

TESTIMONY OF PHILIP S. DELORIA  
ON S. 2097

JULY 15, 1998

Mr. Chairman and members of the Committee. Thank you for the opportunity to testify on this important bill. My name is Philip S. Deloria. I am a member of the Standing Rock Sioux Tribe and I am the Director of the American Indian Law Center, Inc., of Albuquerque, New Mexico, the only Indian-controlled policy studies organization in the nation, having been created in 1967. I am also the President of the Legi\X Corporation, a private lobbying firm with exclusively tribal clients. I am here today giving testimony that is entirely my own, however. I have been professionally involved in Indian affairs for the past 36 years and have considerable experience that might be of some use in these deliberations.

CONTEXT

Let me first say that I appreciate the intention of this Committee to bring greater clarity to Indian affairs over the years and to bring about improvement in the conditions among Indian people, particularly through the Committee's efforts to realize the repeated promise of Indian tribal self determination.

These are not easy times for a student of American politics to understand, if one gives credence to the professed principles of the great American political parties. We have on the agenda a number of bills in the past several sessions that would use the power of Congress to dictate policy at the most local level and to substitute for the wisdom of the local political processes the solutions dictated from Washington. The Congress has been presented with bills that would seriously distort tribal legal systems to virtually ensure - to be blunt - that non-Indians always win in tribal court. That is a privilege that we Indians are not accorded in state or federal court.

If one looks at the history of the doctrine of sovereign immunity, one can see that the real driving force which has limited sovereign immunity has been the marketplace - the place that I had always thought was a place of worship for the Republican party. The federal government and the states have limited their reliance on sovereign immunity in response to the political and economic pressures of the marketplace, as well as their notions of fairness. Have we identified a reason to think that Indian tribes will not do the same if left to that marketplace? Will investors put money into tribes where there is no recourse? Will gamblers visit casinos on a reservation where there is no way to vindicate the various rights that they consider important? If a bank is stupid enough to lend money where there is no recourse, is it the job of Congress to hold them harmless? And, once burned, will that bank ever again lend money to a tribe or other entity that burned them?

I am quite frankly amazed that a Committee of Congress - especially one with a Republican majority - is willing to put so much time considering legislation that would substitute a Washington-made and Washington-dictated solution to a problem - a problem that may not even exist - rather than allow the natural social processes to evolve a solution out of local conditions managed by the people who know the situation the best.

In the last few years we have seen a disturbing pattern to the Indian policy proposed by a member of this committee, who seems to be driving the agenda in this business not only here but because the Republican party saw fit to put the federal Indian budget in his hands. The pattern is that of reversing the thrust of the plenary Indian power of Congress from one which protects the Indians from the ravages of the states and their nearest neighbors to a power which makes the federal Congress the guarantor that a single non-Indian can win in every case. The power of Congress over Indian tribes is not morally justified if it is more often used to hamper them competitively and to force them to give advantages to non-Indians than it is to protect them from the overreaching by their neighbors which history amply demonstrates.

We have seen a parade of non-Indians in here to complain about tribal governments. Many of the members of this Committee have served in state and local government. Do they have any doubt whether the same or similar parade could be assembled to complain about municipal, county or state government - not to mention federal agencies - in any community in this nation? No sane person would take the position that tribal governments or tribal courts are flawless - nor would any sane person take that position as to their federal or state counterparts. The question really is: are the flaws of tribal governments so egregious that federal action is warranted to limit their powers or to dictate their policies? And underlying that question is: is the same energy put into hearing Indian complaints about state government; into ensuring that Indians will always win in state courts? We know the answer.

Many Indian people do not like the notion of the plenary power of Congress on the subject of Indian affairs, in large part because they have been misled as to the meaning of that legal doctrine. The "Plenary Power of Congress" does not mean that Congress can do anything it wants to Indians. It merely means that when the subject of legislative consideration legitimately falls within the aegis of "Indian affairs", Congress has the power to legislate without relying on one of the enumerated Constitutional powers. It does not mean that there is no limit on the powers of Congress.

This doctrine of "Plenary Power" was most clearly enumerated first in the case of Kagama v. United States, where the United States Supreme Court identified as the rationale for this plenary power the fact that the states and the Indians' neighbors are usually the Indians' most deadly enemies. Indian affairs, in the view of the Supreme Court, must be broadly federalized to protect the Indians. Here we have a Congress that is seriously considering using this power - which implicitly limits Indian self-government - to protect non-Indians who may be affected by tribal governments and indeed to give them greater protection than they have against the federal government or against their own state and local governments. I urge this Committee that if we are to be stuck with this plenary power of Congress to at least return it to its doctrinal roots, that of protecting the Indians from overreaching by their more powerful neighbors.

