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STATE OF WASHINGTON

NO. 84716-9

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BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LESTER RAY JIM,

Respondent.

**STATE OF WASHINGTON'S RESPONSE
TO AMICI CURIAE CONFEDERATED TRIBES OF THE
UMATILLA RESERVATION, CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION OF OREGON, NEZ PERCE
TRIBE, AND CONFEDERATED TRIBES AND BANDS OF THE
YAKAMA NATION, AND RESPONSE TO RESPONDENT'S
SUPPLEMENTAL BRIEF**

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I. IDENTITY OF THE RESPONDING PARTY

The Respondent State of Washington (“State”) provides this response to the amicus curiae memorandum of the four identified tribes (collectively, the “Amici Tribes”) and to the portion of Respondent’s supplemental brief raising new jurisdictional issues.

II. INTRODUCTION

The State’s Supplemental Brief described Washington’s 1963 assumption of partial nonconsensual criminal jurisdiction over Indian crimes within Indian country and explained why the Maryhill site is included. The State broadly assumed criminal jurisdiction within Indian country, but enacted specific limitations on that assumption of jurisdiction. Criminal jurisdiction was not asserted over Indian crimes that take place on “tribal lands” or “allotted lands” that are located “within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.” RCW 37.12.010.¹

Application of this statute is straightforward. Assuming the Maryhill Treaty Fishing Access Site is Indian country, the State’s Indian country criminal jurisdiction applies to crimes occurring at the site for two reasons.

¹ State jurisdiction over crimes involving Indians within Indian country is often referred to as Public Law 280 (“PL 280”) jurisdiction in reference to the federal law ceding to states the ability to assert such jurisdiction. *See* Pub. L. No. 83-280, 67 Stat. 588 (1953).

First, it is not the established reservation of any tribe. Second, even if considered the collective reservation of the four tribes utilizing the land for off-reservation fishing activity, it is not restricted allotted land or land held in trust for any tribe. *Id.*

The Amici Tribes' statement of interest bypasses this straightforward statutory analysis by observing that the Maryhill site is managed by the federal government to fulfill treaty obligations. They then conclude the site is, "by definition," an Indian reservation for purposes of RCW 37.12.010. That is incorrect. The treaty right being supported is a right to conduct *off-reservation* fisheries. The federally owned lands administered for this purpose replace *off-reservation* fishing sites inundated by Columbia River dams that were formerly utilized by the four tribes.

More germane to the application of RCW 37.12.010 is the character of the property. Then, as now, the off-reservation fishing access sites were never a part of any tribe's established reservation. Then, as now, the off-reservation fishing access sites were owned in fee by the federal government or private landowners, and were neither held in trust for any

tribe nor restricted allotments held for any individual Indian.² Considering these characteristics of the land, both RCW 37.12.010 and this Court's prior holding in *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996), make it clear that the Maryhill site is not excluded from the State's criminal jurisdiction.

The Amici Tribes also claim that State jurisdiction over Indian crimes will affect their "ownership interests and sovereign powers." These assertions shed no light on the application of RCW 37.12.010. In any event, the first of these claims is without any basis because the lands are not trust lands held for any of the tribes; they are lands owned in fee by the federal government and administered for the exercise of off-reservation treaty fishing rights by four Tribes. The second of these claims is undermined by the Amici Tribes' own brief on page 18 where they recognize that tribes have jurisdiction over their members within lands covered by RCW 37.12.010. In other words, the State's exercise of jurisdiction under RCW 37.12.010 does not limit or impede the Tribes' jurisdiction over their members. *See State v. Schmuck*, 121 Wn.2d 373, 395-96, 850 P.2d 1332, 1343-44 (1993) (suggesting that PL 280 did not

² *See, e.g., United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905) (treaty-reserved fishing rights include the right of access to off-reservation usual and accustomed places, even when access points were patented by the federal government to private owners). Some of the access sites were acquired by the federal government from private citizens.

divest Indian tribes of their sovereign powers to punish their members for violations of tribal law).

With regard to the Amici Tribes' legal arguments concerning Title IV of the 1968 Indian Civil Rights Act (ICRA)³, this federal law did not affect the State's preexisting assumption of PL 280 jurisdiction. As shown below, ICRA's provisions preserve preexisting assumptions of State jurisdiction. Washington's 1963 assertion of partial nonconsensual jurisdiction, and the corresponding federal cession of jurisdiction, was fully formulated in 1963. RCW 37.12.010 constrains the type of land over which the State's Indian country jurisdiction is asserted, not the point in time when such land might be identified as Indian country.

III. ARGUMENT

A. **Preexisting State Assertions of Public Law 280 Jurisdiction Like Those Found in RCW 37.12.010 Were Preserved by the 1968 Indian Civil Rights Act**

In 1968, Congress amended Public Law 280 and modified the consent it provided to states choosing to assert jurisdiction within Indian country.⁴ Thereafter, states "not having jurisdiction over criminal offenses committed by or against Indians" within Indian country could opt into the

³ Pub. L. 90-284, 82 Stat. 79 (1968).

⁴ Section 2 of PL 280 mandated state jurisdiction over Indian country in six states (hereinafter the "mandatory" states). Section 7 provided all other states the option of asserting such jurisdiction (hereinafter the "optional" states). The jurisdiction provided to the mandatory states was not altered by the 1968 amendment, but ICRA did allow for the first time for all states – mandatory or optional – to retrocede jurisdiction back to a tribe upon request, contingent on federal approval. *See* 25 U.S.C. § 1323(a).

jurisdictional framework only with “the consent of the Indian Tribe occupying the particular Indian country or part thereof which could be affected by such assumption” 25 U.S.C. § 1321.

As of 1968, only a few states, including Washington, had asserted nonconsensual jurisdiction over Indian country as authorized in Public Law 280.⁵ The 1968 federal legislation modifying Public Law 280 recognized this fact and expressly preserved the jurisdiction previously asserted by those states. 25 U.S.C. § 1323(b) repealed the federal government’s consent for states to assume jurisdiction over Indian country without tribal consent, but provided that “such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.” At that time, Washington had already taken the necessary steps to perfect its assertion of PL 280 jurisdiction over parts of Indian country. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979) (affirming Washington’s partial assertion of PL 280 jurisdiction and describing it as “allowing scope for tribal self-government on trust or restricted lands” within a tribe’s established reservation while asserting nonconsensual

⁵ See *Hearing on H.R. 15419 and Related Bills before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 29 (Mar. 29, 1968) (letter from Harry Anderson, Assistant Secretary of the Interior) (identifying Idaho, Nevada, and Washington as the only three optional states that had asserted PL 280 jurisdiction over Indians without tribal consent).

State jurisdiction over all other Indian country). Because the 1968 amendments to Public Law 280 retained the jurisdiction that states had previously asserted, the breadth of Washington's assertion of nonconsensual jurisdiction under Public Law 280 was fully preserved.

1. The text and structure of ICRA's amendments to Public Law 280 preserve Washington's assertion of nonconsensual Public Law 280 jurisdiction for the Maryhill property.

Amici Tribes argue that Indian country created after 1968 cannot be subject to a state's preexisting assertion of nonconsensual jurisdiction. That conclusion is not supported by the text and structure of ICRA.

In 1968, 25 U.S.C. § 1321(a) (a section of ICRA) replaced the federal government's prior cession of jurisdiction over Indian country with a new provision requiring tribal consent. The text of this provision demonstrates that it was intended to apply only to those states that had not already perfected an assertion of PL 280 jurisdiction. "The consent of the United States is hereby given to *any state not having jurisdiction* over criminal offenses by or against Indians in the areas of Indian country situated within such state" 25 U.S.C. § 1321(a) (emphasis added). This language plainly addresses only those states that had not asserted any PL 280 jurisdiction as of the effective date of ICRA. *See State v. McCormack*, 793 P.2d 682, 685-86 (Idaho 1990) (25 U.S.C. § 1321

“specifies that it applies only to states *not* previously having jurisdiction over criminal offenses committed in Indian country;” enforcement of post-1968 increase in penalty did not require tribal consent) (emphasis in original). Washington asserted criminal jurisdiction over Indian country in 1963, and thus cannot be described as a “state not having such jurisdiction.” Accordingly, the language of the statute does not support the Amici Tribes’ argument that 25 U.S.C. § 1321(a) requires a new assertion of consensual jurisdiction over Indian country created after 1968.

Section 1323(b) (another section of ICRA) further supports the State’s position. It declares that the repeal of the federal government’s consent for states to assert nonconsensual jurisdiction “shall not affect any cession of jurisdiction” previously made. Washington’s preexisting assumption of PL 280 jurisdiction described categories of Indian country, not specific parcels of land. ICRA preserved this categorical assumption.

The argument that ICRA’s tribal consent provisions apply only to states that had not assumed jurisdiction over Indian country as of 1968 is further supported by comparing the consent provisions with other provisions of ICRA. In 25 U.S.C. § 1323(a), Congress authorized the United States:

to accept a retrocession by *any State* of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of

Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(Emphasis added.) The quoted language demonstrates that Congress knew how to designate which states it intended to be affected by the ICRA provisions – the quote encompasses both the “mandatory” states set out in 18 U.S.C. § 1162 and 28 U.S.C. § 1360, as well as the “optional” states under section 7 of Public Law 280. In contrast to the all-encompassing phrase “any State” used in 25 U.S.C. § 1323(a), Congress used the narrower phrase “any State *not having jurisdiction over criminal offenses*” in 25 U.S.C. § 1321(a).⁶ (Emphasis added.)

When Congress uses different words in a statutory scheme, the court presumes that “Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (internal quotations omitted); *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (“When the legislature uses different terms,” the court deems “the legislature to have intended different meanings.”). The differing statutory language quoted above demonstrates that Congress intended the tribal consent provisions in 25 U.S.C. § 1321(a) to apply only to states that had not yet asserted

⁶ See also 25 U.S.C. § 1322(a), which similarly applies to “any State *not having jurisdiction over civil causes of action*.” (Emphasis added.)

jurisdiction as of 1968. The saving clause in 25 U.S.C. § 1323(b) that preserves the jurisdiction previously asserted by “optional” states, coupled with Congress’s narrow language in 25 U.S.C. § 1321(a), demonstrates that Washington State does not need to obtain tribal consent to exercise its preexisting jurisdiction under RCW 37.12.010, even for lands that become Indian country after 1968.

The preservation of preexisting Indian country jurisdiction for any optional states that had perfected jurisdiction under section 7 of PL 280 is mirrored in Congress’s treatment of the six “mandatory” states, including Oregon. Congress directed in 1953 that Oregon “shall have jurisdiction over offenses committed by or against Indians” in all areas of Indian country within that state except the Warm Springs Reservation. Pub. L. No. 83-280, § 2(a), 67 Stat. 588 (1953), codified as amended at 18 U.S.C. § 1162(a); *see State v. Jim*, 37 P.3d 241 (Or. Ct. App.) (Celilo Indian Village is not part of the Warm Springs Reservation, thus Oregon has PL 280 jurisdiction), *review denied*, 58 P.3d 822 (2002). ICRA did not alter that jurisdiction. *United States v. Hoodie*, 588 F.2d 292 (9th Cir. 1978) (1968 ICRA did not affect PL 280 jurisdiction in Oregon). Consider how the Amici Tribes’ arguments would work in Washington and Oregon. Both states have federally owned treaty fishing access sites situated along the Columbia River. Under the Amici Tribes’ reading of

the ICRA amendments, nonconsensual jurisdiction within Indian country created after 1968 would be preserved in Oregon, but eliminated in Washington. This disparity in outcomes does not square with the text and structure of the statute preserving preexisting cessions of nonconsensual state jurisdiction over Indian country.

2. Legislative history confirms that ICRA’s repeal of the federal consent for states to assume PL 280 jurisdiction without tribal consent applies prospectively to those states that have not already asserted such jurisdiction.

The plain language of ICRA preserves Washington’s assertion of jurisdiction over Indian country as expressed in RCW 37.12.010. However, even if there were ambiguity in the statutory language, the legislative history behind ICRA confirms that Congress intended to limit its application of 25 U.S.C. § 1321(a) to those states that had not yet asserted any jurisdiction under PL 280.

The Indian Civil Rights Act was contained within the broader Civil Rights Act that Congress enacted in H.R. 2516.⁷ A staff report analyzing the ICRA provisions of H.R. 2516 recognized that Title IV of the bill (sections 401-406, which were codified at 25 U.S.C. §§ 1321-26) applies to “states *not* having jurisdiction over civil and criminal actions in Indian country within their boundaries” (emphasis in original). Staff of

⁷ The multi-year history of legislative proposals leading up to the 1968 enactment of ICRA are detailed in Donald L. Burnett, Jr., *An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act*, 9 Harv. J. on Legis. 557 (1972).

H. Comm. on the Judiciary, 90th Cong., Memorandum on H.R. 2516 (as passed by the Senate on Mar. 11, 1968), *reprinted in* 114 Cong. Rec. 9609, 9611 (1968). At a House Committee hearing on a companion bill containing the same language, an attorney representing some tribes that supported the bill testified that the tribal consent provision “would apply to those tribes *where State jurisdiction has not already been lawfully extended.*” (Emphasis added.) Hearing on H.R. 15419 and Related Bills before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 109 (Mar. 29, 1968) (statement of Marvin J. Sonosky, Attorney). Several other references within the long legislative history of ICRA make nearly identical assertions that the law does not affect states that have already asserted jurisdiction.⁸

The legislative history shows that Congress understood and intended that states which had already asserted jurisdiction over Indian country as of 1968 would not be affected by the ICRA amendments. Because Washington asserted nonconsensual jurisdiction over much of Indian

⁸ See S. Rep. No. 841 (1968), *reprinted in Hearing on H.R. 15419 and Related Bills before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. at 21 (Mar. 29, 1968) (“Section 303(b) repeals section 7 of Public Law 83-280, which grants civil and criminal jurisdiction to States, *but will not affect any cession of jurisdiction to a State prior to its date of repeal.*”) (emphasis added); *Hearing on H.R. 15419* at 32 (Mar. 29, 1968) (“The repeal of section 7 of the act of August 15, 1953 (67 Stat. 588), however, *does not affect States which have already assumed jurisdiction under Public Law 280.*”) (emphasis added) (statement of Rep. Glenn Cunningham regarding H.R. 15122, the relevant portions of which are nearly identical to 25 U.S.C. §§ 1321–26).

country in 1963, as set forth in RCW 37.12.010, that jurisdiction is not affected by ICRA. The State assumed jurisdiction over categories of land in Indian country, not specific enumerated tracts of land, and lands within those categories that become Indian country in Washington after 1968 are subject to the State's preexisting assertion of jurisdiction made pursuant to RCW 37.12.010.

3. No prior decision of this Court refutes the conclusion that ICRA preserved Washington's assertion of jurisdiction in RCW 37.12.010.

Both the Amici Tribes and Respondent Jim assert that ICRA's affect on state PL 280 jurisdiction was resolved in *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996). However, that opinion confirms that the issue now raised by Mr. Jim – whether ICRA preserved or limited the State's preexisting assertion of nonconsensual jurisdiction over Indian country established after 1968 – was not decided.

This Court stated that “ICRA did not revoke preexisting state jurisdiction.” 130 Wn.2d at 780. However, because the land at issue in *Cooper* was Indian country prior to 1968, and was also not within the Nooksack Reservation, the Court declined to address Mr. Cooper's argument that establishment of the Nooksack Reservation after the enactment of ICRA vitiated the State's 1963 assertion of PL 280 jurisdiction over certain portions of an established Indian reservation. *See*

Cooper, 130 Wn.2d at 780-81 & n.6 (clarifying that the case was resolved “without deciding” whether ICRA vitiates the State’s nonconsensual jurisdiction under RCW 37.12.010 for Indian country established after 1968). The issue left unresolved in *Cooper* is now before this Court.

Following *Cooper*, this Court had another opportunity to consider whether ICRA has any impact on the State’s preexisting PL 280 jurisdiction. *State v. Squally*, 132 Wn.2d 333, 937 P.2d 1069 (1997). The case involved an Indian crime that took place on land added to the Nisqually reservation after 1968. Previously, the Nisqually Tribe had consented to state PL 280 jurisdiction over its reservation. *Id.* at 339.

