in the survey that Mr. Gray and myself took, that some of the statistics would bear this out; that the majority of minor offenses committed by non-Indians is small on many reservations. And those reservations of large non-Indian populations, they, of course, do favor this bill. Where tribal governments have cooperation with county attorney offices, non-Indian offenders are being prosecuted by local officials.

Also, there is some concern on section 651, jurisdiction and powers, (a)(3), in the language of the bill, and there is concern that there are no express limitations to the powers of the magistrate, and essentially that it should be defined what criminal misdemeanors apply.

On 651(b), it also appears to provide jurisdiction over civil or criminal cases. Right now, the tribal courts are handling civil cases that involve non-Indians, and there was concern expressed over that section.

Also, on section 653(d), it is not clear as to procedure, if this authorizes local law enforcement to enter the reservation, to arrest, if it were an Indian defendant. It seems like this would—well, I guess I am just not clear on the language of that, and maybe you could clear that up. It appears from the language that——

Senator MELCHER. Kathy, we would be glad to respond, or have these attorneys respond, to any specific questions you have. We are trying to go through this record and respond to your questions as you pose them.

Ms. FLEURY. I would appreciate it if that section could be cleared, section 653(d).

In conclusion, it appears that those reservations with a large non-Indian population favor the bill. Those who are more isolated and do not have as many non-Indian population oppose it, and I believe that our position is that if, in fact, the bill would include Indian defendants, we would oppose it. I think that should be expressely stated in the bill, that it does not include Indian defendants or Indian tribal members, that that jurisdiction remains exclusively with the tribal governments.

Senator MELCHER. It is our understanding of the law that it certainly would continue, what we understand the law to be, and that the Federal Government does have jurisdiction over non-Indians committing a crime against—or an Indian committing a crime against a non-Indian—and we do not intend to change that. We think it is there now. You mention tribal courts that are exercising civil jurisdiction over non-Indians. What tribal courts are you speaking of, and are you telling us that you have some data on that you could provide some?

Ms. FLEURY. Senator, I do not have any data, but I believe all tribal courts are exercising civil jurisdiction over non-Indians.

Senator MELCHER. We would be interested in some specifics.

Ms. FLEURY. You mean like numbers of cases and what kinds of cases?

Senator MELCHER. And what are you referring to when you say "all tribal courts"? Do you mean all tribal courts in this area, all tribal courts in the United States, or what?

Ms. FLEURY. I would say all tribal courts in the United States, but definitely in Montana.

Senator MELCHER. Which ones have any cases—that is civil cases, involving non-Indians, and if you have some statistics on that, we would appreciate having it.

Ms. FLEURY. I will try to obtain statistics for you.

Senator MELCHER. We do not have any data on that.

Now, when you say that you think the smaller reservations—and I do not know what that means exactly—but the ones where the population is mainly Indian, the majority are Indian rather than non-Indian, are you referring to Indian reservations within this area or what?

Ms. FLEURY. Yes; I am.

Senator MELCHER. Now, which ones specifically?

Ms. FLEURY. Well, in listening to the testimony from the Fort Peck and the Blackfeet who both favor this bill, and in talking to them, or I talked to one of the representatives personally, and it appeared that primarily the reason that they favor it is because the population, non-Indian population, is too high there that they see this as an immediate solution to the problem. Whereas in a reservation that does not have that large non-Indian population, they are not going to be

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faced with the same problem, so they may, in fact, not see a need for a special magistrate.

Senator MELCHER. Well, in fact, the Crows, then, would be the exception to your comment——

Ms. FLEURY. Yes, sir.

Senator MELCHER [continuing]. Because there is a large non-Indian population on the Crow Reservation, and as of now, they are not in favor of it, as is evident from their testimony just a few minutes ago. But we are searching through these hearings trying to find out what would be, if an approach like this would contribute to anything, and we are not sure. We think it would, but we are not sure that we are going to find, on the balance of testimony, that that would be the opinion of the people that are involved. So we very much appreciate your testimony because you are dealing with this problem.

Mr. Gray, you mention that there are BIA officers to serve warrants and subpenas and so forth. Well, we are aware of a tremendous amount of Indian reservations where there are no BIA officers to serve subpenas and warrants and what-have-you.

Mr. GRAY. Well, that might be.

Senator MELCHER. Are you recommending that we increase the number of BIA special officers?

Mr. GRAY. That might be all right, sir, on some reservations, but we do in Montana and Wyoming. We have authority to enforce Federal laws.

Senator MELCHER. And how many do you have?

Mr. GRAY. Special officers?

Senator MELCHER. Yes; special officers.

Mr. GRAY. I would say 14.

Senator MELCHER. Fourteen for eight reservations?

Mr. GRAY. Yes, sir.

Senator MELCHER. And you can forget about the Flathead because you do not have to worry about that; is that right?

Mr. GRAY. No; we do have certain responsibilities to them.

Senator MELCHER. Hunting and fishing.

Mr. GRAY. Yes, sir.

Mr. MELCHER. You have 14, and you have—from one end to another—about 600 to 700 miles across, and you think that does it?

Mr. GRAY. No; I do not think that does it. It does it from the standpoint——

Senator MELCHER. I am being a little facetious. Of course, it doesn't.

Mr. GRAY. We still have tribal police departments that do police work on the reservation, and they do it in conjunction with the Government.

I would like to make one other comment on this bill, sir, if I might. As a special officer and representing—hopefully I am speaking for the tribal police—that we do not feel that the FBI needs to be involved in these misdemeanor offenses, and I think we can handle it. And, in fact, I think we could probably handle some of the more serious cases, and we do not think it would be necessary to obtain prior authorization from the U.S. attorney in order to prosecute somebody. If we have somebody breaking the law, our officers, we feel, are sufficiently trained that they can file the complaint and bring the charges.

Senator MELCHER. If you believe that, do you believe that we ought to have a Federal magistrate to whom you could bring your complaint in the case of the non-Indian?

Mr. GRAY. In the case of the non-Indian, that would be fine, yes, sir. Because, I think there are a lack of prosecutions on some non-Indian offenses.

Senator MELCHER. Do I understand you correctly; that you are recommending the passage of a bill such as this?

Mr. GRAY. Yes, sir. I think it would help law enforcement generally, but I do feel that——

Senator MELCHER. But you would recommend excluding the Indian offender against the non-Indian?

Mr. GRAY. Yes, sir. I think that is the authority of the tribal government.

Senator MELCHER. Mr. O'Leary, I am glad you are waiting. Could we ask you another question?

You have followed this discussion that we have had with Kathy and Mr. Gray. Do you believe, as the committee's counsel believes, that the Federal jurisdiction exists concurrently in the case of a tribal court system for an offense committed by an Indian against a non-Indian?

Mr. O'LEARY. For the misdemeanor or minor offense that it is under?

Senator MELCHER. Yes.

Mr. O'LEARY. Yes; I think the tribal court has jurisdiction. Our policy is, if the tribal court doesn't handle the matter, it is referred to us and we handle it under the Assimilative Crimes Act.

Senator MELCHER. If the waiver of the Federal jurisdiction depends upon the tribal court taking jurisdiction, and if the tribal court does not take jurisdiction, the Federal jurisdiction is still present?

Mr. O'LEARY. That is correct.

Senator MELCHER. That is our interpretation.

Mr. O'LEARY. I have one matter that I find in Frank Meglen's file back here that I thought might be helpful to the Senator and to the committee.

Some years ago, Rich Allen and I, when we were in the office in the 1960's, put together what we called our laundry list of violations and jurisdiction. Rich Allen went on to be the assistant solicitor to the Department of Interior for Indian Affairs. It is not up to date or current because we are having some changes made, but we still follow it because it is a handy reference guide, and I thought maybe the committee might like to have it within their files.

Senator MELCHER. Yes; we would appreciate it very much.

Mr. O'LEARY. It is not up to date, but we still use it.

Mr. GRAY. May I make one more comment?

Senator MELCHER. Yes, sir.

Mr. GRAY. I would like to say that over the past 25 years, I have worked just about everywhere in the country for the BIA, and the problem of getting the non-Indian into a court when he has been an offender or a violator against the Indian person or property has been a problem for the past 25 years that I know of, except in Alaska during the late 1950's and 1960's when it was all territorial. It has been

a problem, and I think you are on the right track if we can get this little matter of jurisdiction cleared up.

Senator MELCHER. Well, I want to thank you very much for that comment, Mr. Gray, because 25 years, a quarter of a century in law enforcement work on the Indian reservations, gives you a good insight into it.

I want to thank Kathy, too, for her comments, and again, thank you, Robert, for helping us on this.

Mr. O'LEARY. Thank you, again.

Senator MELCHER. I am going to make the Rich Allen/Robert O'Leary laundry list of offenses, a copy of the local rules of the U.S. District Court for the District of Montana governing duties and powers of magistrates, and a memorandum of the Department of Justice dated March 21, 1979, in reference to Federal jurisdiction over non-Indian offenders, a part of the record at this point.

Mr. O'LEARY. Thank you, sir.

[The material follows. Testimony resumes on p. 88.]

Keep in Indian title doc

CRIME	By Indians against Indians or Indian property	By Non-Indians against Indians or Indian property (Assim. Crimes S.13 T18)	By Indians against Non-Indian or Non-Indian property	By Non-Indian against Non-Indian or Non-Indian property
Murder	S.1111 of T.18 U.S.Court only	S.1111 of T.18 U.S. Court ---- State has Conc. Jur.	S. 1111 of T.18 U.S. Court only	State Court only
Manslaughter	S. 1112 of T.18 U.S.Court only	S. 1112 of T.18 U.S. Court ---- State has Conc. Jur.	S. 1112 of T.18 U.S. Court only	State Court only
Rape	S. 1153 of T.18 U.S. Court only No statutory rape	S.2031 of T.18 U.S. Court ---- State has Conc. Jur.	S.1153 of T.18 U.S. Court only ---- Statutory rape incl.	State Court only
Incest	S. 1153 of T.18 Use State Def. U.S.Court only	Not applicable	Not applicable	State Court only
Assault with intent to kill and assault with dangerous weapon	S. 113 of T.18 U.S. Court only	S.113 of T.18 U. S. Court ---- State has Conc. Jur.	S. 113 of T. 18 U.S. Court only	State Court only
Arson	S. 81 of T. 18 U.S. Court only	S. 81 of T. 18 U. S. Court ---- State has Conc. Jur.	S. 81 of T. 18 U.S. Court only	State Court only
Burglary	S. 1153 of T.18 U.S. Court only	U. S. Court ---- State has Conc. Jur.	S. 1153 of T.18 U.S. Court only	State Court only
Robbery	S.2111 of T.18 U.S. Court only	S. 2111 of T.18 U. S. Court ---- State has Conc. Jur.	S.2111 of T.18 U.S. Court only	State Court only
Larceny ?	S. 661 of T. 18 U. S. Court ---- Tribal Court has Jur. for theft	S. 661 of T.18 U. S. Court ---- State has Conc. Jur.	S. 661 of T. 18 U. S. Court ---- Tribal Court has jur. for theft	State Court only
Carnal knowledge of female under 16 yrs. of age ?	No prosecution in U.S.Court as it is no offense. See S.1152 and 1153 of T.18. Tribal Court can prosecute on related crimes	S.2032 of T.18 U. S. Court ---- State has Conc. Jur.	S. 13 of T.18 (Assim. Crimes) and S.2032 of T. 18 U. S. Court ---- Tribal Court can prosecute on related crimes	State Court under statutory rape statute (female under 18 yrs.)
Statutory rape as defined by State law (female under 18 yrs.)	No prosecution in U.S. Court as no offense. S.1152 & 1153 of T.18 ---- Tribal Court can prosecute on related crimes	If under 16 yrs. S. 2032 T. 18 If 16 or 17 yrs. U. S. Court ---- State has Conc. Jur.	Female must be under 16 yrs. (See carnal knowledge above)	State Court only

CRIME	By Indians against Indians or Indian property	By Non-Indians against Indians or Indian property (Assim. Crimes S.13 T18)	By Indians against Non-Indian or Non-Indian property	By Non-Indian against Non-Indian or Non-Indian property
Assault (other than assault with dangerous weapon, assault with intent to kill, or assaulting a Federal officer)	In Tribal Court only. CFR or Tribal Law	S.113 of T.18 or state statute U. S. Court --- State has Conc. Jur.	Tribal Court where it is violation of Tribal Law S.13 of T.18 (Assim. Crimes) and S.113 of T18 or State Statute U.S. Court if not punished in Tribal Court	State Court only
Misbranding	Tribal Court only. CFR or Tribal Law	U. S. Court NDCC 36-09-17 RCM-36-106 State has Conc. Jur.	Tribal Court. CFR or Tribal Law --- U.S. Court has Conc. Jur. if not punished in Tribal Court. NDCC 36-09-17	State Court only
Receiving stolen property not U.S. govt. property or property interstate	Tribal Court only. CFR or Tribal Law	U. S. Court NDCC 12-40-19 --- State has Conc. Jur.	Tribal Court CFR or Tribal Law. --- U.S. Court has Conc.Jur. if not punished in Tribal Court (Assim. Crimes) NDCC-12-40-19	State Court only.
Extortion (not interstate nor by mail)	Same as above	Same as above except NDCC-12-37 RCM-94-1603	Same as above except NDCC-12-37 RCM 94-1603	Same as above
Reckless driving (resulting in property damage)	Same as above	Same as above except NDCC-39-03-03 RCM-32-2143	Same as above except NDCC-39-03-03. RCM 32-2143	Same as above
Malicious mischief	Same as above	Same as above except S. 1363 T.18 USC	Same as above except S. 1363 T. 18 USC	Same as above
Trespass	Same as above	Same as above except NDCC-12-41 RCM 94-3707	Same as above except NDCC-12-41 RCM 94-3707	Same as above
Maintaining a public nuisance	Same as above	Same as above except NDCC-12-01-15 RCM-[illegible]	Same as above except NDCC-12-01-15 RCM-[illegible]	Same as above
Cruelty to animals	Same as above	Same as above except NDCC-36-21 RCM-[illegible]	Same as above except NDCC-36-21 RCM-[illegible]	Same as above
Adultery	Same as above	Same as above except NDCC-[illegible] RCM 94-3707	Same as above except RCM NDCC-12-32-09 RCM-[illegible]	Same as above
Fornication	Same as above	Same as above except NDCC-12-32-09 RCM 94-3707	Same as above except NDCC-12-20-08 RCM 94-3707	Same as above

CRIME	By Indians against Indians or Indian property	By Non-Indians against Indians or Indian property (Assim. Crimes S.13 T18)	By Indians against Non-Indian or Non-Indian property	By Non-Indian against Non-Indian or Non-Indian property
Illicit cohabitation	Tribal Court only. CFR or Tribal Law	U. S. Court NDCC 12-32-12 RCM 94-3707 State has Conc. Jur.	Tribal Court CFR or Tribal Law. --- U.S. Court has Conc.Jur. if not punished in Tribal Court (Assim. Crimes) NDCC-12-32-12 [illegible]	State Court only
Prostitution	Same as above	Same as above except NDCC-12-32-15 RCM 94-3707	Same as above except NDCC-12-32-15 RCM 94-3707	Same as above
Giving venereal disease to another	Same as above	Same as above except NDCC-23-07-21 RCM-[illegible]	Same as above except NDCC-23-07-21 RCM-[illegible]	Same as above
Failure to support wife or dependent persons	Same as above	Same as above except NDCC-12-07-15 and-12-07-16 RCM-94-3704	Same as above except NDCC-12-07-15 and-12-07-16 RCM-94-3704	Same as above
Failure to send children to school	Same as above	Same as above except NDCC-15-34-22 RCM 75-2501	Same as above except NDCC-15-34-22 RCM-75-2501	Same as above
Contributing to juvenile delinquency	Same as above	Same as above except NDCC-27-20-06 RCM 10-1117	Same as above except NDCC-27-20-06- RCM 10-1117	Same as above
Bribery	Same as above	Same as above except NDCC 12-32 RCM 94-3704	Same as above except -NDCC-12-32- RCM-94-3704	Same as above
False arrest	Same as above	Same as above except NDCC-12-17-06 RCM 94-[illegible]	Same as above except NDCC-12-17-06 RCM-94-[illegible]	Same as above
Embezzlement	Same as above	Same as above except NDCC-12-36 RCM-94-3501 [illegible]	Same as above except NDCC-12-36 RCM 94-3501 [illegible]	Same as above
Fraud (Not against U.S. Govt or mail fraud)	Same as above	Same as above. State definition.	Same as above. State definition.	Same as above
Forgery (Not U.S. Govt check)	Same as above	Same as above except [illegible]-39 RCM 94-2004	Same as above except NDCC-12-39 RCM-94-2004	Same as above
Violations of livestock laws	Tribal Court. Tribal Order	U. S. Court --- Any violation of Federal, state or Indian laws	Tribal Court if violation of Tribal Law --- U.S. Court has Conc. Jur. for violation of U.S., state or tribal laws if not punished in Tribal Court	State Court

CRIMES NOT AGAINST SPECIFIC PERSONS OR AGAINST SPECIFIC PROPERTY

CRIME	COMMITTED BY INDIANS	COMMITTED BY NON-INDIANS
Carrying concealed weapon	If violation of tribal ordinance or CFR, Tribal Court. If not punished in Tribal Court, U.S.Court has Conc. Jur. (Assim. Crimes)	State Court and U. S. Court have Conc. Jur. State Court should prosecute.
Disorderly conduct or disturbing the peace	Same as above.	Same as above.
Game violations	Tribal Court if violation of CFR or tribal law. U.S. Court has Conc. Jur. of CFR or tribal law violations if not punished by Tribal Court. U.S. Court has exclusive jurisdiction of state or Federal violations not covered by CFR or tribal law.	U.S. Court and State Court have Conc. Jur. of violation of state law. U.S. Court has jur. of violation of tribal or Federal law.
Gambling violations	Same as above.	Same as above.
Vagrancy	Same as above.	Same as above.
Speeding and other traffic violations incl. drunken driving (when no damage to individuals or property other than defendant).	Same as above.	Same as above.
Civil rights violation	U. S. Court S. 241 etc. T. 18	U. S. Court S. 241 etc. T. 18
State income tax or other state cr. tax laws	U. S. Court only. (Assim. Crimes)	State Court should prosecute. U. S. Court has Conc. Jur. under Assim. Crimes Sec.
Perjury	Tribal Court when committed in Tribal Court. U.S. Court when committed in U.S. Court before U. S. Commissioner or Judge	When committed in Tribal Court prosecution must be in U.S. Court (Assim. Cr.) or State Court. When committed in U.S. Court, U.S. Court has juris.

FILED

NOV 23 1979

LOU ALEKSICH, JR. CLERK
W. CHARLES HOPPER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

IN RE:)
THE LOCAL RULES FOR THE)
UNITED STATES DISTRICT COURT) ORDER
DISTRICT OF MONTANA)

IT IS ORDERED that the Local Rules of Procedure for the United States District Court for the District of Montana be, and they hereby are, amended to include an additional Rule governing and detailing the powers and duties of the United States Magistrates for the District of Montana. That Rule shall be as follows:

Rule 26. MAGISTRATES

A. Duties and Powers

Each United States Magistrate appointed by this Court is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and shall--

(1) Exercise all the powers and duties conferred or imposed upon United States commissioners by law or the Federal Rules of Criminal Procedure;

(2) Administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions;

(3) Conduct trials in conformity with and subject to the limitations of 18 U.S.C. § 3401, order a presentence investigation of any person who is convicted or pleads guilty or nolo contendere, and sentence such persons;

(4) Conduct removal proceedings and issue warrants of removal in accordance with Rule 40, Federal Rules of Criminal Procedure;

(5) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184; and

(6) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782.

Upon reference to him by a Judge of this Court, Magistrates G. Todd Baugh and Dirk H. Larsen are additionally authorized to:

(a) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;

(b) Conduct arraignments in cases not triable by the magistrate to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere, and ordering a presentence report in appropriate cases;

(c) Receive grand jury returns in accordance with Rule 6(f) of the Federal Rules of Criminal Procedure;

(d) Accept petit jury verdicts in civil cases in the absence of a judge;

(e) Conduct necessary proceedings leading to the potential revocation of probation;

(f) Issue subpoenas, writs of habeas corpus (ad testificandum) or habeas corpus (ad prosequandum), or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;

(g) Order the exoneration or forfeiture of bonds;

(h) Conduct examination of judgment debtors in accordance with Rule 69 of the Federal Rules of Civil Procedure; and

(i) Perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

(j) Perform those duties detailed in Sections B and C of this Rule.

B. Prisoner Cases

(1) In accordance with 28 U.S.C. § 636(b)(1)(B) and (C), Magistrates Baugh and Larsen shall hear, conduct such evidentiary hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for the disposition of: (a) applications for post-trial relief made by individuals convicted of criminal offenses; and (b) prisoner petitions challenging conditions of confinement;

(2) Any party may object to the magistrate's proposed findings issued under this section within 10 days after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on all parties, written objections which shall specifically identify the portions of the proposed findings to which objection is made and the basis for such objection. A judge shall make a de novo determination of those portions to which objection is made, and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need not normally conduct a new hearing and may consider the record developed before the magistrate, making his own determination on the basis of that record.

(3) A magistrate may exercise the powers enumerated in Rules 5, 8, 9, and 10 of the Rules Governing Section 2254 and 2255 cases, in accordance with the standards established by 28 U.S.C. § 636(b)(1).

C. Criminal cases

Upon the return of an indictment or the filing of an information, all criminal cases may be assigned by the Clerk of Court to Magistrates Baugh or Larsen for the conduct of an arraignment and the appointment of counsel to the extent authorized by law. The magistrate shall conduct such pretrial conferences as are necessary and shall hear and determine all pretri procedural and discovery motions, in accordance with Section B of this Rule. In conducting such proceedings, the magistrate

shall conform to the general procedural rules of this Court and the instructions of the judge to whom the case is assigned.

Done and dated this 23rd day of November, 1979.

Chief United States District Judge

United States District Judge

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

21 MAR 1979

MEMORANDUM FOR BENJAMIN R. CIVILETTI
Deputy Attorney General

Re: Jurisdiction over "victimless" crimes committed by non-Indians on Indian reservations

This responds to your request for our opinion whether so-called "victimless" crimes committed by non-Indians on Indian reservations fall within the exclusive jurisdiction of the state or federal courts, or whether jurisdiction is concurrent. The question posed is a difficult one 1/ whose importance is far from theoretical. We understand that in the wake of Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), serious concern exists as to the adequacy of law enforcement on a number of reservations. While many questions of policy may be involved in allocating law enforcement resources, you have asked -- as an initial step -- for our legal analysis of the jurisdictional limitations.