We have a number of legislative proposals and positions of individual members of Congress on legislation which are obviously and in many cases admittedly based on the desire to protect local non-Indian business interests from Indian competition. Several years ago the United States Supreme Court held that state taxes imposed and collected on Indian reservations did not infringe on the right of Indians to make their own laws and be ruled by them. This Congress and the American people who elect them have been urging our Indian tribes to become economically self sufficient and to rid

themselves of dependency on the federal government. But when the Supreme Court allowed state taxation on the reservations, where was Congress to correct the mistake? The fact is, the Congress doesn't have an Indian economic development policy other than this misbegotten gambling craze. If a tribe wants to encourage the growth of a healthy mixed economy on the reservation, it must choose between imposing a tax on top of the state tax thereby discouraging private investment on the reservation - or declining to tax - thereby continuing its dependency on the federal government. The idea that this tax situation does not interfere with tribal self-government is breathtaking.

## **S.2097**

Turning to the proposal at hand, I want to recognize the chairman's effort to address a very complex set of problems in a fair and constructive manner. Here are my comments.

The bill combines several issues in a way that is not helpful to clarity of thought. I would agree with many other witnesses in pointing out that these Titles deal with disparate issues, and suggest that Titles I and III be separated. First, let me address the insurance provisions of Title II.

### TITLE II

1 . We do not know how many tribes are now insured, how many insurers hide behind tribal sovereign immunity (in which case, what exactly is the tribe paying for ?), or how many tribes have trouble finding insurers. It doesn't make sense to legislate first and define the problem second.

2. The bill provides that the federal insurance will be available to all tribes having a TPA allocation. My understanding is that all tribes have a TPA allocation, and that tribes that compact or contract under 638 for all or part of the TPA allocation are covered to that extent by the Federal Tort Claims Act. It is not clear, then, what this legislation is intended to cover in relation to the existing protection of the Tort Claims Act, in relation to causes of action outside the Tort Claims Act, and in relation to tribes having a TPA but neither compacting nor contracting under 638.

3, The bill provides that the federal insurance will be available to tribes not buying their own coverage. Will this be a disincentive to tribes to buy their own coverage if the Secretary will buy it for them? Will tribes who now buy their own insurance cancel in favor of the Secretary's policy?

Given the lack of information on the real scope of the problem (and in light of the current public attention to the far more serious problem of the ability of the public to sue their HMO's), it seems that there is insufficient basis for this legislation at this time.

### TITLE I

I have had some experience in state-tribal relations, having been a founder of the Commission on State-Tribal Relations in 1976 - a coalition of organizations of tribal governments, state legislators, attorneys general and county governments formed to examine the intergovernmental relationships on Indian reservations and encourage their improvement. I might add that we enjoyed the

participation of several state governors in our work, but none of the organizations of state governors saw fit to associate with us formally.

Let me state in the clearest terms possible a fundamental problem with the whole area of state tribal relations. In all the work I have done in this area, I am constantly finding that well-meaning people on both sides of the fence think that tribal, state and municipal governments cannot meet and make agreements without federal consent. That is absolutely untrue. I understand that from time to time Congress wishes to encourage states and tribes to settle their differences without recourse to litigation. But for Congress to grant "consent" where none is required does not facilitate tribal-state cooperation, it discourages it.

Formal (as opposed to political) barriers to tribal-state (and in that I include tribal-county or tribal municipal) agreements can only be found in federal, tribal or state law. Not only is there no general federal principle of law requiring federal consent to tribal-state agreements, the Indian Reorganization Act recognizes in specific terms the power of Indian tribes to negotiate with state and local government. We must assume that the Congress that passed the IRA meant that tribes could not only negotiate but could make agreements - Congress was surely not encouraging pointless intergovernmental negotiations.

Rather than assume the need for federal consent to negotiations, one must look at the specific subject matter and determine whether that subject matter is one that falls within federal control, and one must look at the proposed agreement to determine whether its provisions trigger some federal power. Tribes, for example, cannot encumber or alienate trust property without federal approval. An intergovernmental agreement that sought to do this, then, would require the appropriate federal consent. Tribes cannot transfer jurisdiction to state governments without a referendum of the people, a restriction imposed by federal law. Therefore, there are federal limitations on tribal powers to make agreements, but they are not of the sort that would in general require Congressional consent in advance of any negotiations or any agreement that might be made.