The Amici Tribes suggest that *Squally* supports their argument that ICRA vitiates the State’s assertion of PL 280 jurisdiction under RCW 37.12.010. However, *Squally* contains no direct consideration of whether ICRA vitiated the State’s nonconsensual jurisdiction under RCW 37.12.010. Nonconsensual jurisdiction under that statute was not at issue. The issue in *Squally* was whether the State’s *consensual* PL 280 jurisdiction over the Nisqually Tribe’s established Indian reservation, established pursuant to tribal request in 1957, extended to Indian crimes committed on portions of the reservation acquired later in time. This Court concluded that Governor Rosellini’s proclamation of State jurisdiction, following the Tribe’s request, was broad enough to include all

Nisqually reservation land whenever acquired. *Squally* at 343.⁹

While *Squally* does not directly address the ICRA amendments to Public Law 280, the Court was aware of the argument raised in *Cooper* that ICRA might be viewed as a vitiation of preexisting nonconsensual jurisdiction over Indian country created after 1968. *Squally* at 338, n.2. The Court found significant the historical notes to 18 U.S.C. § 1162 concluding that the 1968 repeal of Section 7's cession of jurisdiction to states "does not affect any cession of jurisdiction made pursuant to section 7 prior to its repeal." *Id.* Ultimately, this Court held that the State's assertion of consensual jurisdiction over the Nisqually reservation was not specific to property in existence at the time the Nisqually Tribe's consent was given and included property added to the reservation after 1968 without the need for additional tribal consent. *Squally* at 343. The court concluded that RCW chapter 37.12 was unambiguous in this regard and that construing the statute to provide a "piecemeal assumption of jurisdiction is a consequence to be avoided." *Id.* at 344.

⁹ In 1957, Washington had only asserted consensual PL 280 jurisdiction. Laws of 1957, chapter 240, § 1. Upon request by a tribe, Washington's Governor could proclaim State PL 280 jurisdiction over the Indian country of that tribe. Laws of 1957, chapter 240, § 2. In 1963, Washington revised its PL 280 jurisdiction and asserted nonconsensual jurisdiction over all of Indian country except certain portions of a tribe's "established Indian reservation." Laws of 1963, chapter 36, § 1, now codified at RCW 37.12.010. Additional jurisdiction could be asserted over tribal trust lands and restricted allotment lands within an established Indian reservation by tribal request and proclamation of the Governor. Laws of 1963, ch. 36, § 5, now codified at RCW 37.12.021. *Squally* at 338.

Accordingly, this Court's prior decisions are consistent with the conclusion that ICRA preserved Washington's assertion of PL 280 jurisdiction over the categories of land described in RCW 37.12.010 wherever located within Washington and without regard to the time it becomes Indian country.

B. The Amici Tribes' Summary of the Appellate Case Law Dealing with RCW 37.12.010 Produces No Analysis Refuting the State's Argument That the State Has Jurisdiction Over Indian Crimes Committed Within the Maryhill Treaty Fishing Access Site

Section II of the Amici Tribes' brief purports to reconcile preexisting appellate cases analyzing RCW 37.12.010 with federal concepts of Indian country. The State takes no issue with the general conclusions that can be drawn by this discussion – the breadth of Indian country is defined by federal statute, as informed by federal common law, while RCW 37.12.010 is Washington's expression of jurisdiction over certain described portions of Indian country.

What the Amici Tribes fail to address is whether the Maryhill site possesses the attributes described by Washington's legislature when it identified specific types of Indian country that are not subject to the State's nonconsensual jurisdiction – tribal trust lands or restricted Indian allotments within an established Indian reservation. The State's

Supplemental Brief demonstrates why none of those characteristics are present at the Maryhill site.

Following the rationale of *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), the Maryhill site may be Indian country under the premise that it is arguably set aside for the use of Indians (in this case four tribes) and under the superintendence of the federal government. But *Sohappy* does not answer the question of whether Washington's legislature meant to use similarly broad conceptions when defining the portions of Indian country subject to the State's assertion of PL 280 criminal jurisdiction. Instead, State law uses different and narrower terms. The assumption of PL 280 jurisdiction over Indian country made by RCW 37.12.010 excludes only "tribal land" within an "*established* Indian reservation." It is reasonable to conclude Washington's legislature was focused on individual tribes and their established reservations. The Maryhill site is not a part of any tribe's established Indian reservations.¹⁰

Other portions of RCW 37.12 support the concept that Washington's legislature did not intend to exclude from the State's assumption of PL 280 jurisdiction an off-reservation parcel of federally owned land used by multiple tribes. For example, RCW 37.12.021

¹⁰ It is worth noting that the federal regulations governing the Tribes' use of the Maryhill site do not allow for residential use. 25 C.F.R. § 247.9(a). A place where nobody is allowed to live does not comport with common conceptions of a tribe's "established Indian reservation."

provides a mechanism for a tribe to request consensual jurisdiction where the State did not otherwise assume jurisdiction. It requires a resolution from “the majority of any tribe or the tribal council.” This language contemplates action by an *individual* tribe with respect to that tribe’s lands. Similarly, RCW 37.12.070 provides that “[a]ny tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community . . . shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.” This, too, contemplates the application of a single tribe’s laws.

Aside from the issue of what qualifies as the “established Indian reservation” of any tribe, RCW 37.12.010 further specifies that reservation lands excluded from the assertion of PL 280 jurisdiction must be tribal lands held in trust for the tribe or an allotment subject to a restriction against alienation. These requirements, and their application to the Maryhill site, are summarized in *Cooper*, 130 Wn.2d at 774 n.4:

Because lands held in fee are not lands “held in trust by the United States or subject to a restriction against alienation imposed by the United States,” RCW 37.12.010 effected an assumption of state jurisdiction over fee lands within Indian reservations. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 99 S. Ct. 740, 748, 58 L. Ed. 2d 740 (1979).

The Maryhill site is not land held in trust for any tribe and is not an Indian allotment. It is land owned in fee by the federal government and “administered” to provide off-reservation fishing access for the four Amici Tribes. Pub. L. 100-581, § 401(a), 102 Stat. 2938, 2944 (1988). Accordingly, even if the Amici Tribes could demonstrate that the Maryhill site is a sort of collective “established Indian reservation,” the site lacks the other characteristics that Washington’s legislature prescribed in RCW 37.12.010. Accordingly, it comes within the State’s assumption of jurisdiction over Indian country and does not meet the statutory exception.

C. The Amici Tribes Overlook Limitations on Enforcement Authority That Will Exist If the State Lacks Criminal Jurisdiction at Treaty Fishing Access Sites

The Amici Tribes assert that they have jurisdiction over Treaty Fishing Access Sites like Maryhill to the extent that they are Indian country.¹¹ The Tribes state that they are “stepping up their efforts to curb criminal activity at these sites,” Amici Br. at 19, but no record has been developed regarding the Amici Tribes’ enforcement capacity or activity. Furthermore, the stepped up tribal enforcement activity amici describe

¹¹ The State has not conceded that every Treaty Fishing Access Site is Indian country or that the Maryhill site is Indian country. Rather, the State has argued that even if characterized as Indian country, the State has jurisdiction under the PL 280 jurisdiction asserted by RCW 37.12.010.

began quite recently, after Mr. Jim received the 2008 citation at issue in this case.¹²

Aside from these practical issues regarding enforcement, the State's briefing to the Court of Appeals, at 26-27, explains the legal limitations on tribal enforcement authority. Non-Indian spouses of tribal fishers, and members of the public purchasing fish from tribal harvesters, frequent these fishing sites.¹³ But the Amici Tribes' courts do not have criminal jurisdiction over non-Indians or people of Indian ancestry who are not enrolled in a tribe. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978); *In re Garvais*, 402 F. Supp. 2d 1219 (E.D. Wash. 2004). Without PL 280 jurisdiction, the State's ability to prosecute crimes committed against Indians within Indian

¹² Although not in the record, a press release from Columbia River Inter-Tribal Fish Commission ("CRITFC") discusses the absence of commissioned officers from 2003 to 2010:

Yakama has not commissioned CRITFC Enforcement Officers since 2003 due to concerns of Yakama's involvement with CRITFC. Because of this, CRITFC Enforcement officers cannot cite Yakama fishers into Yakama courts for violations of Yakama codes. Approximately 75% of tribal fishers on the Columbia River are citizens of the Yakama Nation. An August 28, 2009 letter from Washington State Assistant Attorney General Fronda Woods admits Washington Department of Fish and Wildlife "has increased its patrols to compensate for the loss of law enforcement presence that was provided by CRITFE."

Sara Thompson, *Yakama Nation Tribal Leaders Gather with Tribal Fishers on the Columbia River to discuss Enforcement Issues* (Apr. 26, 2010), available at <http://www.critfc.org/text/press/20100426.html> (media contact).

¹³ 25 C.F.R. § 247.3(c).

country would be eliminated. *Williams v. United States*, 327 U.S. 711, 714, 66 S. Ct. 778, 780, 90 L. Ed. 962 (1946); *State v. Larson*, 455 N.W.2d 600, 601-02, (S.D. 1990); Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* § 9.03[1] (2005).

Finally, the present and future enforcement capacity of the Amici Tribes does not decide the legal issue presented by this case. The meaning of RCW 37.12.010 is controlled by the text and language of that statute. The statute assumed PL 280 criminal jurisdiction in 1963, excepting only those tribal trust or restricted allotment lands within an established Indian reservation, an exception that does not apply to the Maryhill site.

IV. CONCLUSION

The Court of Appeals should be reversed with direction to remand this case to the district court for a trial on the merits.

RESPECTFULLY SUBMITTED this 11th day of April, 2011.

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ATTACHMENT TO STATE'S RESPONSE BRIEF TO AMICUS

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1. Hearing on H.R. 15419 and Related Bills before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (March 29, 1968) (27 pages).
2. Volume 114 Congressional Record (6 pages).

RIGHTS OF MEMBERS OF INDIAN TRIBES

3-

HEARING
BEFORE THE
SUBCOMMITTEE ON INDIAN AFFAIRS
OF THE
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
HOUSE OF REPRESENTATIVES
NINETIETH CONGRESS

SECOND SESSION

ON

H.R. 15419 and Related Bills

TO ESTABLISH RIGHTS FOR INDIVIDUALS IN THEIR RELATIONS
WITH INDIAN TRIBES, AND FOR OTHER PURPOSES

FRIDAY, MARCH 29, 1968

Serial No. 90-23

Printed for the use of the
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PROTECTING THE RIGHTS OF THE AMERICAN INDIAN

The Committee on the Judiciary, to which was referred the bill (S. 1843) to establish rights for individuals in their relations with Indian tribes; to direct the Secretary of the Interior to recommend to the Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations; to protect the constitutional rights of certain individuals; and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

Strike all after the enacting clause and insert in lieu thereof the following:

"TITLE I—RIGHTS OF INDIANS

"DEFINITIONS

"SECTION 101. For purposes of this title, the term—

"(1) 'Indian tribe' means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

"(2) 'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

"(3) 'Indian court' means any Indian tribal court or court of Indian offense.

"INDIAN RIGHTS

"SEC. 102. No Indian tribe in exercising powers of self-government shall—

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensation;

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"(9) pass any bill of attainder or ex post facto law; or

"(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

"HABEAS CORPUS

"SEC. 103. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

"EFFECTIVE DATE

"SEC. 104. The provisions of this title shall take effect upon the expiration of 1 year following the date of its enactment.

"TITLE II—MODEL CODE GOVERNING COURTS OF INDIAN OFFENSES

"SEC. 201. The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the court of Indian offenses, and (4) provide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

"SEC. 202. There is hereby authorized to be appropriated such sum as may be necessary to carry out the provisions of this title.

"TITLE III—JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

"ASSUMPTION BY STATE

"SEC. 301. (a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"ASSUMPTION BY STATE OF CIVIL JURISDICTION

"SEC. 302. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or

taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

“(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

“RETROCESSION OF JURISDICTION BY STATE

“SEC. 303. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

“(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

“CONSENT TO AMEND STATE LAWS

“SEC. 304. Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

“ACTIONS NOT TO ABATE

“SEC. 305. (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this title shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

“(b) No cession made by the United States under this title shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

“SPECIAL ELECTION

“SEC. 306. State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

“TITLE IV—OFFENSES WITHIN INDIAN COUNTRY

“AMENDMENT

“SEC. 401. Section 1153 of title 18, United States Code, is amended by inserting immediately after ‘weapon’, the following: ‘assault resulting in serious bodily injury’.

"TITLE V—EMPLOYMENT OF LEGAL COUNSEL

"APPROVAL

"SEC. 501. Notwithstanding any other provision of law, if any application made by any Indian, Indian tribe, Indian council, or any band or group of Indians under any law requiring the approval of the Secretary of the Interior or the Commissioner of Indian Affairs of contracts or agreements relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribe, council, band, or group is neither granted nor denied within ninety days following the making of such application, such approval shall be deemed to have been granted.

"TITLE VI—MATERIALS RELATING TO THE CONSTITUTIONAL RIGHTS OF INDIANS

"SECRETARY OF THE INTERIOR TO PREPARE

"SEC. 601. (a) In order that the constitutional rights of Indians might be fully protected, the Secretary of the Interior is authorized and directed to—

"(1) have the document entitled 'Indian Affairs, Laws and Treaties' (Senate Document Numbered 319, volumes 1 and 2, Fifty-eighth Congress) revised and extended to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967, and to have such revised document printed at the Government Printing Office;

"(2) have revised and republished the treatise entitled 'Federal Indian Law'; and

"(3) have prepared, to the extent determined by the Secretary of the Interior to be feasible, an accurate compilation of the official opinions, published and unpublished, of the Solicitor of the Department of the Interior relating to Indian affairs rendered by the Solicitor prior to September 1, 1967, and to have such compilation printed as a Government publication at the Government Printing Office.

"(b) With respect to the document entitled 'Indian Affairs, Laws and Treaties' as revised and extended in accordance with paragraph (1) of subsection (a), and the compilation prepared in accordance with paragraph (3) of such subsection, the Secretary of the Interior shall take such action as may be necessary to keep such document and compilation current on an annual basis.

"(c) There is authorized to be appropriated for carrying out the provisions of this title, with respect to the preparation but not including printing, such sum as may be necessary."

Amend the title so as to read:

"A bill to establish rights for individuals in their relations with Indian tribes; to direct the Secretary of the Interior to recommend to the Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations; to protect the constitutional rights of certain individuals; and for other purposes."

PURPOSE OF AMENDMENTS

This amended bill represents the consolidation of five individual bills (S. 1843, S. 1844, S. 1845, S. 1846, S. 1847) and one joint resolution (S.J. Res. 87) introduced on May 23, 1967. As originally introduced, these measures covered the six major areas in which the rights of Indians have been neglected for years. As amended, S. 1843 was used as the vehicle for combining the provisions of the six original measures. The committee feels that the omnibus bill is the most expeditious method of securing for the American Indian the broad constitutional rights afforded to other Americans.

LEGISLATIVE HISTORY

In 1961, the subcommittee began its preliminary investigation of the legal status of the Indian in America and the problems Indians encounter when asserting constitutional rights in their relations with State, Federal, and tribal governments. Approximately 2,000 questionnaires, addressed to a broadly representative group of persons familiar with Indian Affairs, comprised an important segment of this investigation. The preliminary research, the first such study ever undertaken by Congress, demonstrated a clear need for further congressional inquiry.

Accordingly, hearings were commenced in Washington in August 1961, and moved to California, Arizona, and New Mexico in November. The following June, hearings were held in Colorado and North and South Dakota and finally concluded in Washington during March of 1963. These hearings and staff conferences were held in areas where the subcommittee could receive the views of the largest number of Indian tribes. During this period, representatives from 85 tribes appeared before the subcommittee.

S. 961 through S. 968 and Senate Joint Resolution 40 of the 89th Congress were introduced in response to the findings of the subcommittee based on these hearings and investigations.