In an opinion to you dated June 19, 1978, we expressed the view that, although the question is not free from doubt, as a general matter existing law appears to require that the states have exclusive jurisdiction with regard to victimless offenses committed by non-Indians. At your request, we have

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1/ The few writers who have touched obliquely on this question have expressed varying views. See, e.g., Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz. L. Rev. 503, 529-30 (1976); Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 541 n. 25 (1975); Davis, Criminal Jurisdiction Over Indian Country in Arizona, 1 Ariz. L. Rev. 62, 73-74 (1959).

carefully re-examined that opinion. We have discussed the legal issue raised with others in the Department, and with representatives of the Department of the Interior. We have also had the opportunity to discuss this question with Indian representatives, and have carefully considered the thoughtful submission prepared by the Native American Rights Fund on behalf of the Litigation Committee of the National Congress of American Indians.

Our further consideration of the question has led us to conclude that our earlier advice fairly summarizes the essential principles. There are, however, several significant respects in which we wish to expand upon that analysis. There are also several caveats that should be highlighted in view of the large number of factual settings in which these jurisdictional issues might arise. We also note, prefatorily, that there are now several cases pending in courts around the country in which aspects of these jurisdictional issues are being, or are likely to be, litigated, 2/ and we may therefore anticipate further guidance in the near term in applying the central principles discussed in this memorandum.

I.

INTRODUCTION

Two distinct competing approaches to the legal question you have posed are apparent. First, it may be contended that pursuant to 18 U.S.C. § 1152, with only limited exceptions, offenses committed on Indian reservations fall within the jurisdiction of the federal courts. The Supreme Court's determination in United States v. McBratney, 104 U.S. 621 (1882), that the states possess exclusive jurisdiction over crimes by non-Indians against non-Indians committed on such enclaves, it is said, was based on an erroneous premise that § 1152 does not control; at best, the argument goes, McBratney creates a narrow exception to the plain command of the statute; this decision should therefore be given only limited application

2/ Mescalero Apache Tribe v. Griffin Bell et al., No. 78-926C (D.N.M. filed Dec. 14, 1978)(jurisdiction over traffic offenses by non-Indians on Indian reservations); State v. Herber, No. 2CA-CR 1259 (Ariz. Ct. App. April 27, 1978) pending on motion to reconsider (authority of State police authorities to arrest non-Indian on Indian reservation).

and should not be deemed to govern the handling of other crimes which have no non-Indian victim. A related argument might also be advanced: with rare exceptions "victimless" crimes are crimes against the whole of the populace; unlike offenses directed at particular non-Indian victims which implicate the Indian community only incidentally, or accidentally, on-reservation offenses without a particular target necessarily affect Indians and therefore fall outside of the limited McBratney exception and squarely within the terms of § 1152.

On the other hand, it may be argued that McBratney was premised on a view of the states' right to control the conduct of their citizenry generally anywhere within their territory; the presence or absence of a non-Indian victim is thus irrelevant. Although continuing federal jurisdiction has been recognized with regard to offenses committed by or against Indians on a reservation, victimless crimes, by definition, involve no particularized injury to Indian persons or property and therefore, under the McBratney rationale, exclusive jurisdiction remains in the states.

We have carefully considered both of these theses and, in our opinion, the correct view of the law falls somewhere between them. The McBratney rationale seems clearly to apply to victimless crimes so as, in the majority of cases, to oust federal jurisdiction. Where, however, a particular offense poses a direct and immediate threat to Indian persons, property or specific tribal interests, federal jurisdiction continues to exist, just as is the case with regard to offenses traditionally regarded as having as their victim an Indian person or property. While it has heretofore been assumed that as between the states and the United States, jurisdiction is either exclusively state or exclusively federal, we also believe that a good argument may be made for the proposition that even where federal jurisdiction is thus implicated, the states may nevertheless be regarded as retaining the power as independent sovereigns to punish non-Indian offenders charged with "victimless" offenses of this sort.

II.

Section 1152 of title 18 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country 3/

Given its full sweep, this provision would require that federal law generally applicable on federal enclaves of various sorts would be equally applicable on Indian reservations. Thus, federal law with regard to certain defined crimes such as assault, 18 U.S.C. § 113, and arson, 18 U.S.C. § 81, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, which renders acts or omissions occurring in areas within federal jurisdiction federal offenses where they would otherwise be punishable under state law. 4/

Notwithstanding the provision's broad terms, the Supreme Court has significantly narrowed § 1152's application. Thus, where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the state absent treaty provisions to the contrary. United States v. McBratney, supra; Draper v. United States, 164 U.S. 240 (1896). Subsequent cases have, for the most part, carefully repeated the precise McBratney formula -- non-Indian perpetrator and non-Indian victim -- and have not elaborated on

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3/ The current version of § 1152 is not of recent vintage, but has roots in the early nineteenth century. See Act of March 3, 1817, 3 Stat. 383; Act of June 30, 1834, 4 Stat. 733, as amended by Act of March 27, 1854, 10 Stat. 269. See also Trade and Intercourse Act of 1790, 1 Stat. 137 (offenses by non-Indians against Indians).

4/ The Assimilative Crimes Act has been regarded as establishing federal jurisdiction over "victimless" offenses occurring within a federal enclave. See, e.g., United States v. Barner, 195 F. Supp. 103 (N.D. Cal. 1961)(reckless driving on air force base); United States v. Chapman, 321 F. Supp. 767 (E.D. Va. 1971)(possession of marijuana).

whether the status of the defendant alone or his status in conjunction with the presence of a non-Indian victim is critical. 5/ However, the McBratney rule was given an added gloss by New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). The Supreme Court in that case characterized its prior decisions as "stand[ing] for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding [18 U.S.C. § 1152]." 326 U.S. at 500. 6/ Similarly, in Surplus Trading Co. v. Cook,

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5/ See, e.g., United States v. Wheeler, 435 U.S. 313, 325 n. 21 (1978)("crimes committed by non-Indians against non-Indians"); United States v. Antelope, 430 U.S. 641, 643 n. 2 ("non-Indians charged with committing crimes against other non-Indians"), 644 n. 4 ("crimes by non-Indians against other non-Indians"); Village of Kake v. Egan, 369 U.S. 60, 73 (1962)("murder of one non-Indian by another"); Williams v. United States, 327 U.S. 711, 714 (1946) ("offenses committed on this reservation between persons who are not Indians"); Donnelly v. United States, 228 U.S. 243, 271 (1913)("offenses committed by white people against whites"). But see United States v. Sutton, 215 U.S. 291, 295 (1909)(characterizing Draper as holding that the state enabling act "did not deprive the State of jurisdiction over crimes committed by others [except] Indians or against Indians").

6/ That the Martin discussion is more than a post hoc explanation for the McBratney Court's failure to give sufficient weight to the plain language of § 1152 is suggested by the careful language of United States v. Rogers, 45 U.S. (4 How) 567, 572 (1846), recognizing federal jurisdiction under the early version of § 1152 with regard to a crime committed by a non-Indian against a non-Indian victim on a territorial reservation ("where the country occupied by [the Indian tribes] is not within the limits of one of the States, Congress may by law punish any offence [sic] committed there, no matter whether the offender be a white man or an Indian)." See also In re Mayfield, 141 U.S. 107, 112 (1891).

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281 U.S. 647, 651 (1930), the Court spoke in the following broad terms: "[Indian] reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." The Court's rationale thus appears to be rooted at least to some extent in basic notions of federalism.

It is, moreover, significant that the historical practice --insofar as we have found evidence on this matter -- has been to regard McBratney as authority for the states' assertion of jurisdiction with regard to a variety of "victimless" offenses committed by non-Indians on Indian reservations. Examination of the limited available precedent provided by turn of the century state appellate court decisions reveals that state jurisdiction was upheld with regard to non-Indian offenders charged with violating state fish and game laws while on an Indian reservation. See Ex parte Crosby, 38 Nev. 389, 149 P. 989 (1915). 7/ An early Washington state case held that a non-Indian charged with the "victimless" crime of manufacturing liquor on an Indian reservation was also held to be properly within the jurisdiction of the state's courts. See State v. Lindsey, 133 Wash. 140, 233 P. 327 (1925). 8/

7/ More recently, in State ex rel Nepstad v. Danielson, 149 Mont. 438, 427 P. 2d 689 (1967), the Montana Supreme Court expressed a similar view after determining that the application of state law had not been preempted by the passage of 18 U.S.C. § 1165, making unlawful the unauthorized entry onto Indian land for purposes of hunting, fishing, or trapping. In 1971, relying on Danielson, Crosby, and opinions of the Attorney Generals of Nevada, New Mexico, and Oregon, the Solicitor of Interior opined that a state would have both the power and the right to exercise jurisdiction over non-Indians alleged to have violated state game laws on an Indian reservation. 78 I.D. 101, 104.

8/ Where the identical acts that constitute a violation of state law would also constitute a violation of a federal statute expressly prohibiting conduct such as unauthorized hunting and fishing or manufacture or sale of liquor on a reservation without attempting to preempt state jurisdiction, a separate prosecution under federal law would of course remain a possibility. See, e.g., United States v. Lanza, 260 U.S. 377, 382 (1922).

State jurisdiction has also been upheld at least as to a woman regarded by the court as a non-Indian who had been charged with adultery; the charge against the other alleged participant in this consensual offense, an Indian man, was dismissed as falling outside the court's jurisdiction. See State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893). 9/ More recent decisions, while not examining the question in depth, have upheld state jurisdiction as to possessory drug offenses, State v. Jones, 92 Nev. 116, 546 P. 2d 235 (1976), and as to traffic offenses by non-Indians on Indian reservations, State v. Warner, 71 N.M. 418, 379 P. 2d 66 (1963). 10/

At the same time as McBratney has been given such broad application, however, the courts have carefully recognized that federal jurisdiction is retained with regard to offenses against Indians. The Court in both McBratney and Draper was careful to limit its holdings to the precise facts presented, reserving the question whether state jurisdiction would also be found with regard to the "punishment of crimes committed by or against Indians, [and] the protection of the Indians in their improvements." See 104 U.S. at 624. Subsequent decisions have expressly recognized that where a crime is committed in Indian country by a non-Indian against the person or property of an Indian victim, federal jurisdiction will lie. United States v. Chavez, 290 U.S. 357 (1933)(theft); United States v. Ramsey, 271 U.S. 467 (1926)(murder); Donnelly v. United States, 228 U.S. 243 (1913)(murder). Insight concerning the significance of and reasoning behind this exception to McBratney's broad sweep is provided by United States v. Bridleman, 7 F. 894 (1881), a decision of the federal district court for Oregon. The case involved the theft, on the Umatilla

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9/ The only other early case with which we are familiar upheld state jurisdiction with regard to one who appeared to be a non-Indian charged with obstructing the use of Indian lands. See State v. Adams, 213 N.C. 243, 195 S.E. 822 (1938). The statement of the case in the appellate court's opinion is extremely obscure; we therefore regard the apparent holding as having limited significance.

10/ See also Op. Az. Att'y Gen. No. 58-71 (1958).

reservation, of an Indian's blanket by a white man. Judge Deady, writing without the benefit of the McBratney decision decided the same year, upheld federal jurisdiction, reasoning that while the admission of Oregon into the Union in 1859 ousted general territorially-based jurisdiction previously asserted by the federal government, "the jurisdiction which arises out of the subject -- the intercourse between the inhabitants of the state and the Indian tribes therein -- remained as if no change had taken place in the relation of the territory to the general government." Id. at 899. He therefore concluded that to the extent that § 1152 provided for punishment of persons "for wrong or injury done to the person or property of an Indian, and vice versa," it remained in force. Id.

Bridleman and the numerous subsequent cases thus support the view that federal jurisdiction exists with regard to offenses committed by non-Indians on the reservation against the person or property of Indians.

The principle that tangible Indian interests -- in the preservation of person and property -- should be protected dates from the earliest days of the Republic when it was embodied in the Trade and Intercourse Acts. 11/ To say that these tangible interests should be protected is not, however, necessarily to say that a generalized interest in peace and tranquility is sufficient to trigger continuing federal jurisdiction. McBratney itself belies that view since the commission of a murder on the reservation -- a much more significant breach of the peace than simple vagrancy, drug possession, speeding, or public drunkenness -- provided no basis for an assertion of federal jurisdiction. Indeed, as the reasoning of Bridleman suggests, it is necessary that a clear distinction be made between threats to an Indian person or property and mere

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11/ See, e.g., § 5, Act of July 22, 1790, 1 Stat. 137 ("crimes upon, or trespass against, the person or property of any friendly Indian or Indians"). See also Donnelly v. United States, supra, 228 U.S. at 272 ("crimes committed by white men against the persons or property of the Indian tribes"); United States v. Chavez, 290 U.S. at 365 ("where the offenses is against an Indian or his property").

disruption of a reservation's territorial space.

We therefore believe that a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) is necessary before federal jurisdiction can be said to attach. In the absence of a true victim, unless it can be said that the offense peculiarly affects an Indian or the Tribe itself, McBratney would control, leaving in the states the exclusive jurisdiction to punish offenders charged with "victimless" crimes. Thus, in our view, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim," and therefore to fall exclusively within state competence.

In certain other cases, however, a sufficiently direct threat to Indian persons or property may be stated to bring an ordinarily "victimless" crime within federal jurisdiction. Certain categories of offenses may be identified that routinely involve this sort of threat to Indian interests. One such category would be crimes calculated to obstruct or corrupt the functioning of tribal government. Included in this category would be bribery of tribal officials in a situation where state law in broad terms prohibits bribery of public officials; 12/

12/ The effect of the Assimilative Crimes Act is to make punishable under federal law minor offenses as defined and punished under state law. See Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965). Whether bribery of tribal officials would constitute an offense punishable under federal law would therefore depend on the precise terms of the applicable state statute and whether it applied to public officials generally or only to enumerated officers of the state and city or municipal governments.

such an offense would cause direct injury to the Tribe and cannot therefore be regarded as truly "victimless." A second group of offenses that may directly implicate the Indian community are consensual crimes committed by non-Indian offenders in conjunction with Indian participants, where the Indian participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. Thus, federal jurisdiction will lie under 18 U.S. § 2032 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. § 13. A third group of offenses which may be punishable under the law of individual states and assimilated into federal law pursuant to the Assimilative Crimes Act would also seem intrinsically to involve the sort of threat that would cause federal jurisdiction to attach where an Indian victim may in fact be identified. Such crimes would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the Tribe.

In certain other cases, conduct which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school or in an obvious attempt to scatter Indians collected at a tribal gathering, and a breach of the peace that borders on an assault may in unusual circumstances be seen to constitute a federal offense.

III.

Whatever the contours of the area in which federal jurisdiction may be asserted, a final critical question remains to be considered: whether state authorities may also legally charge a non-Indian offender with commission of an offense against state law or whether federal jurisdiction, insofar as it attaches, is exclusive. This issue is an exceedingly difficult one and many courts, without carefully considering the question, have assumed that federal jurisdictions whenever it obtains is exclusive. We nevertheless

believe that it is a matter which should not be regarded as settled before it has been fully explored by the courts. Although McBratney firmly establishes that state jurisdiction, where it attaches because of the absence of a clear Indian victim, is exclusive, we believe that, despite Supreme Court dicta to the contrary, it does not necessarily follow that, where an offense is stated against a non-Indian defendant under federal law, state jurisdiction must be ousted.

The exclusivity of federal jurisdiction vis-a-vis the states with regard to 18 U.S.C. § 1153, the Major Crimes Act, has been recognized, see, e.g., Seymour v. Superintendent, 368 U.S. 351 (1962), but has only formally been addressed and decided in the last year. See United States v. John, 98 S. Ct. 2547, 2550 (1978). The Court in John relied on notions of preemption and the slight evidence provided by the legislative history of this provision to reach a result that had long been assumed by the lower courts. 13/

Section 1152 has likewise been viewed as ousting state jurisdiction where Indian defendants are involved. 14/ Supreme Court dicta, moreover, suggests that federal jurisdiction may similarly be exclusive where offenses by non-Indians against Indians within the terms of § 1152 are

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13/ See, e.g., Application of Kinaha, 131 F.2d 737 (7th Cir. 1942); In re Carmen's Petition, 165 F. Supp. 942, 948 (N.D. Cal. 1958), aff'd sub nom. Dickson v. Carmen, 207 F.2d 809 (9th Cir. 1959), cert. denied, 361 U.S. 934 (1960).

14/ See, e.g., United States ex rel. Lynn v. Hamilton, 233 F. 685 (W.D.N.Y. 1915); In re Blackbird, 109 F. 139 (W.D. Wis. 1901); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893); Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 92 (1960).

concerned. 15/ Square holdings to this effect are, however, rare. The Supreme Court of North Dakota has held that state jurisdiction is ousted where federal jurisdiction under § 1152 is seen to exist in cases where non-Indians have committed

15/ See State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 47 U.S.L.W. 4111, 4113 (Jan. 16, 1979) ("State law reaches within the exterior boundaries of an Indian reservation only if it would not 'infringe on the right of reservation Indians to make their own laws and be ruled by them.' Williams v. Lee, 358 U.S. 217, 219-20. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that state laws shall apply'"); Williams v. Lee, 358 U.S. at 220 ("if crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other [than state] courts has remained exclusive"); id. at n.5 ("Congress has granted to the federal courts exclusive jurisdiction over all major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts . . . ."); Williams v. United States, 327 U.S. 711, 714 (1946) ("the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed on the reservation by one who is not an Indian against one who is an Indian"). See also Bartkus v. Illinois, 359 U.S. 121, 161 (1959) (Black, J., dissenting); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1975) (federal law applies to assault by non-Indian against an Indian).

offenses against Indians on the reservation. 16/ At least, three other earlier cases suggest a contrary result, however, recognizing that, as in McBratney, the states have a continuing interest in the prosecution of offenders against state law even while federal prosecution may at the same time be warranted. 17/

Although it would mean that § 1152 could not be uniformly applied to provide for exclusive federal jurisdiction in all cases of interracial crimes, a conclusion that both federal and state jurisdiction may lie where conduct on a reservation by a non-Indian which presents a direct and immediate threat to an Indian person or property constitutes an offense against the laws of each sovereign could not be criticized as inconsistent or anomalous. Section 1153 was enacted many years after § 1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no state jurisdiction over such crimes was contemplated. Consistent with this purpose, § 1152 may properly be read to preempt state attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The state interest in such cases, as recognized by McBratney, is strong. Section 1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian,

16/ State v. Kuntz, 66 N.W. 2d 53 (N.D. 1954) (state prosecution of non-Indian for unlawful killing of livestock of Indian on Indian reservation dismissed on grounds that federal jurisdiction of the offense was exclusive).

17/ See State v. McAlhaney, 220 N.C. 387, 17 S.E. 352 (1941) (state jurisdiction upheld as to non-Indian charged with kidnapping Indian on Indian reservation); Oregon v. Coleman, 1 Oreg. 191 (1855) (territorial jurisdiction upheld as to non-Indian charged with sale of liquor to Indian on reservation notwithstanding existence of comparable offense under federal law). See also United States v. Barnhart, 22 F. 285, 291 (D. Oreg. 1884) (federal jurisdiction would exist as to non-Indian charged with manslaughter of Indian on reservation even if state court had jurisdiction of offense under State law) (dicta).

federal jurisdiction is to be exercised only where the offender is not prosecuted in his own tribal courts. But in no event would the state courts have jurisdiction in such a case absent a separate grant of jurisdiction such as that provided by Public Law No. 280. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the federal interest is not to preempt the state courts, but only to retain authority to prosecute to the extent that state proceedings do not serve the federal interest.

This result follows from the preemption analysis set forth in Williams v. Lee, where the Court recognized that, in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect Indian interests in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under state law for conduct occurring on the reservation, no equivalent damage would be done if state as well as federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other federal enclaves. It is generally recognized that a state may condition its consent to a cession of land involving government purchase or condemnation by reserving jurisdiction to the extent consistent with the federal use. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Paul v. United States, 371 U.S. 245, 265 (1963). Although Indian reservations are in many respects unique insofar as they in most cases existed prior to statehood rather than arising as a result of a cession agreement or condemnation proceedings, an analogy may nevertheless serve.

Since, in most cases, states may retain concurrent jurisdiction except to the extent that that would interfere with the federal use, they may do so here as well by prosecuting non-Indian offenders while federal jurisdiction at the same time remains as needed to protect Indian victims in the event that a state prosecution is not undertaken or is not prosecuted in good faith. For these reasons, therefore, we believe that a strong possibility exists that prosecution may be commenced under state law against a non-Indian even in cases where, as a result of conduct on the reservation which represents a direct and immediate threat against an Indian person or property, federal jurisdiction may also attach.

IV.

CONCLUSION

In sum, although we understand that in many cases commission by non-Indians of crimes traditionally regarded as victimless touchesin a significant way upon the peace and tranquility of Indian communities, as a general rule we believe that such offenders fall within the exclusive jurisdiction of state courts. A more limited class of crimes involving direct injury to Indian interests should, however, be recognized as having Indian victims -- whether the Tribe itself, an Indian who falls within the class of persons to whom certain statutes are particularly designed to afford protection, or an individual Indian or group of Indians who are victimized by conduct which either as a matter of law or as a matter of fact constitutes a direct and immediate threat to their safety. In such cases, federal law enforcement officers may properly prosecute non-Indian offenders in the federal courts. We also believe that despite the common understanding that jurisdiction over crimes on Indian reservations is either exclusively state or exclusively federal, a substantial case can be made for the proposition that the states are not ousted from jurisdiction with regard to offenses committed by non-Indian offenders which pose a direct and substantial threat to Indian victims, but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable state law as well.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Senator MELCHER. The committee will be in recess for 5 minutes, and then we will come back to hear our last witnesses. It will be promptly in 5 minutes.

[Recess.]

Senator MELCHER. The hearing will resume.

Gerald One Feather, director, Public Safety Commission, Oglala Sioux Tribe, Pine Ridge, S. Dak., is our next witness.

STATEMENT OF GERALD ONE FEATHER, DIRECTOR, PUBLIC SAFETY COMMISSION, OGLALA SIOUX TRIBE

Mr. ONE FEATHER. My name is Gerald One Feather, and I am the executive manager of the public safety at Pine Ridge Reservation, and the commission is comprised of law enforcement and prosecution, which was in restructure of the tribal court system. The prosecution was transferred over to enforcement.

This statement is submitted to express the views of the Law and Order Committee of the Oglala Sioux Tribe and the Public Safety Commission of the Pine Ridge Reservation on the proposal to establish special magistrates to exercise Federal jurisdiction on Indian reservations.

The tribe is the federally recognized governing body of the second largest Indian reservation in the United States and exercises criminal jurisdiction within its 2,778,000-acre reservation. The tribe has operated the Bureau of Indian Affairs law enforcement program for the past 3 years under the Indian Self-Determination and Education Assistance Act through an elected public safety commission.

