



Justice, Law Enforcement & Homeland Security

A Special Report Prepared by:

Democratic Policy Committee

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Jurisdictional issues in Indian Country are among the most intractable issues Congress encounters. Many tribal people feel that states should have no legal jurisdiction over them, and many non-Indians living within or near reservation boundaries are resentful of any exposure to tribal jurisdiction. Because of the “checkerboard” jurisdiction in many areas (non-Indian communities on state land within the exterior boundaries of a reservation), this situation has become increasingly complicated. In addition to jurisdictional complications, inadequate funding for tribal law enforcement is also a recurring issue.

Law Enforcement

Racial Profiling. Racial profiling has been persistent in and around Indian country for many years, and continues to undermine the relationship between law enforcement and the community, as well as the ability of law enforcement to do its job effectively. In fact, many Indians now question the motives for any police action taken against them.

For these reasons, the Senate has been working diligently to develop legislation that would balance the need for strong law enforcement with the importance of racial sensitivity. While separate legislation has not yet been introduced, Senate Democrats included language in the *Equal Rights and Equal Dignity for Americans Act of 2003* that expressed the Senate’s support for legislation to ban racial profiling.

Disparities in Sentencing. It is well documented that minorities often receive harsher sentences than their white counterparts, and this is certainly true for much of Indian country. There are a number of reasons for these disparities, including institutional racism, lack of access to legal services, and fear of engaging in the legal system. These issues are hard to address comprehensively in Congress because of the separation of powers between the judicial and legislative branches of our government. Yet, the problems remain, and Congress must work to address them in any way possible.

Prison Issues. Prison conditions are a growing concern nationwide, including within the Native American community. The Senate recently passed bipartisan legislation on the issue of prison rape—the *Prison Rape Elimination Act of 2003*. This statute provides for the analysis of the incidence and effects of prison rape in federal, state, and local institutions, as well as information, resources, recommendations, and funding to protect individuals from prison rape. Freedom to practice native religions in prison also continues to be of concern.

Because of the steadily growing Native American population, and general increases in both the frequency and severity of crimes on many reservations and within urban areas, these problems will only continue to escalate. In an effort to improve conditions in prisons that house Native American prisoners, a group of Democratic Senators wrote to the Senate Appropriations Committee earlier this year in support of adequate funding for the construction of tribal prison facilities.

Juvenile Justice. The Department of Justice (DOJ) issued a report that found many states out of compliance with existing federal guidelines for treatment of juvenile offenders, thus removing their federal grant eligibility. As a result, many state legislatures are passing laws that would bring them back into compliance.

Among other things, the federal statute requires that states address whether minority juveniles are confined at a greater rate than other youth. Preliminary information suggests that Indian juveniles are arrested and incarcerated at a disproportionately high rate compared to white youth. Various federal programs—for example, DOJ’s Juvenile Accountability Incentives Block Grant

(JAIBG) program—have been helpful in addressing problems in the juvenile justice system. However, the President continues to underfund or eliminate programs that would provide much-needed resources for prevention, rehabilitation, and after-school activities.

Drugs. The Administration has made international drug traffickers its highest priority in the war on drugs and, accordingly, has proposed requiring High Intensity Drug Trafficking Area (HIDTA) grant applicants to demonstrate a link to international drug trafficking in order to qualify for funding under the program. This could have a negative impact on anti-drug efforts in rural and tribal communities, since most drugs in these areas are produced in labs at home, such as methamphetamine, with no ties to international drug trafficking. Senate Democrats continue to oppose the Administration's proposal to require HIDTA regions to demonstrate a link to international drug trafficking in order to qualify for funding. (Senator Daschle has introduced the Rural Safety Act, which contains provisions to assist with methamphetamine prevention, treatment, and clean-up efforts.)

Rural Law Enforcement. Senate Democrats have supported a number of initiatives during the 108th Congress that would provide assistance to both state and federal law enforcement. Senator Daschle introduced the *Rural Safety Act*, which would authorize grants to rural communities to help them retain officers, purchase crime-fighting technology, improve access to 9-1-1 services, and establish juvenile justice programs. This legislation also contains provisions to improve training programs for rural law enforcement, and provides a set-aside for tribal communities.

Tribal Policing and Law Enforcement. Tribal law enforcement is in a state of crisis. The jurisdiction of a typical tribal police department covers a sparsely populated area the size of Delaware (or larger), and is patrolled by no more than three officers—and as few as one—at any given time. Some have extremely high per-capita crime rates. Officers are generally high school and law enforcement academy graduates; a slight majority are Native American. They are forced to be generalists, making it difficult to focus on the special needs of the populations they serve (such as alcohol abuse, substance abuse, and domestic violence). In addition, they face a complex web of jurisdictional issues; for example, they may be able to arrest someone on one side of the road, but not the other.