On June 22, 23, 24, and 29, 1965, the subcommittee, meeting in Washington, received testimony relative to these measures. Additional statements were filed with the subcommittee before and following the public hearings. In all, some 79 persons either appeared before the subcommittee or presented statements for its consideration. These persons included representatives from 36 separate tribes, bands, or other groups of Indians located in 14 States. Four national associations representing Indians, as well as three regional, federated Indian organizations, presented their views. Members of Congress, State officials, and representatives from the Department of the Interior also submitted opinions on this legislation.

The 1965 hearings revealed the necessity of revising some of the original measures, combining two of them into title I, and deleting two proposals from the legislative package. The six titles of S. 1843, as amended, are products of the recommendations of the Subcommittee on Constitutional Rights as reported in its "Summary Report of Hearings and Investigations on the Constitutional Rights of the American Indian, 1966."

On May 23, 1967, Senator Ervin and others cosponsored S. 1843 through S. 1847 and Senate Joint Resolution 87. Because extensive hearings were held on similar measures in the 89th Congress, no further hearings were necessary.

PURPOSE OF LEGISLATION

The purpose of S. 1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.

TITLE I

The purpose of title I is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. These limitations are the same as those imposed on the Government of the United States by the U.S. Constitution and on the States by judicial interpretation.

Title I is designed to remedy a situation first brought to light in the 1961 hearings of the Subcommittee on Constitutional Rights and found to be a continuing problem.

The quasi-sovereign character of Indian tribes, Indian self-government, and particularly the administration of justice, are factors which may deny both procedural and substantive rights to the residents of Indian communities. This denial results from the fact that particular restraints on the United States do not apply to the operation of tribal governments. While a great deal of blame has been placed on Indian governments for these denials, the Federal Government and the States must share the responsibility for the Indian's lack of constitutional rights.

It is hoped that title II, requiring the Secretary of the Interior to recommend a model code for all Indian tribes, will implement the effect of title I.

Accordingly, the provisions of title I are scheduled to take effect upon the expiration of 1 year from the date of enactment, thus affording Indian tribes a period in which to prepare themselves for a new concept of law and order.

TITLE II

The purpose of title II is to provide for a model code which will safeguard the constitutional rights of the American Indian. The Secretary of the Interior would be directed to draft a model code of Indian offenses which would apply uniformly to all Indian courts in Indian country, thus assuring that all Indians receive equal justice under Indian law. It is also envisioned that the model code

would incorporate those rights enumerated in title I, which places certain limitations on Indian tribal governments in the exercise of self-government, particularly in the administration of justice.

TITLE III

The purpose of title III is to repeal section 7, Public Law 280, 83d Congress, and to authorize the United States to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of that law, as it was in effect prior to its repeal by this title. The consent of the United States is also given to any State to assert civil and criminal jurisdiction in Indian country where no State jurisdiction now exists and where the consent of the Indian tribes is obtained by popular referendum of all the enrolled adult Indians within the affected area.

TITLE IV

The purpose of title IV is to add to the "Major Crimes Act" the offense of "assault resulting in serious bodily injury." This new crime would amend section 1153 of title 18 of the United States Code.

TITLE V

The purpose of title V is to expedite the approval of contracts between Indian tribes or other groups of Indians and their legal counsel when such approval by the Secretary of the Interior or the Commissioner of Indian Affairs is required by law.

TITLE VI

The purpose of title VI is to update and expand the volumes entitled "Indian Affairs, Laws, and Treaties" (S. Doc. No. 319, 58th Cong.), the treatise entitled "Federal Indian Law," and to prepare an accurate compilation of the opinions of the Solicitor of the Department of the Interior.

NEED FOR LEGISLATION

The need for legislation to protect the rights of the American Indian became evident as the Subcommittee on Constitutional Rights conducted its studies and hearings over the past several years, beginning in 1961.

TITLE I

A. Denial of rights by tribal governments

When the subcommittee began its investigation of the constitutional rights of American Indians, Chairman Ervin wrote the Attorney General of the United States requesting his views on the constitutional rights of American Indians. Attorney General Kennedy replied as follows:

"All the constitutional guarantees apply to the American Indians in their relations with the Federal Government, or its branches, and the State governments to the same extent that they apply to other American citizens. It is not entirely clear to what extent the constitutional restrictions applicable to the Federal Government, or its branches, and to the State governments are applicable to tribal governments, but the decided cases indicate there are large areas where such restrictions are not applicable."

Indian tribes in the United States have been recognized and treated as distinct and independent political communities since early 1800. Indian tribes possess and exercise inherent powers of self-government which derive from the sovereign character of the tribe and not by grant or cession from Congress or the States.

Several sections of the Constitution have been used to establish restraints on Indian self-government although Congress has exercised its powers to legislate such restraints on numerous occasions. The tribe retains quasi-sovereign authority over its internal affairs, and thereby exercises final, unchecked authority over many facets of an Indian's life.

The contemporary meaning of tribal sovereignty is defined in the case of *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956), as follows:

"It would seem clear that the Constitution, as construed by the Supreme Court, acknowledges the paramount authority of the United States with regard to

Indian tribes, but recognizes the existence of Indian tribes as quasi-sovereign entities possessing all the inherent rights of sovereignty except where restrictions have been placed thereon by the United States itself."

In discussing the scope of the meaning of tribal sovereignty, Felix Cohen in his book entitled "Federal Indian Law," said:

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles:

"(1) The Indian tribe possesses, in the first instance, all the powers of any sovereign state.

"(2) Conquest renders a tribe subject to the legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, e.g. its power to enter into treaties with foreign nations, but does not, by itself, affect the internal sovereignty of the tribe; that is, its power of local self-government.

"(3) These powers are subject to qualification by treaties and by express legislation by Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

The courts have repeatedly upheld the quasi-sovereign status of the tribe; however, the Congress has the prerogative placing limitations upon tribal autonomy.

Since 1885 and the enactment of the Seven Major Crimes Act, tribal authority has been markedly circumscribed by congressional action. That sovereignty, moreover, has been further limited in those instances in which States, acting pursuant to Public Law 83-280 have undertaken to assume civil and criminal jurisdiction over Indians. There remain, however, significant areas in which the tribe retains complete authority over the lives of its members.

One of the most serious inadequacies in tribal government arises from its failure to conform to traditional constitutional safeguards which apply to State and Federal Governments. As Senator Anderson, a member of the Committee on Interior and Insular Affairs has noted: "An Indian citizen has all the rights of other citizens while he is off the reservation, but on the reservation 'in the absence of Federal legislation' he has only the rights given to him by the tribal governing body."

Chairman Ervin has made a similar observation: "It appears that a tribe may deprive its members of property and liberty without due process of law and may not come under the limitation of Federal and State governments as stated in the Bill of Rights. However, the sovereignty of an Indian tribe can be limited by acts of Congress."

In examining the legal status of the American Indian, it is first necessary to appreciate what transpires where tribal law denies Indians the constitutional protection accorded other citizens. As a corollary consideration, it is also important to understand whether a tribal Indian can successfully challenge on constitutional grounds specific acts or practices of the Indian tribe. A negative response to this question was given in *Elk v. Wilkins*, 112 U.S. 94 (1884) for example, where the unilateral renunciation of tribal affiliation by an Indian was held to be insufficient to confer citizenship. An affirmative act of recognition by the Federal Government was deemed essential to establish citizenship. Absent such an affirmative act a State was able to deny Indians the right to vote in a State election. Only recently has this right been held to be irreconcilable with the 15th amendment and the Citizenship Act of 1924, 43 Stat. 253 (1924), 8 U.S.C. 1401 et seq. See e.g., *Montov v. Bolack*, 70 N. Mex. 196, (1962); *Harrison v. Laveen*, 67 Ariz. 337 (1948).

Because general acts of Congress were thought not to be applicable to Indians, general constitutional provisions received similar interpretation. In *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court refused to apply the fifth amendment to the Constitution to invalidate a tribal law that established a five-man grand jury. In this case the Court held that the Cherokee Nation, as an autonomous body, had the power to define crimes and independently provide for criminal procedure. Recognizing that the fifth amendment limits only the powers of the Federal Government, the Court rejected the argument that the power of local government exercised by the Cherokees was Federal in nature, that is, based on the Constitution. The Court also said:

"It follows that as the powers of self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment which, as we have said, had for its sole object to control the

powers conferred by the Constitution on the National Government." (163 U.S. 376 at 384 (1894)).

Only a limited number of cases involving the denial of constitutional rights in Indian court proceedings reach the Federal courts due to the absence of a right to appeal tribal court decisions to Federal courts. The case of *Colliflower v. United States*, 342 F. 2d (1965), virtually stands alone in upholding the competence of a Federal court to inquire into the legality of an order of an Indian court. Federal courts generally have consistently refused to impose constitutional standards on the tribes on the theory that these standards apply only to State or Federal governmental action. For example, the guarantee of representation by legal counsel has been held not to apply in tribal court action. In *Glover v. United States*, 219 F. Supp. 19 at 21 (D. Mont. 1963), the Court stated:

"The right to be represented by counsel is protected by the Sixth and Fourteenth Amendments. These Amendments, however, protect * * * [this right] only as against action by the United States in the case of the * * * Sixth * * * [Amendment], and as against action by the states in the case of the Fourteenth Amendment, Indian tribes are not states within the meaning of the Fourteenth Amendment."

In the case of *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10 Cir. 1959), the Court by implication, held that a tribal Indian cannot claim protection from illegal search and seizure protected by the fourth amendment. The case involved the relationship between tribal law and first amendment guarantees of freedom of religion. The Native American Church is a religious sect to which many Indians belong. Peyote, a hallucinating agent, is used by members of this church in their religious ceremonies. Its use is often prohibited by State and tribal laws. In *State v. Big Sheep*, 75 Mont. 219 (1962), for example, the constitutionality of a tribal ordinance prohibiting its importation and use was challenged on the grounds that it violated the first, fourth and fourteenth amendments. The tenth circuit denied relief noting lack of Federal jurisdiction, and observed that internal affairs such as police powers were solely within the cognizance of the various tribes and that the general law of the United States could not interfere with purely internal matters. (272 F. 2d 131 at 134-135.) In refusing to concede the applicability of the fourteenth amendment to Indian tribes, the court stated:

"No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither under the Constitution nor the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious workship." (272 F. 131 at 135.)

In 1954, an effort to redress tribal infringements of religious freedoms by involving civil rights statutes also failed in the case of *Toledo v. Pueblo De Jemez*, 119 F. Supp. 429 (D. N. Mex. 1954). In this case, six Jemez Pueblo Indians brought an action for declaratory judgment against their tribe, the tribal council, and its governor charging that they had been subjected to indignities, threats, and reprisals solely because of their Protestant faith. Despite a tribal ordinance purporting to guarantee freedom of religion, the tribal council had refused to permit them to bury their dead in the community cemetery and had denied them permission to build a church. The court acknowledged that the tribal government acts represented a serious invasion of religious liberties; however, it concluded that these actions were not taken "under color of any statute, ordinance, regulation, custom or usage of any State or Territory," as required to invoke the Civil Rights Act, 119 F. Supp. 429 at 431-432. Thus, the Indians had no cause of action under the Civil Rights Act in the Federal courts.

In addition, a tribe can impose a tax (see *Barta v. Oglala Sioux Tribe*, 259 F. 2d 533 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 89 (8th Cir. 1956), or revoke tribal membership rights without complying with due process requirements. *Martinez v. Southern Ute Tribe*, 249 F. 2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958).

These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply.

Section 102 of title I provides that any Indian tribe in exercising its powers of local self-government shall, with certain exceptions, be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the Constitution.

TITLE II

A model code is needed to enumerate Indian rights and specify trial and appellate procedures. Testimony before the subcommittee has shown that tribal courts have a variety of rules of evidence, procedures, and concepts of justice, which in many instances, are devoid of fundamental guarantees secured by the Constitution. Individual Indians have suffered many injustices as a result of vacillating tribal court standards, untrained judges, and unwritten tribal laws.

The present code of offenses, which is operative in the courts of Indian offenses and which serves as a pattern for the codes of tribal courts, was established more than 30 years ago. It is found in title 25 of the Code of Federal Regulations, part II, which deals with law and order on Indian reservations. Sections 11.2 CA-11, 37 CA of title 25 sets out the jurisdiction of the court of Indian offenses and the number, duty, qualifications and procedures for the appointment of the judges. Also contained in these sections are a definition of the method of setting up the appellate proceedings and rules concerning jury trials and the selection of jurors, use of professional attorneys, appointment and duties of clerks of court, recordkeeping, issuance of warrants, detention procedure, bail procedures, et cetera.

25 C.F.R. also sets out the crimes and punishment under the Code of Indian Tribal Offenses. Approximately 58 criminal offenses are within the jurisdiction of the courts of Indian offenses, and sentences range from 5 days to a maximum of 6 months.

The procedures in title 25 are outmoded, impractical, and fail to provide for an adequate administration of justice on Indian reservations. For example, under the existing code, the total number of challenges in selecting a jury, pre-emptory and challenges for cause, is three. Subpenaed witnesses are paid by the party calling them their actual traveling and living expenses incurred, if the court so direct, and the fee for jury duty remains 50 cents a day. Questions before the court regarding the meaning of laws, treaties, or regulations are frequently referred to the superintendent for his opinion even though he is not a lawyer and lacks a legal training.

A new model code is necessary if there is to be a sensitivity to our traditional and constitutional standards in Indian courts. A code applied uniformly to all Indian courts would also assure individuals subject to their jurisdiction the same rights, privileges, and immunities under the U.S. Constitution as are guaranteed other citizens of the United States being tried in a Federal court for similar offenses.

TITLE III

In 1953, Public Law 83-280 (67 Stat. 588) conferred to certain States civil and criminal jurisdiction over Indian country. In many instances, this has resulted in a breakdown in the administration of justice to such a degree that Indian citizens are being denied due process and equal protection of the law. Tribes have been critical of Public Law 83-280 because it authorizes the unilateral application of State law to all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted and, as a consequence, tribal communities could not be governed effectively.

The Subcommittee on Constitutional Rights in its "Summary Report of Hearings and Investigations of the Constitutional Rights of the American Indian" arrived at the following conclusion concerning legislation to remedy Public Law 83-280:

"Indian governments do not, of course, bear full responsibility for those denials of rights which have occurred or which in the future may occur. It appears, paradoxically, that the States have also erred, both by failing to prosecute offenses and by assuming civil and criminal jurisdiction when that assumption was clearly against the wishes of the Indian peoples affected. Concurrent jurisdiction by the United States in the first instance and a repeal of Public Law 280 or at least its modification to include tribal consent as a precondition of the State's assumption of jurisdiction, would seem to provide a suitable remedy."

TITLE IV

As a result of an early Supreme Court case, *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that State courts lacked jurisdiction over offenses committed in Indian country, Congress enacted the "Major Crimes Act" in 1885. This law presently provides Federal courts with jurisdiction over the crimes of

murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person.

Those crimes not prosecuted in Federal courts fall within the jurisdiction of Indian tribal courts, which by Federal law, cannot impose more than a 6-month sentence. Presently, aggravated assaults committed in Indian country cannot be prosecuted in Federal courts.

In a report on comparable legislation (S. 967) in the 89th Congress, the Subcommittee on Constitutional Rights concluded:

"Besides extending protection to the rights of individual Indians, it is also important that the legitimate interests of the Indian communities in a lawful and peaceable order be recognized. Accordingly, it is essential that provision be made for the trial and punishment of offenses not now dealt with in an adequate manner by tribal authorities."

TITLE V

As a result of his guardianship powers, the Secretary of the Interior has been provided authority to approve contracts between Indian tribes and their attorneys. Despite efforts of the Department of the Interior in 1960 and 1962 to expedite approvals of tribal attorney contracts, administrative delay in approving such contracts is a continuing problem. Frequently these delays extend for over a year and consequently impose so severe a hardship upon tribes in need of counsel that they constitute a denial of due process of law.

The subcommittee in its 1966 "Summary Report of Hearings and Investigations of the Constitutional Rights of the American Indian," made the following conclusion regarding title V:

"Blame for the denial of the rights of Indians must also be assigned, at least in part, to actions of the Government of the United States. In addition to the actions implicit in the foregoing, reference is also made to the delays Indian tribes have experienced in the approval by the Secretary of the Interior of contracts with their attorneys. To the extent that such delays take place, Indian peoples are denied, in a very broad sense, the fundamental right of counsel. To the credit of the Department of the Interior, however, it is apparent that very few such delays have occurred since 1962."

