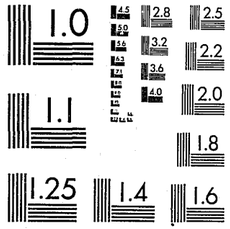

MF-1

Department of Justice

STATEMENT

OF

MARK RICHARD
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
HOUSE OF REPRESENTATIVES

CONCERNING

FBI LAW ENFORCEMENT ON INDIAN RESERVATIONS

ON

MARCH 31, 1982

Thank you for your invitation to appear here to discuss with the Subcommittee some of the problems relating to law enforcement upon Indian Reservations.

Approximately one year ago to the day, this Subcommittee conducted hearings on that subject in connection with the Department of Justice Appropriation Authorization Act for Fiscal Year 1982. In the light of testimony from certain witnesses, you Mr. Chairman, and Representative Henry Hyde, wrote the Attorney General suggesting "creation of a pilot project whereby those reservations which are currently capable of assuming a greater responsibility for investigation of serious crime, be identified and encouraged as a 'model.'"

Before addressing that suggestion, I would like to sketch in general terms the complex jurisdictional background of the problems of criminal law enforcement on reservations.

In the first place there are a number of states in which the Federal Government exercises no criminal jurisdiction over Indian country. This is a result of statutes - particularly P.L. 280, enacted in 1953, - which ceded federal criminal jurisdiction to five named States (California, Minnesota, Nebraska, Oregon, and Wisconsin). It also permitted other States to assume jurisdiction. In 1968, the Act was amended to require tribal consent to the assumption of jurisdiction and to permit States to retrocede jurisdiction to the United States.

We are concerned here today with those areas in which the United States continues to exercise criminal jurisdiction. In

these areas criminal jurisdiction is also exercised by tribal authorities and the States. To some extent the jurisdiction is concurrent and overlapping, that is, two authorities may be able to punish the same conduct, but generally speaking jurisdiction is exclusive with only one of the three authorities competent to act. The nature of the offense, the status - Indian or non-Indian - of the offender or the victim are factors that determine the appropriate forum.

We begin by a short explanation of the basic division of felony jurisdiction. On its face 18 U.S.C. 1152 (the General Crimes Act) appears to make federal enclave law applicable to all crimes committed within Indian country except those left to tribal jurisdiction. The crimes left to tribal jurisdiction are those committed by one Indian against the person or property of another Indian, crimes committed by Indians that have been punished by the local law of the tribe, or crimes as to which a treaty gives the tribe exclusive jurisdiction.

This statute, and its predecessors, however, have been interpreted by the Supreme Court as not granting federal jurisdiction over crimes by non-Indians against non-Indians, even though such offenses occur within Indian country. United States v. McBratney, 104 U.S. 621; Draper v. United States, 164 U.S. 240; New York ex rel. Ray v. Martin, 326 U.S. 496. See Williams v. Lee, 358 U.S. 217, 219-220; see also McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-171. In such crimes the interest of the State has been considered to be greater than that of the United States, and the statute has been

read in historical perspective as not intending a contrary result.

A second modification of the scheme of 18 U.S.C. 1152 is set out in 18 U.S.C. 1153 (the Major Crimes Act) which creates an exception to the general rule that the tribal court has jurisdiction over intra-Indian offenses, by providing federal jurisdiction over 14 major crimes when committed by Indians against other Indians or non-Indians in Indian country. Other crimes committed by Indians against Indians are left to tribal jurisdiction (see Keeble v. United States, 412 U.S. 205, 209-212), except for federal crimes not dependent on the territorial jurisdiction of the United States, such as possession of narcotics, or assault upon a federal officer. United States v. Wheeler, 435 U.S. 313, 329 n.30 (1978); United States v. Smith, 562 F.2d 453, 457 (7th Cir. 1977).

The broad pattern of felony jurisdiction that has arisen, despite its complexity of origin, is not irrational. In light of the substantial non-Indian populations on many reservations, felonies wholly between non-Indians are left to state prosecution. Major crimes involving an Indian, whether as victim or accused, are federal prosecutions.

With regard to misdemeanor jurisdiction in Indian country, in those areas subject to P.L. 280, basic misdemeanor jurisdiction over all offenses committed in Indian country lies in the state. It is not well settled to what extent tribal courts maintain concurrent jurisdiction over their own members.

It is now settled, however, that tribal courts may not exercise misdemeanor jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In areas not subject to P.L. 280, the division of misdemeanor jurisdiction is basically the same as for felonies, except for the significantly larger role permitted to tribal courts. 18 U.S.C. 1152 makes no distinction between felonies and misdemeanors and provides basic federal jurisdiction over all offenses except for the retention of tribal authority that it contains and the exception created by McBratney for misdemeanors wholly between non-Indians. The difference from felony jurisdiction, of course, is that since 18 U.S.C. 1153 only lists major crimes, misdemeanors between Indians are handled exclusively in tribal courts. Moreover, it is undisputed that tribes have jurisdiction over misdemeanors committed in Indian country by Indians, even if the victim is non-Indian. If however, the tribe fails to exercise jurisdiction in cases where the victim is a non-Indian, the federal courts have jurisdiction, as they do in cases of misdemeanors committed by non-Indians against non-Indians.