Data suggests that tribes have far fewer resources than non-tribal communities, while, at the same time, they experience a violent crime rate more than double the national average. Furthermore, tribal communities have a much smaller police-to-citizen ratio than communities with comparable policing needs. Complicating matters, many tribal communities have an antagonistic relationship with tribal law enforcement officials. Because of the lack of resources, many law enforcement officials are unable to perform their jobs effectively, strengthening the perception that the police are unmotivated or corrupt. In addition, evidence suggests that many young people who train for careers in law enforcement return less respectful of the local tribal customs and traditions, thus complicating—and even creating—problems that could easily be solved using traditional tribal dispute resolution techniques. As a result, many tribal leaders are advocating for the creation of their own culturally appropriate tribal law enforcement training centers.

Homeland Security. Last year, Senators Inouye and Campbell introduced their version of tribal provisions to the *Homeland Security Act* (S. 578). While most of the bill is non-controversial, there is one major controversial provision. Section 13 of S. 578 would legislatively reverse a U.S. Supreme Court decision (*Nevada v. Hicks*) that has had the effect of limiting or eliminating the sovereign power of Indian tribes to exercise civil, criminal and regulatory jurisdiction over non-tribal members on Indian lands for national security purposes. This provision has raised serious concerns both from non-member Indians and non-Indians who do not want another tribe to have jurisdiction over them, and from tribes who feel they currently do not have the resources to assume these responsibilities.

PATRIOT Act. The *PATRIOT Act* has been controversial as a result of the broad powers it provides the federal government for investigations and prosecutions related to terrorism. Since its passage, Senate Democrats have joined a number of advocacy organizations to question certain provisions of the Act and implementation of the Act by Attorney General Ashcroft. Several bills have been introduced in both the House and the Senate to scale back provisions affecting civil liberties and personal privacy. However, in a speech last fall, President Bush reiterated the Administration's intention to push legislation that would further expand the government's authority under the *PATRIOT Act*, including: 1) authorizing the death penalty for certain additional terrorist acts; 2) allowing a judge to deny bail in some terrorist cases; and 3) allowing DOJ to issue administrative subpoenas (DOJ would not have to go to a judge first).

Domestic and Family Violence. DOJ reports that American Indians experience higher rates of domestic violence and related crimes than other racial groups. However, because of the stigma associated with the issue, and the lack of understanding among law enforcement and other parts of the legal system, these crimes largely go unreported and un-prosecuted.

Senators Daschle, Leahy, and Biden have worked in recent years to help address the issue of family violence by supporting passage of the *Violence Against Women Act*, and providing funding for domestic violence shelters, child advocacy centers, and visitation centers. The *Violence Against Women Act* is scheduled to be reauthorized next year, and the reauthorization language will likely include an expanded tribal role, especially with respect to child advocacy.

Child Sexual Assault. From about 1870 to 1970, the federal government removed Indian children from their homes and placed them in boarding schools, often hundreds of miles away. This was done to purge them of their native language and culture, and to “civilize” them. A popular credo of the time was, “Kill the Indian, save the man.” Tragically, many of the teachers and staff attracted to these remote schools were pedophiles. While attending these boarding schools, many Indian children were sexually abused by their teachers and other school staff.

As a result, many victims of this sexual abuse suffered from mental disorders and alcoholism. In addition, some victims became sexual predators themselves, passing the problem from one generation to the next, cycles which have been difficult to break.

To deal with part of the individual, collective, and intergenerational damage felt by victims and their families, there is a nationwide campaign to seek acknowledgement by and restitution from the individuals and institutions responsible for the assaults. Hundreds of lawsuits have been filed. Tribal people and their supporters in Congress are working to address the needs of victims and stop these cycles of abuse. Next year, Congress will consider the reauthorization of the *Indian Child Protection and Family Violence Prevention Act*.

Legal

Supreme Court to Review White Mountain Apache and Navajo Nation. At the request of DOJ, the Supreme Court has granted review of the *White Mountain Apache* and the *Navajo Nation* cases and, in an unusual decision, has agreed to join the cases for back-to-back arguments when the Court begins its new term in October. DOJ has briefed the Supreme Court on these issues, arguing that large Indian trust claims could endanger the U.S. Treasury, and asked for rulings limiting the right of Indian Tribes to sue on such breach of trust cases to circumstances where Congress intended to create a “private right of action” to sue the United States for damages. In recent years, the Supreme Court has restricted such “private rights of action,” making it difficult for individual citizens to sue the federal government. DOJ wants to use this doctrine to limit Indian trust cases.

