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Tribal Government Amendments to the Homeland Security Act and Indian Tribal Sovereignty

M. Maureen Murphy
Legislative Attorney
American Law Division

Summary

S. 477, the Tribal Government Amendments to the Homeland Security Act of 2002, has been introduced to "ensure that ... the Department of Homeland Security consults with Indian tribal governments ... and ... [that] Indian tribal governments participate fully in the protection of the homeland of the United States." An earlier version of this legislation, S. 578, in the 108th Congress raised concern in some quarters that it would overturn *Nevada v. Hicks*, 533 U.S. 353 (2001), or otherwise expand Indian tribal sovereignty. S. 477 differs from the earlier version both by including authority for direct funding, rather than indirect funding through individual states, of Indian tribal homeland security projects, and by eliminating the provisions in the earlier bill that appeared to endorse a view of tribal criminal and civil jurisdiction inconsistent with Supreme Court rulings on the subject of tribal jurisdiction. The operative provisions of the legislation remove tribal governments from the definition of "local governments," and distinguish them from both state governments and local governments. The legislation also appears to contain no direct statement specifically granting or delegating a particular law enforcement authority to tribes or overruling any named Supreme Court case. Related legislation includes § 131 of S. 536 and S. 1374 which contain provisions authorizing a border preparedness pilot program on Indian land. This report will be updated as legislative events warrant.

Background. In introducing S. 477, The Tribal Government Amendments to the Homeland Security Act of 2002, on March 1, 200,. Senator Dorgan noted that although they are not subdivisions of states, tribal governments are included in the Homeland Security Act (HSA) definition of "local government," and, thus, derive their funding for responding to threats of terrorism through state programs. He stated that S. 477 is designed to correct this situation: "to treat Indian tribes as the separate political entities that they are, consistent with the Federal policy of tribal self-governance and self-determination" and to "explicitly vest the Secretary of the Department of Homeland Security with the discretionary authority to provide direct funding to Indian tribal governments," rather than indirect funding, through the individual states. 151 *Cong. Rec.* S1868-1869. An earlier bill, S. 578 of the 108th Congress, with a similar purpose raised

concerns that it would overturn *Nevada v. Hicks*, 533 U.S. 353 (2001), or otherwise expand Indian tribal sovereignty.

Tribal Governmental Sovereignty and Inherent Jurisdictional Authority. Early decisions of the Supreme Court gave rise to an understanding that Indian tribes were both sovereign nations and dependent wards of the United States, their trustee. A series of cases in the Supreme Court during Chief Justice John Marshall's era, solidified the status of Indian tribes under the federal Constitution. The federal Constitution confers on Congress the "Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[1] and on the President and the Senate, the power to make treaties, including treaties with the Indian tribes.[2] In *Cherokee Nation v. Georgia*,[3] the Marshall Court ruled that the Cherokee Indian Nation was not a foreign state and referred to Indian tribes as "domestic dependent nations,"[4] entitled to the land that they occupied until the national government, which held title against their will, sought possession. He declared that in their relationship to the national government, tribes were in a "state of pupilage" resembling "a ward to his guardian."[5] The following year, in *Worcester v. Georgia*,[6] the Court ruled that state laws could not be applied to activity in Indian country where federal law, by virtue of the Supremacy Clause, ruled; federal power was paramount and plenary in Indian country. From these cases are derived certain principles that have guided court decisions in the field of federal Indian law:

> (1) by virtue of aboriginal political and territorial status, Indian Tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility.[7]

From the earliest days of the nation, federal power has been interpreted broadly and used to enact statutes to regulate trade and commerce, define and punish crimes, prohibit liquor traffic, and dispose of Indian lands and property.[8] The Supreme Court has upheld this broad exercise of power in Indian affairs and referred to it as "plenary,"[9] and has only recently recognized constitutional limits on it, when it acknowledged that the Fifth Amendment, for example, places limits on that power.[10]

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[1] U.S. Constitution, Art. I, sec. 8, cl. 3.6

[2] U.S. Constitution, Art. II, sec. 2, cl. 2.