The Oglala Sioux Tribe has long supported the concept which is contained in S. 2832. Lack of effective enforcement of Federal laws on the Pine Ridge Reservation, especially against non-Indian offenders, is a continuing problem for our tribe, and we are convinced that the establishment of a Federal magistrate on the reservation would greatly assist tribal authorities in maintaining law and order. In particular, violations of the rights of Indians by non-Indians would in many cases constitute Federal offenses which could be brought before the Federal magistrate.

We note that the bill, in section 652(d), expressly authorizes tribal and Bureau of Indian Affairs police officers to execute warrants and to take law enforcement actions in aid of a Federal magistrate. The Oglala Sioux Tribe, of course, endorses this aspect of the bill. We have, however, been concerned for some time with the apparent uncertainty in certain Federal circles as to the legal status and authority of our tribal officers who have been formally commissioned by the Bureau of Indian Affairs as Federal officers. While the Interior Department has advised us that these officers are fully authorized to act as Federal officers and are protected as such by the provisions of 18 U.S.C. 1111 and 1114, we understand that the U.S. Department of Justice disputes this view, and we have been provided with a legal memorandum from Justice's Office of Legal Counsel which concludes otherwise, and this has been submitted for the record.

Senator MELCHER. Yes, we are glad to have that for the record, and we are going to make that part of the record following your statement.

Mr. ONE FEATHER. We do not feel that this matter should be left in doubt. Our Indian officers daily place their lives on the line to promote

the peace and safety of the reservation and rely upon their Federal commissions. As we have been unable to obtain a resolution of this matter through contacts with the Interior Department and the Department of Justice over a 2-year period, we ask that the following brief amendment should be included in S. 2832 to resolve the matter once and for all.

After paragraph (e) of section 653, add the following paragraph (f):

> For the purpose of maintaining law and order and protecting persons and property within the Indian country, the Secretary of the Interior, hereinafter the 'Secretary', may commission any officer or employee of the Department of the Interior or of any other Federal, tribal, State, or local government agency to exercise such of the following authorities as the Secretary deems appropriate: (1) carry firearms; (2) secure and execute any order, warrant, subpena, or other process issued under the authority of the United States or an Indian tribe; (3) make arrests; (4) perform any other law enforcement duty that the Secretary may designate.

Also for the record, I am enclosing the superintendent's letter of support from our local agency, and this completes my brief statement.

Senator MELCHER. The letter will be made a part of the record and will also appear at the end of your testimony.

We appreciate your testimony and I think you noted earlier that—I think it was with the U.S. attorney, Robert O'Leary—we asked whether or not in his view tribal police officers should be granted the same protection as Federal officers such as special BIA officers. His answer, as I recall, was in the affirmative. I think that is part of the point that you are making with the suggested language to the bill, is it not?

Mr. ONE FEATHER. I guess.

Senator MELCHER. Just for my own curiosity, what is the enrollment of the Oglala Sioux?

Mr. ONE FEATHER. Well, the current enrollment we use is 12,500, but they are now updating their tribal enrollment and have pretty near 7,000 new applications to process. So, whenever the tribe acts on these applications, it will affect the population.

Senator MELCHER. That is the enrollment of the Oglala Sioux on the Pine Ridge Reservation?

Mr. ONE FEATHER. Pine Ridge, yes.

I would like to mention that on Pine Ridge we do have an unusual case involving the Federal jurisdictions. On the northern boundary of the reservation, we have the Badlands, which come into the reservation, and there, all offenders, Indian and non-Indian, go into the Federal magistrate.

Senator MELCHER. On that portion of the reservation?

Mr. ONE FEATHER. Right.

Senator MELCHER. In the Badlands?

Mr. ONE FEATHER. In the Badlands, right. The hunting by aircraft last fall has been taken over by the U.S. Department of Fish and Game.

Senator MELCHER. I used to live near the Pine Ridge Reservation west of Oglala, and how does it happen that that portion of the reservation uses the Federal magistrate for both Indian and non-Indian violators?

Mr. ONE FEATHER. Because the boundaries have been extended southward to include the old bombing range.

Senator MELCHER. And there is a little different jurisdiction now than just an Indian reservation?

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Mr. ONE FEATHER. Yes. It is under the National Park Service jurisdiction.

Senator MELCHER. And the National Park Service extended their jurisdiction across onto the bombing range?

Mr. ONE FEATHER. It is tribal land, but it is being leased to the National Park Service.

Senator MELCHER. I understand. Then the tribal government agreed as a part of the lease arrangement?

Mr. ONE FEATHER. Right.

Senator MELCHER. I see.

Mr. ONE FEATHER. Well, we did not agree to the jurisdiction.

Senator MELCHER. You did not buy that part of it?

Mr. ONE FEATHER. It was something that just happened through the process, and now we are trying to find a way to resolve it. The Park Service, at this point, is also without any authority to deal with the issue. We are sort of in limbo.

Senator MELCHER. That is interesting. I have not been through the Badlands recently. The last time I went through there, it rained and I got stuck, and that was about 30 years ago.

Mr. ONE FEATHER. But, we carry on all the functions of investigation on Pine Ridge, the tribal law, the tribal law enforcement people, and we have been getting good cooperation from the U.S. attorney in dealing with all crimes.

Senator MELCHER. Gerald, does the U.S. attorney involved use the investigation on major crimes by the tribal police officers rather than the FBI?

Mr. ONE FEATHER. Yes; he does, in certain situations, on what they call the nonviolent crimes.

Senator MELCHER. The nonviolent crimes are still listed within what, the 14 major crimes? It is still a part of the 14 major crimes?

Mr. ONE FEATHER. But in the last 6 months, the U.S. attorney has been very favorable in accepting the cases prepared by our tribal police.

Senator MELCHER. That is encourging.

Mr. ONE FEATHER. In fact, we have talked about setting up a model—not a model, but to work out an agreement between the U.S. attorney's office, the FBI, and the tribe in regard to dealing with the Major Crimes Act and also at the same time to deal with declinations that are refused prosecution by the U.S. attorney, and this has presented the tribal court system with the opportunity, I think, to see what they can do about dealing with these kinds of cases, which are high misdemeanors, as far as the tribe is concerned.

Senator MELCHER. Because of declinations and the handling of high misdemeanors, what about the fines; punishments? Those are still very low, are they not?

Mr. ONE FEATHER. They are still very low, but I think that is something to be dealt with down the road. I see the possibility of lifting the limit on which the tribal governments can assess, because all crimes, such as misdemeanors, are much lower than the Federal misdemeanor authorization that now exists.

Senator MELCHER. Thank you very much, Gerald, for your testimony. We appreciate your coming up here from Pine Ridge to give us this very positive testimony.

Mr. ONE FEATHER. Thank you.

[The memorandum and letter follow:]

DEPARTMENT OF JUSTICE

MEMORANDUM DATE: MAR 9 [illegible]

TO: Judy Bartnoff
Associate Deputy Attorney General
Office of the Deputy Attorney General

FROM: Henry Watkins
Office of Legal Counsel

SUBJECT: Whether contract deputy officer employed by an Indian Tribe under the Indian Self-Determination Act (P.L. 93-638) are "federal officers" as that term is used in 18 U.S.C. §§ 111, 1114

You have requested that this Office informally review an August 8, 1978 memorandum from the Criminal Division to the Deputy Attorney General on the above referenced subject. I have reviewed that memorandum and believe it to be correct for the reasons herein stated. If you desire a formal Office of Legal Counsel opinion after reviewing my thoughts on this matter please let us know.

The Criminal Division's August 8, 1978 memorandum (attached) concludes that contract deputy officers employed by Indian tribes are not "federal officers" as that term is used in 18 U.S.C. §§ 111, 1114. You asked that we review Criminal's memorandum to determine whether we agree with their analysis and conclusion. We agree with the Criminal Division's conclusion, however, we offer additional reasons in support thereof.

The relevant facts are set forth in the August 8, 1978 memorandum, however, we will briefly outline the facts out of which the question arises. Section 1114 of title 18 makes it a federal criminal offense to kill certain federal law enforcement personnel, including "any officer or employee of the Indian field service of the United States." 1/ As the Criminal

1/ Section 111 of title 18 incorporates by reference § 1114's listing of federal officers and prohibits certain conduct directed against such officers.

Division points out, persons in the "Indian field service" are clearly employees of the Bureau of Indian Affairs of the Department of Interior. They are therefore federal law enforcement personnel covered by sections 111 and 1114.

The Indian Self-Determination Act of 1976 (25 U.S.C. § 450) has as one of its basic objectives, giving tribes the right to administer programs and services provided for them by the Federal Government. Under the Act a tribe may elect to have the Federal Government continue providing certain services, or it may request that the Secretary of Interior contract with tribal organizations to provide these services. The personnel operating under such a contract are accountable directly to the tribe. We further understand that the tribe selects and generally supervises such personnel. The Government funds these services and establishes general standards that must be met by contract employees. From these facts the question arose whether persons so employed to provide tribal law enforcement services are federal officers covered by 18 U.S.C. §§ 111, 1114. For the reasons stated by the Criminal Division and for the additional reasons that follow, we agree that these persons are not covered by the subject provisions.

In the congressional debates relating to the original legislative precursor of §§ 111 and 1114 Congressman Dowell questioned the coverage of the bill under consideration. He noted that in most cases it was clear that those covered were federal officers, however, a term there used, "secret service operative," to him was not clearly limited to federal officers and employees. For this reason Congressman Dowell questioned whether language should be included to make it clear that coverage was limited to federal officers. The following colloquy took place:

> Mr. SUMNERS of Texas. I do not believe it is necessary to insert it. We are dealing with Federal officers.
>
> Mr. DOWELL. The language used in this instance does not indicate who these operatives are. I merely call attention of the chairman to that fact, and I think, if it referred definitely to Federal officers, it would be clearer.

> Mr. MONTAGUE. Mr. Speaker, will the gentlemen yield?
>
> Mr. SUMNERS of Texas. Yes.
>
> Mr. MONTAGUE. What jurisdiction would the United States Government have with respect to anybody else except Federal officers?
>
> Mr. DOWELL. They would have none.
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> Mr. MONTAGUE. We could not legislate with respect to anyone else, and, therefore, there is nothing here but United States Secret Service officers. I agree with the gentlemen that it should apply to them, but we cannot legislate about anybody else than United States officers.

78 Cong. Rec. 8127 (1934). Thus, Congress intended to limit coverage under the legislation to United States officers and employees.

There is no dispute that the contract "deputy special officers" are not technically United States officers or employees. Section 2105(a)(1) of title 5 U.S.C. lists the traditional indicia of a federal employee. It defines a federal employee as one who is (1) appointed in the civil service; (2) engaged in the performance of a federal function; and (3) subject to the supervision of a federal employee while engaged in the performance of his duties. The requirement of Government supervision is an important factor, see Lodge 1858, Amer. Fed. of Govt. Employees v. NASA, 424 F. Supp. 186 (D.C. 1976). It seems that the contract deputies can only claim status of federal officers by virtue of their performing a federal function. We assume for purposes of argument that contract deputies perform essentially the same functions as BIA's regular Indian Police. However, performance of a federal function cannot, in our opinion, bring one under the coverage of §§ 111 and 1114. This view seems consistent with the above quoted colloquy of the 1934 Congress and debates. Although a "secret service operative" not a Government employee, functioning pursuant to instructions of the Government would seem to be performing a federal function it was made clear that he is not covered.

Further, if performance of a federal function would bring one under the coverage of §§ 111, and 1114, it would follow that anyone engaged in a federal function would be covered. This

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includes State and local law enforcement personnel cross deputized under authority of 18 U.S.C. § 3055 who were enforcing federal law. Even private citizens attempting a citizen's arrest for the violation of a federal offense would seem to be covered. We think it plain that Congress did not intend such an expansive construction. In this connection it warrants mention that § 1114 lists covered positions rather than functions.

To read § 1114 as broadly as Interior urges would afford coverage under the statutes to persons who officiously and ignorantly seek to enforce federal law. We do not believe this to be consistent with Congress' intent. Rather, we read § 1114 to limit coverage to those in positions designated in § 1114 whose actions are subject to the control and supervision of the Federal Government. The contract deputies are not listed in § 1114 and neither are their actions subject to direct control and supervision of the Federal Government.

Finally, it is significant that § 1114 has been amended to bring certain persons who are not civil service employees within its coverage. Thus, where Congress intended § 1114 to apply to those not technically Government employees it has said so. In 1940 Congress amended § 1114's predecessor to cover persons employed to assist a U.S. or deputy U.S. Marshal. 2/ 48 Stat. 780. The amendment was explained during the floor debate by Congressman McLaughlin:

> Mr. McLAUGHLIN. The bill amends the existing law relating to the killing of certain Federal law-enforcement officers. The present act makes it a Federal offense to kill certain designated officers. Among these are United States marshals and deputy marshals and also special agents of the Federal Bureau of Investigation. The law is indefinite in that it is not quite certain whether it applies to the murder of a person who is employed to assist a United States marshal or deputy marshal or to a

2/ Section 1114 also was amended to cover persons assisting officers or employees of the Customs Service and the IRS.

> person who is an officer or an employee of the Federal Bureau of Investigation but who may not be officially designated as a special agent of that Bureau. This bill simply expands the definition to make it certain that the law will apply to a person who is appointed by a marshal for the purpose of assisting him while, for instance, taking a prisoner to a Federal penitentiary.
>
> Mr. FADDIS. Then it does not narrow the field any?
>
> Mr. McLAUGHLIN. It expands it.

82 Cong. Rec. 1626.

As it was explained, this amendment expanded § 1114's coverage to persons assisting a marshal when employed by him and, of course, subject to his supervision. This undermines the argument that persons not even employed by or subject to the supervision of the United States Government are covered.

Moreover, § 1114's express inclusion of certain non-governmental personnel indicates that the absence of contract deputies is not a legislative oversight.

For these reasons we are of the view that contract "deputy special officers" are not covered by §§ 111 and 1114.

We do not find the cases cited by Interior at odds with our conclusion. Basically, Interior has lifted excerpts discussing "federal officers" from various cases. The problem with this is that these excerpts are not directly relevant to the inquiry at hand. That is, what did Congress mean by its use of the term "any officer or employee of the Indian field service of the United States." 18 U.S.C. § 1114.

One case upon which Interior places heavy reliance is Buckley v. Valeo, 424 U.S. 1 (1976). They point to the language of that case that states that an officer of the United States is "any appointee exercising significant authority pursuant to the

laws of the United States." 424 U.S. at 126. This is inopposite to the issue here under consideration. The Court in Buckley considered the scope of the term "officers of the United States" as it is used in Article II, Section 2, clause 2 of the Constitution. In using the language quoted by Interior the Court distinguished between those United States officers whose appointments require the advice and consent of the Senate, and those other inferior officers whose appointments do not. By definition all the officers discussed by the Court were officers or employees of the United States. Thus, this case does not further Interior's argument since Buckley was limited to a discussion of a very narrow range of U.S. officers, i.e., those requiring Senate confirmation.

Interior also quotes from the case of Ladner v. United States, 358 U.S. 169 (1958), a case discussing 18 U.S.C. § 1114, as follows:

> [T]he congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim. (Emphasis added)

Id. at 175-176. Here again, this does not aid Interior's argument. The above quoted language does not purport to define the term federal officers. It merely states that the purpose of § 1114 is to protect such officers in the performance of their official duty and that this will assure the carrying out of federal purposes and interests. This is clearly intended to distinguish between situations where federal officers are performing official duties as opposed to those cases where they are not. 3/ The term federal officer is not expounded upon.

The other cases cited by Interior also fail to dissuade us from our view on this issue. For example, United States v. Mississippi Valley Co., 364 U.S. 520 (1961) is not pertinent here for several reasons. First, the statute there at issue applied to a person acting as an agent for the Government as well as to federal employees. Id. at 552. Second, the individual in that

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3/ The case of United States v. Heliczer, 373 F.2d 241 (2d Cir. 1967), a case cited by Interior, involves a similar situation. In Heliczer there was no question about the subject individuals being federal officers. The inquiry was limited to whether they were acting within the scope of their official responsibility.

case was requested by the Bureau of the Budget to perform certain services which provided the basis for the law suit. Finally, the statute involved in that case was a conflict-of-interest statute, and the Court acknowledged that these statutes have always been considered to apply to irregular employees of the Government, whether or not compensated. Id. at 15. Either of these factors adequately distinguishes the Mississippi Valley Co. case from the issue at hand.

The cases holding that jailers who confine federal prisoners must be considered federal officers for purposes of a writ of habeas corpus, is no more than common sense. If a prisoner held pursuant to federal authority is ordered released by a federal court this order cannot be frustrated by a claim that the prisoner is not held by a federal officer. If the writ is to retain any validity, it of course must carry the power to compel release of federal prisoners held by state and local jailers who are acting as agents for the federal Government. In this connection the court in Reid v. Covert, 351 U.S. 487 (1956) held that where a jailer was required to "receive and keep" prisoners of the United States "he is to that extent an officer of the United States," for purposes of the habeas statute. Id. at 490.

Provancial v. United States, 454 F.2d 72 (8th Cir. 1972) held that persons holding BIA special officer commissions even-though employed by a local non-Indian government and not paid by federal funds are covered under the Federal Tort Claims Act. However, the court made it clear that the basis for its holding was that that Act covered not only federal officers and employees, but "persons acting on behalf" of a federal agency as well. 28 U.S.C. § 2671. Thus, the court relied on this more expansive language to bring the special officers under the Act's coverage.

The Criminal Division has responded to Interior's argument based on United States v. Smith, 562 F.2d 453 (7th Cir. 1977) cert. denied, ____ U.S. ____ (1978). See page 10 of the Criminal Division's August 8, 1978 memorandum. The few remaining cases cited are clearly distinguishable and, I don't believe warrant any treatment here. However, should you wish us to discuss either of these cases please let us know.

RECEIVED 7-25-80

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
PINE RIDGE INDIAN AGENCY
PINE RIDGE, SOUTH DAKOTA 57770

IN REPLY REFER TO
Superintendent's
Office

JUL 24 1980

Mr. Gerald One Feather
Executive Director, Public Safety
PO Box 300
Pine Ridge, SD 57770

Dear Mr. One Feather:

Thank you for the information you recently provided relative to the possibility of securing a Federal Magistrate to hear an adjudged case through the Oglala Sioux Tribal Court System.

After some consideration of the matter, it would appear that we should be able to extend timely action on a number of issues which receive no attention whatsoever at this time. Some of these areas which involve trespass, theft, hunting on the reservation by caucasian, and the destruction of reservation road systems by through-traffic.

We believe a Federal Magistrate would be an excellent idea. This would enhance the prestige of the judicial system and bring justice to some areas which at this present time are totally ignored.

You have my assurance of full support in securing this valuable service.

Sincerely,

Superintendent

Senator MELCHER. Our next witnesses are Rick Reid, fourth chapter president, Montanans Opposing Discrimination, Poplar, Mont., and Joel Eggelbrecht, a member of the Wolf Point City Council.

STATEMENT OF RICK REID, FOURTH CHAPTER PRESIDENT, MONTANANS OPPOSING DISCRIMINATION

Mr. REID. My name is Rick Reid, and I am from Poplar, Mont., which is located on the Fort Peck Reservation.

I will skip over some of the stuff that I was going to emphasize and more or less try to wrap up my presentation because of the lateness of the day.

We appreciate the effort that you have made to bring Government closer to the people by holding these hearings in Billings rather than have us go the long distance to Washington, D.C. This gives us a feeling that we do have some say in this Government, and we feel good about that.

We are also encouraged that someone in the political arena has acknowledged, that there are problems between Indians and whites on the Indian reservations, and we feel that this bill is evidence that maybe there are solutions to it. Of course, Government policy in the past has placed two people within the reservations under changing rules. They forced Indians to the reservations with treaties and enticed the white settlers via the Homestead Act. We have lived in these areas under some sort of harmony for some years, but we are changing in laws and stuff. It seems to have left us in limbo with loopholes in the laws that encourage the lack of prosecution and punishment of minor crimes.

With white settlement on the reservation, our State and local governments are set up to administer all Government services and justice over the white persons and property, and we were secure in that fact in the early days of the reservation because of the constitutional principle that guaranteed us the right to vote to elect any governing body that would administer any government control over us or our properties.

These laws, though, have been changed in the last few years and has limited the power of our county and State governments to exercise judicial control over our property when it pertains to crimes between Indians and whites. Since the change in the law which forbids the State jurisdiction over Indians on deeded property, we have lived in this limbo of an incomplete jurisdiction state. We are left with only the option of using tribal courts which sometimes answers our complaints, but on the whole has not administered fairly to our needs.

Our objections with using the tribal justice system does not lie with the personalities of the people who are involved with the tribal judicial system, but rather with what we feel is a constitutional guarantee of equal participation by vote in the Government that controls the judicial branches of any government that attempts to exercise control over us. The citizenry are only at ease when they know that they have a chance to correct, by vote, an injustice or lack of justice by any government. Under today's rules, the tribal governments do not have to reflect our concerns for we cannot influence that government through the elected process.

What we need today is to bring our judicial systems or processes together so that all citizens, Indians or whites, have equality under one law. The only way that we feel we can achieve that process is to enact a law that will place Indians and whites in the same court which will administer the same punishment for the same crimes. Until we do this, we do not feel that there will ever be complete harmony or equality on the reservation areas.

In that, it appears to me that we have three solutions, and listening to the testimony today from tribal governments and from other people, we heard what I feel are three options.

We have No. 1, the tribal option or tribal court system which some have stated they feel, as far as minor crimes, they ought to have control over the white resident and his property on the reservations; No. 2, we also have the State or State jurisdiction; and we have No. 3, which would be the Federal level, or the bill which you have introduced today which is a Federal magistrate.

I would like to comment briefly on the one on tribal court and what my concerns as a citizen are in that area, and as a property owner on the reservation. As a white property owner, I am not a tribal member. I do not feel that I should have any control in tribal government, for I am not a tribal member. I have never attempted to influence tribal government in that manner, but for them to exercise jurisdiction over me, I feel, is an encroachment upon the constitutional principles. I believe that the *Oliphant* case, while it only addressed the criminal aspect of jurisdiction, our attorneys that we have talked to said that if need be, if we were to push the civil aspect through the court system, they believe that we would be upheld in the civil jurisdiction as we were in criminal jurisdiction.

Senator MELCHER. There are several cases going through the Federal courts on that very point right now, Rick.

Mr. REID. I am aware of that.

Senator MELCHER. When it reaches the Supreme Court, we will find out.

Mr. REID. What we are trying to say is, I do not know that we specifically approve of the Federal magistrate bill. I do approve of the concept for the one court for the one crime. If that is what it does, rather than go to the tribal option, which I do not feel can be upheld in the court system for the tribes, in other words, exercising jurisdiction over me. If that were the case, then I think the Federal Indian policy which opened the reservation for homesteading has been drastically changed from the original intent, and if that is the solution, to put us under the tribal jurisdiction system, I think the followup would have to be a condemnation of any deeded property on the Indian reservations and removal of anybody other than tribal members from that area. Unless that is done, I think we are in continual conflict and we will have to oppose that concept because of the vote.