Accordingly, the subcommittee made the following recommendation:

"Even though delays in approval of attorneys' contracts have become less significant since 1962, there is still no guarantee that the previous unfortunate situation won't recur. Accordingly, the subcommittee recommends enactment of S. 968 (now title V). Mindful that the arbitrary time limit may result in a perfunctory disapproval of contracts, this legislation will nevertheless force the Department of Interior to take a position promptly on these contracts."

TITLE VI

The research of the Subcommittee on Constitutional Rights into the legal status of the American Indian involved an examination of the legislative, judicial, and administrative interpretations available on the subject. The volumes entitled "Indian Affairs, Laws and Treaties" (S. Doc. No. 319, 58th Cong.) proved to be an invaluable research tool despite the fact that the last volume was published in 1938. The treatise entitled "Federal Indian Law," originally prepared by Felix S. Cohen in 1940, and last revised in 1956 by the Department of the Interior, was also useful.

Equally important in appraising the legal status of Indians are the opinions of the Solicitor of the Department of the Interior which have the force and effect of law. However, many of the opinions of the Solicitor have not been published and made available to those interested in Indian affairs.

An updating of these documents and other materials relating to Indian affairs: not only will assist students, courts, agencies, and others attempting to secure information pertaining to Indian affairs, but also will provide an aid to individual Indians and Indian groups in achieving their rights as American citizens.

In its "Summary Report of Hearings and Investigations on the Constitutional Rights of the American Indian, 1966," the subcommittee concluded:

"The need for adequate and up-to-date research tools in the area of Indian affairs is pronounced. If our Indian citizens are to receive benefits in full measure from their own efforts, as well as from the activities of their attorneys and of scholars working on their behalf, full and easy access must be had to relevant

documentary sources. Instances of out-of-print, out-of-date, and out-of-circulation materials must be corrected * * *."

SECTION-BY-SECTION ANALYSIS OF S. 1843, AS AMENDED

TITLE I

Section 101 contains the definition of certain items, "Indian tribe" is defined to mean any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government. The term "self-government" means and includes all governmental units (executive, judicial, legislative, and other tribunals, bodies, officers, etc.) by and through which powers are executed as to individual Indians. "Indian court" is defined to mean any Indian tribal court or court of Indian offense.

Section 102 enumerates the constitutional rights guaranteed to Indians by this act by placing limitations on tribal government units exercising powers of self-government in their dealings with individual Indians. Specifically, section 102 (1) through (10) prohibits Indian tribes in exercising powers of self-government from doing the following:

(1) Making or enforcing any law prohibiting the free exercise of religion, or abridging the freedom of speech, press, or assembly, or the right of the people peaceably to assemble and to petition governmental units for a redress of grievances;

(2) Violating or abusing individual Indians in their person, home, or possession, and securing protection to individual Indians against abuses in the search and seizure of their persons, homes, and possessions;

(3) Subjecting any person for the same offense to be twice put in jeopardy;

(4) Compelling any person in any criminal case to be a witness against himself;

(5) Taking any private property for a public use without just compensation;

(6) Denying to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense at his own expense;

(7) Requiring excessive bail or fines and inflicting cruel and unusual punishment. (The penalty of a \$500 fine or imprisonment for a term of 6 months or both would remain the maximum limitation as to punishment for any one offense);

(8) Denying to any individual Indian within its jurisdiction equal protection of the laws or deprive any person or liberty or property without due process of law;

(9) Passing any bill of attainder or ex post facto law; or

(10) Denying to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Section 103 provides that the privilege of the writ of habeas corpus shall be available to any person in a court of the United States to test the legality of a detention by order of a tribal court.

Section 104 provides that the provisions of title I shall take effect upon the expiration of 1 year following the date of its enactment.

TITLE II

Title II directs the Secretary of the Interior to prepare and recommend to the Congress a model code governing the administration of justice by Courts of Indian Offenses on Indian Reservations.

Section 201 directs the Secretary to include provisions in the model code which would:

(1) Assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the U.S. Constitution as any citizen being tried in a Federal court for a similar offense;

(2) Assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the Constitution and any applicable tribal constitution;

(3) Establish proper qualifications for the office of judge in the court of Indian offenses; and

(4) Provide for the establishing of educational classes for the training of judges of courts of Indian offenses.

In carrying out the provisions of the proposed bill, the Secretary of the Interior is directed to consult with Indians, Indian tribes, and interested agencies of the United States.

Section 202 authorizes Congress to appropriate such sums of money as may be necessary to carry out the provisions of this title.

TITLE III

Section 301(a) authorizes a State to assume jurisdiction over any or all criminal offenses committed by or against Indians on Indian country in the State, and to punish an offender in accordance with State law. Before a State can assume criminal jurisdiction, consent of the tribe(s) on Indian country in the State is required.

Section 301(b) prohibits the alienation, encumbrance, or taxation of real or personal property, including water rights, of any Indian or tribe held in trust by the United States or the regulation of such property in a manner inconsistent with any Federal treaty, agreement, or law, and the deprivation of hunting, fishing, or trapping rights afforded any Indian or tribe under Federal treaty agreement, or statute.

Section 302(a) authorizes a State to assume jurisdiction over any or all civil causes of action between Indians, or to which Indians are party, which arise in Indian country in the State and to apply State law to such causes of action. Before a State can assume civil jurisdiction, consent of the tribe(s) on Indian country in the State is required.

Section 302(b) prohibits the alienation, encumbrance, or taxation of real or personal property, including water rights, of any Indian or tribe held in trust by the United States; the regulation of such property in a manner inconsistent with any Federal treaty, agreement, or statute; and the adjudication by a State, in probate proceedings, the ownership or right to possession of such property.

Section 302(c) provides that tribal ordinances or customs adopted by an Indian tribe consistent with applicable civil State law shall be given full force and effect in the determination of civil causes of action.

Section 303(a) authorizes States that have acquired civil and criminal jurisdiction over Indian country to relinquish such jurisdiction to the United States.

Section 303(b) repeals section 7 of Public Law 83-280, which grants civil and criminal jurisdiction to States, but will not affect any cession of jurisdiction to a State prior to its date of repeal.

Section 304 provides that enabling legislation related to the admission of a State to the Union will not bar any State from removing any legal impediment to the assumption of civil or criminal jurisdiction as authorized under this act.

Section 305(a) provides that legal proceedings before any court or agency of the United States immediately prior to a cession of jurisdiction to a State under this act would not abate, and that such cession take effect on the day following final determination of such legal proceeding.

Section 305(b) provides that cession by the United States under this title shall not deprive a U.S. court of jurisdiction over any offense cognizable under the laws of the United States committed before the effective date of the cession. In such cases, cession shall take effect on the day following the date of final determination of the proceeding.

Section 306 requires that before State jurisdiction acquired by this title becomes applicable in Indian country, consent of a majority of the enrolled Indians within the affected Indian country must be obtained at a special election held for this purpose.

TITLE IV

This title adds to the "Major Crimes Act" the crime of "assault resulting in serious bodily injury," thus making possible Federal prosecution for the commission of this act in Indian country.

TITLE V

This proposal provides that applications related to the employment of legal counsel made by Indian tribes and other Indian groups to the Secretary of the Interior of the Commissioner of Indian Affairs are deemed approved if neither approved nor denied within 90 days from the date of filing.

TITLE VI

Section 601 authorizes and directs the Secretary of the Interior to revise and republish Senate document 319, 58th Congress, and the treatise entitled "Federal Indian Law." This section directs that an accurate compilation of the official opinions of the Solicitor of the Department of the Interior be compiled and maintained on an annual basis, and that Senate document 319, containing treaties, laws, Executive orders, and regulations relating to Indian affairs be kept current on an annual basis. The section authorizes the necessary funds for carrying out the purposes of title VI.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law to which no change is proposed shown in roman):

TITLE III

(67 Stat. 588 (1953), Public Law 83-280)

[Sec. 7. the consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.]

TITLE IV

(18 U.S.C. 1153)

§ 1153. Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, *assault resulting in serious bodily injury*, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

The CHAIRMAN. Without objection, the report from the Department of Interior, under date of March 27, 1968, together with a report from the Office of the Attorney General, under date of March 29, together with a letter under date of March 28, 1968, which is in response to some questions sent by Mr. Sigler to the Department, which has attached to it some very pertinent material, will be made a part of the record at this place. In asking for this request, the acting chairman of the subcommittee, the chairman of the full committee, wishes to make this public announcement. One of the greatest impediments to the consideration of constructive legislation, especially during this era, it appears, is the fact that when some people introduce legislation, it seems that it should be considered immediately. And they also seem to have the idea that they should have the legislation considered and approved without following any regular procedure, legislative procedure.

In the interest of assuring maximum flexibility in absorption by States of civil and criminal jurisdiction over members of consenting tribes, the bill permits the jurisdiction so acquired to be limited both geographically and by subject matter. (Conversely, jurisdiction previously acquired pursuant to Public Law 280 could be retroceded selectively.) This Department has in the past emphasized the desirability from a law enforcement point of view of not adding to the complexity of the existing jurisdictional structure. For this reason States and consenting tribes should be encouraged to shift jurisdictional responsibility *en bloc* whenever possible.

Retrocessions to the United States are subject to acceptance, presumably by the Secretary of the Interior pursuant to the authority of N U.S.C. 485 and 25 U.S.C. 2.

Title IV of the bill would amend section 1153 of title 18, United States Code. That section provides that any Indian who commits certain crimes in Indian country shall be subject to the same laws and penalties as other persons committing these offenses in places within the exclusive jurisdiction of the United States. If an offense by an Indian on an Indian reservation is not defined here, or elsewhere by Federal law, it is punishable, if at all, only by tribal courts under tribal law. Title IV would amend existing law to include the offense "assault resulting in serious bodily injury" in section 1153.

The assault statute applicable in places within the exclusive jurisdiction of the United States does not define or punish the offense set forth in title IV. The bill, also, provides no penalty for this offense. Consequently, any prosecution for the offense could be predicated only on the Assimilated Crimes Act (18 U.S.C. 13), and only in States in which such an assault is punishable under State law.

Titles V and VI of the bill involve matters for which the Department of Justice does not have primary responsibility and, accordingly, we have no comments with respect to these titles.

Subject to the comments and recommendations made above, the Department of Justice urges the enactment of this legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

WARREN CHRISTOPHER,
Deputy Attorney General.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 28, 1968.

Mr. LEWIS A. SIGLER,
Consultant on Indian Affairs, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. SIGLER: Your letter of March 16, 1968, requested answers to a number of questions relative to S. 1843. The questions and our responses are as follows:

"1. In your opinion, would the right of a defendant in a criminal proceeding to have the assistance of counsel tend to disrupt some tribal court proceedings where neither judge nor prosecutor is an attorney? Explain."

Comment: We believe that there could be some disruptive effect although our experience with the use of professional attorneys in tribal courts where the judge is not an attorney is so limited that we can do little more than speculate. What little experience we have had also indicates that the disruptive effect would vary with the degree of acculturation and sophistication of the Indian judge concerned. With even less experience as concerns prosecutors in tribal courts, we are not aware of any instance where a professional defense counsel has had any disruptive effect on the nonprofessional prosecutor. We do believe, however, that in general the presence of an attorney should be helpful.

"2. Do some tribal courts prohibit participation by attorneys? How many?"

Comment: Tribal codes typically contain a provision that prohibits the practice of attorneys in tribal courts unless rules of court adopted locally permit the practice. We do not have definitive information regarding local rules of court, but our impression is that practice of attorneys is usually not permitted. We have been able to identify, however, five tribal codes that permit practice of attorneys. These are Fort Totten, Pine Ridge, Rosebud, Standing Rock, and Turtle Mountain. The pueblos in New Mexico have a traditional court system which is not coded. It is our understanding that attorneys are not permitted.

"3. On the basis of an estimate, how many tribes have a court system?"

Comment: We estimate that 62 tribes have a court system. This information updates the information appearing on page 242, *et seq.*, of Part I, Hearings before the Subcommittee on Constitutional Rights of Senate Committee on the Judiciary, August 29-September 1, 1961.

"4. On the basis of an estimate, how many tribal courts have judges who are licensed attorneys?"

Comment: We have identified five tribal courts having judges who are licensed attorneys. They are Fort Totten, Rosebud, Standing Rock, Turtle Mountain, and Fort Berthold.

"5. If the maximum penalty in a tribal court is fixed at \$500 and 6 months imprisonment, some Indian offenders who are tried in the tribal courts will be treated more leniently than the same type of offender is treated in the state courts. Is this type of discrimination wise? Why should there be a statutory limit on penalties? If the tribe can define the offense why shouldn't it also prescribe the penalty?"

Comment: Undoubtedly, Indian offenders are treated more leniently in some tribal courts than the same type of offenders in some state courts. But this difference in treatment also exists in the courts of the various political subdivisions throughout the country. There is at present no statutory limit on penalties in tribal courts. Tribes have the power to both define the offense and prescribe the penalty, subject only to rescission or disapproval by the Secretary of the Interior, in most cases, where the offense or penalty is deemed inappropriate. Penalties between the tribes may differ widely. A statutory limit on penalties is appropriate because the criminal acts treated in the tribal court system are minor, and the possibility of disproportionate punishments should be prohibited.

"6. Is the jury trial requirement compatible with present tribal custom and procedure? What percentage of the tribal courts provide for jury trial? How would you evaluate the results of the procedure?"

Comment: The jury trial requirement in tribal courts is compatible with the tribal court system. With the possible exception of the traditional court system of the pueblos in New Mexico, whose laws are based on custom and tradition, all tribal codes have provisions for jury trials. The latest information available to us is for the years 1960 and 1961. That information indicates that, in that 2-year period, of the more than 80,000 cases, civil and criminal, in only 58 cases were jury trials requested. We do not know why the use of juries has been so minimal.

"7. How many states have assumed civil or criminal jurisdiction under Public Law 280? Please furnish copies of the state statutes."

Comment: Five States have assumed jurisdiction in whole or in part. They are: Florida, Idaho, Montana, Nevada, and Washington. Copies of the state statutes are enclosed.

"8. Has any State assumed jurisdiction when the Indians involved opposed the action? Specify."

Comment: Idaho and Nevada assumed jurisdiction without consultation or consent. In 1957 the Washington legislature enacted a law that permitted the governor, upon request of a tribe, to extend jurisdiction by proclamation over the reservation. Thirteen of the small tribes in western Washington requested extension of jurisdiction. One of these tribes subsequently changed its mind and the governor revoked his proclamation. In 1963 the legislature enacted a statute, without consultation with or consent of the tribes, that assumed jurisdiction on a piecemeal basis over a limited category of subject matter. Florida assumed jurisdiction at the request of the Seminole Tribe. Montana assumed jurisdiction on the Flathead Reservation at the request of the Flathead Tribes.

"9. Do any tribes now subject to state jurisdiction want to terminate the jurisdiction?"

Comment: We know that the Quinault Tribe, one of the 13 in Washington that had originally requested the state to assume jurisdiction, has requested termination of the state's jurisdiction. We have had no formal expression of a desire by any other tribe to terminate state jurisdiction. Informal discussions from time to time with tribal leaders and individual Indians indicate some dissatisfaction with state jurisdiction.

"10. Are any States currently planning to assume jurisdiction? Specify."

Comment: We are not aware of any current plans on the part of any State to assume jurisdiction.

"11. Has any State that has assumed criminal jurisdiction failed to provide enforcement services comparable to those formerly furnished by the Bureau of

Indian Affairs and the tribe? Specify and explain. What has the Bureau of Indian Affairs done to assure adequate services, before the State acted? afterward?"