[3] 30 U.S. (5 *Pet.*) 1 (1831).

[4] 30 U.S. (5 *Pet.*), at 17.

[5] 30 U.S. (5 *Pet.*) at 17.

[6] 31 U.S. (6 *Pet.)* 515 (1832).

[7] Conference of Western Attorneys General, *American Indian Law Deskbook* 3-4 (1998). (Footnotes omitted.)

[8] See *Felix S. Cohen's Handbook of Federal Indian Law* 212 (1982 ed.).

[9] *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

[10] In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Court ruled that even

(continued...)

The Supreme Court, in *Montana v. United States*, 450 U.S. 544 (1981), provided an authoritative statement of tribal sovereignty. The Court drew a distinction between tribal sovereign powers that have been retained and those that have been divested. Divestment may occur either explicitly by federal statute or implicitly as inconsistent with a tribe's status as subject to the sovereign authority of the United States. According to the Court, authority over internal tribal affairs and relations among tribal members falls into the category of powers that have been retained, while those directed outside the tribe are of the type that may have been divested.[11]

Tribal sovereignty has been diminished by treaties, statutes, and by the existence of the sovereignty of the United States. In the field of administration of justice, there has been considerable dilution of tribal authority. Prior to the treaties, tribes could exert civil and criminal jurisdiction to prescribe rules of conduct and maintain law and order. They could define and punish malfeasance and crime within their territory, a power that sometimes extended to non-members.[12] Today, although tribes have no criminal law jurisdiction over non-Indians, in accordance with the Supreme Court's ruling in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), they do retain criminal law power over their members[13] and exercise delegated power over non-member Indians under 1990 legislation, which has been upheld by the Supreme Court in *United States v. Lara*.[14] This criminal law power has been limited in at least three ways: (1) by federal statutes extending federal criminal law jurisdiction over Indian country; (2) by the Indian Civil Rights Act,[15] limiting tribal power to impose sentences or fines; and (3) by delegation of criminal law jurisdiction over Indians and reservations to states.

Much law enforcement authority over Indians on Indian reservations resides with the federal government. Federal prosecutors prosecute crimes under the various federal criminal statutes that apply only in "Indian country," broadly defined to include all land within the exterior limits of an Indian reservation, all dependent Indian communities, and

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[10] (...continued)
though Congress could dispose of Indian property or change it from one form to another, when it took land from a tribe for a public purpose, the Fifth Amendment required just compensation. Courts having to determine if legislation providing special treatment to Indians is within Congressional power look to whether the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This case upheld statutes providing preferential treatment for Indians in hiring for positions in the Bureau of Indian Affairs.

[11] *Montana v. United States*, 450 U.S. 544, 565 (footnotes omitted).

[12] The early treaties recognized the power of tribes to punish wnon-Indians within their territory. See Treaty of July 2, 1791, with the Cherokee Nation, 7 *Stat.* 40 "If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not as they please."

[13] *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[14] 541 U.S. 193 (2004). See CRS Report RL32361, *Tribal Sovereignty Over Nonmember Indians: United States v. Billy Jo Lara*, by Nathan Brooks.

[15] 25 U.S.C. § 1301, *et. seq.*

all Indian allotments.[16] Certain statutes define specific crimes in Indian country, such as gambling[17] or introducing liquor into Indian country in violation of state or tribal law.[18] Others assert federal criminal law jurisdiction broadly over offenses committed in "Indian country"; exempt offenses committed by Indians against one another's property, offenses committed by Indians already punished by their tribes, or offenses committed to tribal jurisdiction by treaty; and, essentially reassert jurisdiction over a list of major crimes when committed in Indian country by Indians against persons or property.[19]

Although Congress has not unequivocally transferred criminal law power over Indian lands to the states,[20] there are some specific statutes that delegate authority over individual lands or tribes or states. There is also a statute that authorizes any state to assume criminal law jurisdiction, provided tribes assent. Public Law 280[21] authorizes any state to assume any portion of jurisdiction over Indian offenses committed within Indian country within the state provided tribal consent is obtained. As originally enacted, the statute delegated criminal law jurisdiction to California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation) and offered other states the option of accepting jurisdiction or any portion thereof. Subsequent amendments added Alaska as a mandatory state, permitted retrocession of jurisdiction, and required tribal consent for assumption of jurisdiction.