As I said before, we are not concerned through prejudice, as has been implied by the tribal members, through prejudice, et cetera. We are not concerned with the personalities involved in the tribal police forces, but rather in that principle of voting in and participating in the Government which controls us.

As an example, in the city of Poplar, we were accused of many things when we started the model organization, and our primary

concern for starting that organization was encroachment of tribal jurisdiction over our lives, which was before the *Oliphant* case, and it had been stated that because of the prejudices, et cetera, that we were just sore on this point. But that is not the case. The city of Poplar had an Indian chief of police, a tribal member, who was chief of police for many, many years, and he was a qualified chief of police. He had the support of the community for one reason—that the community had the right to vote to elect the city government that hired or fired him, and if he abused his position as in the case of any other police officer, he could have been removed. But now, we talk of the threat of tribal control over our lives. We have absolutely no control over that tribal government that appoints the police force, and in that light, we have to oppose, under any circumstances, any manner of tribal jurisdiction.

While I am on the tribal jurisdiction subject, the cross-deputization concept has been mentioned. There are problems, we feel, with the cross-deputization concept on the same basis. Granted, they are not, or you are not in this bill, advocating that we go to the tribal court system, but the tribal police department is an arm of the tribal government. We are not members of that tribal government, and consequently, if there is an abuse by their officers, I do not see where we have the proper appeal to remove that police officer.

Senator MELCHER. Under this concept, it is a Federal law that is being enforced. The use of the tribal police officer is only for that purpose. There is a question of whether or not you are confident that under that concept of enforcing Federal law, whether that does not serve justice and does not preserve your rights as a citizen. It is our feeling that probably it does, but that is why we are here; to receive testimony on it and get your opinion on it.

Mr. REID. As I said, we are concerned with that. As far as cross-deputization, as far as the cooperation of police departments, I am all for that. I think that we have to have that. But we have to get into one court system to get away from this—a prime example of what I am talking about would be an open contai .er law in the city of Poplar. If you would care to drive up on Main Street in Poplar unannounced on Sunday morning, or almost any morning—and granted I am not saying that Indians are the only ones that violate the laws, whites do, too—but I would like to propose a possibility that if I walked up the street arm in arm with an Indian and we both had an open container—the city has an open container ordinance and the tribe also has an open container ordinance—under cross deputization, the tribal police would have the right to arrest me, to send me to my court for punishment that their court does not enforce. It is on the books, but it is not enforced.

Granted, I am sure that they will contest that, but repeated appearances or approaches up and down our Main Street of town, and just to watch in the evenings as to who is running up and down the streets, if their enforcement is there, there must not be enough penalty to cause it not to be done as often in the future, because we have not changed the appearances of that community. And in that light, we are concerned about that.

The other option we mentioned was State jurisdiction, which we believe still would be the best approach. I assume that it is an unattain-

able approach. Basically, our argument there, and it goes on to some of the arguments that the tribal members stated; why would not the white people be under the tribe's jurisdiction on the reservation, because they are when they go off the reservation. But there is nothing in that law that precludes them from participating in those governments when they are off the reservation. However, there are situations that preclude us from being members of tribal governments.

Senator MELCHER. Your point is specifically that they are entitled to vote?

Mr. REID. Sure. If they went to Forsyth when you were mayor, they may not have been a resident and did not vote at that time, but if they cared to establish a residency there, they could correct that fault. However, in the opposite extreme, that we should be under the tribal law, I do not see any comparison at all in that because we never, and should not, participate in tribal government because we are not tribal members. If they would purport to give us equal participation in tribal government, maybe we would have to address that issue there, but I do not foresee that that is the solution.

What I am suggesting is the possibility of State jurisdiction, which was in the early phases of the reservations. The tribal members were, if they were on deeded portions, subject to State law, and we never felt any problems in our areas until that law was changed. I cannot tell you the date that it was changed or what changed it, but it was changed and it took a long time for even the tribes to realize that it had been changed. But from that point on, our situation seems to have deteriorated.

It seems to me, in the testimony that I have heard from tribal members today, that basically the reason they need this jurisdiction is that the overwhelming offenses are by non-Indians or whites against the Indians, and we realize that these cases do go on. However, talking to the tribal or the chief of police in the city of Poplar 2 years ago, I asked him the percentage of the makeup of the law and order calls that they had, and he said at that time—I do not have it with me, but I can go back to him and get it and submit it for the record—was 90 to 95 percent Indian and 5 to 10 percent white.

So I do not think their argument is actually what they proclaim it to be. I realize that whites do break the law and if there are loopholes in the law that allow the whites to abuse the Indian and get away with it, I think that should also be corrected.

The third step, of course, is your Federal magistrate concept. If it would put the Indians and whites, such as myself walking up the street with the open beer container, if it would put us, for minor crimes between Indians and whites or a mix of an Indian on deeded property, if it would put us under that court system, we would wholeheartedly support it, for then we would go to the same court and get the same penalty for committing the same crime.

Senator MELCHER. I am afraid that for an open container ordinance, which is an ordinance, you say, adopted by the city of Poplar and the Fort Peck Tribe, I do not think we can find anything in Federal law that would cover that.

Mr. REID. Right.

Senator MELCHER. So, we do not want to try to tell you that this bill goes farther than it does. It does not go into that particular, into

that group of laws, as a matter of fact, which, in effect, are really the nature of local ordinances. This will go into Federal misdemeanors, which are vandalism, assault, and petty theft. Things of that nature. But it does not cover everything.

Mr. REID. The major crimes—you know, like murder, et cetera—concern you very greatly because those are pretty definite crimes.

Senator MELCHER. Yes.

Mr. REID. But these minor crimes are the crimes that we live with every day. You see that day, after day, after day—repeats most of the time. The same people repeating that same crime. Those are the crimes that seem to really aggravate the people. As it is set up today, where the white goes to his court and the Indian goes to his, whether there is even equality, maybe the Indian gets a more severe sentence in his court than the white does, or if the white gets a worse one than the Indian does, it creates disharmony and dissatisfaction in the whole system and eventually causes animosity. If that goes unchecked, those crimes, leaving out the open container law, are the ones that we live with everyday, and we see it and it is a repeat. We are frustrated.

Senator MELCHER. It would go to that broad range of misdemeanors.

Mr. REID. If we can answer those, the open container would not bother me quite as much. If the law does that, Senator, we would wholeheartedly suport it.

Senator MELCHER. It does address itself to the Federal misdemeanors which are assault, petty theft, disturbing the peace, and vandalism. It addresses all those things, and if that is what you mean by the type of violations that you have to live with day by day, yes, it does address itself specifically to that. It does apply to the Indian and the non-Indian; puts them in the same arena before the same magistrate.

Our next witness is Joel Eggelbrecht.

STATEMENT OF JOEL EGGELBRECHT, MEMBER, WOLF POINT CITY COUNCIL

Mr. EGGELBRECHT. Thank you for giving me this time, Senator. My name is Joel Eggelbrecht. I am here as a member of the Wolf Point City Council.

First of all, I would like to relay to you that the city of Wolf Point is running into enormous problems every year in trying to come up with enough money to satisfy the police department's budget on which they can operate efficiently for a year's time. This year, in order to maintain a decent police department, we had to go to the county and ask them for funds, which we received. I believe that this would not be necessary if our police department had to enforce only those ordinances that the city has laid down, and also if those ordinances being violated were only done so by non-Indians.

But I have with me here some statistics given to me by Bob Neumiller, the Wolf Point chief of police. Bob Neumiller gave you the bottom line, but if I could be given the time, I would like to break them down a little bit on tribal versus city percentages of activities.

For example, in general disturbance calls: city, 10 percent; tribe, 90 percent. Family calls in disputes: city, 10 percent; tribe, 90 percent. Arrests for all offenses: 20 percent city; 80 percent tribe. Traf-

fic accidents: 50–50. Dog citations, 100 percent city, because the tribe has no dog rules. Dog hauls, impounding and destroying: 25 percent city; 75 percent tribe. Emergency messages and assists: 5 percent city; 95 percent tribe. Burglary and vandalism investigation: 5 percent city; 95 percent tribe. All paperwork forms and activities: 25 percent city; 75 percent tribe. Traffic citations: 40 percent city; 60 percent tribe. Courtroom preparation and paperwork: 20 percent city; 80 percent tribe. Daily reports concerning activities: 20 percent city; 80 percent tribe.

In all, the bottom line, 80 percent tribe and 20 percent city.

Senator MELCHER. I want to ask you this. Is the situation at Wolf Point such that the city police go outside the city limits?

Mr. EGGELBRECHT. Yes; they do make calls into the tribal housing areas which are not incorporated into the city limits.

Senator MELCHER. That is unincorporated because it is tribal land, and the tribe has no desire that it be incorporated into the city; is that correct?

Mr. EGGELBRECHT. Not at this time, no.

Senator MELCHER. This is an unusual circumstance, I believe, where the city of Wolf Point police officers have jurisdiction outside of the city and habitually answer calls outside the city in the tribal housing; is that correct?

Mr. EGGELBRECHT. Yes.

Senator MELCHER. And can you just describe, so we understand this, what the population is within the city limits and what the population is in the tribal housing area?

Mr. EGGELBRECHT. I can not give you exact figures on that, but I can roughly guess. I can give you the households. There is a total of 1,100 households, both tribal and nontribal; and tribal, I believe, there are 204 homes.

Senator MELCHER. 204?

Mr. EGGELBRECHT. Right.

Senator MELCHER. There are a fairly large number of homes in relationship to the total number. About 20 percent, then? Close to 20 percent?

Mr. EGGELBRECHT. Yes.

Senator MELCHER. Please proceed.

Mr. EGGELBRECHT. The point that I am trying to get at, I guess, is that the city of Wolf Point has adopted all of the State codes, which, to me, are rules and regulations that all non-Indians have to live by. What the tribe has adopted consists of just one page. So it appears very evident to me that Indians and non-Indians are living entirely under two separate sets of rules and regulations, which is sort of a slap in the face to all law enforcement and justice systems. But I think that your Senate bill 2832 is a good step, but I think that the bottom line in the future, is that we are going to have to see something where we both—the Indian and the non-Indian—live under the same set of rules and regulations. If this can be done, I think this will solve all of our problems; that we can be equal to one another instead of unequal. But, if I had the State codes sitting in front of me, it would be a stack of books like this, and they have one page here. It just does not make any sense to me that we can operate and function normally under circumstances like this.

As far as FBI participation goes on our reservation, I think it is a total joke; that we see the FBI in our community roughly 2 to 3 hours in 1 week's period of time. What they do the rest of the time, I have no idea, and they live 50 miles down the road in Glasgow. I would like to see them stationed in the reservation within the exterior boundaries of the reservation where we could get more help and use from them.

Again, I thank you for making your effort on this bill here, and I think it is a step in the right direction. I sincerely hope that someday we will both be able to live under the same rules and regulations.

Senator MELCHER. Joel, we want to be sure that the list that you were reading from is available to the committee. Would you mind leaving that with us? We may have gotten that earlier.

Mr. EGGELBRECHT. I believe Chief Neumiller told me he had given you one.

Senator MELCHER. If we have it, then it is fine. We will make it a part of the record in connection with this testimony.[1]

I want to thank you both for your testimony. It has been helpful to the committee. You live in an area where we hope that this bill will alleviate some of the problems that exist.

Mr. REID. Thank you.

Mr. EGGELBRECHT. Thank you, Senator.

Senator MELCHER. We have two more witnesses that have asked to testify. Mr. Philbrick, would you please approach the witness table? To save time, I am going to ask Dale Kindness to approach the witness table at the same time. Dale, would you approach the witness table?

STATEMENT OF ROBERT PHILBRICK, CHAIRMAN, CROW CREEK SIOUX TRIBE, ACCOMPANIED BY MR. RENCOUNTRE, SECRETARY

Mr. PHILBRICK. I first want to thank you for giving us the time to express our opinion here. We do not have a statement, but I think when we get back, we will have a statement and possibly a resolution from our tribe.

Our tribe is the Crow Creek Sioux from Fort Thompson, S. Dak., and I am Robert Philbrick. I am the chairman of the Crow Creek Sioux Tribe, and with me is Mr. Rencountre. He is the secretary of the Crow Creek Tribe.

We learned about your bill—and I want to thank you myself because I feel that it takes a lot of courage for a Senator or Congressman to introduce any kind of a bill that is going to affect Indian people. I have been to Washington a few times, and I have been in politics for maybe 40-some years. I know that even though we have a lot of Indian leaders today, it does not look like we speak loudly enough to let the people in Washington know what we really want.

Even though this bill that you have introduced may not have all the answers, I think it is the right step to make because we know that there is a lot of need for improvement in our tribal court system. I do not want to get too far here. I know it is getting kind of toward time to quit, I guess, and I want some of these others to say something,

[1] See p. 34.

too. But, it seems to me that when we talk about tribal court, I kind of have a question whether it is tribal court or not, because the money comes from the U.S. Government. They all tell us that we have a treaty; each tribe has a treaty with the United States, and, therefore, we are treated as a little different, a sovereign country.

When we get to a case that was tried and passed by the Supreme Court—the *Oliphant* decision—I know it affected all of the Indian people, and I know that it was more or less a very cunning way to use the *Oliphant* decision, because I was told that it was a weak case that the tribe had up there. Lawyers from different States, as well as from South Dakota—the attorney general, Mr. Bill Janklow, was involved in this—and they spent so many thousands of dollars to take the case up to the Supreme Court, and this was one of the things that they wanted to do was to show that the Indian tribal courts cannot try a non-Indian. I think this is one of the lowest blows that the Indian people have had to face since I came into politics. I know we have had a lot of times when we had some problems, but we always talked them over and we seem to have gotten legislation or something to follow it. I know at one time they were trying, the State was trying to take jurisdiction and we were successful in getting the vote to overcome this.

So today, I am just going to ask you to give us a little time so we can properly present you with our statement and also a resolution, and I will have Mr. Rencountre make some comments of his own.

Senator MELCHER. Do you care to say something, Mr. Rencountre?

Mr. RENCOUNTRE. Well, I do not have too much to say. This is my first time being in tribal politics; I have been in only 2 months, and this is altogether new to me.

But, you know, I will hold with whatever you say. This is the first time I have ever seen a Senator, and you look something like me, you know.

Senator MELCHER. Not too much different.

Mr. RENCOUNTRE. There is another thing. To solve all this, if all the white people packed up and went back home, we would not have trouble here.

Senator MELCHER. What band of Sioux are you from, Hunkpapa?

Mr. RENCOUNTRE. Yes.

Mr. PHILBRICK. Hunkpapa. It is the same band as Sitting Bull's.

Senator MELCHER. And Crazy Horse, and the Crazy Horse Sioux were from the Oglala?

Mr. PHILBRICK. Yes.

Senator MELCHER. Thank you very much, Mr. Philbrick and Mr. Rencountre.

Now, Dale, would you testify? You had some testimony to offer?

Mr. KINDNESS. Yes, I do, Senator.

Senator MELCHER. Please proceed.

STATEMENT OF DALE KINDNESS, MEMBER, CROW TRIBE

Mr. KINDNESS. To avoid any confusion, Senator, at the outset, I would like to point out that I am a member of the Crow Indian Tribe, and in case we did confuse you, the two gentlemen that just left are from Crow Creek.

Senator MELCHER. Yes.

Mr. KINDNESS. I am from the Crow Reservation, and we have a creek over there called Big Horn Creek. You want to remember; there is a difference there.

As I pointed out, my name is Dale Kindness. I am a member of the Crow Tribe, and I am speaking as a member of the Crow Tribe. There are 6,500 members of the tribe, somewhere in that neighborhood, and I do not speak for all of them. I speak as an individual member of the tribe.

I have worked in the tribal court system as a defense lay advocate for a year and a half now, and as such, my comments are based upon the experience that I have had during those months and also from the training that I have had as a member of the tribal council beginning in 1973.

My first comments deal with section 650(c). I have a problem with the language giving preference to "already reasonably available" magistrates being appointed. It is an already reasonably available feeling of Indians generally, that the present exercise of justice doled out by non-Indian judges who handle Indian cases not unusually borders upon and is influenced upon feelings of racism. This may sound ugly, but the truth is not always pretty. Right now, check out any jail adjacent to an Indian reservation and compare the number of Indian/non-Indian prisoners therein, and you should find more Indians behind bars. Not that Indians are more criminal, but for a number of reasons, including the results of intentional socioeconomic and cultural genocide practiced by this Nation.

Many of my brothers and sisters have a great problem with alcohol which, in turn, leads to and away from, or leads, rather, away from the social problem to one that is criminal. Thus, the high number of jailed Indians who face a member of the local white community who views all Indians as stereotypes. The same is true for the population of the State penitentiary which, I believe, is somewhere in the neighborhood of 40 percent Indian and 60 percent non-Indian, and this is a great difference in comparison to the total population of the State of Montana in regards to the number of Indians in this State, which is somewhere in the neighborhood of 50,000 to 55,000. There is a great difference there.

Perhaps a panel composed of American Indian Lawyers and non-Indian lawyers can be put together, and this group or panel may be authorized to select a magistrate for the various reservation communities, and, of course, there should be a majority of American Indian lawyers on this panel, for, after all, the American Indian knows the reservation and the problems there a lot better than the non-Indians do.

Then, my next comments deal with section 651, jurisdiction and powers.

Senator MELCHER. I do not want you to miss the point, Dale, of 650 (a), which makes the special magistrate subject to the advice and consent of the Senate.

Mr. KINDNESS. Well, perhaps it can be brought before this President, whoever he may be. Perhaps this panel can select a list of possible magistrates for his final approval. I cannot recall whether or not

I requested, in this line of thought, that preference be given to American Indian lawyers to sit as U.S. magistrates.

I will continue along with my comments on section 651. Subsections (a) and (b) appear to strongly infringe upon one of the few remaining attributes of tribal sovereignty that most all tribes and tribal courts presently exercise. That, of course, is the right to make our own laws and to be governed by them through our various tribal judicial branches. The present language will give the magistrates jurisdiction to try and punish Indian criminal offenders even though tribal courts are already doing just that and have been doing so for quite some time.

Oliphant has been mentioned. *Oliphant* said we cannot try and punish white criminal offenders in tribal courts. We all know that, but now, are you proposing that *Oliphant* be extended to provide that tribal courts cannot try and punish Indian offenders? If so, there will be no reason or purpose for tribal courts if you take away that right. Tribal courts will become meaningless; in fact, defunct. I cannot help personally having that feeling, and express that I feel that this is what the major long-range objective is; to make our tribal courts defunct, and, in fact, to wipe out our reservations. Instead of trying to *Oliphant* us to death, why not provide that magistrates cannot handle cases involving Indian offenders when the tribal courts presently are hearing that case? In fact, they are going to the magistrate courts.

I have a few other comments here, but in regards to the statements made by Kathy Fleury—I believe her name was—was it Kathy Fleury from BIA?

Senator MELCHER. Yes; it was, Dale.

Mr. KINDNESS. OK. You asked some questions regarding what tribal courts in that area are exercising civil jurisdiction over non-Indians in the court system. Down at Crow there, I do not know about the other tribes; I am not up to date on them, although I should be, I guess. But, we are exercising civil jurisdiction over non-Indians. In fact, I, personally, right now, am handling four cases, civil matters, disputes between Indians and non-Indians. I have this information available. I can give some of it to your committee here.

Senator MELCHER. We would appreciate it if you will supply it, if if you can. For instance, for the past year, how many civil cases involving an Indian and a non-Indian or involving non-Indians were before the tribal court, the Crow Tribal Court?

Mr. KINDNESS. I would be glad to turn that over.[1]

Senator MELCHER. We will appreciate that.

Mr. KINDNESS. A note which you may find interesting: There is one case pending right now in tribal court in Crow which involves a dispute between two non-Indians. In fact, both parties are non-Indians, and under *Oliphant*, since we think we have the right to listen to these civil matters, we are exercising that jurisdiction presently between the parties.

I have heard you say, Senator, in so many words, in regards to the question of whether or not the jurisdiction under section 651 extends to Indian criminal offenders, that, in fact, the jurisdiction does not apply.

Senator MELCHER. The jurisdiction does apply if it is an Indian

[1] Not received at time of printing.

offender against the non-Indian. Jurisdiction does not apply if it is an Indian against an Indian.

Mr. KINDNESS. If it is an Indian offender, in the U.S. magistrate's court, and the other party is a non-Indian? OK. You are saying that this jurisdiction, then, goes to the U.S. magistrate's court?

Senator MELCHER. Yes; and it is already there. We are not extending it. That is our interpretation of the law now, and that is the interpretation of Mr. O'Leary, also. We can describe that as being concurrent, though, with the tribal court.

Mr. KINDNESS. Wouldn't that, then——

Senator MELCHER. Concurrent, but that it is also a Federal jurisdiction that does exist right now.

Mr. KINDNESS. Including misdemeanors?

Senator MELCHER. Including misdemeanors. That is the point; yes, including misdemeanors, Federal misdemeanors.

Mr. KINDNESS. Federal misdemeanors. Presently, in Crow tribal court in those types of criminal matters where, say, the person who commits the crime is an Indian and the victim is a non-Indian, we handle those matters now in tribal court.

Senator MELCHER. Yes; you can. The Federal law permits it. Present Federal law also permits the magistrates to have jurisdiction.

Mr. KINDNESS. This bill, then, would take away that right of the tribal courts and try Indians in cases involving a non-Indian victim?

Senator MELCHER. Well, it would not, but you can argue that the preference would be to use the Federal magistrate system, or you could argue that the Federal magistrate would be more active than the tribal court, and that, therefore, the concurrent jurisdiction would be used more likely before the Federal magistrate. We do not know that that would be the case, but we do view this as concurrent jurisdiction at present; both Federal and tribal.

Mr. KINDNESS. After enactment of this bill, it does not change anything?

Senator MELCHER. No.

Mr. KINDNESS. Then, could I hear you state now that you would agree to an amendment to section 651, and that amendment would be to the effect of what we just discussed; like if there is an Indian offender this court will not have exclusive jurisdiction over that case?

Senator MELCHER. The bill, as it is written, does not give the magistrate court exclusive jurisdiction over it, but you could view that the outcome would be that the magistrate court would be the more active court, more active than the tribal court. And, since there is concurrent jurisdiction, might act quicker. I do not know that that would be the case, but you could argue that if you would like.

As to any proposed amendment that you might have to the bill, we would be glad to consider any that you recommend, but I would not want to try to pass judgment on it at this time. I am merely trying to tell you what we view this proposed bill to cover and exactly how it does cover it as drafted.