In summary, the consent of the United States is not needed for tribes and state to make tax agreements unless they infringe on a particular federal restriction. In fact, there are probably hundreds of tax collection agreements throughout the country, some decades old, whose legality is not in question.

What is missing in the equation is the political will on the part of states and tribes to make tax collection agreements. In a situation such as this, the party whom the existing law favors finds the law crystal clear; the party feeling disadvantaged by existing law finds it "ambiguous" and seeks to have it "clarified" - that is, changed to be more favorable. Under the existing state of the law, tribes play defense and states play offense. These tax provisions will encourage states to bring additional pressure to extend their taxing powers deeper into reservation life.

The greatest encouragement possible for increased tribal-state cooperation in the tax or any other area is for the federal government - all three branches - to take seriously the federal trust responsibility to Indian tribes. When that happens, states see an incentive to negotiate. If, on the other hand, the states see - as they often do - a lack of federal enthusiasm for the tribal position,

they are not encouraged to negotiate but instead encouraged to take a hard line. That is precisely why the anti-tribal forces control the agenda in the Congress now - because the Congress does not simply reject their position and get on with business. As long as the anti-tribal forces feel they can get some concession, why on earth would they not continue the pressure?

As I understand the law, Indian tribes are only obligated to pay taxes to the state on fee land and on certain off-reservation activities (under the Mescalero decision). S. 2097 seems to be aimed at situations in which the Supreme Court has suggested that tribes should collect taxes for the states on transactions where the state taxes the consumer and the tribe is the vendor. Even in these three situations, a very small amount of money is involved, but this bill may open the door to much larger claims by the states because of the ambiguous wording of the bill.

I would have thought that the Congress might have learned some lessons about facilitating tribal state agreements from the fiasco of the gaming compacts. As a general rule, I would urge this committee to make a very careful analysis - as I understand these hearings to be - of the costs and benefits of federal involvement in the tribal-state relationship, particularly where, as here, there is no inherent federal role.

Finally, I would like to address Sect. 105, JOINT TRIBAL-FEDERAL-STATE COMMISSION ON INTERGOVERNMENTAL AFFAIRS. As the founder and principal staff support for the Commission on State-Tribal Relations for about ten years (and as a veteran of the American Indian Policy Review Commission), I have some experience in this area. It is true that there is a need for more detailed information concerning the tribal-state relationship. Little of that information is available from federal agencies, however. The tribes, states and municipalities have the information about existing agreements - formal and informal - and would be willing to share that information if it would be of help.

Rather than create a commission which would put everything on hold for a few years, this Committee could perform a valuable service by holding hearings in which each federal agency is asked to report on the actions it takes to support tribal taxing and regulatory powers, thereby facilitating tribal-state cooperation. It could also hold hearings on the public services - paid for out of both federal and state tax dollars - which are denied to otherwise eligible Indian people on the ground that they are Indians and - unlike their non-Indian neighbors - are required to exhaust specifically Indian services before being served by state and local government.

I am skeptical about whether a federal commission would help at this point. It might delay the slow progress in this area by providing the excuse that "Let's not do anything until the federal commission makes its report". In my view, the track record of such commissions is pretty dismal, being niired in organizational politics and the difficulty of obtaining funding to do the job needed.

The greatest disincentive to increased tribal-state cooperation these days is the perception by the states that they have the tribes on the run politically, and the shocking but not surprising overreaching by many states in the gaming compacting process. It is reminiscent of the 19th century treaty negotiations that Indian tribes are forced to engage in "negotiations" with the states with U.S. Attorneys and federal marshals figuratively standing outside the door ready to close

them down if they don't agree to state demands. Creating such an inherently unfair and unworkable process is not my idea of the actions of a trustee, or of facilitating true tribal-state cooperation.

If Congress would give a clear indication to the states that it is truly committed to tribal self determination and not willing to give in to state pressure, tribes and states can get back to the business of negotiating their way around various obstacles as they have been for the past 30 years, and with very little federal involvement. The best single thing Congress could do would be to reduce the power of states in the gaming negotiations and restrict the power of states to impose taxes on Indian reservations, which would enable tribes to have an economic development policy and begin to solve their economic problems without undue reliance on gaming revenue.

Thank you for the opportunity to testify.