S. 477 and Indian Tribal Sovereignty. Generally, most of the provisions in the bill do not effectuate substantive changes in the law because they merely add the word, "tribal," after "state" in the phrase "state and local governments" in contexts in which HSA has already included tribal governments by incorporating them within the definition of "local government."[22] The bill also renames HSA's Office of State and Local Government Coordination to "Office of State, Tribal, and Local Government Coordination." While these changes do not alter substantive law, they may have the effect of increasing or centralizing the attention that HSA provides to tribal government concerns. Similarly, there are other provisions that specifically mention the Indian Health Service and define Indian colleges and universities. This seems to be aimed at focusing

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[16] 18 U.S.C. § 1151.

[17] See *Felix S. Cohen's Handbook of Federal Indian Law* 212 (1982 ed.).

[18] 18 U.S.C. §§ 1154, 1155, 1156, and 1162.

[19] The General Crimes or Indian Country Crimes Act, 18 U.S.C. § 1152, makes federal criminal law applicable in Indian country "[e]xcept as otherwise provided by law." It exempts from its provisions "offenses committed by one Indian against the person or property of another Indian," and "any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." The Major Crimes Act, 18 U.S.C. § 1153, asserts federal criminal law jurisdiction over Indians committing any crime in a specified list of offenses against persons or property.

[20] Under the act of July 2, 1948, ch. 809, 60 *Stat.* 1224, 25 U.S.C. § 232, jurisdiction is given to New York State over offenses committed by or against Indians on Indian reservations within the state, with the exception of treaty guaranteed hunting and fishing rights.

[21] Act of August 15, 1953, ch. 505, 67 *Stat.* 588, 18 U.S.C. § 1162, 25 U.S. C. § 1321.

[22] 6 U.S.C. § 101(10).

Department of Health, Education, and Welfare attention, with respect to HSA efforts, on Indian health and education needs and resources within the context of HSA preparedness programs and research. At least one of the provisions of the bill would permit enforcement of tribal law within the context of federal laws.[23] Two provisions permit federal agents serving warrants authorized by the Foreign Intelligence Surveillance Court to consult with tribal as well as other law enforcement officials.[24]

Omission of Earlier Bill's Provisions Criticized for Expanding Tribal Sovereignty. Two provisions that were included in S. 578 of the 108th Congress that were criticized[25] as expanding tribal sovereignty are not included in S. 477. The first is a provision of section 10(b) of the earlier legislation that would include tribal law under a choice of law provision relating to federal causes of action for claims arising out of acts of terrorism when certain technologies have been deployed defensively giving rise to claims against the seller under section 863(a)(1) of the Homeland Security Act of 2002. That section appears to require application of tribal law to the "area under the jurisdiction of an Indian tribe," despite a variety of court decisions suggesting that the rules for application of tribal law are more complex than mere geography. One of these decisions is *Nevada v. Hicks*, 533 U.S. 353 (2001). In that case the Court ruled that a tribe's jurisdiction did not extend to a state law enforcement official executing a state search warrant on tribal land.