Mr. KINDNESS. I believe that is where the strongest opposition is here, because as I mentioned, we are exercising jurisdiction over Indians who commit a crime against non-Indian, and we feel that you are infringing upon our rights.

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Also, in regard to some of the questions Alex Laforge raised earlier. You did give him a definite answer like in regard to application of State gambling laws and application of State lottery tickets, and you stated that the State laws will not apply in those instances.

Senator MELCHER. If they apply now, we do not change it. We have never seen them applied, so we do not know.

Mr. KINDNESS. Incidentally, sometimes when we have our hand games, we have about 3,000 members of the tribe there, and they are betting. This is an old custom. I would like to see any cop go down there and try to arrest 3,000 of my members of the tribe at one of the hand games.

With that, I have nothing further to add, and thank you very much. If you have any question, I will try to answer them.

Senator MELCHER. We are glad to have your testimony, Dale, and we will review any proposed amendment that you would like to submit or take it from your testimony, however you want us to do it.

Mr. KINDNESS. I understand the record is open for an additional 14 days?

Senator MELCHER. Yes; it is.

Mr. KINDNESS. Thank you, Senator, very much.

Senator MELCHER. Thank you.

I understand that Carol Redcherries of the Northern Cheyenne Tribe would like to present some testimony. We are under limited time, Carol, because we are approaching the end of our day.

Ms. REDCHERRIES. Thank you for your time.

Senator MELCHER. The Northern Cheyenne Tribe was notified of the hearing and invited to testify. We did not get any response from the tribe.

Ms. REDCHERRIES. I didn't even know this was happening until a couple of days ago. Otherwise, I could have submitted a prepared statement. It was kind of a last-minute thing, but thank you for letting me in.

STATEMENT OF CAROL REDCHERRIES, JUDGE, NORTHERN CHEYENNE TRIBAL COURT

Ms. REDCHERRIES. The Northern Cheyenne Tribe at one time, some years ago, did have jurisdiction over nonmembers, and we saw nothing wrong with it and initiated jurisdiction without any trouble. In fact, when *Oliphant* came onto the scene, there were a lot of Caucasian people that were disappointed and stated that they would still prefer to come into our court at any time; that they trusted us with handling any kind of problem that they had. We, as a tribe, or as the working people in the areas that this affects, we were very sad to hear this decision made by the U.S. Supreme Court, because what it has done is, it has hindered us in many ways of trying to protect our people.

As you know, we are surrounded by, maybe in due time 100 percent, coal development. There is going to be an influx of nonmembers. We feel that there is just no way that we can prevent our people from the harassment and different problems that this is going to create on the reservation, and at this time, you know, since *Oliphant*, it has really been a great hindrance.

The *Oliphant* decision has really messed us up, because as a tribe, I feel that we were doing just fine until *Oliphant* came along. Prior to that, we had built up our court system. It was a poor court system. However, we had determined people. We had determined, enrolled members that got in there and did the best they could on what little we had. You can look; you can make comparisons with our Indian court system, all Indian court systems, and the U.S. court systems, and, you know, you folks are considering precedents that were initiated clear over in Mother England, whereas our court systems have been established since 1936, and we have had to come right up to par with your court system with hardly nothing to operate on.

Ever since we have been on reservations, it has always been an act of Congress or maybe an Executive order or the U.S. Supreme Court. The three different bodies of the U.S Government have always come down with something or other, and sometimes they conflict, and here we are sitting back here on the reservation, and we are wondering, "Just what are they going to think of next?" or "What are they going to take away next?" And every time they make these kinds of decisions, seems like there are no Indian people involved, which I think is important. Just like Mr. Kindness stated, there should be some Indian attorneys sitting up here on this committee to hear what we have to say. They do understand and know because they come from there.

And the way things are now as far as this magistrate—Federal magistrate—coming onto the reservation, I am totally against it because I feel that it is going to be a confused mess once it gets started because there are going to be some Indians that will not want to be handled by the Federal magistrate. They will prefer to be handled in their own Indian court.

When it comes to Federal magistrates and this new system that should be enacted, whenever, next year, I guess, I think that it is going to be a little bit more expensive than what you really are planning on, because you are going to have to have some Indian interpreters in there. You are going to have to have people in there who are familiar with the language, because we have some offenders that do not understand English too well. They cannot write very well. And, when they come into a Federal magistrate's court, that's going to be a problem for the magistrate.

So when *Oliphant* came into focus it really meant that no doubt some other things were going to be thought of, which is this Federal magistrate thing.

Senator MELCHER. Well, what would you suggest?

Ms. RECHERRIES. For what?

Senator MELCHER. In view of *Oliphant*, what would be your suggestion?

Ms. REDCHERRIES. I wish the U.S. Supreme Court would just do away with that complete situation and let us continue to try and work toward the objectives of the U.S. Government and have three branches of government just like the U.S. Government. We will eventually get there, but we just started in 1936, and now you have these different acts coming along. Every time an act comes along, we have to take an about-face and start doing something else or we lose something someplace.

Senator MELCHER. Well, Carol, first of all, this is an Indian attorney

sitting to my right, and second, in view of *Oliphant*, what is your recommendation?

Ms. REDCHERRIES. My recommendation is that hopefully the tribes that do not want a Federal magistrate on the reservation will speak up and say so, because I believe it is going to really confuse things, and there is going to be that confusion and no decisions out there that the Indians will have to make. Many of the Indians will want to be handled in their own court. I know that.

Senator MELCHER. Well, of course, that would remain the case under this bill for an Indian-versus-Indian dispute. But it could be, under this bill—because there is a Federal magistrate present on the reservation—that a dispute, or a case involving an Indian against a non-Indian, would get into the Federal branch of court. But that is only one thing. You do not like the *Oliphant* decision, and you testified that the Northern Cheyenne tribal court system is not working good involving non-Indians since *Oliphant*. If you do not view this as a solution to *Oliphant*, I am asking you, from your point of view, what would be your recommendation for a solution to the *Oliphant* decision.

Ms. REDCHERRIES. I do not know if it could ever happen, but I wish that the U.S. Supreme Court would do away with it.

Senator MELCHER. Well, it would have to be a reversal, and it does not seem to be happening. I do not believe there are cases of a similar nature proceeding through the Federal court system to the Supreme Court. So, I am just asking you; you don't like this approach; do you have something to offer as a countersolution?

Ms. REDCHERRIES. I do not have anything to offer you, but as far as the tribe, our tribe, is concerned, we do have a very hard law, and that is the exclusion law. The exclusion law states that if a nonmember commits one crime on a reservation, then we can exclude them, and that is a very hard law, because there is a certain amount of outside people we need.

Senator MELCHER. It may not even be constitutional.

Ms. REDCHERRIES. Well, it is there, and we use it.

Senator MELCHER. I do not think you could impose it.

Ms. REDCHERRIES. We have imposed it.

Senator MELCHER. I do not know how you would impose it against a non-Indian in view of the *Oliphant* decision.

Ms. REDCHERRIES. This falls under the civil area.

Senator MELCHER. Well, OK, if it is civil. But, in a criminal offense by a non-Indian on the Northern Cheyenne Reservation, you do not have any authority under *Oliphant* to use some sort of an exclusion ordinance of the tribe against a non-Indian, as far as I know.

Ms. REDCHERRIES. We have, though. We have. There have been nonmembers that have been excluded, and they have gone rather than stay.

Senator MELCHER. They had rather not get involved in a long dispute over it.

Ms. REDCHERRIES. I am really concerned. I just glanced at the bill, and I do not think it is a good thing for reservations at all.

Senator MELCHER. Thank you very much, Carol. We appreciate your volunteering to testify, and it helps us.

This is the end of our hearing today. We will hold the hearing record open for 14 days. The hearing is adjourned.

[Whereupon, at 5:05 p.m., the hearing was adjourned.]

RELATED MATERIALS RECEIVED FOR THE HEARING RECORD

COMMENTS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON S. 2832

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

September 4, 1980

REC'D SEP 8 1980

The Honorable John Melcher
The United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

You have requested a study and comments on S.2832, a bill to establish a system of special magistrates within Indian country. That proposal will be presented to the Judicial Conference of the United States for its official comments later this month.

The legislation has been reviewed by this office and by the Judicial Conference's Committee on the Administration of the Federal Magistrates System and its Committee on the Operation of the Jury System. In light of your desire for an early response, and without prejudice to the actual consideration of the bill by the Judicial Conference itself, I am writing to offer the following comments on the proposal:

1. The creation in the district courts of a separate, parallel system of special magistrates having limited jurisdiction concurrent with that of United States magistrates is unnecessary and should be opposed as a matter of policy.

2. It appears that the real need which the legislation seeks to address is not the availability of judicial services, but the appropriate level of enforcement of criminal laws in the Indian country. That is a policy matter for determination by the Executive and Legislative Branches.

3. The bill's specific provisions for juries in cases before special magistrates should be opposed on the following grounds:

   (a) The provision for the maintenance of separate jury pools by the special magistrate would be costly and, essentially, duplicate the work of the court's jury commissioner.

   (b) Restricting the composition of juries to "persons who actually reside within the reservation in which the offense is alleged to have been committed" represents a sharp departure from the philosophy of the Jury Selection and Service Act of 1968 which establishes a right to a jury randomly selected "from a fair cross section of the community."

   (c) Requiring the magistrates to compile an independent list of persons "eligible or registered" to vote in state, local, or tribal elections is inconsistent with the provision of 28 U.S.C. § 1863 (b)(2) prescribing the use of local voter registration lists or lists of actual voters.

   (d) Limiting the size of the jury to six persons is an unprecedented departure from the traditional practice of having 12 jurors which has governed the trial of federal criminal cases.

A copy of a study of S.2832 prepared by this office for consideration by the Magistrates Committee is enclosed for your information. I am also enclosing a copy of a letter from the Chairman of the Jury Committee which discusses that aspect of the bill in more detail.

Sincerely yours,

William E. Foley
Director

Enclosures

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

October 28, 1980

Honorable John Melcher
Chairman, Select Committee
on Indian Affairs
United States Senate
6313 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

You have requested the views of the Judiciary on S. 2832, a bill to provide special magistrates in the Indian country. On September 4th I informed you of the comments of the committees which had considered the bill on behalf of the Judicial Conference of the United States.

The Judicial Conference itself met on September 24th and 25th and adopted the recommendations of its committees. Accordingly, the following comments represent the views of the Judicial Conference on the proposal:

1. Your remarks on introducing the bill suggest that the need addressed by the legislation is primarily one of appropriate law enforcement on Indian reservations. The availablity of federal judicial services, however, does not appear to be a major factor in the current level of enforcement of the criminal laws in the Indian country.

2. Should the number of cases prosecuted in Indian country increase and the availability of federal judicial resources become inadequate, the existing United States magistrates system has sufficient flexibility to permit the allocation of additional magistrate positions on a case-by-case basis. In light of the flexibility inherent in the present system, the creation of a new and separate system of magistrates having overlapping jurisdiction is not necessary.

3. The bill's specific provisions for juries in cases before the special magistrates should be opposed on the following grounds:

(a) The provision for the maintenance of separate jury pools by the special magistrate would be costly and, essentially, duplicate the work of the court's clerk or jury commissioner.

(b) Restricting the composition of juries to "persons who actually reside within the reservation in which the offense is alleged to have been committed" may depart from the philosophy of the Jury Selection and Service Act of 1968 which establishes a right to a jury selected "from a fair cross-section of the community." That act established the judicial district or division as an appropriate "vicinage" for jury selection.

(c) Requiring the magistrate to compile an independent list of persons "eligible or registered" to vote in state, local, or tribal elections is inconsistent with the provision of 28 U.S.C. § 1863(b)(2) prescribing the use of local voter registration lists or lists of actual voters.

(d) Limiting the size of the jury to six persons is an unprecedented departure from the traditional practice of having 12 jurors which has governed the trial of federal criminal cases.

A copy of a study of S. 2832 prepared by this office for consideration by the Committee on the Administration of the Federal Magistrates System is enclosed for your information. Also enclosed is a copy of a letter from the Chairman of the Committee on the Operation of the Jury System which discusses the jury aspects of the bill in more detail.

We are concerned that the problems in the Indian country which you have described might ever be the result of a lack of sufficient judicial resources. Accordingly, the Administrative Office will continue to study the judicial workload in the Indian country and the availability of magistrates to meet those needs. A report on that study will be presented to the Magistrates Committee of the Judicial Conference. We will be happy to provide you and members of your staff with that report when it is completed.

Thank you again for the opportunity to comment on this important bill. We look forward to working with you and your staff in making our judicial system as accessible and effective as possible.

Sincerely yours,

William E. Foley
Director

Enclosures

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
P. O. Box 013009
Miami, Florida 33101

C. Clyde Atkins
Chief Judge

August 26, 1980

Honorable Charles M. Metzner
United States Senior District Judge
United States Courthouse
Foley Square
New York, New York 10007

Dear Judge Metzner:

I understand that your Committee on the Administration of the Federal Magistrates System has recently had before it the bill S.2832, which has been referred by the Senate Select Committee on Indian Affairs for study and report by the Judicial Conference.

As you know, this bill is also of interest to the Committee on the Operation of the Jury System, which I chair. In establishing special magistrates with jurisdiction over criminal misdemeanors alleged to have occurred on Indian reservations, this bill would make the following three fundamental changes in existing law and procedure regarding jury selection and trial by jury:

1. Proposed section 653(c)(1) of title 28, as it would be enacted by this bill, would restrict the composition of juries in the trials of misdemeanor cases before the special magistrates to "persons who actually reside within the reservation in which the offense is alleged to have been committed." This restricted locus of selection represents a sharp departure from the philosophy of the Jury Selection and Service Act of 1968, which has governed the selection of all federal juries since that time. The Act requires at 28 U.S.C. §1861 that all litigants in federal courts shall have the right to juries selected at random "from a fair cross section of the community in the district, or division wherein the court convenes." In restricting jury selection to a small geographical portion of a judicial district the proposed legislation sharply contradicts existing statutory policies and may violate consti-

tutional principles as well. Of particular significance in this regard is the question whether it is appropriate for inhabitants of Indian reservations to be judged solely by their fellow inhabitants without any opportunity for outside residents of the judicial district to be included.

2. It would be provided at section 653(c)(2) that the special magistrate shall develop a list of persons for purposes of jury selection, which lists shall be derived or compiled from lists of persons "eligible or registered" to vote in state, local, or tribal elections. This is a departure from the provision of 28 U.S.C. §1863(c)(2), which now requires that prospective jurors shall be selected from voter registration or actual voter lists of all political subdivisions within the judicial district or a division thereof.

3. Section 653(c)(3) would provide that the trial by jury, in misdemeanor cases where there is such a right, would take place before juries of six persons. This is, of course, unprecedented in the federal system in that federal criminal cases have never before been tried to juries of less than 12. Compare Colgrove v. Battin, 413 U.S. 149 (1973), with respect to reduction in jury size for civil trials by local court rule. It is true, of course, that the Supreme Court has considered and in some instances approved the trial of state criminal cases to juries of less than the traditional 12. See, e.g., Williams v. Florida, 399 U.S. 78 (1970) and Burch v. Louisiana, 441 U.S. 130 (1979).

Our Committee defers to the Magistrates Committee on the more fundamental issues raised by the bill, namely the appropriateness of special magistrates and of making these sorts of special provisions regarding misdemeanor cases arising on Indian reservations. Nevertheless we want you to be especially aware of our reservations regarding the above-cited issues as to jury selection and trial. We urge that you ask the Judicial Conference to cite these issues in its response to the Congress. If the Jury Committee can be of assistance in undertaking any further study which may be necessary con-

cerning this legislation, you are most welcome to call upon us or our staff.

With kindest regards and looking forward to seeing you in September, I am

Sincerely,

C. Clyde Atkins
United States District Judge

CCA:ct

bcc: All Members Jury Operations Committee

SPECIAL MAGISTRATES FOR INDIAN RESERVATIONS

Legislation has been introduced (S. 2832) which would authorize the appointment of special magistrates to hear cases arising within Indian reservations. The bill's sponsor, Senator Melcher, has requested the views of the Judiciary on the proposal.

Purpose

The bill seeks to improve the enforcement of existing laws on Indian reservations. No change would be made in present jurisdictional provisions. Senator Melcher has explained the need for the legislation:

> Mr. President, many of the complaints of Indians and non-Indians relate to lack of enforcement of laws or hardships imposed on defendants, witnesses, and families arising from the distance of Federal courts from reservation area. Federal investigators are many times slow to respond to requests for investigations; U.S. attorneys are reluctant to undertake prosecutions for offenses (particularly minor offenses) occurring miles from the courthouse, particularly when obtaining witnesses may be difficult; witnesses are reluctant to respond to subpenas which require them to travel great distances; obtaining juries which are representative of the community in which an offense occurs is not possible. Establishment of magistrate courts to sit in Indian country will not correct all of these problems, but it can go a long way to resolving many of the problems.

Provisions

1. Special Magistrates

The proposal calls for special magistrates to be appointed by the President as officers of the district courts. Preferential consideration is to be given to qualified incumbent United States Magistrates for such appointments. [It is not clear

whether one individual could serve in both capacities.] The bill would adopt the provisions of the Federal Magistrates Act as to administration except in the following instances:

(a) A special magistrate must reside within the reservation or reasonably adjacent thereto.

(b) The President would determine the need for each special magistrate position and whether the position would be full-time or part-time.

(c) The qualification and selection provisions of 28 U.S.C. § 631(b) are not adopted, except for the 5-year bar membership requirement.

(d) The President would fix the compensation of part-time special magistrates.

(e) The proposal does not incorporate 28 U.S.C. § 638(a) which requires the Director of the Administrative Office to furnish each magistrate a copy of the United States Code and authorizes him to prescribe and provide docket books and forms.

(f) The proposal also omits references to 28 U.S.C. § 604 which provides certain authority for the Director of the Administrative Office to supervise the United States magistrates system.

2. Jurisdictional Provisions

(a) Within the boundaries of the reservation to be served, a special magistrate will have the authority to conduct preliminary commissioner-type proceedings in any criminal case and to conduct trials in misdemeanor cases. The misdemeanor trial jurisdiction would differ from that

of the United States magistrates in that (1) the special designation of the district court would not be required; and (2) the defendant would not be permitted to elect a trial before a district judge.

(b) Each special magistrate may also be authorized by the district court to exercise any other power or duty of a United States magistrate.

3. Remand of Custody

The bill authorizes a special magistrate, upon a determination that Federal jurisdiction over the alleged offense is lacking, to order the defendant remanded to the custody of the appropriate law enforcement officials.

4. Enforcement Officers

Tribal police officers and other law enforcement agents are specifically authorized to execute orders of special magistrates, to the extent that the officers have geographic jurisdiction.

5. Lay Representation

The defendant's right to counsel would be extended to include a right to be assisted by a "lay spokesman." Provision is made to immunize such "lay spokesmen" from prosecution for the unauthorized practice of law.

6. Juries

(a) The proposal requires that the special magistrate maintain a list of eligible jurors, in consultation with tribal authorities and county and municipal officials.

(b) Only persons who reside within the reservation would be eligible to serve on the jury panel.

(c) Juries in trials before special magistrates would consist of six persons.

7. Federal Criminal Jurisdiction

The bill would not amend the basic Federal criminal statutes establishing jurisdiction in the Indian country (18 U.S.C. §§ 1152 & 1153). Senator Melcher has stated that "The United States already has jurisdiction over an ample number of offenses in Indian country."

Comments

1. Special Magistrates

Assuming that a need exists for additional magistrates to handle offenses on Indian reservations, no justification has been presented for establishing a separate tier of magistrates. The Federal Magistrates Act now provides ample authority for the Judicial Conference of the United States to establish additional United States magistrates at appropriate locations to handle whatever cases are actually prosecuted.

More importantly, no need has been demonstrated for additional magistrates. United States magistrate positions have been authorized to handle cases arising in Indian country. The volume of cases brought before such magistrates, however, has generally been minimal. Magistrates are judicial officers who hear and decide cases.

Senator Melcher's introductory remarks, however, indicate that prosecution policies and allocations of law enforcement personnel, rather than the availability of judicial officers, are the real problem which the legislation is designed to remedy:

> [The authorization for tribal and State police officers to investigate and present cases] may be the most important provision in this bill for purposes of implementing existing Federal jurisdiction. One of the most serious criticisms to emerge from our March hearing was the failure

> of Federal prosecutors to vigorously discharge those duties within existing law. Among other reasons given is an excessive caseload. This provision authorizes State and tribal police officers as well as Federal officers to initiate proceedings before the special magistrate. The provision contemplates that most of the minor offenses charged will be informally presented by police officials as in the current practice now for minor offenses in such Federal enclaves as national parks.

The flexibility of the present Federal Magistrates Act provides ample assurance that judicial officers will be available to hear any misdemeanor cases which may be prosecuted. Accordingly, the creation of an additional tier of special magistrates is unnecessary and is opposed, as a matter of policy.

2. Jurisdiction

The jurisdictional provisions are closely patterned after the existing Federal Magistrates Act. A special magistrate's jurisdiction would be limited to the conduct of proceedings in criminal cases arising in the Indian. Flexibility is provided for each district court to assign any other duty which a United States magistrate might perform. If a special magistrate system is created, the proposed jurisdictional provisions would be appropriate.

The jurisdiction proposed, however, overlaps that exercised by United States magistrates. Accordingly, the bill should clarify what preference, if any, should be given to prosecuting offenses in Indian country before special magistrates and what residual authority, if any, would be left to United States magistrates.

The bill contains several special procedural provisions applicable only to trials before special magistrates. If residual authority in such cases is retained by United States magistrates, there should be a clear statement as to the

71-015 0 81 - 9

applicability of the special provisions when a case is heard by a United States magistrate.

3. Remand of Custody

Ordinarily, when a federal court determines that it lacks statutory jurisdiction over a criminal defendant, the charges are dismissed and the defendant is discharged from federal custody. Whether the defendant continues to be held on potential charges within a State's jurisdiction generally depends on the existence of cooperative agreements among the respective law enforcement agencies and the willingness of the prosecutor of the respective jurisdiction to pursue the charges. There does not appear to be any reason to require more extensive judicial intervention in such matters in cases arising in Indian country.

4. Law Enforcement Authority

The authorization for tribal and State police officers to become involved in cases before special magistrates is primarily a policy question for determination by the Congress. The Congress should also consider the importance of the role of the Department of Justice, particularly in the prosecution of criminal cases under 28 U.S.C. §§ 519 & 547.

5. Lay Representation

The Congress should include in its consideration of the issue of lay representation:

(a) The responsibility of the court to insure that the defendant is adequately represented by his chosen spokesman; and

(b) The potential unavailability of funds under the Criminal Justice Act to compensate lay representatives for defendants eligible under the Act.

6. Juries

(a) Authority now exists for United States magistrates to preside over jury trials. Jury panels for cases before magistrates, however, are drawn under a district's existing plan. Providing separate arrangements for juries for magistrates would entail substantial, unnecessary duplication of effort.