Comment: Shortly after Public Law 280 became effective in 1953, a number of allegations were made by Indian leaders that law enforcement services by the States and local subdivisions were inadequate to the reservations' needs. We know that transfer of jurisdiction by Public Law 280 created additional financial burdens that local subdivisions were hard pressed to assume. For example, the affected counties in Nebraska could not, without state financial aid, provide services to the Indians. This was also true in Wisconsin. Indians in California and Minnesota complained then and have continued to complain of inadequate services. Before Public Law 280, the Bureau of Indian Affairs carried on consultations with the Indians and the five States that would be affected by the law to make certain that the proposal was clearly understood. In many cases, California, for example, Public Law 280 meant simply the legalizing of a de facto situation, since the Bureau was providing very little, if any, in law enforcement services. The Bureau had only one law enforcement agent in California. Before state assumption of jurisdiction, the Bureau provided services to the limit of funds available. Since state assumption of jurisdiction, the Bureau has provided no direct assistance as authority therefor was lacking. The Bureau has continued to counsel with both tribes and local authorities to communicate and interpret the needs of the Indians, and assist with an understanding of such needs.

"12. Has the assumption of partial state jurisdiction created any problem of which you are aware? Explain."

Comment: Assumption of partial or "piecemeal" jurisdiction has resulted in various types of problems. For example, Idaho assumed jurisdiction over selected areas of subject matter and specified that such jurisdiction was concurrent with that of the tribes. As a result local authorities look to the tribes to continue assuming jurisdiction, and the tribal authorities look to the State to assume jurisdiction, and, frequently, no action is taken. In other instances, as in the case of Washington, local authorities may disregard their jurisdiction or refuse to assume it on the ground that the state assumption was invalid in the first instance even though the state supreme court may have already ruled on the precise question.

We wish to point out that since the enactment of Public Law 280 in the 83d Congress, there has been almost total support for those proposals which would amend Public Law 280 to provide for tribal consent. During the period covered by the 84th through the 89th Congresses, approximately 23 bills were introduced to amend Public Law 280 to provide for consent of the tribes. All have had the united support of the Indian tribes. Again, the Indian tribes and Indian interest groups, such as the National Congress of American Indians, actively support the proposed amendments. Lastly, the President, in his recent message to the Congress on the American Indian, strongly urged the enactment of "Legislation that would provide for tribal consent before such extension (Public Law 280) of jurisdiction takes place." S. 1843 carries out this recommendation. The requirement of consent should solve most problems of state assumption of jurisdiction.

Sincerely yours,

(S) HARRY R. ANDERSON,
Assistant Secretary of the Interior.

The CHAIRMAN. We have a full calendar today. It will be the purpose of the chairman to listen first to the Members of Congress, and then to the Governors who are here from the Pueblos, and then the visiting State representatives, and then we will get to the Department, and then we will get to the attorneys later on.

The chairman does not think it will be humanly possible to clear up this matter today.

First I wish to recognize one of the sponsors of the legislation, our good colleague, who himself has been a tremendous aid and help to the Indians, Mr. E. Y. Berry, for any statement he may wish to make.

Mr. BERRY. First, Mr. Chairman, let me commend you on the statement that you have made, and let me assure you that I think—that

I know everyone on this committee, and I think everyone on the full committee, appreciates your statement.

I am not going to take time now, because we have a lot of people who have come a long way to be heard.

Thank you, Mr. Chairman.

The CHAIRMAN. Without objection, the statement of the Honorable Glenn Cunningham, one of the sponsors of the bill, will be made a part of the record at this place.

(The prepared statement of Glenn Cunningham, referred to, follows:)

STATEMENT OF THE HONORABLE GLENN CUNNINGHAM, A MEMBER OF CONGRESS
FROM THE STATE OF NEBRASKA

Mr. Chairman, on February 6, 1968, I introduced in the House of Representatives a bill to clarify the rights of our individual Indian citizens in their relations with the tribes. My bill, H.R. 15122, on which you are holding hearings today directs the Secretary of the Interior to recommend to the Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations, to protect the constitutional rights of certain individuals and for other purposes.

This bill is identical to the legislation sponsored by Senator Ervin, the Chairman of the Constitutional Rights Subcommittee of the Senate Judiciary Committee. Senator Ervin's bill, S. 1843, passed the Senate without objection on December 7th.

I was pleased when President Johnson included a recommendation of legislation guaranteeing constitutional rights for American Indians in his message of March 6th. I quote from the President's message:

"A new Indian Rights bill is pending in the Congress. It would protect the individual rights of Indians in such matters as freedom of speech and religion, unreasonable search and seizure, a speedy and fair trial, and the right to habeas corpus. The Senate passed an Indian Bill of Rights last year. I urge the Congress to complete action on that Bill of Rights in the current session."

Mr. Chairman, because of my long interest in the plight of our American Indians, members of the Omaha Indian tribe with a reservation in Macy, Nebraska, frequently visit my district office in Omaha. I held a meeting with members of that tribe in January of this year.

In my subsequent review of their problems and in discussions with members of the Senate Subcommittee on Constitutional Rights, I was shocked to learn that these first Americans do not have the protection of even the most basic of our constitutional rights. In their relationships with the tribal government, reservation Indians are not guaranteed freedom of speech, freedom of religion or any of the other basic freedoms guaranteed by our Bill of Rights. I believe my bill, H.R. 15122, before this Committee today will go a long way toward solving some of the problems facing the Indian.

TITLE I

Title I of the bill would grant to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments, State governments, and the Federal Government. Investigations have shown that tribal members' basic constitutional rights have been denied at every level.

The Federal courts generally have refused to impose constitutional standards on Indian tribal governments, on the theory that such standards apply only to State or Federal governmental action, and that Indian tribes are not States within the meaning of the 14th amendment.

Under this rationale, for example, tribes have been permitted to impose a tax without complying with the due process requirements, tribal membership rights can be revoked at the will of tribal governing officials, and Indians have been deprived of the right to be represented by counsel.

Under the provisions of Title I, tribal governments are prohibited from:

(1) Making or enforcing any law prohibiting the free exercise of religion, or abridging the freedom of speech, press, or assembly, or the right of the people

peaceably to assemble and to petition governmental units for a redress of grievances;

(2) Violating or abusing individual Indians in their person, home, or possession, and securing protection to individual Indians against abuses in the search and seizure of their persons, homes, and possessions;

(3) Subjecting any person for the same offense to be twice put in jeopardy;

(4) Compelling any person in any criminal case to be a witness against himself;

(5) Taking any private property for a public use without just compensation;

(6) Denying to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense at his own expense;

(7) Requiring excessive bail or fines and inflicting cruel and unusual punishment. [The penalty of a \$500 fine or imprisonment for a term of 6 months or both would remain the maximum limitation as to punishment for any one offense];

(8) Denying to any individual Indian within its jurisdiction equal protection of the laws or deprive any person of liberty or property without due process of law;

(9) Passing any bill of attainder or ex post facto law; or

(10) Denying to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

TITLE II

Title II is designed to implement the provisions of Title I. It directs the Secretary of the Interior to recommend to Congress a model code governing the administration of justice by courts of Indian offenses on Indian reservations. The present code, drawn up over 30 years ago and found in title 25 of the Code of Federal Regulations is outmoded and fails to provide for adequate administration of justice. For instance:

(1) Indians serving on tribal juries receive only 50 cents a day for jury service.

(2) The total number of challenges in selecting a jury is only three, including peremptory and challenges for cause.

(3) Trial by jury may be had only if a trial judge finds that there is substantial question of fact involved, and, even then the jury is composed of six persons who may render a verdict by a majority vote. Furthermore, there is no provision for a grand jury to determine if probable cause exists.

(4) Subpoenaed witnesses are paid their actual traveling and living expenses by the party calling them only at the discretion of the court.

(5) Questions before the court regarding the meaning of laws, treaties, or regulations frequently are referred to the superintendent for his opinion even though he is not a lawyer and has no legal training.

TITLE III

This title repeals section 7 of Public Law 280, 83d Congress (67 Stat. 588) and authorizes States to assert civil and criminal jurisdiction in Indian country only after acquiring the consent of the tribes in the States by referendum of all reserved Indians.

In 1953, Public Law 280, 83d Congress (67 Stat. 588) conferred to States civil and criminal jurisdiction over Indian country. Tribes have been critical of Public Law 280 because it authorizes the unilateral application of State law to all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws are unnecessarily preempted and, as a consequence, there was no law and order in some tribal communities.

The repeal of section 7 of the act of August 15, 1953 (67 Stat. 588), however, does not affect States which have already assumed jurisdiction under Public Law 280.

TITLE IV

In 1885, Congress enacted the "Major Crimes Act," which presently provides Federal courts with jurisdiction over the crimes of murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, assault with intent to commit rape, carnal knowledge, arson, burglary, robbery, embezzlement, and larceny committed by an Indian against another Indian or other person. The Federal courts have jurisdiction over these crimes where the States have not

assumed criminal jurisdiction over Indian offenses. This title adds "assault resulting in serious bodily injury" to the "Major Crimes Act." Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be more in proportion to the seriousness of the offense.

TITLE V

This title provides that applications related to the employment of legal counsel made by Indian tribes and other Indian groups to the Secretary of the Interior or Commissioner of Indian Affairs are deemed approved if neither approved nor denied within 90 days from the date of filing.

Frequently, these delays in approving contracts extend for periods far exceeding a year and, consequently, impose so severe a hardship upon tribes in need of counsel that they constitute a denial of due process of law.

TITLE VI

This title authorizes and directs the Secretary of the Interior to revise and prepare the documents entitled, "Indian Affairs, Laws and Treaties" (S. Doc. 319, 58th Cong.), "Federal Indian Law," and the opinions of the Solicitor of the Department of the Interior. This title will assist many groups in helping Indians achieve their rights as American citizens.

For most Americans claiming deprivation of some right afforded them under the laws and treaties of the United States or State laws, it is a simple matter to have an attorney look up the law and court interpretations thereof, and to bring suit based on the result of such legal research. For the American Indian such a solution is difficult because of the inadequacy and sometimes even the total absence of legal documents. For instance, the latest edition of the document, "Indian Affairs, Laws and Treaties" was published in 1930 and the official opinions of the Solicitor of the Department of the Interior relating to Indian affairs are not always published and have never been compiled in one document.

Mr. Chairman, I believe this legislation is sound, it is the result of a six-year study by the Senate Subcommittee on Constitutional Rights, and I believe it to be a common sense way of giving the American Indian the basic rights which all other Americans enjoy.

The CHAIRMAN. Unless there is an objection, the statement of the Honorable Robert V. Denney, Congressman from the State of Nebraska, and a coauthor of the bill with Mr. Cunningham, will be made a part of the record at this point.

Hearing no objection, it is so ordered.

(The prepared statement of Congressman Denney, referred to, follows:)

PREPARED STATEMENT OF CONGRESSMAN ROBERT V. DENNEY, FIRST
CONGRESSIONAL DISTRICT OF NEBRASKA

First of all, I would like to thank the distinguished Chairman from Florida, Mr. Haley, for giving me the opportunity to present testimony before this Committee in support of H.R. 15122 and related legislation. As you know, that bill was introduced by Congressman Cunningham and myself on February 6, 1968.

The main purpose of this bill is to give full constitutional rights to the American Indian. It is ironic indeed that the first settler of this country, the Indian, has, in many instances, been denied rights that are guaranteed to those who settled this country many years later.

TITLES I AND II

The purpose of Title I is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing restraints on Indian tribe powers of self-government. These limitations are the same as those imposed on the Government of the United States by the U.S. Constitution and on the States by judicial interpretation.

Mr. SONOSKY. No. This was done without their consent. It was imposed by and that is a distinction I would like to make. Congress has plenary authority under our Constitution over Indians, under our Constitution.

Mr. McCLURE. Do you advocate that we repeal that change?

Mr. SONOSKY. No. I wouldn't advocate we change our Federal Constitution.

Mr. McCLURE. Would you advocate we repeal the major crimes?

Mr. SONOSKY. No. I wouldn't advocate that.

Mr. McCLURE. How do we make a distinction between that and Public Law 280?

Mr. SONOSKY. No; I wouldn't advocate—

Mr. McCLURE. How do you make a distinction between that and Public Law 280?

Mr. SONOSKY. First let me say that the jurisdiction exercised by Indian tribes is about the equivalent of jurisdiction of a justice of the Peace Court. We are dealing here with misdemeanors of everyday life. Ninety percent of all crimes committed on Indian reservations are disorderly conduct and possibly drunkenness. Those two cover 90 percent easily.

The CHAIRMAN. You can't answer that. You folks started back and forth, but I say that we might or might not be interested in this, but we don't have the time. Thank you very much.

Mr. SONOSKY. Thank you.

STATEMENT OF MARVIN J. SONOSKY, ATTORNEY

Mr. SONOSKY. My name is Marvin J. Sonosky. I am an attorney practicing mainly in Indian matters with offices at 1225 19th Street NW., Washington, D.C.

I thank the committee for this opportunity to appear on behalf of my tribal clients, the Rosebud Sioux Tribe of South Dakota, the Standing Rock Sioux Tribe of North and South Dakota, the Assiniboine and Sioux Tribes of Montana, and the Shoshone Indian Tribe of Wyoming.

The tribes support H.R. 15122 and S. 1843 which are identical. The tribes are opposed to Congressman Berry's bill, 15419, insofar as it eliminates the most important feature of the proposed legislation, namely, amendment of Public Law 280 to require the consent of the tribe before State jurisdiction may be extended over Indians on the reservation.

S. 1843 was passed by the Senate on December 7, 1967 and the text of S. 1843 was included in H.R. 2516, the civil rights bill which passed the Senate on March 11, 1968. But the history of S. 1843 goes back to 1961, when the Senate Subcommittee on Constitutional Rights commenced extensive investigations into the constitutional rights of the American Indian. These investigations were prompted by complaints from individual Indians. About 2,000 questionnaires were issued. In 1961 hearings were held in Washington, California, Arizona, and New Mexico. In June 1962, hearings were held in Colorado and North and South Dakota and concluded in Washington in March 1963. Based on the findings resulting from the subcommittee's investigations, bills,

predecessor to S. 1843, were introduced in 1964 in the 88th Congress (S. 3041-3048, and S.J. Res. 188).

The bills again were introduced in the 89th Congress (Feb. 2, 1965) (S. 961-S. 968, S.J. Res. 40). Extensive hearings were held on June 22, 23, 24, and 29, 1965. These hearings were arranged to correspond with the Washington meeting of the National Congress of American Indians so that there was a wide representation of American Indians. The Senate Subcommittee on Constitutional Rights received the testimony and statements of some 79 witnesses, including representatives from 36 tribes located in 14 States. These hearings disclosed the need for modifications in the bills. In the 90th Congress, S. 1843 through S. 1847, and Senate Joint Resolution 87 were introduced on May 23, 1967. The text of these five bills and the resolution was consolidated under separate headings in one bill, S. 1843, and was passed by the Senate on December 7, 1967. The text of S. 1843, as passed by the Senate, was included in House Resolution 2516, the civil rights bill which passed the Senate on March 11, 1968.

There is a need for legislation for the protection of the rights of individual American Indians on Indian reservations. The administration of justice for Indians on Indian reservations is a Federal function. The protection of the lives and property of Indians on Indian reservations, and the enforcement of their rights as Indians and as humans, is as much a Federal function as the protection of the health of Indians, or the education of Indians. The history of Interior's appropriations discloses that over the years the Department has consistently requested and received increased amounts to administer "trust property," including irrigation, reclamation, timber, and grazing. Those are the assets used as much by non-Indians as by Indians. But the administration of justice on Indian reservations has been lackluster. Less than 1 percent of the appropriations for the Bureau of Indian Affairs for the last 10 years has been dedicated to "law and order."

S. 1843 and House Resolution 15122 would provide remedial legislation that is long overdue. The bills would place legislative compulsion on the Department of the Interior to take an affirmative interest in providing reservation Indians with a more effective system of justice.

Title I of all three bills before the committee would provide individual Indians with the protection of a bill of rights modified to fit the situation on Indian reservations. An Indian held in detention under tribal law would have the privilege of the writ of habeas corpus, in a Federal court to test the legality of his detention. There is no such protection now.

Title II of S. 1843 and House Resolution 15122 calls on the Secretary of the Interior to recommend to Congress a model code to govern the administration of justice on Indian reservations. Such a model is needed. The tribes understand that they are free to accept or reject the model in whole or in part. Congressman Berry's bill omits this section.