The second is section 13 of the earlier bill, "Congressional Affirmation and Declaration of Tribal Government Authorities." It makes a broad statement of tribal "inherent sovereign authority," qualified by the phrase "[f]or the purpose of the act." So broad is the statement that it would confer on tribes the authority exercised by the United States in "Indian country" under 18 U.S.C. § 1151. Without the qualifying prepositional phrase limiting the statement to "the purpose of the act," this section would appear to confer, reinstate, or delegate to tribes authority over nonmembers and non-Indian fee land that the courts have found to have been divested.[26] On the other hand, because that qualifying phase appears, the courts might have found the section to be limited because the only provision in the bill that appears to enhance tribal jurisdiction is that which related to choice of law in tort actions arising in connection with technology employed in defense against terrorist acts. The introductory statements, moreover, are distinguishable on the issue of jurisdiction, an aspect of tribal sovereignty. When Senator Inouye introduced S. 578, he stated that the bill would make it "clear that for purposes of homeland security, the United States recognizes the inherent authority of tribal governments to exercise jurisdiction [con]currently with the Federal government to assure

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[23] S. 477, § 12(a)(2), amending the Cyber Security Enhancement Act of 2002.

[24] S. 477, § 12(f).

[25] See Testimony of Thomas B. Heffelfinger, U. S. Attorney, State of Minnesota, on Behalf fo the Department of Justice, criticizing section 13 of S. 578. "Tribal Government Amendments to the Homeland Security Act of 2002," Hearings Before the Committee on Indian Affairs, United States Senate," 108th Cong., 2d Sess. 22, 23-25(2004).

[26] See, e.g., *Montana v. United States*, 450 U.S. 544 (1981) (civil regulatory jurisdiction); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (tribes have been divested of inherent criminal jurisdiction over non-members); *Duro v. Reina*,495 U.S. 676 (1990) (tribes have been divested of inherent criminal jurisdiction over non-member Indians).

that applicable criminal, civil and regulatory laws are enforced on tribal lands." 149 *Cong. Rec.* S3392 (daily ed. March 7, 2003).[27] In introducing S. 477, Senator Dorgan spoke in terms of tribal governments as serving "as the primary instruments of law enforcement and emergency response for more than fifty million acres of land that comprise Indian country," and of the bill, as treating "Indian tribes as the separate political entities that they are, consistent with the Federal policy of tribal self-government and self-determination." 151 *Cong. Rec.* S1868.

Funding. Under current law, HSA funding for tribal governments is indirect; it is transmitted through the individual states. S. 578 of the 108th Congress did not address that issue. S. 477 does. It authorizes, but does not mandate, the Secretary of Homeland Security to provide any funds available under the HSA *directly* to federally recognized Indian tribes.

Related Legislation: Border Preparedness Pilot Project. S. 536 and S. 1374 contain provisions authorizing a border preparedness pilot program on Indian lands and authorizing appropriations of $3.5 million annually for fiscal years 2006 through 2008. Section 131 of S. 536 would require the Homeland Security Department to establish a pilot program to include at least six tribal governments with land near the Mexican or Canadian border. The purposes of these pilot projects would include facilitating response to threats to border security, enhancing tribal authority as first responder to illegal immigrant border crossings, and providing assistance to tribes with respect to surveillance technologies, communication systems, and personnel training. Under this bill, funding would be subject to the provisions of the Indian Self-Determination and Educational Assistance Act (ISDEAA), 25 U.S.C. § 450 et seq. S. 1374, introduced on July 12, by Senator McCain, provides similar authority for a border preparedness pilot program on Indian lands without the nexus to ISDEAA. In addition S. 1374 would authorize the pilot program to provide technical assistance to tribes to plan and implement strategies to detect and prevent "any illegal entry by a person into the land of the tribes ... and ... the transportation of any illegal substance within or near the boundaries of the land of the tribes."

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[27] This statement appears to be referring to the fact that while states have limited criminal law jurisdiction over Indians in Indian country, tribes and the federal government share jurisdiction over Indian offenses. Within Indian country, federal and tribal courts have concurrent jurisdiction over: (1) certain crimes committed by an Indian against an Indian; (2) certain crimes committed by an Indian against a non-Indian; and (3) victimless crimes committed by an Indian. Conference of Western Attorneys General, *American Indian Law Deskbook* 99 (1998).