Thus, while as a practical matter felony jurisdiction is handled exclusively in federal and state courts -- misdemeanor jurisdiction is divided between state, federal, and tribal courts. However, tribal courts are often the only courts actually located in an Indian reservation. Because tribal court jurisdiction is considered limited to crimes wholly between

Indians, misdemeanors committed by non-Indians against Indians or Indian property can only be handled by courts (and sometimes police) far from the Reservation. The role of federal courts (and federal prosecutors) in regard to Indian country is, therefore, not their usual supplemental role as enforcers of federal law, leaving to state courts the enforcement of ordinary criminal statutes. In Indian country the federal court has the role of a county court as well. It is thus imperative that there be sufficient federal judges, and courts sitting sufficiently close to Indian populations, to exercise these functions, and that United States Attorneys be supplied with adequate staff specializing in Indian problems -- not handling them as an undesirable overload.

The overlapping of criminal jurisdiction in Indian country results in investigative authority being vested in several law enforcement agencies. Investigations of state and local offenses are, of course, conducted generally by state and local officers. Primary investigative jurisdiction for most major federal crimes rests with the FBI, while tribal police monitor violations of tribal ordinances, and officers of the Department of the Interior's Bureau of Indian Affairs provide law enforcement services on over 163 reservations or areas in 23 states. The BIA employs 553 officers itself, and, in addition, has commissioned as BIA Deputy Special Officers some 700 of the 850 to 900 officers employed by various tribes. All BIA officers undergo an extensive training program at the BIA Police

Academy in Brigham City, Utah. To receive a Deputy Special Officer commission, a tribal officer must have taken training at the BIA Academy or have completed a State-certified law enforcement program.

Since the appropriate jurisdiction for prosecution depends upon the nature of the offense and the Indian status of the defendant or victim, it often occurs that the agency with primary jurisdiction is not in a position to act against ongoing crime or respond immediately to the crime scene. This has been remedied to some extent by inter-agency cooperation, the judicial recognition of authority of police officers of one jurisdiction to hold suspects for other authorities, and, by cross-deputization which allows officers who have apprehended a criminal to investigate, arrest and deliver the accused to the proper prosecutorial and judicial authorities in their own right.

Against this background, I would like to address now the proposal made in your letter of April 1, 1981, Mr. Chairman, that certain Indian reservations be selected as pilot projects in which Bureau of Indian Affairs or tribal police would be given greater responsibility for the investigation of serious crimes.

As you noted in your letter, the Department of Justice Task Force on Indian Matters in its 1975 review of law enforcement on Indian reservations reported that on many occasions there was an unnecessary duplication of effort because the United States

Attorneys almost invariably required reinvestigation by the FBI of matters initially investigated by BIA or tribal police. As a result of the Task Force recommendations the Department adopted a policy of encouraging United States Attorneys to take advantage of investigations by Indian police, thereby conserving FBI resources and encouraging local pride and self-reliance. This policy is currently published in the United States Attorneys' Manual, and reads as follows:

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The FBI has investigative jurisdiction over violations of 18 U.S.C. 1152 and 1153. Frequently by the time the FBI arrives on the reservation some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and United States Attorneys are free to ask for FBI investigation in all cases where it is felt that such is required. However, United States Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where you feel a sufficient investigation can be undertaken by BIA or tribal law enforcement officers.

The policy of the Department, while encouraging the use of Indian police investigative work, nevertheless recognizes that in the last analysis it is the responsibility of the United States Attorney to conduct the prosecution successfully. By virtue of his familiarity with the case and the personnel, he is also in the best position to evaluate the capabilities of the individual officers and units involved, and to determine the kinds of cases that can be left to their primary investigative jurisdiction. It is therefore necessary and proper to leave to his discretion the decision whether the quality of investigation the local officers of the BIA or the tribe are capable of performing is adequate to the needs of the prosecution.

As you are also aware from the testimony given at the hearing, after the adoption of the above policy, the then United States Attorney for the District of Arizona, Michael Hawkins, initiated a written policy dispensing with FBI investigation in certain classes of cases on the Navajo reservation. Primary investigative jurisdiction was conferred upon BIA and Navajo tribal police in all cases in which federal prosecution would routinely be declined in favor of tribal court action, and in some classes of cases in which federal prosecution would be undertaken. The program was extended by United States Attorneys in neighboring states to the segments of the Navajo reservation in their districts, and later, by Mr. Hawkins, with some modifications, to the reservations of other tribes in his district.

In our opinion there really is no need for pilot projects. The experience of Mr. Hawkins and the Navajos has already shown that where one has a substantial stable Indian community that can support a well-trained professional force, the quality of investigation and police work is high. The United States Attorneys can be relied upon to take advantage of such resources where they exist. Selecting reservations for a limited time on a trial basis would compel a United States Attorney to accept an investigative product in which he has no confidence, and would place him in a position inconsistent with the obligations of his office and the welfare of the Indian community. The termination of a pilot project following a determination that it was not working out properly would only lead to animosity and exacerbate any discontent already felt by the community.

We therefore believe that, rather than designate certain reservations as pilot projects, it would be more advantageous to continue the present practice of instructing the United States Attorneys to utilize BIA and tribal resources to the maximum extent deemed consistent with providing investigations of sufficient quality to support successful federal prosecutions. Presently the BIA has one "slot" in each of the four classes trained annually at the FBI Academy at Quantico, Virginia, and tribal officers have attended the Treasury Department's consolidated Federal Law Enforcement Training Center. This type of training, which we fully endorse, will enhance the professional capabilities of BIA and tribal

officers. As their professional qualifications are raised, and the quality of work that can be expected from them improves, the United States Attorneys will come to rely more and more on their investigative efforts.

That completes my prepared testimony, Mr. Chairman. I would be pleased to attempt to answer any questions the Subcommittee might have.

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