The bill would require separate jury panels for Indian reservations. The existing experience under the Federal Magistrates Act does not indicate that there would be a sufficient number of jury trials to justify the expense and burdens of establishing a parallel jury selection process.

(b) The bill goes beyond a requirement that persons residing on a reservation be included in jury panels. It limits jury panels to only residents of the reservation involved. Demographic information necessary to an assessment of the full implaications of that provision are not available to us at this time. The provision, however, does raise a substantial possibility that there will be a number of instances in which a jury selected from the residents of a reservation alone will not represent an adequate cross-section to survive constitutional challenge.

(c) Juries of only six persons are not mandated under any other Federal criminal statute. The Supreme Court has approved State provisions for six-person juries and less-than-unanimous verdicts when there are more than six jurors. Presumably, this provision would pass a constitutional challenge.

The trial jurisdiction involved here would include misdemeanors. Petty offenses would involve jury trials only to the extent required by the Constitution. If Federal experimentation with six-person juries in criminal cases is deemed to be advisable, the types of cases involved in the proposed legislation may well be an appropriate starting point.

7. Federal Criminal Jurisdiction

Present law is not clear as to jurisdiction over certain offenses-- particularly so-called "victimless" crimes. Many of these offenses are typically classified as misdemeanors. In considering the proposal, the Congress might also weigh the desirability of clarifying the matter.

Conclusions

1. The real question which the legislation seeks to resolve is the appropriate level of enforcement of criminal laws in the Indian country. That is a policy matter for determination by the Executive and Legislative Branches.
2. As a matter of policy, the creation of a separate, parallel system of magistrates in the district courts is opposed as unnecessary.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 2, 1980

Honorable John Melcher
Chairman, Select Committee
on Indian Affairs
United States Senate
6313 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for requesting our views on S. 2832. The federal judiciary responds to congressional requests for comment through the Judicial Conference of the United States. I have today referred your request to the chairman of the Judicial Conference's Committee on the Administration of the Federal Magistrates System.

That committee is now scheduled to meet on July 25-26, 1980. Although your June 19 letter specifically requests our response within thirty days, I hope you will be able to accommodate a slight extension of that time period. As soon as the Conference's committee has formulated comments for review by the Judicial Conference, I will notify you of the committee's action.

Sincerely yours,

William E. Foley
Director

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

June 19, 1980

William E. Foley
Director
Administrative Office of
U.S. Courts
Washington, D.C. 20544

Dear Mr. Foley:

The Senate Select Committee on Indian Affairs is herewith transmitting S. 2832 for your study and report thereon.

It is requested that 30 copies of your report on this bill be supplied for the use of the Committee and the staff.

It is the hope of the Committee that your report may be submitted within 30 days, or that we be advised if any delay beyond this time period is necessary.

Sincerely,

John Melcher
John Melcher
Chairman

Enclosure

CORRESPONDENCE

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

June 23, 1980

To: The Tribal Chairman of
all Federally recognized
Indian tribes
Tribal Attorneys
Indian organizations

On June 16, 1980, I introduced in the Senate, S. 2832, a bill to establish special magistrates with jurisdiction over Federal offenses within Indian country. I accompanied the introduction of this bill with extensive remarks in order to outline the purpose of this legislation and the need for its enactment. A copy of these remarks and the bill as reported in the Congressional Record is enclosed.

For a number of years I have discussed with attorneys, tribal and legislative leaders support for the establishment of full-time magistrates to serve their reservation areas.

In March of this year, the Select Committee on Indian Affairs held three days of hearings on jurisdictional issues in Indian country. The essentials of this legislation, the sections on jurisdiction and practice and procedure, were considered in those hearings and received strong support from the witnesses who addressed the concept. This bill, S. 2832, is the outgrowth of those hearings.

Our Select Committee on Indian Affairs will be holding hearings, both in the field and in Washington, D.C., in the coming weeks. I would appreciate receiving your comments on this bill in order that the Committee may give due consideration to your recommendations.

With best regards.

Sincerely,

John Melcher
John Melcher
Chairman

SAN JUAN TRIBAL POLICE

P.O. BOX 42
SAN JUAN PUEBLO, NEW MEXICO 87566

A. MARTIN ESPINOSA
Chief of Police

TELEPHONE
852-4257

June 4, 1979

Senator John Melcher
Chairman, Senate Select
Committee on Indian Affairs
Dirkson Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Melcher,

Sunday last, I read an article in the Albuquerque Journal titled, "Law, Order Need Cited For Indian Lands". This article presented your views on the need for a stronger Federal presence on Indian reservations. I fully agree that a U.S. Magistrate should be placed in a position that is more responsive to the needs of the Indian Communities. Positive programs can come about using this method, because prosecutive and other law and order questions can be answered first hand.

As it stands now, the San Juan Tribal Police (San Juan Pueblo, New Mexico), are dealing effectively with crime, but thats where it ends. In over two years, we have not had a single Federal Prosecution for Felonies committed on this reservation. Many things have contributed to this fact. Poor investigations, lack of cooperation between agencies, jurisdictional problems, distance between agencies and the nearest U.S. Magistrate and much more. What this adds up to is poor communication between all concerned.

The Police Department I administer is currently contracted through and by the Bureau of Indian Affairs. To make your proposed solution to the Law and Order problem workable, contract tribes must be adequately funded. Once this is done, Tribal Police Agencies can truly become competent, professional organizations. Currently, Tribal Agencies subsist on meager Fiscal Year Budget Contracts. These contracts are based on statistics, but do not take into account the number of incident/calls that are handled monthly by the Tribal Police. If the tribes could count on a certain yearly allotment, policing would take on a new meaning. Personnel, equipment and training would be the best, subsequently Law Enforcement in Indian Communities would be on equal ground with city, county, state and federal agencies. Tribes could plan new strategies to

combat crime, and the Bureau of Indian Affairs and Federal Bureau of Investigators could count on thorough well planned investigations. (I've included statistics on the number of Incident/Calls that this agency has handled for a 9 month period.) In other words Senator, I consider my agency to be one of the few that is effectively combating crime, but we need help in this endeavor. I applaud your stand and look forward to working with you.

If I can be of any assistance in the future, please feel free to contact me.

Very Truly Yours

A. Martin Espinosa,
Chief of Police
San Juan Tribal Police

SAN JUAN TRIBAL POLICE

STATISTICS

SEPTEMBER 6, 1978 THROUGH MAY 25, 1979

1.	Police Assistance	767
2.	Abondoned Vehicles & Stolen	39
3.	Family Disturbances & Other	158
4.	Accident Investigations	93
5.	Agency Assists	297
6.	Alarms	9
7.	Burglary & Follow-up	33
8.	Public Hazards	23
9.	Homicide Follow-ups	26
10.	Liquor Violations	13
11.	Narcotics Investigations	30
12.	Premise Checks	755
13.	Motorists, Assistance	322
14.	Requests to Locate	22
15.	Escorts, Prisoner, Funeral, Other	303
16.	Runaways & Missing Persons	18
17.	Subpoena Service, Warrant Service	265
18.	Traffic Enforcement, Citations, Etc	712
19.	Robbery, Armed, Other	3
20.	Enforcement, Other-Assault, Vice, Petty Theft, Minor Police Services	306
	TOTAL	4194

Average number of Incident/Calls per month is approximately 466. This report does not take into account the summer months, which are traditionally the busiest time fo the year. This department handles the Incident/Calls with a minimum staff of 7 men and 3 Dispatchers. The officers are certified and are professionals. Training is given once a week, and includes keeping abreast of new techniques and physical training.

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT
ATTORNEYS AT LAW
PIONEER BUILDING, 600 FIRST AVENUE
SEATTLE, WASHINGTON 98104

STEVEN S. ANDERSON
RICHARD H. BERLEY
STEVEN H. CHESTNUT
BARRY D. ERNSTOFF
MOSHE J. GENAUER
FRANK R. JOZWIAK
MASON D. MORISSET
ROBERT L. PIRTLE
THOMAS P. SCHLOSSER
SAMUEL J. STILTNER
JAMES L. VANNELL
ALVIN J. ZIONTZ

AREA CODE 206
623-1255

TWX 910-444-4047
ZIONTZFIRM SEA

March 20, 1980

Senator John Melcher
1123 Dirksen Office Building
Washington, D.C. 20510

Re: Indian Magistrates Concept

Dear Senator Melcher:

You indicated at the hearing regarding the Indian Magistrates Concept on Tuesday, March 18, 1980, that the record would be open for the filing of additional materials. In that connection I enclose herewith a letter from Mr. Herbert A. Becker, Assistant United States Attorney for the District of North Dakota, to Mr. Melvin Grey Bear, Captain of Police of the Devils Lake Sioux Indian Tribe, dated January 22, 1980, in which he points out that Magistrate Dosch, the local magistrate, had dismissed citations for illegal fishing of four non-Indians because the Indian trust land was not posted.

It is exactly this kind of refusal to prosecute non-Indian trespassers on Indian land on hypertechnical grounds that makes it imperative that Congress enact a statute embodying the Indian Magistrate Concept. If you need further information in this regard, please advise me.

Very truly yours,

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT

Robert L. Pirtle

By: Robert L. Pirtle

Enc.
RLP:mm

bcc: Pete Taylor w/Enc.

U.S. Department of Justice

United States Attorney
District of North Dakota

219 Federal Building and U.S. Courthouse
655 First Avenue North
Fargo, North Dakota

Post Office Box 2505
Fargo, North Dakota 58108

701/237-5771 Ext. 5671
FTS/783-5671

January 23, 1980

Mr. Melvin Grey Bear
Captain of Police
Fort Totten Agency
Fort Totten, ND 58335

Dear Melvin:

Re: United States v. Ruby Rueb, et al.

I am returning the title status report that was used in the trial of the Ruebs and Enzmingers; that trial if you recall involved the issuance of citations for fishing without a license on Indian property. Magistrate Dosch at the conclusion of the briefing period found the parties not guilty and in doing so stated that he would not find anyone guilty of violating 18 U.S.C. 1165 unless the Tribe posts notices on Indian trust land. Therefore, we request that in the future when you make arrests for this type of violation you contact this office so we can file an Information in U. S. District Court. We feel that Dosch was incorrect in his decision but because there is no appeal from it, we are forced to bypass him entirely and go directly to the U. S. District Court.

If you have any questions about this, please contact me.

Sincerely,

JAMES R. BRITTON
United States Attorney

HERBERT A. BECKER
Assistant United States Attorney

HAB:s
Enc.

BIG HORN COUNTY

HARDIN, MONTANA

P. O. Box H
(406) 665-1506

March 25, 1980

Senator John Melcher
1123 Dicksen
Senate Office Building
Washington, DC 20510

Dear Senator Melcher:

I would like to take this opportunity to again thank you for taking time out of your busy schedule to visit with me and the other commissioners on our recent trip to Washington D.C. Thanks for anything you can do for all counties on the revenue sharing issue.

In regards to the Jurisdictional problems on Indian Reservations through out the country, I hope that however it can be resolved, it will be mandatory that there be a uniform code of law for all reservations and they apply to reservations the same as state and county.

If all liability problems could be worked out, perhaps some jurisdictions could implement cross deputization if the climate between local elected officials and tribal governments are right.

We may not see it in our time, but sometime for the good of all concerned, we will all have to be the same class of citizens with the same obligations.

In talking to the county attorney and others, at this time without more time and thought, the Federal magistrate proposal cannot be given any constructive proposals. It may be a help in jurisdictional problems if the duties can be outlined, with powers that are acceptable to all concerned.

We at the local level are fully aware that there is no easy solution to this complex problem.

You have done a service to those concerned, with the work you are carrying out. With effort and cooperation, hopefully a reasonable solution will be forth coming.

Respectfully,

BIG HORN COUNTY COMMISSIONERS

By Ed A. Miller
Ed A. Miller, Member

EM/dlj

AK-CHIN INDIAN COMMUNITY

Route 2, Box 27 - Maricopa, Arizona 85239 - Phone 568-2379, 568-2362

June 30, 1980

REC'D JUL 7 1980

Honorable John Melcher, Chairman
Senate Select Committee on Indian Affairs
Washington, D. C. 20510

Dear Chariman Melcher:

The Ak-Chin Indian Community fully supports S.B. 2832. We, here at Ak-Chin, would like very much to have this special magistrates established, and as soon as possible at that.

Ak-Chin does have it's own Court System and also has a Mutual Law Enforcement Agreement with the Sheriff's Office of Pinal County, Arizona, approved by the Pinal County Board of Supervisors and the State of Arizona Attorney General's Office, as well as the Ak-Chin Indian Community Council.

None-the-less, there are times that someone might be turned lose because of an incomplete jurisdictional system, since Ak-Chin is a small Reservation located entirely in Western Pinal County, completely surrounded by non-Indian Communities and Farms, thus a lot of non-Indians travel in and about our Reservation. We also have quite a number of non-Indians residing on Ak-Chin Reservation.

Sincerely,

Leona M. Kakar, Chairman
Ak-Chin Indian Community

THE SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS
206 GREENOUGH ST.
SAULT SAINTE MARIE,
MICHIGAN 49783

July 1, 1980
REC'D JUL 8 1980

Mr. John Melcher, Chairman
United States Senate
Select Committee On Indian Affairs
Washington, D.C. 20510

Dear Mr. Melcher:

At your request, I have reviewed S. 2832, a bill which would establish special federal magistrates within Indian Reservations. The bill would have the effect of increasing the availability of federal courts to enforce criminal laws on reservations, by making a specific federal magistrate responsible for each reservation and giving him the power to try cases involving minor violations. It would also allow tribal, federal or state officers to bring enforcement action to the court, which now can only be brought by the U.S. Attorney, who in our case is in Grand Rapids.

The bill does not effect the question of which laws are to be enforced. Only violations of existing federal law governing Indian Reservations would be brought before the new magistrates.

The bill would not, to my mind, diminish tribal powers in any way.

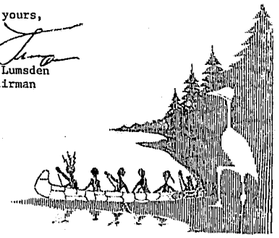
In summary, S. 2832 would make federal laws governing Indian Reservations more effective, by making the federal courts more directly available to try and punish offenses. I believe the bill would enhance law enforcement on Indian Reservations. I stronly and whole-heartedly support this bill.

Sincerely yours,

Joseph K. Lumsden
Tribal Chairman

JKL/bjs

Enclosure



COLORADO RURAL LEGAL SERVICES, INC.
P.O. BOX 1408
1211 MAIN AVENUE
DURANGO, COLORADO 81301
(303) 259-0393

July 1, 1980

REC'D JUL 8 1980

John Melcher, Chairman
Max Richtman, Staff Director
Select Committee on Indian Affairs
United States Senate
Washington D.C. 20510

Re: Senate Bill 2832

Dear Senator Melcher:

I was pleased to read in the Congressional Record dated June 16, 1980, the content of Senate Bill 2832 relating to the establishment of special magistrates with jurisdiction over Federal offenses within Indian country. I am in basic agreement with the Bill as its passage into law will assist in resolving some of the law enforcement problems relating to reservation communities.

However, I would suggest that the Bill be more specific with regard to the service of process or subpoenas upon Indians within reservation boundaries. Unless there is a State-Tribal agreement for cross deputization, much confusion could be alleviated if the bill would specifically provide that either Federal or tribal officials must serve process or subpoenas upon Indians within the reservation boundaries. Undoubtedly, your committee is aware of case law which has invalidated the on-reservation service of process upon Indians by state officials. That case law should not be impliedly repealed by this act.

Thank you for considering this comment and I would appreciate being kept up-to-date on the progress of this Bill.

Very truly yours,

Timothy A. LaFrance
Directing Attorney-
Indian Component

TAL:pb

DNA-PEOPLE'S LEGAL SERVICES, INC.
POST OFFICE BOX 306
WINDOW ROCK, NAVAJO NATION, ARIZONA 86515
TELEPHONE (602) 871-4151

PETERSON ZAH
DIRECTOR
KENNETH L. BEGAY
DEPUTY DIRECTOR
EDWARD B. MARTIN
ADMINISTRATIVE MANAGER

ALAN R. TARADASH
DIRECTOR OF LITIGATION
TOM TSO
DIRECTOR OF NLD & LU
MILLER NEZ
DIRECTOR OF COMMUNITY EDUCATION

July 2, 1980

REC'D JUL 8 1980

Honorable John Melcher, Chairman
Select Committee on Indian Affairs
Washington, D.C. 20510

Re: S.2832 - magistrates in
Indian Country

Dear Senator Melcher:

Thank you for sending me a copy of S.2832 which you introduced on June 16, 1980. I am in agreement with the objectives of the proposed law, and think it wise for the reasons stated in your introductory remarks.

One area should be reconsidered, I believe. 18 U.S.C. §1151 defines "Indian Country" more broadly than "within a reservation." 18 U.SC. §1152 extends the reach of the criminal laws of the United States to include "Indian Country." In the proposed Act, however, at §653 (c)(1) and (c)(2), the language seems to exclude non-reservation Indian Country, and would imply that the magistrate has jurisdiction over reservations only. Because Navajo Indian Country is so extensive (and because the policies you outlined apply equally to non-reservation areas), I suggest that the "reservation" language be dropped in favor of more general Indian Country terminology.

Thank you again for the opportunity to comment on S.2832.

Very truly yours,

Paul Frye
Attorney-at-Law

PF/ds

71-015 O 81 - 10

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION

PHONE 237-0405
237-0721

FORT HALL TRIBAL COURT
P.O. BOX 306
FORT HALL, IDAHO 83203

July 3, 1980
REC'D JUL 8 1980

Senator John Melcher
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Sir:

I have received your letter of June 23, 1980 concerning the Indian Reservation Special Magistrate and Law Enforcement Act of 1980. I appreciate the opportunity to respond to this piece of legislation which is new to me.

In the past our reservation has experienced a great deal of frustration resulting from the U.S. Attorney in our area refusing to handle certain offenses which fall under the Major Crimes Act. As a result, we have modified our Law and Order Code to include most of those crimes thus allowing our Court to prosecute those neglected offenses. This remedy, however, does have its limits since we are bound by the Indian Civil Rights Act as to the length of incarceration we may impose for any particular offense. The result is obvious.

The Act would be of great benefit to our Court system and of great comfort to the Indian community knowing they will be protected from future criminal acts of certain defendants. While I cannot represent the official feeling of the Tribe at this time, I can speak for the Court system on this reservation in saying that I am in favor of such an Act. I would like to be kept informed on field hearing dates and places in my area so that I may attend and express this support and some other feelings not contained in this correspondence.

There is one question I will pose now. I do no understand who the prosecutor will be under the Act? Will it be an informal proceeding where the citing officer will act in that position or will the otherwise negligent U.S. Attorney fill that function? Also, will the U.S. Attorney exercise the discretion of the prosecutor in being allowed to refuse prosecution on any of these cases? If so, the purpose of the Bill is defeated. Thank-you and I look forward to seeing you at the hearings.

Sincerely,

John Traylor

John Traylor
Court Administrator

Lance W. Burr
Attorney and Counselor at Law
16 East 13th
Lawrence, Kansas 66044

Stanton A. Haslett

(913) 842-1133

July 7, 1980
REC'D JUL 14 1980

Honorable Senator John Melcher
Chairman Select Committee on Indian Affairs
Senate Building
Washington, D. C. 20510

Dear Senator Melcher:

On behalf of Chairman Keith Keo of the Kickapoo Nation in Kansas, I want to thank you for your letter of June 23, 1980, regarding Senate Bill 2832. We certainly appreciate your efforts, and I would like to add that the most pressing problem is to give Indians throughout the country jurisdiction over state offenses in addition to federal offenses within Indian territory. As you can probably imagine, most of the criminal matters center around or deal with violations of state law, not federal law.

In particular, the United States Congress back in the 40's gave the State of Kansas jurisdiction over the Kickapoo Reservation and, of course, over all the reservations in Kansas, including the Pottawatomie, Sac and Fox, and Iowa. What we need now is legislation repealing that section and allowing the tribes to exercise criminal jurisdiction within their sovereign boundries. This should apply both to federal and state offenses that I mentioned earlier.

If we can be of any assistance in any manner, please do not hesitate to call or write. Thank you for your efforts on behalf of the Indian tribes throughout the country, and I would appreciate it if you would put us on your mailing list with regard to anything concerning Indian affairs. Thanks again.

Sincerely,

Lance Burr
Attorney at Law and
Attorney for the Kickapoo Tribes of Kansas

cc: Keith Keo

HOH INDIAN TRIBE

STAR ROUTE 1, BOX 917 5 FORKS, WASHINGTON 98331
TELEPHONE 206-374-6582

July 10, 1980
RET'D JUL 18 1980

Honorable John Melcher - Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Melcher,

I support your bill S.2832 authorizing the appointment of Special Magistrate having jurisdiction over Federal Offenses in Indian Country. I think that the goal of this legislation which is to strengthen the effectiveness of Law Enforcement in Indian Countries is highly desireable.

One concern regarding the legislation, however, is that it does not indicate that the various affected tribes would have substantal unput into the selection of magistrates. In as much as the tribes are the consumer group affected by the appointment it would seem that they should exercise at least vito power. Given assurance this input into the selection procedure will in fact occurr, I would urge that this legislation receive full support of the Native American Community.

Sincerely,

Bruce Bowersox
Executive Director

BB:vp

MUCKLESHOOT INDIAN TRIBE

OFFICE OF THE TRIBAL ATTORNEY
39015 172ND AVENUE S.E. - AUBURN, WASHINGTON 98002 - (206) 939-3311

July 11, 1980
RET'D JUL 18 1980

Senator John Melcher, Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

RE: S.2832

Dear Senator Melcher:

The Muckleshoot Indian Tribal Council supports efforts to improve law enforcement on Indian Reservations, through measures such as S.2832. However, as a "full" Public Law 280 tribe, Muckleshoot is concerned that Congress not ignore the problems of law enforcement on reservations where state governments presently exercise criminal jurisdiction. The problems on reservations subject to state criminal jurisdiction are at least equally serious and in need of Congressional attention. The assumption that Public Law 280 jurisdiction would alleviate law and order difficulties has proved to be a gross error.

The Muckleshoot Council recommends that:

1) the bill include a provision allowing retrocession of Public Law 280 criminal jurisdiction upon tribal and Department of Interior approval (the tribe realizes S.1722 contains such a provision, but S.1722 may not ultimately be passed for reasons unrelated to the retrocession issue and this bill seems an appropriate one to include a retrocession provision as well).

2) The act should be clarified so that there will be no question that its provisions will apply to reservations which subsequently become subject to the exercise of federal jurisdiction.

3) Tribal criminal laws should be made enforceable against non-Indians.