In addition, DOJ has emphasized in its briefs that when the United States has different duties at issue, such as providing for administrative office space at the White Mountain Apache reservation, those must be taken into account in determining the appropriate standard of conduct for the federal government in a claim of breach of trust due to injury to the trust assets. In other words, where the federal government “wears more than one hat,” Indian tribes cannot expect the undivided loyalty of a private trustee.

White Mountain Apache v. United States (2001). In 1960, the federal government turned over Fort Apache, a 7,500-acre former military post, in trust to the tribe, “subject to the right of the Secretary of the Interior to continue to use” the property for administrative or school buildings. White Mountain Apache Tribe has sued the United States because the Secretary has continued to use many of the buildings for BIA purposes and they have fallen into disrepair. About \$14 million was at stake. However, in the spring of 2003, the Supreme Court ruled in favor of the White Mountain Apache, thereby creating a precedent allowing tribes to sue the federal government for money damages arising out of violations of its trust obligations.

Navajo Nation v. United States (2001). In this case, the Navajo Nation brought suit against the Secretary of the Interior for breach of fiduciary duties owed to the Nation with respect to leases of trust land for coal mining. The Nation alleges that the Department of the Interior concealed a favorable BIA ruling on coal leases, resulting in the negotiation of a lower royalty rate. Over \$600 million was at stake; however, the Supreme Court ruled in favor of the U.S.

Trust Responsibility: Cobell Litigation. In *Cobell v. Norton*, individual Indian money (IIM) account holders have sued the Secretary of the Interior for an accounting of the IIM trust funds held by the Secretary, and the Department of the Interior has made clear that it is unable to conduct such an accounting. This case has caused Justice and Interior much concern, as evidenced by the Secretary of the Interior's proposed controversial reorganization plan and Administration efforts to add a rider to the *Fiscal Year 2003* and *Fiscal Year 2004 Interior Appropriations bills* to cut off IIM claims that arose before 1985. However, on September 25, 2003, a U.S. District Court ruled in favor of the plaintiffs, and directed Interior to conduct a full historical accounting of specific accounts.

Unfortunately, the Bush Administration and the House Republican leadership successfully added a controversial rider to the *Fiscal Year 2004 Interior Appropriations bill*. This provision essentially halted the *Cobell* case and directed the Court how to construe existing law (a violation of the constitutional separation of powers).

Legal Services. Concerns have frequently been raised about the limited, or often nonexistent, access to free or reduced-cost legal services for Native Americans. The Legal Services Corporation (LSC) provides high-quality legal assistance for persons who would otherwise be unable to afford legal counsel. LSC's programs serve clients with cases concerning housing, family law, income maintenance, consumer issues, and employment. LSC maintains an Indian Legal Services program.

Unfortunately, Congressional Republicans' severely cut federal investments in the LSC in the 1990s. As a result, in recent years, nearly half of all people who applied for assistance from local LSC programs have been turned away. In each of the past two Congresses, Senator Daschle has included a provision in his Democratic leadership bill on civil rights that addresses this shortfall and would restore the funding for LSC to its pre-1994 level of \$400 million.

Judicial

Judicial Nominations. The President's nominations to the federal bench increasingly affect Indian tribes and organizations. Federal courts have jurisdiction over issues such as the *Major Crimes Act*, land-into-trust, environmental issues, and sacred sites. The recent debate over William G. Meyers III, a Bush nominee for the Ninth Circuit Court of Appeals, was strongly opposed by national Indian organizations that, previously, had never issued formal positions on judicial nominations. This trend will likely continue, particularly if a vacancy opens on the Supreme Court.

Tribal Courts. To be effective in combating the increase in violent crime, law enforcement improvements in Indian country must be combined with equally important prevention, suppression, and intervention programs. Offenders may be arrested, but tribes frequently lack adequate court systems to prosecute them in a timely manner. In *Fiscal Years 1999 and 2000*, Congress funded a Tribal Courts Project administered by the Office of Justice Programs' Bureau of Justice Assistance, which has provided grants for the development and enhancement of tribal courts.

Strong tribal court systems can respond rapidly to crime with graduated sanctions, and can prevent the escalation of minor criminal activity to violent crime, which ultimately becomes the responsibility of the federal criminal justice system. Federal Judge William C. Canby, Ninth Circuit Court of Appeals recognized this fact, stating: "We in the federal and state judiciary could not do without [the tribal courts]...A disappearance of the tribal court system would be a major disaster, not just for the tribes and their courts, but for our whole national system of civil and criminal justice." Without adequate funding, the current backlog in tribal court dockets will continue to rise.