Title III of S. 1843 and House Resolution 15122, the most important title, would modify Public Law 280 to permit State jurisdiction to be extended over Indians on Indian reservations, only with the consent

of the tribe. Congressman Berry's bill omits this amendment of Public Law 280. I should like to dispose of the remaining sections of the bills and return to the title III amendment of Public Law 280.

Title IV and title V of S. 1843 and H.R. 15122 are relatively minor. Title IV is omitted from Congressman Berry's bill. Title IV would amend the U.S. criminal code by adding "assault resulting in bodily injury" as one of the major crimes within the exclusive jurisdiction of the Federal courts. Title V concerns approval of contracts between attorneys and Indian tribes. As to these two titles, my clients have not expressed either support or objection.

Title VI of S. 1843 and H.R. 15122 directs the Secretary of the Interior to revise and extend Kappler's "Indian Affairs, Laws and Treaties" and keep it current, to update the handbook on "Federal Indian Law," and to prepare a compilation of the published and unpublished opinions of the Department relating to Indian affairs. Congress, the tribes, the bar, the courts, and the Department itself have great need for such a work.

Congressman Berry's bill authorizes the Secretary to publish and keep current on an annual basis, Kappler's work. The difficulty is that Kappler's volumes are not complete for the period they cover. Also, some items omitted from earlier volumes were added in later volumes and are not in chronological order. For that reason a revision is needed as provided in S. 1843 and H.R. 15122.

I should like to return to title III of S. 1843 and H.R. 15122, modifying Public Law 280. Title III would require tribal consent before State jurisdiction could be imposed on Indians residing in Indian country. It would apply to those tribes where State jurisdiction has not already been lawfully extended. It is the most significant feature of the bills and of the greatest importance to Indians.

Public Law 280* permits State sovereignty to be imposed on Indian people residing in Indian country without their consent. Of all Indian legislation on the books there is none better known to Indians, or more generally despised, than Public Law 280. The most objectionable provisions of Public Law 280 are those contained in sections 6 and 7. These provisions were inserted in committee without an opportunity for the tribes affected by those sections to be heard. When the legislation was sent to President Eisenhower for signature, the tribes bitterly protested the bill and urged veto. President Eisenhower recognized that the bill was contrary to principles of self-determination and standards of democracy that every American takes for granted. He characterized the bill as an "unchristianlike approach" at the time he signed it into law. President Eisenhower at the same time made clear that he expected the next Congress to rectify the wrong, at least by requiring "consultation." But although bills to amend Public Law 280 to require tribal consent have been introduced in almost every Congress since the 83d, the wrong has not been rectified.

Where States have tried to impose State jurisdiction under Public Law 280, the tribes I represent have resisted. In the last 9 years, a

*Act of Aug. 15, 1953, c. 505, 67 Stat. 538 (18 U.S.C. 1162, 28 U.S.C. 1360).

good deal of tribal effort and money have been expended in preventing States from extending State jurisdiction without tribal consent. In North Dakota, the legislature early extended State jurisdiction under Public Law 280. The Supreme Court of North Dakota held that the State statute violated the State constitution. The constitution was amended to permit the North Dakota Legislature to assume jurisdiction over Indians on reservations. Thereafter, the North Dakota legislative committees held extensive hearings at which the Indians of North Dakota were afforded a full opportunity to present their views. I am happy to say that the North Dakota Legislature did what Congress did not do in Public Law 280. North Dakota adopted legislation which extends State jurisdiction only with the consent of the Indians affected.

The Legislature of the State of Montana also held full hearings on legislation to extend State jurisdiction to Indians in Indian country. The Montana law, like the North Dakota law, requires tribal consent of the Indians affected.

In 1964, a former State senator from the county in which the only reservation in Wyoming is located, introduced a bill to amend the constitution of Wyoming so as to empower the Wyoming Legislature to extend State jurisdiction under Public Law 280. This action was taken without prior consultation, let alone consent, of the governing body of the tribes. I am happy to say that the people of Wyoming did not go along with this sort of approach. In a State referendum, they rejected the attempt even to amend the constitution to give the legislature the power to impose State jurisdiction. To me this points up the basic fairness of the American people. Given the opportunity to express themselves, the voters of a State will remind their legislators that the principles of consent and self-determination are not to be forgotten in dealing with citizens of Indian blood.

The Indians of South Dakota are fully satisfied that the people of South Dakota still hold the principles of consent and self-determination in high regard. In March 1963, the Legislature of the State of South Dakota still hold the principles of consent and self-determination in South Dakota. This was done on short notice and with small opportunity for the Indians to present their views. Livestock interests spearheaded by the majority leader of the State senate, formerly a State senator from Indian country, were behind the effort to place Indians under State control and jurisdiction.

For the first time, probably, since the battle of the Little Big Horn, the nine tribes in South Dakota, all Sioux, united, pooled their resources and obtained a referendum under the State constitution to refer the issue to the people. The tribes purchased television and radio time, and newspaper and magazine coverage for the purpose of bringing to the people of South Dakota, Abraham Lincoln's message that, "No man is good enough to govern another man without that other man's consent." The people of South Dakota responded and rejected by an overwhelming vote of almost 4 to 1, the statute adopted by the legislature of the State of South Dakota. This was a costly procedure for the tribes, but necessary. The people of South Dakota renewed Indian faith in the fairness of the American people.

Given the facts, Americans will not agree arbitrarily to impose their will on another people. This tenet is a fundamental precept of our

foreign policy. We think it should apply at home to our own American Indians. Indians are delighted with the action of the Senate in passing S. 1843 and incorporating its text in the civil rights bill. On behalf of my clients, I urge that S. 1843 be speedily approved and reported and that its text be supported in the civil rights bill.

The CHAIRMAN. Next is Mr. Lazarus. Without objection the statement of Mr. Lazarus will be made a part of the record as if read, and you may use your five minutes as you see fit.

**STATEMENT OF ARTHUR LAZARUS, JR., ATTORNEY AT LAW,
WASHINGTON, D.C.**

Mr. LAZARUS. Mr. Chairman, my name is Arthur Lazarus, Jr. I am a member of a New York and Washington law firm and I appear here today on behalf of six Indian tribes which we represent:

The Hualapai Tribe of Arizona, the Metlakatla Indian Community in Alaska, the Nez Perce Tribe of Idaho, the Oglala Sioux Tribe of South Dakota, the Salt River Pima-Maricopa community in Arizona, and the San Carlos Apache Tribe of Arizona.

I would like for the sake of shortening time to subscribe to the remarks of Mr. Sonosky with respect to title II and title III and to address myself to title I.

At the outset I would like to point out that title I deals with certain specific and enumerated rights which according to the bill an individual Indian would have with respect to the operations of his tribal government. Among these rights are such very basic things as freedom of speech and religion, freedom from unreasonable searches and seizures, and freedom from double jeopardy or the imposition of a cruel and unusual punishment. All of the rights that are enumerated are considered in this day and age basic to the maintenance of a free and democratic society.

These are basic rights. These are rights which I believe, and if I understand the testimony of the other witnesses today, we all believe follow living in the United States. These are things everybody is entitled to no matter what the jurisdiction, no matter what the area. As a matter of fact, the Supreme Court has held that these rights follow American citizens abroad and the American citizen in relation to his Government abroad enjoys these rights.

These are things without which we cannot exist and therefore we can say to everybody in the United States this is what you have, and that is where I would draw the distinction between the basic rights set out in title I and the whole panoply of the Bill of Rights or of Public Law 280.

Some things there is no debate about and that is what is in title I. Everybody has these rights. You can debate about a good number of the, what we call remedial rights under the Constitution. The Supreme Court has drawn the distinction between fundamental rights such as those set forth in S. 1843 and remedial rights about which there is constant interpretation and which do not necessarily follow the flag.

The territorial cases have held that remedial rights need not be granted in territories of the United States.

I would like, therefore, also to pin down what struck me as testimony this morning that went out a little too far in analyzing the

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Finally, Mr. Speaker, it is useful to remind ourselves that the pending bill is a better balanced piece of legislation than most people seem to realize. In addition to its civil rights provisions, it contains important antiriot sections which will be effective in preventing and controlling any further disorders.

For all these reasons—but with emphasis on the continuing need to do justice, to discourage racial discrimination, to bring new hope and opportunity to all our people—I urge our colleagues to approve the resolution and to pass the bill. In the final analysis, the obligation to act rightly and responsibly belongs to us. We must not avoid it.

Mr. SMITH of California. Mr. Speaker, I yield 5 minutes to the distinguished minority leader, the gentleman from Michigan [Mr. GERALD R. FORD].

Mr. GERALD R. FORD. Mr. Speaker, I speak only for myself. In this emotional atmosphere I would hesitate to claim that I speak for others.

I must say that I speak with deep conviction and with a troubled heart.

As I said several weeks ago, I favor the enactment of fair housing legislation and will vote for such legislation regardless of the parliamentary procedure determined by a majority of the Members of this body. But in all sincerity I strongly urge that the Senate bill be sent to conference.

Mr. Speaker, over the years the Congress, but more particularly the House of Representatives, has been a bulwark of strength reflecting the good judgment of the American people. This is so because we—each of us—go back to put our records on the line for approval or disapproval every 2 years.

Over the years the House with courage and wisdom has rejected the excessive and unwise demands of the executive branch of the Government.

Over the years the House with forthrightness and sagacity has maintained its right as a copartner with the Senate in working our combined will on legislative matters.

Over the years the House with dedication and good judgment has refused to be stampeded by one group or one segment of our society.

We have followed the time-tested procedures, and America has been the better for it. The net result: the Congress, and specifically the House of Representatives, has contributed constructively to America today and despite its problems, it is a great country.

I am saddened—and I sincerely mean it—by what we may do here today, not on the issue of open housing but because I feel we may abandon those procedures whereby a collective judgment of the Members of the other body and of ourselves will be the determining factor in what we finally approve.

I am saddened by the possibility that we may be rubberstamping some far-reaching legislation that came from the other body, not for ourselves in part.

Today we are considering this bill of some 50 pages, and we are considering it in 1 hour on an up or down basis.

It all began last August in this body

when the House, by a vote of 326 to 93, passed a six-and-a-half-page bill which went to the other body and was referred to their Committee on the Judiciary. After 3 months of consideration their Committee on the Judiciary sent to the Senate a four-and-a-half-page document which was significantly different from the bill that we passed.

Then in January of this year this bill, as amended by the Senate Committee on the Judiciary, came to the Senate floor, and in 40 days of debate that body considered the House bill as amended and added one amendment after another, including H.R. 421, which in July of last year we passed in the House by a vote of 347 to 70.

But they did not pass the same bill in substance that the House had approved. The amendment the Senate added is not the bill that we passed. As a matter of fact, they deleted a most important provision which this House in working its will insisted be retained in the legislation by a vote of 2 to 1.

There are other substantive differences in this bill between what we passed and what the Senate approved. The Senate in its 40 days of deliberations added S. 1843 relating to Indian rights, approved by the Senate Committee on Interior and Insular Affairs. This was a 10-page-plus bill of considerable importance and some little controversy. This is legislation which is in the House Committee on Interior and Insular Affairs with no action on it thus far. If we approve this 50-page bill today, we will take from the 34 Members on both sides of the aisle in that committee the right to work their will and to make their recommendations to us.

Then the other body added a 23-page open housing provision, a provision which is quite different from the one passed here 2 years ago in the House of Representatives. The fair housing legislation passed in 1966 was more narrow in its coverage but more stringent in its enforcement provisions.

The SPEAKER pro tempore (Mr. ALBERT.) The time of the gentleman from Michigan has expired.

Mr. SMITH of California. Mr. Speaker, I yield the gentleman 1½ additional minutes.

Mr. GERALD R. FORD. I pass no judgment on the two fair housing versions—the House version called the Mathias amendment on the Senate version—but since the House in the 90th Congress has not previously considered such legislation, I believe we should now do so through our House conferees.

Of course the Senate added other legislation concerning so-called gun control.

It will be said there is no significant difference between what the Senate did and what the House approved in August 1967. I respectfully urge each and every one of you to examine carefully this 24-page memorandum that came from the House Committee on the Judiciary staff. No good lawyer could allege there are no significant or material differences between the House version and the Senate proposal. The memorandum follows:

MEMORANDUM ON H.R. 2516

This memorandum contains a more complete analysis of H.R. 2516 (as passed by the

Senate on March 11, 1968) than that provided by minority staff in the first memorandum of March 13, 1968. As in the first memorandum, the Senate substitute is compared to relevant House-passed bills, H.R. 2516 and H.R. 421 of the 90th Congress and H.R. 14765 of the 89th Congress. However, unlike the first memorandum, this provides an analysis of Titles II through VII of the Senate substitute which treat with Indian rights.

TITLE I—INTERFERENCE WITH FEDERALLY PROTECTED ACTIVITIES

Title I of the Senate version embraces the areas covered both in H.R. 2516 and H.R. 421, as they passed the House in 1967. It should be noted that Republican members of the Judiciary Committee expressed the view in the Committee reports on both of these House bills that the two bills actually reflected two sides of one problem, and that they therefore should be joined together. The Senate has taken the suggested approach.

The first half of Title I is similar to the House version of H.R. 2516. However, there are several differences. Both the House version and the Senate version make it a crime for anyone, whether or not acting under the color of law, by force or threat of force, to injure, intimidate or interfere with any person because he is or has been participating in specified federally protected activities. However, the Senate version requires that such injury be done "willfully," whereas the House version requires that it be done only "knowingly."

The Senate version divides the enumerated activities into two categories: the first might be called that of greater federal interest; and the second, that of lesser federal interest. But only as to the second category of activities does the Senate version purportedly require that racial motivation (a shorthand term for "because of his race, color, religion or national origin") be proved as an element of the offense. The House version does not divide the enumerated activities into two categories, and requires that racial motivation be proved as to all cases. The Senate version does not mimic the House version in describing the substance of the protected activities. There are thus subtle differences in the two versions.

After considerable debate in the House, it was agreed that "attempts to interfere" with a person's federally protected rights were simply too tenuous a basis for prosecution. The Senate version does not agree. However, neither did the House version consistently take that position throughout the entire bill. Compare Sec. 245(a) with Sec. 245(b), 245(c) and 245(d).

The House version forbids discrimination on the basis of "political affiliation" in the enumerated areas, whereas the Senate version does not.

After some discussion, the House, in the Committee of the Whole, narrowly defeated (90-90) an amendment to protect businessmen during riots. However, such protection is extended to such people by Sec. 245(b) (3) of the Senate version.

Sec. 245(b) (4) (A) of the Senate version, which forbids interference with one "participating without discrimination on account of race, color, religion or national origin in any of the benefits or activities" enumerated, presents a serious problem. If the section is designed to proscribe acts of terrorism against minority groups, it may be superfluous (and certainly confusing) in view of the intimidation clause that was added by the Senate at subsection 1 of the Sec. 245(b). The House bill requires a separate acts-of-terror section, 245(b) (on page 3 of the House version), because it does not have an intimidation clause comparable to that in Sec. 245(b) (1) of the Senate version. If, on the other hand, it is not designed to proscribe acts of terrorism, but applies rather

to civil rights workers (see Cong. Rec., March 7, 1968, page 5636), it is likewise superfluous and confusing.

It should be noted that the language of the House version is far more clear. The principal sections were not rewritten on the floor. Thus the House version avoids awkward phrasing like that in proposed section 245(b)(1): "whoever, whether or not acting under color of law, by force or threat of force willfully . . . intimidates . . . any person . . . in order to intimidate such person or any other person or any class of persons from participating in the activities described. Proposed section 245(b)(4)(A) repeats this language verbatim except that it adds the qualification that the victim must be participating "without discrimination on account of race," etc. Is that a distinction without a difference? Probably so.

Proposed section 245(b)(2) requires racial motivation as an element of the offenses concerning activities of lesser federal interest. This is the only place in Title I of the Senate version where racial motivation is made an element of an offense. But that requirement in proposed section 245(b)(2) is made meaningless by (b)(4) of such section which makes it a crime to do what (b)(2) forbids even if racial motivation is lacking.