MUCKLESHOOT INDIAN TRIBE

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Senator John Melcher, Chairman
July 11, 1980
Page two

The Tribe supports the bill's provisions on migistrate appointment, law advocates, jury selection and tribal police power.

Thank you for your consideration of these comments.

Yours truly,

Marie Starr

Marie Starr, Chairperson/or
Gilbert King George, Vice Chairman

MS:AS:bcs

cc: Senator Edward Kennedy

WIND RIVER LEGAL SERVICES, INC.
P. O. BOX 247
FORT WASHAKIE, WYOMING 82514
PHONE (307) 332-6626
856-0891

July 14, 1980
RET'D JUL 18 1980

Senator John Melcher
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Senator Melcher:

We have read your Bill, S. 2832, proposing to establish a special magestrate with jurisdiction over federal offenses within Indian country and to authorize Tribal and local police officers to enforce federal laws within their respective jurisdictions. We believe that this Bill would be very beneficial to our Reservation here in Fremont County, Wyoming. It would provide a process that would be quicker for defendants in cases and also would provide a presence for the Federal Court that would probably be very helpful for criminal officers operating within the exterior boundaries of the Reservation. We especially like the provision §652(c)(1) in which a defendant requesting a trial by jury can have a jury of his peers or people that are residents of the Reservation rather than as it is now done in Wyoming. Since the Federal Court is in Cheyenne, Wyoming, over 250 miles away, the chances of an Indian defendant receiving an Indian jury are very slim.

I appreciate the time that it took for you to solicit these comments and I hope that our comments are helpful.

Yours truly,

M. L. Barton
Attorney at Law

MLB/jg

THE PAPAGO TRIBE OF ARIZONA
P. O. Box 837 • Telephone (602) 383-2221
Sells, Arizona 85634

July 15, 1980
RET'D JUL 21 1980

Hon. John Melcher
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

On behalf of the Papago Tribe and its members, I wish to thank you for your leadership in developing and sponsoring S. 2832. The Papago Reservation covers almost three million acres of land lying both close to, and very distant from existing urban and Federal court centers. The bill appears to offer excellent and simple solutions to extremely complicated jurisdictional and geographic problems, and is sensitive to Indian custom, concerns and needs. The Papago Tribe is facing extremely difficult minor crimes law enforcement problems, and the bill would provide an excellent tool to help resolve these problems.

We fully support the bill, and recommend that it be passed into law and implemented as soon as possible.

Very truly yours,

THE PAPAGO TRIBE OF ARIZONA

Max H. Norris

Max H. Norris, Chairman

MHN/j

SOUTH DAKOTA LEGAL SERVICES, INC.
BOX 727
MISSION, SOUTH DAKOTA 57555
605-856-4444

July 17, 1980
REC'D JUL 22 1980

Mr. John Melcher, Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Senator Melcher:

The bill seems admirable to the extent that it: (1) provides for federal magistrates on or near Indian reservations (2) provides for jurors exclusively from Indian reservations (3) recognizes the right of Indian people to be represented by lay advocates. Overall, it recognizes that to a certain extent law enforcement problems on Indian reservations are unique and attempts to deal with those problems.

One problem is that a United States Attorney could by using this procedure to a great extent divest tribal courts of a great deal of its jurisdiction. This would be done by charging federal misdeamnors on those crimes that now are referred to the tribal court itself. Perhaps this is what you are encouraging. My comment would be to spend the money that would be used for federal magistrates under the bill by funding particular tribal court judges under contracts that are federally monitored. In other words spend the money on upgrading tribal courts, not by divesting it of jurisdiction and alleviating the problem by creating another layer of functional courts.

In addition, providing federal magistrates locally will not be effective without also providing local federal law enforcement backup by the FBI. At the present time days and sometimes weeks pass before criminal investigations are initiated by this agency.

Some of the justifications that you use for promulgating the bill I feel do not lead to the decision that this bill is needed. However, I have discussed those in previous correspondence and I will not reiterate them here.

Thank you for soliciting my comments.

Sincerely,

Anita Remerowski

Anita Remerowski
Director of South Dakota
Legal Services

AR:jv

Absentee Shawnee Tribe of Oklahoma
Post Office Box 1747
Shawnee, Oklahoma 74801
Phone 275-4030

July 28, 1980

Mr. John Melcher, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Melcher:

I am writing in response to your recent letter whereby you indicate that you have introduced in the Senate a bill to establish special magistrates with jurisdiction over Federal offenses within Indian country (Senate Bill 2832).

I am please to learn that you recognize the lack of law enforcement now existing in what is commonly known as Indian Country. As you may know, there currently exists a Court of Indian Offenses in Western Oklahoma which is designed to provide an appropriate mechanism for law enforcement on properties held in trust by the United States for Indian Tribes and Indian individuals. This court system, however, only applies to cases involving misdemeanor crimes. All felony offenses in Western Oklahoma are administered by the United States District Court in Oklahoma City. Because of the large number of cases handled by the United States District Court, it seems to be virtually impossible for this court to handle all federal offenses for the western half of Oklahoma. As a result, many federal offenses no doubt go unpunished for lack of federal enforcement. I feel that the bill which you have introduced will help to fill this void, and I fully support this bill.

I would appreciate your keeping us advised as to the status of this bill, and also inform us of the hearings in our area as they are scheduled. I commend you for your efforts to seek legislation for such an important cause.

Sincerely,

John L. Sloat
Governor

JLS:jb

STOCKBRIDGE - MUNSEE BAND OF MOHICAN INDIANS

INCORPORATED

STOCKBRIDGE - MUNSEE COMMUNITY
Route 1 Phone Bowler 793-4678
BOWLER, WISCONSIN 54416

July 30, 1980

The Honorable John Melcher
Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Sir:

Thank you for your involvement and undertaking in behalf of all Indians, particularly in such vital areas of law enforcement and jurisdiction.

In response to your letter, dated June 23, 1980, regarding Bill S. 1832, I am requesting clarification of the following sections in answering the question, "How does this Act affect P.L. 280 Indian Reservations?"

Sec. 650 (a)...serve each Indian reservation and such additional areas as are within the Indian country as defined in Section 1151, Title 18, United States Code, and over which the United States exercises criminal jurisdiction under the provisions of Chapter 53 of Title 18, United States Code.

Sec. 651 (a) Each special magistrate serving under this chapter shall have, within the territorial jurisdiction prescribed by his appointment.

Sec. 651 (b) Each such magistrate so serving under this chapter shall have any other duty or power which may be exercised by a U.S. Magistrate in a civil or criminal case, to the extent authorized by the court for the district in which he serves.

Sec. 653 (d) Tribal police officers, Bureau of Indian Affairs police officers, and federal, state and local law enforcement officers, acting within the geographic

areas in which they have jurisdiction under the laws of their respective governments...

Thanking you in advance for your cooperation in this matter.

Sincerely yours,

Leonard E. Miller Jr.
Tribal Chairman
Stockbridge-Munsee Community

LM/cm

Montanans Opposing Discrimination

6 Third Ave. W.
P.O. Box 673
Polson, Montana
59860

Telephone:
(406) 883-2198

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Interstate Congress
for Equal Rights
and Responsibilities

August 5, 1980
REC'D AUG 1980

Honorable John Melcher, Chm.
Select Committee on Indian Affairs
Washington, D.C. 20510

RE: Testimony on S.B. 2832

Dear Senator Melcher:

Thank you for your letter of July 29, 1980, and a copy of SB 2832 plus the Congressional Record.

M.O.D. has completed a poll of it's membership on this Reservation regarding this Bill. Results were almost two to one against.

While I see many advantages on some Reservations, I find our membership unalterably opposed to Tribal Police having jurisdiction over non-members in the areas outlined in the bill.

Great concern is expressed as to funding such a program on all Reservations in the Country and the ultimate bureaucratic growth of the offices.

Aside from SB 2832, other questions in the poll included "Who is an Indian" and "Tribal Sovereignty".

Except for six, all returns agreed that to be classified as Indian the person must possess at least one-half Indian Blood.

On the question of whether or not an Indian Tribe should be classified as a Sovereign Nation, 100 per cent agreed they should not.

Sincerely,

John C. Cochrane
President

po

cc

Montanans Opposing Discrimination is dedicated to the end that no federal, state or local government shall make any distinction in civil or political rights on account of race, color or national origin.

Montana Inter-Tribal Policy Board

711 Central Ave. ● Billings, MT 59102 ● (406) 245-2228

REC'D AUG 13 1980

August 7, 1980

Honorable John Melcher
316 North 26th Street
Billings, MT 59101

Dear Senator Melcher:

The Montana Inter-Tribal Policy Board (MITPB) is a coalition of delegates representing the seven (7) Indian Reservations and the Little Shell Band in Montana. The purpose of the MITPB is to represent, protect and advance the interests of the Montana Tribes.

In the area of law enforcement, the MITPB recognizes that the excercise of federal criminal jurisdiction has been ineffective. Therefore, we feel the provisions in S.2833 will help address the problem of non-prosecution by the U.S. Attorney of crimes committed on Reservations.

The MITPB supports and urges for the passage of S. 2833, the Indian Reservation Special Magistrates Act of 1980, directing the President to appoint special magistrates to excercise jurisdiction over federal offenses committed within Indian country.

Best wishes for a successful hearing.

Sincerely,

T. Fierson Lee
for THOMAS C. WHITFORD
Director
Montana Inter-Tribal Policy Board

TD/cg

IN CHAMBERS
R. D. McPHILLIPS, JUDGE
434-2451
SHELBY, MONTANA

-•- -•-

TETON COUNTY • CHOTEAU
PONDERA COUNTY • CONRAD
GLACIER COUNTY • CUT BANK
TOOLE COUNTY • SHELBY

DISTRICT COURT
NINTH JUDICIAL DISTRICT
STATE OF MONTANA

W. J. MAY
COURT REPORTER
278-3552
CONRAD, MONTANA

August 11, 1980
REC'D AUG 18 1980

Hon. John Melcher
United States Senate
Washington, D.C. 20510

Dear Senator Melcher:

I note with some interest you have introduced a bill requiring the Tribal Court system to be presided over by some sort of federal magistrate. The idea is excellent and needed.

While tribal judges have improved over the past years, some sort of system whereby the judge is not subjected to all the tribal politics is needed. Law and Order on the reservation is almost non-existent, and the fault is that of the system. Frequently, during jury term in Cut Bank, Indian people tell me that they cannot sit on a particular case because of fear of retribution and ask to be excused from jury service for that reason.

Perhaps a step toward some sort of independent judiciary would be a start to give law-abiding citizens a feeling of some security.

Please have your staff send me a copy of your proposed bill.

Kindest regards, I wish to remain

Very truly yours,

R. D. McPhillips
District Judge

elr

LAKE COUNTY, MONTANA

POLSON, MONTANA 59860

August 11, 1980
REC'D AUG 18 1980

The Honorable John Melcher
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: S. 2832

Dear Senator Melcher:

I have been asked by Wesley Leishman, Chairman of the Lake County Board of County Commissioners, to relate comments from county law enforcement personnel about the bill you have introduced to the U. S. Senate to be known as the "Indian Reservation Special Magistrate Law Enforcement Act of 1980".

I have discussed the bill and its detailed provisions with Sheriff Glenn Frame. Glenn has been Sheriff of Lake County since the retirement of W. A. "Bill" Phillips at the end of January, 1977. Prior to that time, he was Sheriff Phillip's Undersheriff and earlier served as his Chief Deputy. I have been County Attorney of Lake County, Montana, since January, 1963, with the exception of the years 1967 through 1970. I was in office at the time the grant of criminal jurisdiction and certain areas of civil jurisdiction were made to the State of Montana with respect to the Flathead Indian Reservation. I mention these things to indicate the background and experience which contribute to our views of the proposed legislation.

We believe we have few, if any, of the problems which give rise to your proposal. A Federal magistrate is available in Flathead County some 53 miles to the north of Polson. I am not aware of the case load which the part-time magistrate, James Oleson, carries with respect to violations of Federal law on the Flathead Reservation; I suspect they may have to do principally with fishing and possibly hunting within

the Tribal territory. The State of Montana has general criminal jurisdiction within the reservation, which jurisdiction is concurrent with the Federal jurisdiction in cases of major crimes and concurrent with Tribal jurisdiction over its members in cases of minor offenses where the Tribal law and order code includes at least some reflections of State law. For these reasons, Sheriff Frame and I believe that the "Special Magistrate" within the Flathead Reservation is not needed to answer the types of problems which apparently exist on other reservations.

We do voice a serious concern over the provision of the bill which would authorize Tribal police officers to execute warrants used by the "Special Magistrate". We recognize that the bill does not authorize arrests to be made without warrant as for misdemeanor violations which may occur in the presence of such Tribal officers. We believe it will create a potentially explosive and harmful situation in the county (and possibly Missoula County to the south of us) where a Tribal officer makes an arrest of a non-Indian person. As you know, there is a very substantial disparity between Indian and non-Indian population in Lake County; Tribal population represents about 18% of the total county population (without reference to the 1980 census figures which we have not seen). As you know, an arrest without a warrant is a serious action, one which carries with it potential for violent reaction by the person arrested. Were such arrests to be made by Tribal officers who would be wearing Tribal officer uniforms and would convey defendants in Tribal patrol cars, possibly to Tribal detention facilities, I would be doubly apprehensive of the reaction of the non-Indian population of Lake County. I do not believe the non-Indian population would make the distinction as to which jurisdiction is exercising the authority; it would be viewed as an exercise of Tribal police jurisdiction. Such authority has a potential in this area for doing substantial harm to interracial relations and it is altogether doubtful that the benefits of enforcement (chiefly in the areas of fishing and hunting violations) could offset the potentially harmful effects to interracial relationships.

I would also be concerned about the meaning or usages which could arise under Section 652. If the power of arrest were to be limited to warranted arrests or warranted searches, there would be little or no reason for arrests outside of Federal jurisdiction to be made. I would be apprehensive that such intake power would be used to compromise the existence of state prosecutional discretion or that it may allow a means of enforcement of strictly Tribal code offenses against non-Indians. It seems to portend an implementation of the power of Congress to enlarge the arrest and prosecutorial power of Tribal Courts following the Oliphant decision of 1978, 435 US 191, 55 L Ed 2d 209, 98 S Ct 1011.

71-015 O 81 - 11

The Honorable John Melcher
Page 3
August 11, 1980

Sheriff Frame and I are also concerned about the qualification and training of Tribal police officers based on experience over the years we have been acquainted with them. Undoubtedly, it has improved substantially since 1963, yet, in our opinions, it is less than that possessed by the Federal officers of the Bureau of Indian Affairs. For similar reasons, Sheriff Frame has continued to oppose cross-deputization of Tribal officers. Such deputization also involves substantial problems of liability, individual, county and state, as well as the question of divided loyalities.

Please understand that we do not challenge the assertion that on some reservations the problems of lack of law enforcement in the areas of minor violations could be solved by your proposal; it is simply that in the case of the Flathead Reservation where criminal jurisdiction is presently exercised by the State and Federal jurisdiction could be exercised concurrently and Tribal jurisdiction also concurrently in limited areas, a "Special Magistrate" is not needed and the manner of enforcement would do harm to racial relations. Our only suggestion is to exempt reservations where such concurrent jurisdiction exists.

If we can address any further specific questions you or your committee may have, please do not hesitate to contact Sheriff Frame or myself.

With kindest regards, I remain

Yours truly,

Richard P. Heinz

RICHARD P. HEINZ
Lake County Attorney

RPH/rl

cc: Wesley Leishman
Chairman, Board of Lake County Commissioners

LAW OFFICE
WILLIAM F. MEISBURGER
Professional Building
FORSYTH, MONTANA 59327

TELEPHONE (406) 356-2175

P.O. BOX 149

August 13, 1980.

REC'D AUG 19 1980

Senator John Melcher,
Senate Office Building,
Washington, D. C.

Dear John:

I read a bit this morning about a bill you are proposing for establishment of Federal Magistrates on Indian Reservations.

I have no details, of course, at this point but it sounds like a wise approach to a very difficult problem. For several years I took cases in tribal court in Lame Deer but finally came to the conclusion that the state of tribal law was so confused that it was impossible to work with it and there is no question but that the various jurisdictional questions which constantly arise in Indian matters are so profound and sometimes insoluble as to create a state of utter confusion and certainly frustration for all who are concerned, most of all I am sure the Indian people.

If the Indian people will accept something along the lines which you are proposing I would think it would go a long way towards solving the problems of all who live on an Indian Reservation.

Best wishes,

Bill Meisburger.

WFM/jam

YANKTON SIOUX BUSINESS & CLAIMS COMMITTEE

ROUTE 3 · WAGNER, S. DAK. 57380 · PHONE 384-3641

August 18,1980

TO: Congressional delegates

FROM: Y.S.Tribal Chairman

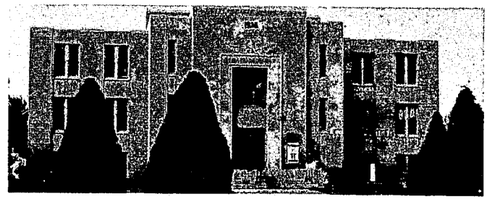
RE: Senate Bill 2832, Indian Reservation Special Magistrate and Law Enforcement Act of 1980.

Dear Delegates,

I'm taking the time to write to offer my support for Senate Bill 2832, Indian Reservation Special Magistrate and Law Enforcement Act of 1980, with one small recommendation. The recommendation would be to give consideration to Indian Attorneys or Indian judges as magistrates.

Larry D. Cournoyer

Y.S. Tribal Chairman



GLACIER COUNTY

CUT BANK, MONTANA

5427

August 19, 1980

REC'D AUG 29 1980

Senator John Melcher
Senate Office Building
Washington, D. C.

Dear Senator Melcher:

We are much in favor of your hearing on the Police Magistrate Court System, in Billings, Montana.

BOARD OF GLACIER COUNTY COMMISSIONERS

BY Fred R. Johnson Sr. CHAIRMAN

SHOSHONE & ARAPAHOE TRIBES

BOX 217
FORT WASHAKIE, WYOMING 82514

CHIEF WASHAKIE

CHIEF BLACK COAL

SHOSHONE BUSINESS COUNCIL
FRANK L. ENOS
ROBERT N. HARRIS, SR.
ENOS J. ENOS
BENJAMIN SNYDER, SR.
ALFRED WARD
WESLEY L. MARTEL

ARAPAHOE BUSINESS COUNCIL
ERNEST HANWAY
BURTON HUTCHINGSON
PATRICK GOGGLES
JOSEPH OLDMAN
WAYNE FELTER
EUGENE RIDGELEY, SR.

August 29, 1980
RECD SEP 2 1980

The Honorable Senator John Melcher
United States Senate
Room 123, Dirkson Senate Building
Washington, D. C. 20510

Re: U. S. Senate Bill 2832

Dear Senator Melcher:

We have received notice that you recently introduced into the Senate S. 2832, the Indian Reservation Special Magistrates Act of 1980. The Shoshone and Arapahoe Tribes of the Wind River Reservation would like to make it known that we support this bill.

Our support is partly based on the fact that this bill does not change jurisdictional provisions relating to law enforcement on Indian reservations. We note that your bill provides for the appointment of federal magistrates to enforce existing Federal law on Indian reservations, and in areas of Indian Country over which the United States now exercises criminal jurisdiction.

Of particular interest to us is the provision which gives local police, both Indian and non-Indian, authority to aid in the enforcement of Federal law and to act as officers of the special magistrates court. This provision, we feel, would result in an improved working relationship between tribal, federal, state and local officials acting within their respective jurisdictions as officers of the special magistrates court.

The district court and federal investigators in our area face an overload of cases much of the time. We believe having a special magistrates court to handle minor federal offenses committed by Indians and non-Indians, both on and off the reservation, would improve what often amounts to a lack of law enforcement. Many cases which at this time must go to district court in Cheyenne, about 300 miles away, could be

Senate Bill 2832
August 13, 1980
Page Two

handled here at less cost. The necessity of traveling that distance creates hardships for Indians and non-Indians alike when they become involved in a federal court action.

We again wish to affirm that we support this bill, as we understand it, and hope that it will become law.

Sincerely,

Robert N. Harris, Sr.
Chairman, Shoshone Business Council

Joseph Oldman
Chairman, Arapahoe Business Council

cc: Alonzo T. Spang, Sr.
Superintendent
Wind River Agency
Ft. Washakie, WY 82514

Glen A. Wilkinson, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Marvin J. Sonosky, Esq.
Sonosky, Chambers & Sachse
2030 "M" Street, N.W.
Washington, D. C. 20036

Montanans Opposing Discrimination

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Polson, Montana
59860

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and Responsibilities

August 22, 1980

Honorable Max Baucus
Senate Office Building
Washington, D.C. 20515

Dear Senator Baucus:

Except for the informational letters I have sent to all Senators and Congressmen, I have not wanted to annoy you with my concerns and issues; most of which I am sure you are already aware of.

Our meeting with Mr. Foulis was quite enlightening and I appreciate his interest in asking for it. I have enclosed copies of the letters he thought you would be interested in.

At this point we feel Senator Melcher's SB 2832 would eventually develop into a vast Bureaucracy and the cost to the Federal Government would be tremendous. I have to agree, however, that such a system would be helpful on Reservations where the State does not enjoy Criminal Jurisdiction.

It would seem to me that, regardless of the fact that Indians are a subject of the Federal Government, the Congress could give Criminal Jurisdiction to the affected States whose court systems are already in place.

Sincerely,

John C. Cochrane

John C. Cochrane,
President

po

Enclosures.

THE JICARILLA APACHE TRIBE
P. O. BOX 507 • DULCE, NEW MEXICO 87528

August 26, 1980
REC'D SEP 3 1980

Senator John Melcher
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Proposed Indian Reservation Special Magistrate
and Law Enforcement Act of 1980 - S2832

Dear Senator Melcher:

As President of the Jicarilla Apache Tribe, I am very interested in enforcement of federal offenses within the boundaries of the reservation as all such offenses impact upon the Tribe in some way. The Jicarilla Apache reservation is located in north-central New Mexico in a fairly remote and isolated part of the state. Its northern boundary borders the state of Colorado and the Southern Ute Indian reservation. The reservation is some 70 miles long and about 30 miles in width containing some 742,000 acres. The majority of people, including approximately 2,000 members of the Tribe, reside in the town of Dulce near the northern border of the reservation. Occasionally there are federal offenses committed within the reservation boundaries by Indian and non-Indians and it is difficult to obtain prosecution in federal court. Therefore, the idea of establishing a special magistrate on the reservation is appealing to me. Following are my comments on your proposed S2832 relaing to each section number.

Sec.650(a). Prior to selection of a special magistrate for appointment, the President should request a recommendation or nomination from the governing body of the Tribe and from the appropriate Bureau of Indian Affairs agency responsible for that tribe.

