

Statement of

Hon. William C. Canby, Jr.
Senior Judge, United States Court of Appeals
for the Ninth Circuit

to the

Senate Committee on Indian Affairs
Hearing on S. 2097, A Bill to Encourage
and Facilitate the Resolution of Conflicts
Involving Indian Tribes
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Good morning Mr. Chairman and Members of the Committee. I appear here as a former professor of Indian Law who has worked on technical assistance programs with tribal courts over the years. For the past eighteen years I have been a judge of the Ninth Circuit Court of Appeals, and am chair of that court's Task Force on Tribal Courts, whose work I will mention later. I preface all of my remarks with the disclaimer that the views I state are my own; I cannot and do not speak for my court or the federal judiciary in general.

I have been asked to comment on Section 105 of S. 2097, which would establish a Joint Tribal-Federal-State Commission on Intergovernmental Affairs. I confine my prepared remarks to that provision, and take no position on the other portions of S. 2097.

The proposed Commission is to be established by the Secretary of the Interior, and is to be comprised of representatives of Indian tribes, the States, and the Federal Government. The Commission's duties are to advise the Secretary concerning issues of intergovernmental concern to the tribes, the States, and the Federal Government. Included among those issues are (A) law enforcement; (B) civil and criminal jurisdiction; (C) taxation; (D) transportation; (E) economy development, and other matters. In addition to advising the Secretary, the Commission would

report periodically to the President, this Committee, and the House Committee on Resources.

In my experience, there is much to be gained by the establishment of a continuing body representing tribes, States, and the Federal Government, to suggest innovative solutions to unavoidable problems arising from overlapping jurisdiction in Indian country. Such efforts have proved to be very beneficial, at least, in ameliorating problems of criminal and civil jurisdiction and law enforcement in several States within the Ninth Circuit.

As I stated, I am chair of the Ninth Circuit's Task Force on Tribal Courts, which was established six years ago to open lines of communication between federal and tribal courts in the Ninth Circuit, which encompasses the nine westernmost States in the country. It soon became apparent that there were constant problems arising from the division of criminal and civil jurisdiction in Indian country, and that the State governments had become nearly as involved in them as the tribes and the Federal Government. Our Task Force decided to encourage the regular exchange of ideas between the three governments. At the same time, the Conference of State Chief Justices, the National Center for State Courts, and the State Justice Institute, were establishing tribal-state forums in several pilot states, including my home State of Arizona. Where those forums existed, our Task Force prevailed upon them to add representation from the Federal Government. In States where there were no forums, we found existing state-federal judicial councils, which we prevailed upon to add tribal representation. In other States, we helped to found new tripartite groups.

The need for accommodation between these three governments, as this Committee knows, was great indeed. The division of criminal and civil jurisdiction in Indian country is incredibly complex. On the criminal side, tribal Courts have jurisdiction over misdemeanors committed by Indians when the victims are Indians or the crimes are victimless. The Federal Government has

jurisdiction over major crimes by Indians, which jurisdiction is at least theoretically concurrent with that of the tribes. The Federal Government also has exclusive jurisdiction over crimes by Indians against non-Indians, and crimes by non-Indians against Indians. The States have jurisdiction over crimes by non-Indians against non-Indians, and victimless crimes by non-Indians. Needless to say, with modern mobility and intermixture of Indians and non-Indians in Indian country, this division of jurisdiction leads to severe enforcement problems.

The division of civil jurisdiction is equally complex, but is far more uncertain and is changing rapidly. Tribal courts have general civil jurisdiction, but it does not apply in many instances against non-Indians on fee lands or state highways within Indian country. State and federal courts also exercise civil jurisdiction in Indian country. Regulatory jurisdiction may or may not be coextensive with civil jurisdiction. As the tribes develop their economies, regulatory problems increase. Pollution control, for example, is a concern of all three governments and by its nature transcends geographical and jurisdictional boundaries. In addition, Indian treaties often guarantee rights, such as that of fishing, that may be exercised under tribal regulation outside of Indian country.

Against this backdrop of checkerboard jurisdiction, we have found that continuing tribal-State-Federal bodies can serve as catalysts for cooperative arrangements that ameliorate some of the problems arising from fractionated jurisdiction. A small example from Arizona will indicate what I mean. In Arizona, tribal judges who were members of the tribal-State-Federal forum pointed out that, although State resources were theoretically available for mentally ill Indians, the State Hospital would not accept civil commitments ordered by tribal judges. At first some state judges in the Forum agreed to accept tribal court orders as a matter of full faith and credit, and issue state court commitment orders based on the tribal orders. This informal arrangement

solved the problem in the short run. The Forum then suggested State legislation to remedy the problem. With tripartite backing, the legislation easily passed and the State Hospital now accepts tribal court commitment orders directly, as a matter of state law.

Problems in enforcing federal law in Indian country in Arizona also have been addressed by the forum. In these matters we have enjoyed great assistance from Attorney General Reno. In Arizona, the United States Attorney, who is a Forum member ex officio, arranged to appoint tribal prosecutors as special assistant U.S. Attorneys so they could bring non-Indian offenders before a federal Magistrate Judge when they committed minor crimes against Indians or Indian property. Neither the tribe nor the State had jurisdiction over such crimes, but federal enforcement officers were not available to police such misdemeanors; the tribal officers were the ones on the scene. The new arrangement is working well, and is being duplicated in other jurisdictions.

on another front, our Clerk of the Federal District Court in Phoenix has conducted several workshops' for tribal court administrative personnel, to help in establishing efficient systems of docketing and case management in tribal court.

These and other such efforts have been successful, but they are modest and necessarily local. Staff and administrative support are lacking, and must be borrowed. Many of the jurisdictional and enforcement problems are systematic, and require cooperative solutions on a multi-State or multi-tribe scale. Some of the problems are caused by federal judicial limitations on tribal court jurisdiction, for which legislative solutions ought to be carefully considered. The national Joint Tribal-Federal-State Commission on Intergovernmental Affairs proposed by S.2097 would fill these needs. It would be a continuing body, able to acquire expertise and perspective in addressing jurisdictional and governmental problems arising among the tribes, the

States, and the Federal Government. Those of us who have been working at the local level have seen what fine results can come from cooperation between these three groups. When the tribes, the States, and the Federal Government all address problems together, they can solve many intergovernmental problems without ignoring or trampling upon the rights or interests of any of the three. The key is that the solutions are voluntary, they are worked out by the parties actually affected, The process works; we have proved and they are thought through. The process works; we have proved that. At the national level, we need only the instrument -- not just to propose national solutions but also to stimulate local ones on a continuing and consistent basis. The proposed Commission on Intergovernmental Affairs' will serve that purpose admirably, and help to accomplish these worthwhile cooperative goals.

Mr. Chairman, Members of the Committee, thank you for giving me this opportunity to address you.