Thus the element of racial motivation drops out of the Senate version—an effect which was probably not intended by the other body. Thus, for example, if a fist fight breaks out in a labor dispute because one party was "enjoying employment . . . by any private employer" as, say, a seab laborer, then a federal crime may have been committed. The same might be true if two employees fought over the fact that one received a bonus (a "perquisite") while the other did not. These results are not in harmony with the probable legislative intent of the other body, let alone that of the House.

One should recall that one of the earlier stalemates in the other body was caused by the question whether racial motivation should be made an element of the crime. Though subsections (b)(1) and (b)(2) give the appearance of compromise on that question, subsection (b)(4) indicates that the so-called liberal bloc lost the bargain.

The other example of a disparity in Title I between what was intended and what was legislated grows out of the Mrs. Murphy amendment [compare section 201(b)(1) of the Civil Rights Act of 1964] proposed by Senator Cooper (Cong. Rec., p. 5636, March 7, 1968). The amendment reads:

"Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence."

Thus if Mrs. Murphy wishes to intimidate a prospective Negro tenant she may do so without violating Title I of the Senate version. But suppose the Ku Klux Klan intimidates Mrs. Murphy because she has a Negro tenant. Does Title I of the Senate version protect her? No. The relevant language is found in proposed section 245(b)(4)(B): no one may intimidate Mrs. Murphy for "affording another person . . . opportunity . . . to so participate."

The language refers back to (4)(A) whose coverage was truncated by the Cooper amendment. Thus, since Mrs. Murphy was affording opportunities beyond those delimited in (4)(A) she is not protected by (4)(B).

The House version of H.R. 2516 probably produces a different result in both cases: Mrs. Murphy could not intimidate (by force or threat of force) the prospective Negro

tenant nor could the KKK intimidate Mrs. Murphy for affording a room to such a tenant.

Thus it should be noted that these last two major differences (racial motivation, protection of Mrs. Murphy) between Title I of the Senate version and H.R. 2516 as passed by the House are somewhat accidental. It is probable that the Senate did not intend to be different on those two issues.

The question of protection from and protection of Mrs. Murphy is not laid to rest by the Cooper Amendment to Title I. Since Title VIII does not regulate Mrs. Murphy [section 803(b)(2)] and since the purpose of Title IX is only to enforce Title VIII with criminal sanctions, it would seem that none of the criminal sanctions in the Senate Amendment apply to the Mrs. Murphy situation. That was probably the intent of section 101(b) of the Senate version which states: "Nothing contained in this section shall apply to or affect activities under title VIII of this Act."

The argument would be valid if Title IX had been written to do no more than enforce Title VIII. But Title IX, mirroring the approach of Title I, makes it a crime to intimidate "any person because of his race . . . and because he is . . . renting . . . occupying . . . or negotiating for the . . . rental . . . or occupation of any dwelling . . ."

Thus Mrs. Murphy may not intimidate the prospective Negro tenant. And since Title IX also forbids intimidating anyone because he is "affording another person . . . opportunity . . . so to participate," the KKK cannot intimidate Mrs. Murphy for renting to a Negro without subjecting itself to criminal penalties.

Thus the results under Title IX, unlike those under Title I, appear to square with the House version.

Both the Senate and House versions provide for the protection of Civil Rights workers. While the House version protects Civil Rights workers who are "persons," the Senate version protects only those who are "citizens." See proposed section 245(b)(5) in Title IX of the Senate version.

Both the Senate and House versions provide for an identical tier of penalties for violations of the Act based upon the seriousness of the offense.

Two Senate amendments attempt to make the protection provisions inapplicable to law enforcement officers. The first, proposed by Senator Talmadge, insulates officers who are "lawfully" carrying out the duties of their office, Sec. 245(c). The second amendment, proposed by Senator Ervin, provides that the operative sections shall not apply to "acts or omissions on the part of law enforcement officers . . . who are engaged in suppressing a riot or civil disturbance or restoring law and order during a riot or civil disturbance." Under the latter amendment, Sec. 101(c), protection of the law may be wanting when it is needed most. Although neither the term "riot" nor the term "civil disturbance" is defined for the purposes of the chapter in question, it is clear that the Ervin Amendment would seriously decrease the number of people ("whoever, whether or not acting under color of law") whose conduct would be regulated by the proposed legislation.

The amendments to Sec. 241 and 242 of Title 18 concerning penalties are the same in the House and Senate versions.

The pre-emption Section of the House version says that no state law is pre-empted unless it is "inconsistent" with the Federal law, whereas the Senate version makes clear that there is no pre-emption whatsoever. Since it is unlikely that a State would seek to enforce a statute conflicting with the federal policy stated herein, it is probable that the different approaches would produce the same result.

Finally, Sec. 245(a)(1) of the Senate version states that no prosecution shall be undertaken unless the Attorney General certifies in advance that it is "in the public interest and necessary to secure substantial

justice." The House version contains no such provision.

H.R. 421 and the Thurmond-Lausche amendment contain almost identical operative sections. However, the Senate version makes clear that the overt act which is required may occur either during the travel or use of the interstate facility or after the travel or use of such facility, whereas the House version seemed to say that the overt act could occur only after the travel or use of the interstate facility.

Sec. 2101(b) of the Senate version provides for a rule of evidence. It is senseless. The House version has no such provision.

Sec. 2101(c) of the Senate version provides that conviction or acquittal on the merits under the laws of any state shall be a bar to any federal prosecution "for the same act or acts." What is the scope of the quoted phrase? The House version has no such provision.

Sec. 2101(d) of the Senate version requires that the Department of Justice quickly prosecute interstate rioters or report to Congress in writing. The House version has no such provision.

Sec. 2101(e) of the Senate version insulates labor unions from the anti-riot provisions, so long as they are "pursuing the legitimate objectives of organized labor." The House, in the Committee of the Whole, twice handily rejected (120-66 on a division, CONGRESSIONAL RECORD, vol. 113, pt. 15, p. 19418, and 110-76 on a division, CONGRESSIONAL RECORD, vol. 173, pt. 15, p. 19423) similar exemptions for labor unions.

Sec. 2101(f) of the Senate version is the anti-pre-emption section. It makes clear that the federal remedy is in addition to the state remedies. The House version says that the federal remedy does not pre-empt the state remedies unless they are "inconsistent." Since it is unlikely that a State would seek to enforce a statute conflicting with the federal policy stated herein, it is probable that the different approaches would produce the same result.

Sec. 2102 of the Senate version defines the terms "riot" and "to incite a riot," as does the House version. Both the House and the Senate versions make the mistake of applying the "clear and present danger" doctrine to the definition of a riot, rather than the definition of "to incite a riot." For the doctrine sets down a rule by which freedom of speech is limited. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Thus Congress may limit "speech" where it presents a clear and present danger of a riot. The doctrine does not address itself to the issue of whether a riot, in order to be defined as a riot, must present a clear and present danger of harm to the community.

The Senate definition of "riot" includes not only acts of violence, but also threats of acts of violence. The House version embraced only the former. The Senate version, like the House version, of the definition of the term "to incite a riot" states that such term does not mean the mere advocacy of ideas or expression of belief. However, the Senate version makes clear that "expression of belief" does not involve "advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit any such act or acts," whereas the House version is silent on that particular aspect.

These six titles were added to H.R. 2516 in the Senate by Senator Ervin. They constitute the exact provisions of S. 1843, a bill which passed the Senate without debate on December 6, 1967 and is presently pending before the House Committee on Interior and Insular Affairs. The bill has never before had the benefit of hearings in the House, although the Interior Committee has scheduled hearings beginning March 29, 1968, nor has such legislation been considered in any previous Congress.

A comprehensive analysis of these six titles concerning the Rights of Indians is found

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TITLE II—RIGHTS OF INDIANS

This title creates a "bill of rights" for Indians in relationship to their tribal government similar to the guarantees of our Federal Constitution. It embodies portions of the First, Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments and Article I, Sec. 3 of the Constitution and applies them to Indians who are not now so protected. Indian tribal courts, acting under Indian customs, presently are not subject to Constitutional sanctions.

In addition to the specific portions of the Constitution made applicable to Indians, this title provides additionally that: (1) tribal courts may not impose criminal penalties in excess of \$500 and six months imprisonment, or both; (2) jurors may not be fewer than six; (3) assistance of counsel shall be at the accused's own expense (present interpretations of Constitutional minimum requirements of the Sixth Amendment applicable to non-Indian citizens require lawyers to be appointed at no cost to the non-Indian accused, if he is indigent and the Criminal Justice Act of 1964 provides payment for such lawyers in the Federal Courts); (4) habeas corpus application for release from tribal detention shall be made in the Federal courts (under present Constitutional practice, non-Indian citizens, if imprisoned under state law, must first seek habeas corpus by exhausting available state court remedies before applying to Federal courts.)

TITLE III—MODEL CODE GOVERNING COURTS OF INDIAN AFFAIRS

This title authorizes the Secretary of the Interior to draft for Congressional consideration a model code to govern the administration of justice by Indian courts which would supplant the present code now reposing in Title 25 of the Code of Federal Regulations and which is more than thirty years old. Curiously, this title requires that such code shall assure that any accused shall have the "same rights, privileges and immunities" as non-Indian citizens have under the Constitution. This blanket extension of protection under the Constitution seems to make the *Pertini* enumeration of "rights" under title II unnecessary or confusing.

TITLE IV—JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

This title authorizes states not having jurisdiction over civil and criminal actions in Indian country within their boundaries to assume such jurisdiction only with the consent of the Indians (majority vote of adult Indians required). To accomplish that, title IV amends Public Law 83-280 (67 Stat. 588) which now permits States to assume such jurisdiction by legislative action and without Indian consent.

Some States presently exercise jurisdiction over Indians by authority of their own legislative enactment (PL 83-280) and some by Federal mandate (18 USC 1162, 28 USC 1360).

To implement the purposes of the bill—to govern Indians only with their consent—title IV repeals that part of PL 83-280 (Sec. 7) which permits States to assume Indian jurisdiction without Indian consent. The bill does not amend, however, those provisions of Federal law that specifically require certain States to assume jurisdiction. Instead title IV allows those States, along with others now exercising jurisdiction, to retrocede such presently exercised jurisdiction back to the United States. Retrocession, presumably, would then permit those States to extend jurisdiction back to Indians only upon the Indians' consent. But careful analysis of the bill and Senate report No. 841 reveals a contrary result.

The Senate report says that title IV authority for States to assume Indian jurisdiction—with Indian consent—extends only

to those States where no such jurisdiction "now exists." Thus, States now exercising jurisdiction are not granted authority to extend such jurisdiction to Indians even in the event they should retrocede that jurisdiction to the U.S. This anomalous situation occurs because retrocession necessarily would be a future event. The State retroceding jurisdiction would, at the time of retrocession, and only then, become a State "not having jurisdiction." The bill, as explained by the Senate report gives authority *only* to States where no jurisdiction "now exists." Therefore, those retroceding States would not be authorized by this or any other provision to regain jurisdiction for subsequent extension to Indians once it is given up.

The apparent gap between the bill's purpose and effect is due to the interpretation given the authority grant language, namely to those States where no jurisdiction "now exists." Although this interpretation frustrates the purpose of the bill, it is supported by the general rule that Congress does not give its consent to acts that may occur in the future. That doctrine is best demonstrated in the analogous situation where Congressional consent to interstate compacts is required. In such cases, the consent given is for only those acts presently occurring and not for acts that may happen in the future.

TITLE V—OFFENSES WITHIN INDIAN COUNTRY

This title amends the "Major Crimes Act" (18 USC 1153) to include an additional offense of "assault resulting in serious bodily injury." This offense, along with other serious crimes, will be prosecuted in Federal courts, since Indian courts may punish only up to \$500 and six months, or both. Senator Ervin, who sponsored this amendment, thus sought to have serious assaults punished by more substantial penalties than imposed by Indian courts (Senate Report No. 841, p. 12). But that may not be the result. Section 1153, to which this crime is added, provides no specific penalty, but instead provides such punishment as the offense would merit under other Federal jurisdiction. But the crime this amendment specifically defines does not appear in Title 18 U.S. Code. Therefore, no Federal penalty is provided. The Federal assault statute most nearly similar in definition (18 USC 113d) provides no greater penalty than the Indian court may impose. It could be argued, however, that 18 USC 13 would apply to effect the purpose of this amendment. 18 USC 13 provides that offenses occurring in Federal jurisdictions that are not defined by Federal statute are punishable under applicable State law. However, that application not only raises questions of State jurisdiction over Indians which other parts of this bill would extend only with Indian consent, but it also raises questions of whether similar State laws even exist or, if they do, whether they provide greater penalties.

TITLE VI—EMPLOYMENT OF LEGAL COUNSEL

This title provides that when approval of agreements between Indians and their legal counsel is required by the Secretary of the Interior or the Commissioner of Indian Affairs and takes longer than ninety days in forthcoming, such approval shall be deemed granted.

TITLE VII—MATERIALS RELATING TO CONSTITUTIONAL RIGHTS OF INDIANS

This title authorizes and directs the Secretary of the Interior to revise, compile and publish certain documents and materials relating to Indian rights, laws, treaties and other affairs.

TITLE VIII—OPEN HOUSING

This analysis will compare Title IV of the 1966 Civil Rights bill, H.R. 14765, which passed the House on August 9, 1966, with Title VIII of H.R. 2516, as passed by the Senate on March 11, 1968. The analysis will

attempt primarily to note the differences in the two approaches.

The House version was more narrow in its scope and more stringent in its enforcement. The House version sought to regulate only real estate brokers, their employees, salesmen and people "in the business" of building, developing, selling, and so forth. The Senate version, rather than treat the commerce of building, selling, and renting houses, embraces every dwelling in the nation except for certain cases where the conduct of the owner qualifies for an exemption from the law.

The House version established strict enforcement procedures. It established a Fair Housing Board as a new government agency with broad powers, similar to that of the National Labor Relations Board. Thus, the complainant would seek the vindication of his fair-housing rights before the Board, rather than going to court, as he would under the Senate version. Under the House version, the Secretary of HUD served in an auxiliary enforcement capacity, but his powers were limited to investigating, publishing reports and studies, and co-operating with other agencies in eliminating discriminatory housing practices.

Under the Senate version, the Secretary of HUD is authorized to educate, persuade and conciliate in order to eliminate discriminatory housing practices. But, if the Secretary of HUD is unsuccessful, the sole recourse under the Senate version is to the court, State or Federal, and not an administrative agency, such as a Fair Housing Board.

The two versions differ in more particular ways. Under the Senate version, the discriminatory basis is that of race, color, religion or national origin. The House version covered those four bases but also, at times referred to the factors of economic status and of children, both in their number and their age, as discriminatory bases upon which the bill was predicated.

The House version forbade real estate brokers and the like to refuse to use their "best efforts" to consummate any sale or rental because of race, color, etc., whereas the Senate version is silent.

Moreover, the House version forbade brokers and the like from engaging in any practice to restrict the availability of housing on the basis of race, color, etc., whereas the Senate version is silent.

The House version made clear that nothing in the Act would affect the right of the broker to his commission, whereas the Senate version is silent. On the question of the breadth of coverage, Sections 403(e) and 402 were at the heart of the House approach in that they emphasized the freedom of the typical homeowner in selling or renting. Sec. 403 said:

"(e) Nothing in this section shall prohibit, or be construed to prohibit, a real estate broker, agent, or salesman from complying with the express written instructions of any person not in the business of building, developing, selling, renting, or leasing dwellings, or otherwise not subject to the prohibitions of this section pursuant to subsection (b) or (c) hereof, with respect to the sale, rental, or lease of a dwelling owned by such person, if such instruction was not encouraged, solicited, or induced by such broker, agent, or salesman, or any employee or agent thereof."

The last sentence of Sec. 402 reads:

"But nothing contained in this bill shall be construed to prohibit or affect the right of any person, or his authorized agent, to rent or refuse to rent, a room or rooms in his home for any reason, or for no reason; or to change his tenants as often as he may desire."