Sec.650(b). This section is not practical if the magistrate is required to live within the boundaries of the reservation. I suppose many other tribes are like the Jicarilla Apache in that there are no members of the Tribe who are lawyers and if one of our members were to become a lawyer he would not be eligible for five years. I suggest that the law allow for appointment of a non-lawyer magistrate in situations such as ours. I further suggest that for the State of New Mexico the five year experience requirement is too severe and perhaps should be reduced to three years. This provision effectively precludes any member of the Tribe from being a magistrate.

Sec.650(c). The requirement that the special magistrate reside within the exterior boundaries of the reservation or reasonably adjacent thereto will make it difficult to find a magistrate to serve remote Indian reservations. I am more concerned with having a fair, honest magistrate than with having one available on ten minutes' notice. Therefore, the requirement should be that the magistrate

located close enough to the reservation to adequately serve the needs of the community. Please realize that at least for the Jicarilla Apache Tribe, the majority of residents living within the reservation boundaries are members of the Tribe with any non-Indians residing within the reservaiton boundaries being associated with the BIA, Indian Health Service or the Public School except for one New Mexico State Policeman. Therefore, you will be asking a newly appointed magistrate to move within the reservation boundaries.

Sec.650(h). Since any magistrate will be required to move within the reservation boundaries or reasonably close thereto, the expenses of this special magistrate should include housing expenses as this is the most difficult convenience to find in remote areas of the country. Further, the expenses should include detention facilities or funding to lease detention facilities as well as adequate travel in the event a prisoner must be taken into custody and transported to the Federal Detention Center in Albuquerque which is some 180 miles.

Sec.651(a). The jurisdiction section should specifically require the magistrates to enforce violations of state law by non-Indians while within the boundaries of the reservation as federal laws pursuant to the Assimilative Crimes Act, 18 U.S.C. §1152 as well as enforcing the Major Crimes Act 18 U.S.C. §1153, and other federal laws. Many crimes committed by non-Indians within the boundaries of the reservation do not fall within the provisions of the Major Crimes Act but are nonetheless violations of state law. It is difficult for the Tribe to obtain prosecution of non-Indians in State court and in my mind the Federal court has exclusive jurisdiction of these matters under the Assimilative Crimes Act. There is no question that at least the Federal court has concurrent jurisdiction with the State; however, we are presently not able to utilize the Assimilative Crimes Act for prosecution of non-Indian crimes that are violations of state law and committed within the boundaries of the reservation unless such crime, in the opinion of the U. S. Attorney, endangers Indian life or property. The unfairness of this policy of the Department of Justice is apparent on its face and is not the policy position of the Department of Interior. The real purpose of having magistrates established within the reservation boundaries would be to protect the Indian communities from non-Indians who violate state law or federal law while within the reservation boundaries. The ability of the Tribe to protect its members and Indian property was taken away by the United States Supreme Court in the case of Oliphant v. Suquamish Tribe, 435 US 191 (1978), and therefore it is incumbent upon Congress to provide reasonable protection of Indian people and property. Although the special magistrate appointment may be a step in the right direction, it cannot be successful without Congress insisting that the Assimilative Crimes Act make enforceable all violations of state laws within the reservation boundaries by non-Indian with jurisdiction vested in the Federal courts as it should be. The problem is that the Department of Justice will not prosecute such federal law violations unless Indian life or property is endangered. Thus, in the Department's view any "victimless" crime (without defining "victimless") is not a federal matter. We have been unseccessful in having non-Indians caught and prosecuted in State courts for suich crimes. therefore, our only hope is to use the federal courts.

Sec.651(e)(3). If the special magistrate is allowed to conduct trials within the reservation boundaries which he should be, there will be need to fund the necessary expenses incurred in having the proper facilities and personnel available.

Sec.652(a). The term "federal jurisdiction" should be specifically defined to include prosecution of non-Indians in Federal court under the Assimilative Crimes Act for violations of state laws while within the reservaiton boundaries.

Sec.652(b). The question of whether or not assistance by a lay spokesman is Constitutional should be thoroughly researched. It seems inappropriate that lay counsel should, for example, be allowed to represent a defendant at trial while a lay spokesman may be appropriate for arraignment purposes. If use of a lay spokesman, however, does not waive the right to appointed counsel then a person may have the right to two arraignments. Futhermore, the assistance of any lay counsel should not waive the right of the defendant not only to appointed counsel, but also to retained counsel, as many people may desire to hire their own lawyer, even though such a lawyer may not be available at the time of arraignment given the isolated location of the reservation.

Sec.653(c)(1). Drawing of a jury panel may be difficult in the situation of the Jicarilla Apache Tribe since only members of the Tribe vote in Tribal elections and there is no other voter list kept that identifies the state voters as living within the reservation boundaries or not. Further, all the land within the reservation boundaries except for a few isolated in-holdings is owned by the Jicarilla Apache Tribe and there are no property owner registration lists from which to choose a jury panel. Therefore, limiting a jury panel to those living within the boundaries of the reservation, both Indian and non-Indian, may be difficult.

Sec.652(c)(2). The same comments as set forth in Section 652(c)(1) are applicable here. Additionally, many Indian reservations may have the same situation as the Jicarilla Apache where it would be inappropriate for county officials to be involved in preparation of jury selection lists or any other matters involving the reservation since the county seat is at Tierra Amarilla, some 40 miles away. It may be more appropriate to rely on Tribal authorities and the BIA Superintendent or the Agency personnel to develop an appropriate jury list.

Sec.656(a). We suggest that training be mandatory for any new magistrate including training in Tribal Court jurisdiction. Additionally, any clerks or associated court personnel should be required to have mandatory training.

Generally the concept of magistrates within Indian country is a welcome idea; however, it appears that such would be very expensive in light of the remote areas that the magistrates would have to serve and the fact that many times federal prosecutors or federally appointed and paid public defenders may have to attend trials quite a distance from their home base. Perhaps it would be better after surveying the situation to have one magistrate for a number of tribes depending on the case load, number of residents and rate of offenses experienced within the various reservation boundaries. This would return us to the circuit trial

judge situation for federal offenses but would certainly provide a magistrate with a special expertise in Indian law which is necessary to reinstate law enforcement in Indian country now that the ability of the tribes to undertake such law enforcement has been taken away by the United States Supreme Court. Perhaps another solution would be to enact legislation authorizing Tribal Court jurisdiction over non-Indian violations of Tribal criminal laws.

I appreciate having this opportunity to make comments on your proposed Indian Reservation Special Magistrate and Law Enforcement Act of 1980.

Yours very truly,

JICARILLA APACHE TRIBE

Leonard Atole, President

LA:cp

cc: Senator Pete Domenici
Jicarilla Agency Superintendent

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

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19 September 1980

REC'D SEP 23 1980

The Honorable John Melcher
United States Senate
Washington, D.C. 20510

Re: S. 2832

Dear Senator Melcher:

Thank you for the opportunity to comment on S. 2832, the bill to establish special federal magistrates with jurisdiction over federal offenses in Indian country. I support the concept and the substance of the bill and feel that it is part of a necessary package to deal with problems of law enforcement on Indian reservations.

There are two other areas of concern which should be noted. First, even though S. 2832 expands federal magistrate services, it does not expand the services of the United States Attorney. In Montana the United States Attorneys are located at substantial distances from all reservations, except the Crow. This physical separation, along with the work load on existing staff, has resulted in poor prosecutorial services for most reservation areas. Most "minor" crimes and even some more major crimes seem to be routinely not prosecuted. Therefore, the best alternative would be to provide for one or more additional United States Attorneys on or near each of the reservations.

The second area of concern is the quality of investigative services being rendered by the FBI in major crimes. Based upon the reports we receive there is a high level of dissatisfaction with the FBI among the Indian community on some reservations. The best example is the Blackfoot where there have been several recent highly publicized but unsolved homicides. It is possible that expanding the United States Attorneys services could help solve this problem by having an essentially local prosecutor to insist that investigations be thoroughly pursued. Furthermore, having expanded United States Attorneys services could act as an incentive to the local FBI officers to carry through their investigations based upon the knowledge that a prosecution would likely result.

The Honorable John Melcher
Page No. 2
19 September 1980

Once again I wish to thank you for an opportunity to comment and to bring these additional problems to your attention.

Very truly yours,

MIKE GREELY
Attorney General

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September 22, 1980
REC'D SEP 24 1980

The Honorable John Melcher, Chairman
Senate Select Committee on Indian Affairs
1123 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Melcher:

Enclosed is a statement by Austin Gillette, Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, for whom we are general counsel, expressing the Tribes' views on S. 2832, the Indian Reservation Special Magistrate and Law Enforcement Bill.

In the statement, Mr. Gillette supports the basic concept of S. 2832, namely, the appointment of a special magistrate to serve each Indian reservation, as a partial remedy for law enforcement problems on the reservation. He also notes certain deficiencies in the bill that need correction, and suggests the need for further hearings and legislation directed toward law enforcement problems that would not be alleviated by S. 2832.

We request that these comments be made part of the record in your Committee deliberations on S. 2832. Please let us know if we can answer any questions concerning them.

Sincerely,

WILKINSON, CRAGUN & BARKER

By: Charles A. Hobbs

Enclosure

STATEMENT TO THE SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS ON S. 2832

Dear Senator Melcher:

My name is Austin Gillette, Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota. I am grateful for the opportunity to present the Tribes' views on S. 2832, the Indian Reservation Magistrate's Bill.

S. 2832 provides that the President, by and with the advice and consent of the Senate, shall appoint special magistrates as may be necessary to serve Indian reservations over which the United States exercises criminal jurisdiction. Once appointed and confirmed, the magistrate must reside on or near the reservation to be served. The power and authority granted to these special magistrates is the same as that granted to U.S. Magistrates by federal law or by the court for the district in which they serve. In addition, the same rules of practice and procedure apply to the special magistrates' courts.

We wish to point out, at the outset, that the appointment procedure in Section 650 of the bill is defective because it fails to give each Indian tribe a voice in deciding who will be appointed as a special magistrate for its Indian reservation. The special magistrate system can work well only if it leads to the appointment of competent persons with knowledge and interest in the Indian culture and way of life on the reservation to be served. To achieve that end, input from each tribe is essential.

Therefore, we suggest that this section of the bill be amended to require each tribe to approve the appointment of a special magistrate for its reservation before the appointment becomes effective, or to give each tribe a veto power over such an appointment.

We strongly support the basic concept of S. 2832, the appointment of special magistrates to serve on Indian reservations, as a positive attempt to alleviate some of the law enforcement problems on Indian reservations. The bill would go a long way toward reducing the problems associated with the great distance separating most Indian reservations, including Fort Berthold, from federal law enforcement-related personnel and federal courts. For the Fort Berthold Reservation, presently the nearest U.S. Attorney, FBI Special Officer, and U.S. Magistrate are headquartered in Minot, some 80 miles northeast of New Town, North Dakota, where the main BIA police office is located, and even farther from the rest of the Reservation. The closest U.S. district court is at Bismarck, about 100 miles from the closest reservation village (White Shield) and 150 miles from New Town. These distances often hinder effective prosecution, particularly for minor offenses: the prospect of an 80-mile drive to file a complaint or to present an arrested person to the magistrate often means that the local law enforcement official or the U.S. Attorney may choose to let the misdemeanor go unprosecuted. Those which are prosecuted are done only at a great expense of time and distance.

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If a special magistrate were located on the Fort Berthold Reservation, under the terms of S. 2832, the problems related to distance would be substantially reduced. Most importantly, the magistrate could conduct trials, including jury trials, of misdemeanors committed on the Reservation. The greatest number of offenses committed on the Fort Berthold Reservation are, by far, misdemeanors; for example, in 1979, 1,652 misdemeanors, and only 25 major offenses, were reported to the U.S. Attorney. Hunting- and fishing-related violations of federal law, such as offenses under 18 U.S.C. § 1165, are particularly prevalent on our Reservation. If these minor offenses could be prosecuted near the scene of crime, rather than in Minot or Bismarck, we believe that law enforcement would be carried out much more swiftly and efficiently.

In this regard, we favor the provision in S. 2832 stating that a defendant does not have the right to elect to be tried for a misdemeanor before a district court judge rather than the special magistrate. If defendants brought before the special magistrate were so allowed to elect a district court trial, they would have to be brought to Bismarck — once again triggering the problems related to distance, and greatly diluting the benefits entailed by an on-site special magistrate.

In addition, we favor allowing defendants appearing before the special magistrate to be represented by a lay spokesman. Many Indian defendants, unfamiliar with lawyers' formal legal proceedings, will feel more comfortable with lay assistance,

particularly from persons familiar with situations on the Reservation. In many tribal courts, including the Fort Berthold tribal court, Indian defendants are represented by lay persons. We also support the provision requiring that, for a jury trial, jurors must be persons residing on the reservation. This will help to insure that defendants will be judged by persons with firsthand knowledge of the Reservation and tribal traditions and culture.

We agree that, as provided in Section 653(d) of the bill, tribal and BIA police officers, and federal, state and local law enforcement officers, should have the authority to execute warrants, summonses, and subpoenas issued by the special magistrate. Clearly, an essential link in any law enforcement system is an active and effective network of police to investigate crimes and make arrests. Given the unique and complex interrelationships of jurisdictions and legal authority on and near Indian reservations, it is especially important that all law enforcement personnel be authorized to enforce federal law within their respective jurisdictions. On the Fort Berthold Reservation, tribal officers already are deputized to enforce federal law, and we are working toward cross-deputization arrangements with state and local enforcement agencies. This provision in S. 2832 would help establish a similar cooperative law enforcement scheme on all Indian reservations.

However, in order to make it clear that this provision in S. 2832 is intended to give police officers full authority

to enforce federal law, we propose that it be amended to provide that any federal, state or tribal officer may arrest, without process, any person taken in the act of violating federal law, and take such person before the special magistrate. We believe this would more fully ensure that, as you state in your remarks in the Congressional Record, June 16, 1980, "this provision authorized State and tribal police officers as well as Federal officers to initiate proceedings before the special magistrate." (Emphasis added.)

We wish to emphasize that, at Fort Berthold, our primary need is for a more efficient and convenient method of bringing minor offenders to justice. The appointment of a special magistrate along the lines of this bill would help meet this need. Investigation and prosecution of major offenses, however, presents no real problem here. Because of the fairly effective work by the police, the BIA Special Officer, the FBI Special Officer and the U.S. Attorney, the relatively few major offenders are brought to justice. For example, in 1979, twelve cases were presented to the U.S. Attorney's Office: five were prosecuted, five are still pending and two were declined. See Inspection/Evaluation Report, Fort Berthold Law Enforcement Program, New Town, North Dakota, BIA Division of Law Enforcement Services, January 1980. However, we recognize that numerous problems in the prosecution of major offenses, such as unresponsive U.S. Attorneys and duplication of investigative efforts by BIA and FBI investigators, plague most reservations. S. 2832 does not deal with these very serious problems not by providing a nearby magistrate to take

action such as issuing warrants and conducting preliminary hearings to determine probable cause. We suggest, therefore, that the Committee hold additional hearings to focus on these problems and sponsor additional legislation directed at solving them.

Finally, a continuing problem that this legislation does not address relates to enforcing tribal law against non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), precludes tribal courts from exercising criminal jurisdiction over non-Indians absent congressional delegation of such power. At the same time, tribal law has not been assimilated into federal law by the Assimilative Crimes Act or any other general federal law. There are some limited assimilations of tribal hunting and fishing regulations, */ but many other types of tribal law remain unaddressed. As a result, non-Indians can freely violate tribal law without fear of prosecution, especially when their action does not constitute any violation of federal law. Often those offenses that are not also violations of federal law are most important to Indian culture and tradition. To fill this enforcement void, we also favor legislation either authorizing tribal courts to exercise criminal jurisdiction over

*/ Under 18 U.S.C. § 1165, a non-Indian who goes on Indian land for the purpose of hunting or fishing without tribal permission (which would include compliance with tribal regulations) commits a federal offense. Section 1165 does not cover non-Indian land within the reservation. S. 1882, the Lacey Act Amendments, now pending in the Senate, would assimilate tribal fish and wildlife laws, by making it unlawful to transport, sell, receive, purchase or possess illegally obtained fish and game.

non-Indians, or assimilating tribal law into federal law along the lines of 18 U.S.C. § 1165 and S. 1882, so that non-Indian offenders of tribal law can be brought to justice in the federal court system.

In conclusion, we support S. 2832, with our suggested amendments, as a positive step toward alleviating some of the problems in federal law enforcement, particularly of minor offenses. However, there is still a need for additional legislation to address the problems with United States Attorneys, duplicative efforts of BIA and FBI investigators, and enforcement of tribal law against non-Indians.

Thank you for the opportunity to present this statement, Mr. Chairman.

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Rec'd OCT 14 1980

September 24, 1980

Honorable John Melcher, Chairman
Senate Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Melcher:

Thank you for your letter of June 23, 1980, concerning introduction of S. 2832, a bill to establish special magistrates with jurisdiction over federal offenses within Indian country, and to authorize tribal and local police officers to enforce federal laws within their respective jurisdictions. It appears that this bill was introduced as a result of a perception that there is a general lack of law enforcement through structures now in place, with the hopes that this legislation would strengthen those structures and produce the enforcement which federal jurisdiction now fails to provide.

This legislation and the justification for it sounds similar to those which resulted in the passage of Public Law 280.

That there is a serious lack of federal enforcement and federal prosecution on Indian reservations cannot be questioned. The real issue, of course, is how does one provide the federal enforcement and prosecution now lacking in Indian country? Is it more appropriate to create still another federal instrumentality or should existing institutions be improved to meet the needs they are not presently fulfilling? These questions do not appear to be adequately addressed by S. 2832.

Lack of Enforcement. One of the more serious problems of federal law enforcement within Indian country is the failure to provide needed personnel to accomplish a serious enforcement effort. Nothing in S. 2832 appears to remedy that problem. While the proposed legislation would expand enforce-

ment ability by extending to tribal and state police enforcement over trivial crimes covered by the Assimilative and General Crimes Act, it would not guarantee that the lack of enforcement which now plagues enforcement of major crimes would be remedied. In fact, the reluctance of federal enforcement officers and of United States Attorneys to vigorously pursue enforcement and prosecution of these crimes could be seriously undercut by the provision of an additional federal forum which would address these same problems as lesser included crimes. It is hard to imagine that there would not be temptation to leave the prosecution of these crimes to the magistrates as lesser offenses rather than dedicate the already overburdened resources of U.S. Attorneys' offices. As has already been attested to in past Justice Department reports, U.S. Attorneys see Major Crime Act violations as very low priority matters within their offices. 1/ It seems the more helpful provision would be to require U.S. Attorneys to accept prosecutions from tribal and state police officers in major crimes matters. This would greatly expand enforcement capability within the Indian country without necessitating the creation of a new federal instrumentality.

Lack of Prosecution. It is hard to imagine that U.S. Attorneys now unwilling to commit significant resources to the prosecution of major crimes would be willing to commit any additional staff time to the prosecution of crimes in the Magistrate Court. Indeed, as was earlier suggested, it may be a temptation to dump further cases into the Magistrate's Court which might otherwise be prosecuted in the District Court. This would leave prosecution of crimes in the Magistrate Court to the police officers bringing the charges. This of course would lead to rather uneven quality of representation on behalf of the United States. There is little reason to believe, therefore, that prosecution of crimes committed in Indian country would enjoy a significantly increased incident of success.

Impact on Indian Forums. While it is now clear that tribes have no criminal jurisdiction over non-Indian violators of tribal codes it is equally clear that they do have jurisdiction over Indian violators of those codes within Indian country. At present tribal courts are growing phenomena in Indian country that are developing ever greater expertise and credibility both within the Indian and non-Indian communities. Tribal courts that are functioning and in place now accept prosecution of Indian offenders which might otherwise go into federal forums. The creation of a Magistrate Court would amount

1/ The notable exception to this is Sidney Lezak, U.S. Attorney for the District of Oregon.

to the placement of a local competitor with those tribal courts. Tribal police officers who do not share the same philosophies as the judges of tribal courts would be sorely tempted to bring their cases against Indian violators into Magistrate Court rather than into the Indian courts where they are now prosecuted. It may therefore be appropriate to provide some provision that prosecution in Magistrate Court of Indian offenders would depend upon a prior declination by the tribal forum or a determination that, although not a major crime, the matter was serious enough to require prosecution in both forums.

Alternative Possibilities. It is not apparent that the present difficulty in getting prosecutions in Federal court against non-Indians is a result of a lack of judges. It is therefore difficult to understand why creating magistrate positions in Indian country would facilitate a significant rise in those prosecutions. The difficulty appears to be that U.S. Attorneys are unwilling to commit the necessary staff and personnel to aggressively pursue such prosecutions. It is therefore suggested that either earmarked funds be made available to U.S. Attorneys' offices that have significant areas of Indian country within their jurisdictions to obtain and support staff necessary to carry forth such prosecution, or that the funds now available to them be conditioned upon the U.S. Attorney's demonstration that he has committed sufficient staff to accomplish the necessary prosecutions.

A second alternative to S. 2832 is to provide, by legislation, jurisdiction for Indian tribal courts, which choose to do so, to exercise jurisdiction over non-Indian violators of tribal codes. It is understood that such legislation would probably require tribal courts, which exercise such jurisdiction, with all of the Constitutional requirements of non-Indian courts in criminal prosecutions. It is for that reason that each tribe should have the discretion concerning whether or not to assume such jurisdiction. A third alternative is to do nothing for the present. Indications are that tribal governments with ever greater sophistication are entering into cooperative agreements with local governments including state agencies which are also showing a greater sophistication in dealing with issues of jurisdiction within Indian country. Given the evolution of this relationship it may be too early to take decisive action concerning who shall exercise jurisdiction over criminal violations by non-Indian perpetrators within Indian country.

Conclusion. At present it does not seem that S. 2832 adequately addresses the need it is designed to resolve. It seems appropriate that more investigation should be invested in designing a solution to the perceived lack of law enforcement.

Sincerely,

Steven Lowenstein
Director

SL/sd

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October 24, 1980

OCT 1980

Hon. John Melcher
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

Re: Senate Bill 2832
Indian Reservation Special Magistrate
and Law Enforcement Act of 1980

Dear Senator Melcher:

As General Counsel for the Navajo Nation, we commend your efforts regarding the Magistrate's Bill, which has long been needed. Passage of this Bill is vital to the Nation and to all Native Americans residing on reservations.

The enactment of this legislation is likely to lessen the opportunity for lawlessness on or near reservation lands. If there is anything that we can do towards aiding the enactment of this legislation, we would be pleased to be so advised.

You can be assured that the legislation has the support of Chairman MacDonald and the tribal law enforcement personnel.

Your efforts are greatly appreciated.

Very truly yours,

Sheldon Stern

SS/k

cc: Hon. Peter MacDonald
Lt. Col. Leroy Bedonie

END