Since the House version regulated only those in the business of selling, renting, or developing, those who were not in such business were implicitly exempt although they were not expressly exempt. The only express exemption (the last sentence of section 402, quoted above) applied to homeowners

renting rooms in the town "homes" (whatever that means) even though they might otherwise be "deemed to be in the business" of renting under section 402(d).

However, the Senate version covers all classes of dwellings in all transactions except three. They are as follows:

A. A single-family "house" (whatever that means) sold or rented by an owner but only if the following four conditions are true:

(1) he owns three or fewer single-family houses,

(2) he sells no more than one non-residence in any two year period,

(3) he sells without the services of a broker or the like, and

(4) he sells without any discriminating advertising.

These conditions present some problems. The first condition is modified by an attribution clause resembling in purpose those found in the Internal Revenue Code. That is, the ownership of an item by one spouse or relative is attributed to the other spouse or relative lest some rule be circumvented. The attribution clause here is very loose in comparison to IRC attribution sections.

The second condition is phrased in troublesome language: "The exemption . . . shall apply only with respect to one such sale within any twenty-four month period." What if two non-residences are sold in such time? Which sale gets the exemption? The first? Or is it the seller's choice?

The fourth condition requires that, "after notice," there be no discriminatory advertising. What "notice"? By whom? there is no intimation in the entire Title of what is meant by "after notice."

However, it is clear that regardless of circumstances, no one can "make . . . any notice, statement, or advertisement" that discriminates, section 804(c). That applies to all dwellings except religious and fraternal organizations exempted by section 807. Thus the fourth condition, which is stated in more narrow terms (it requires less of the seller) apparently contradicts the broader requirement of section 804(c) stated above.

The fourth condition would seem to require only the avoidance of written discriminatory advertising whereas section 804(c) would arguably require the avoidance of both written and spoken (a "statement" can be oral) "indications of preference."

So, does the fourth condition mean that less is required? Or is it simply a nullity? Furthermore, don't these prohibitions violate "free speech" under the First Amendment? Does not a citizen have the right to indicate his preference by the spoken or written word? Those questions are not easy to answer.

B. Mrs. Murphy's boardinghouse. It appears under section 803(b) (2), there is an exemption for "rooms or units in dwellings" holding no more than four families ["family" includes a single individual"—section 802(c)] living independently of each other, if the owner resides therein. The exemption applies to both the sale and rental of rooms and units, not merely to rental as would be true if this were purely a Mrs. Murphy exemption. (Note in comparison that private clubs are exempt only for rental purposes under section 807.) Is it then possible for Mrs. Murphy to sell all her units (i.e., her house) to one buyer and still be exempt?

If Mrs. Murphy is not exempt by section 803(b) (2) in selling her dwelling, is she exempt under section 803(b) (1)? Is Mrs. Murphy's house a "single-family" dwelling? From the use of language in Title VII, especially in sections 802(b), 802(c) and 803(b) (2), it would seem that a "single-family" house is one which is "occupied as, or designed or intended for occupancy as, a residence by one" family.

Thus if Mrs. Murphy has a boarder or if her house is designed to hold both the Murphy family and others as well (i.e., it has an extra room), then her house is not exempt

for sale purposes under section 803(b) (1). Of course, there are many homes that fit that definition. If the definition is correct, then many dwellings considered exempt will not prove so.

However, the sections delimiting the exemptions are not so clear as they should be in view of their central importance.

It is interesting to note that a four-apartment condominium would be exempt under section 803(b) (2) whereas a co-operative would not, because in the former, each family owns a unit, whereas in the latter each family owns an undivided quarter which may not be considered by a court to be a "room" or "unit." The policy for making such a distinction is not clear.

However, the House version contained a provision, section 403(b), which was substantially similar to section 803(b) (2).

C. 1. A dwelling maintained by a religious group for a non-commercial purpose, exempt as to both sale and rental.

2. A dwelling maintained as a bona fide private club for a non-commercial purpose, exempt as to rental only so that preference can be given to members of such club.

In the House version, section 403(c) exempted the same two groups as to both the sale and rental to their own members.

Section 805 of the Senate version forbids banks and similar institutions from discrimination on the basis of race, color, etc. in the financing of housing. So did section 404 of the House version.

Section 806 of the Senate version forbids discrimination in the provision of brokerage services. So did section 403(a) (6) of the House version.

As for the enforcement of the open housing provision, it was noted earlier that the House version provided for an administrative remedy before the Fair Housing Board.

In contrast, section 810 of the Senate version permits any aggrieved person to file a complaint with the Secretary of HUD within 180 days after the alleged discriminatory housing practice occurred. Within thirty days after receiving a complaint, the Secretary must notify the aggrieved person whether he intends to resolve the complaint. The Secretary, if he intends to do so, then proceeds to correct the alleged discriminatory housing practice by informal methods of conciliation and persuasion.

The functions of the Secretary are delegable within the Department. However, HUD has only six regional offices and one area office within the United States. The bill does not make clear how or where a complaint will be filed. However, section 808(c) does state that conciliation meetings shall be held in the locality where the alleged discrimination occurred.

Under section 810(c), where there is a State or local fair-housing law applicable, the Secretary is required to notify the appropriate State or local agency of any complaint filed with him. If, within thirty days after such notice has been given to the appropriate State or local official, such official commences proceedings in the matter, then the Secretary must refrain from further action unless he certifies (why? to whom?) that such action is necessary.

However, section 810(d) interrupts this conciliation process by permitting the aggrieved person within thirty days after the filing of a complaint (that is, within the same period that the Secretary has to judge the substantiality of the complaint) to file an action in the appropriate U.S. district court against the respondent named in the complaint—unless State or local law provides "substantially equivalent" relief, whereupon such relief must be sought.

However, the Secretary may continue to seek voluntary compliance up until the beginning of the trial (as distinguished from the commencement of the law suit.)

In the course of the investigation, the Sec-

retary is permitted to make whatever searches and seizures are necessary "provided, however, that the Secretary first complies with . . . the Fourth Amendment." The Secretary may issue subpoenas to compel production of such materials and may issue interrogatories and may administer oaths. Any person who is found in contempt of the Secretary by "willfully" neglecting to attend and testify or to answer any lawful inquiry or to produce records shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Thus, in summary, the Secretary's powers are limited to education, conciliation, and investigation. He apparently cannot enforce the title; only a court can.

However, section 808(c) yields a contradictory implication. It empowers the Secretary to prescribe the "rights of appeal from the decisions of his hearing examiners." That implies administrative enforcement of the prohibitions of the title. It might be the source of an unintended enlargement of administrative power. Caution would require its elimination.

Section 812 states what is apparently an alternative to the conciliation-then-litigation approach above stated: an aggrieved person within 180 days after the alleged discriminatory practice occurred, may, without complaining to HUD, file an action in the appropriate U.S. district court. At this point, two commands come into play: Section 812 commands the court to wait to determine if the Secretary can achieve voluntary conciliation, while section 814 requires that the court "assign the case for hearing to the earliest practicable date and cause the case to be in every way expedited." Note further that the command of section 814 to expedite applies only in the situation where the aggrieved party has not sought the assistance of the Secretary of HUD, but has instead filed a civil action without the prior aid of the Secretary. If the aggrieved party has first sought the assistance of the Secretary and then files an action within thirty days of his filing the complaint with the Secretary, then the civil action arises under section 810(d), a section to which the expedition requirement of section 814 does not apply.

Section 812(a) also changes the law concerning the bona fide purchaser and the doctrine of lis pendens. Under section 812(a), it appears that a person who purchases a house that is involved in a law suit is termed a bona fide purchaser if he does not actually know of the law suit, even though he has constructive knowledge that such a law suit was pending.

Section 812(b) permits the court to appoint an attorney for the plaintiff where justice requires it. However, the court has that power only where the action is brought under section 812 and not where the action is brought under section 810 (that is, after the assistance of the Secretary has been sought). Note that under section 812(c), the court may award up to \$1,000 in punitive damages. The House version contained no such provision.

Both the Senate version, section 115, and the House version, section 407(a), stated that the provisions of the federal law do not preempt State and local open housing laws, but do preempt State and local laws which required or permitted discriminatory housing practices.

Section 817 of the Senate version establishes a civil cause of action in tort for the interference by coercion or threats with any person in the enjoyment of his right to fair housing. Section 407 of the House version is comparable.

Section 819 of the Senate bill is a separability clause. The House version contained no such clause. However, whereas the 1966 House bill fell within the Congressional power over interstate commerce, the more far-reaching Senate bill probably does not and must look to section 5 of the Fourteenth Amendment as

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its constitutional basis. Since section 1 of the Fourteenth Amendment focuses only on "State" action, it has long been doubted that Congress could reach private discriminatory action through legislation to "enforce" section 1 of the Fourteenth Amendment; See *Civil Rights Cases*, 109 U.S. 3 (1883). However, six Justices of the Supreme Court of the United States, in the case of *United States v. Herbert Guest*, 383 U.S. 745 (1966), stated in *dictum* that section 5 of the Fourteenth Amendment empowers Congress to enact laws which reach private discrimina- tion.

The following is a list of the comparable sections in the House and the Senate versions:

House version, 1966	Senate version, 1968
401	801
403(a) (1)	804(a)
403(a) (2)	804(b)
403(a) (3)	804(c)
403(a) (5)	804(d)
403(a) (6)	806
403(a) (8)	804(e)
403(b)	803(b) (2)
403(c)	807
404	805
405	817
406(a)	812(a)
406(b)	812(b)
406(c)	812(c)
407(a)	813
410	815

TITLE IX—PREVENTION OF INTIMIDATION IN FAIR HOUSING CASES

Title IX of the Senate version provides criminal sanctions in the fair-housing area, just as Title I provided criminal sanctions in the areas enumerated in that Title. The Senate version apparently classifies the open-housing area as one of lesser federal interest and thus, as in Title I, requires racial motivation as an element of the crime in one section, but not in another. Compare section 901(a) with section 901(b) (1). Since the treatment of open housing in Title IX is identical with Title I's treatment of the areas of lesser federal interest, there is no readily apparent reason why Title IX could not have been incorporated into Title I.

Title V, section 501(a) (5) of the 1966 bill, passed by the House, also provided criminal sanctions for the interference with any person because of his race, color, religion or national origin while he is seeking to engage in the purchase, rental, or occupancy of any dwelling.

Note that both of these protection provisions with criminal sanctions are broader in scope than the open-housing rights recognized for the civil-law purposes. In both versions, the criminal sanctions apply with reference to "any dwelling" without exception.

Note also that because both versions protect the right to occupy any dwelling, that they are both public-accommodation and open-housing provisions.

TITLE X—CIVIL OBEDIENCE

Three new Federal crimes punishable by \$10,000 or five years, or both:

1. Teaching or demonstrating the use of making of firearms or explosives or incendiaries or techniques capable of causing injury, knowing or *having reason to know* such devices will be used unlawfully in a civil disorder adversely affecting commerce or the performance of a federally protected function.

2. Transporting or manufacturing for transportation in commerce a firearm or explosive or incendiary knowing or *having reason to know* that such device will be used unlawfully in furthering a civil disorder.

3. Commission of an act to obstruct a law enforcement officer or fireman lawfully engaged in performing his duties incident to and during a civil disorder which adversely

affects commerce or the performance of a federally protected function.

Section 232 defines "civil disorder" as a "public disturbance involving acts of violence by assemblages of three or more persons . . ." This definition of civil disorder is different from the Title I definition of "riot" (pages 7-8 of this memo). Civil disturbances for gun control and fireman and policeman protection purposes require acts of violence (but not threats) by assemblages, whereas riots require acts of violence (or threats of violence) by only one person as part of an assemblage. There seems no apparent reason for this confusing difference except that the "riot" amendment was offered by Senators Thurmond and Lausche and "civil disturbances" amendment was offered by Senator Long (D-La.). From the debate record, it appears that both sections were meant to treat with the same kind of "disturbance" or riot.

Section 231(a) (1), listed as number 1 under Title X above raises questions as to the scope of "teaching" and "demonstrating" either use of weapons or "techniques capable of causing injury . . ." when coupled with criminal liability for those acts by "having reason to know" that such weapons or techniques will be used unlawfully in furtherance of a civil disorder. What does that prohibition include? Also, what is the meaning of the requirement that the disorder adversely affect commerce? Does *scienter* also include knowledge of the effect on commerce?

The prohibition against transportation or manufacture for commerce of firearms and incendiaries, unlike the teaching and demonstrating prohibition, does not require that the disorder affect commerce. Does that difference make the disorder any more or less serious. Should teaching about firearms, incendiaries or "techniques" that cause injury become criminal only in disorders that affect commerce and should shipping firearms and incendiaries become criminal in disorders that do not affect commerce?

The firearms sections differ substantially from the proposals now being considered in the House and Senate Judiciary Committees (Dodd, Celler, Hruska and Blister-Ballsback bills) in that these Title X sections prohibit the demonstration and transfer and manufacture of firearms and explosives with respect to their subsequent use. The bills in Judiciary Committees would simply regulate commerce of such devices and would not rely on subsequent use. Use of firearms and similar devices has been a matter for local control by states and political subdivisions. Law enforcement officials, lawfully performing their duties, are excluded from the prohibitions of Title X.

Neither the 1966 nor the 1967 House-passed Civil Rights bills contained provisions affecting firearms.

Yes, Mr. Speaker, expediency may be the House decision today. I think it is wrong. We should not condone it.

In 1957 one of the great liberal Senators in the other body said in the consideration of equally important civil rights legislation then, and I quote:

Oh, Mr. President, I say to the liberals, parliamentary expediency is not the road to travel.

Those words by that individual in 1957 are applicable to us today. If we take the path of expediency, we will live to regret it. I say to you in my best judgment we should follow the time-tested principles of parliamentary procedure, because they are primarily in the best interests of our minority groups, and also in the best interests of all our citizens.

Mr. MADDEN. Mr. Speaker, I yield 2 minutes to the gentleman from Colorado [Mr. ASPINALL].

Mr. CLARK. Mr. Speaker, will the gentleman yield?

Mr. ASPINALL. I yield to the gentleman from Pennsylvania.

Mr. CLARK. Mr. Speaker, we cannot overestimate the seriousness of the action this House is being asked to take today. As most of my colleagues know, I have been speaking out frequently on the subject of law enforcement for several years now, most recently within the past few weeks.

An examination of the CONGRESSIONAL RECORD will clearly indicate that, unfortunately, my predictions of disaster have come true this past weekend. I have the feeling, however, that my voice is still not being heard when I repeat once again that we cannot make any progress in the field of civil rights when we are in a state of anarchy. And we will remain in that state just as long as we continue the policy of nonsupport for our law-enforcement agencies.

Mr. Speaker, if there is an underprivileged, downtrodden minority in this country today—and this past weekend—it is the police officers of the Nation. They were required to accept unspeakable insults, flagrant injuries, were shot at, thrown at, spit at, cursed at—and then asked to accept it quietly and at the same time be held responsible for the maintenance of law and order.

I say to my colleagues that this intolerable condition must be corrected first—now, before any other action is taken by this House. I, for one, will not be stamped or threatened into precipitous legislative action that will in effect reward looters and arsonists.

Mr. Speaker, we are supposedly considering a civil rights bill. As I have said before, what we have been dealing with here has been neither civil, nor right. I say to the Members in this Chamber that before they vote today they should walk out that door and onto buses and ride through the destroyed areas and streets of our Nation's Capital. I ask how many of the Members about to vote here have been through the ravaged region of this city? I ask how many have talked to the police officers and National Guardsmen and Federal troops who braved the war on Washington? And that is exactly what it has been—a war on Washington.

Total and utter destruction of blocks of the city creating havoc and spreading fear through this city such as has never been done before. And now we are being asked to forge our usual calm, deliberative, legislative process, in an atmosphere of fear to pass legislation that may well have beneficial effects, but how do we know until our proper committee has examined the contents of this legislation?

Mr. Speaker, I rise today not in opposition to this bill in itself, I rise and speak with all of the earnestness of my heart to speak for the police of this Nation. And I ask my fellow Members to consider that we are adding still another indignity to their already overwhelming ones by precipitous passing of a bill that will make it clear to them that their job cannot be done.

Recently, I read a document of the District of Columbia National Guard entitled: "Riot Control Training, FBI,