The Potential Passage of Proposed Senate Bill 578 and Its Implication on Hicks v. Nevada and Twenty Years of Supreme Court Jurisprudence

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In *Nevada v. Hicks,* the United States Supreme Court held that state officers may enter the Fallone Paiute-Shoshone reservation without tribal permission to investigate or prosecute an off-reservation violation of state law. The Court held that tribal courts do not have jurisdiction to hear civil rights cases under federal law, specifically 42 U.S.C. § 1983 claims, because they are not "courts of 'general jurisdiction.'" In so holding, the Court found in concert with over twenty years of Supreme Court jurisprudence. Limits were imposed on both tribal judicial and executive powers, while at the same time state jurisdiction was expanding within Indian country.

In response to *Hicks,* Sen. Daniel Inouye (D.-Haw.) introduced a bill on March 7, 2003, known as the Tribal Government Amendments to the Homeland Security Act of 2002 (Senate Bill 578). Senate Bill 578 seeks to amend the Homeland Security Act of 2002 to include Indian tribes among the entities

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2. *Id.* at 374.
3. 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.")
4. *Hicks,* 533 U.S. at 367-68.
consulted regarding activities carried out by the Secretary of Homeland Security. This bill or any similar version of it, if passed, would effectively reverse Hicks and numerous other Supreme Court decisions over the past twenty years that govern the extent of tribal sovereignty, tribal jurisdiction over non-members, authority of taxation, and the power of tribal courts.

This note contains five parts. Part II addresses the background regarding the history of tribal sovereignty and highlights landmark decisions leading up to Nevada v. Hicks. Subpart B in Part II provides an explanation of the proposed Tribal Government Amendments to the Homeland Security Act of 2002. Part III provides an overview of the facts and procedural history of Nevada v. Hicks in Subpart A and summarizes the majority's opinion in Subpart B. Subpart A of Part IV offers analysis and discussion that demonstrates that Senate Bill 578 would effectively reverse the decision in Nevada v. Hicks and reverse over twenty years of Supreme Court jurisprudence. Subpart B of Part IV sets forth Senator Inouye's reasons for supporting Senate Bill 578. This note concludes in Part V.

II. Indian Sovereignty: Setting the Stage for Hicks

A. Indian Sovereignty Case Law

Three Supreme Court cases known as the Marshall Trilogy continue to provide the foundation for Federal Indian law and issues of tribal jurisdiction. In Johnson v. McIntosh, the issue was whether title issued by Indian nations to private citizens could be recognized by the United States. The Court adopted the principle of discovery and held that the nation that discovered the land had

7. Id.
8. Senate Bill 578 was sent to Committee on July 3, 2003. There is no indication that this bill is still pending. However, lobbying and special interest groups anticipate that a revision or modification of this bill will be reintroduced in a later congressional session. Therefore, Senate Bill 578 or any subsequent revision of this bill would reverse Hicks and twenty years of Supreme Court decisions.
11. Id.
12. 21 U.S. (8 Wheat.) 543 (1823).
13. Id. at 571-72.
the sole right of acquiring it from the native people.14 Therefore, the discovering nation had the sole right to purchase that land to create settlements for white settlers.15 Consequently, the Court held that Indian nations had no power to transfer or sell lands to anyone other than the United States government.16 This significantly limited tribal sovereignty by restricting the Indians’ right to sell land despite the fact they were considered to be legal occupants of the land.17

*Cherokee Nation v. Georgia*18 is the second case in the Marshall Trilogy. In *Cherokee Nation*, the state of Georgia attempted to execute and enforce laws within Cherokee territory resulting in the Cherokees seeking an injunction to prohibit this action by Georgia.19 Although the Cherokee Nation argued that it was a foreign state under Article III of the United States Constitution, the Court held that it was not a foreign state20 but instead was a “domestic dependent nation.”21 In identifying the Cherokee Nation as a “domestic dependent nation,” the Court noted that “[t]heir relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the president as their great father.”22 As a result of the decision in *Cherokee Nation*, tribes were considered to be independent in the sense that they could make laws to be executed within their own boundaries, while at the same time being subordinated to the federal government.

In *Worcester v. Georgia*23 the Supreme Court considered whether a Georgia statute that prohibited white people from living in the Cherokee Nation was consistent with the United States Constitution.24 Finding that the Georgia state law was “void,”25 Chief Justice Marshall noted that:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia

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14. *Id.* at 573.
15. *Id.*
16. *Id.* at 574.
17. *Id.*
19. *Id.* at 15.
20. *Id.* at 20.
21. *Id.* at 17.
22. *Id.*
24. *Id.* at 541.
25. *Id.* at 561.
have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.26

Ultimately, Chief Justice Marshall and the Court held that state laws have no effect inside Indian reservation borders.27

The concepts of limiting tribal sovereignty set forth in the Marshall Trilogy echo to this day. In 1959 the Supreme Court held in Williams v. Lee,28 that the tribal court has exclusive jurisdiction when an Indian is a party to an action if it takes place on a reservation.29 In Williams, a non-Indian, Lee, owned a store located within the Najavo Indian Reservation and sold goods to the appellant and his wife on credit.30 When Williams and his wife failed to pay, Lee initiated suit in Arizona state court to collect this debt.31 Williams attempted to dismiss the claims on the basis that the Arizona state court had no jurisdiction because the tribal court alone had jurisdiction.32 The Court found that Indians’ rights to govern themselves would be infringed upon if state jurisdiction was allowed, and held that the tribal court, and not the state court, had jurisdiction over matters taking place on reservations involving Indians.33 In concluding, the Court claimed that “[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations.”34

In Fisher v. District Court,35 the Court extended the holding in Williams. In Fisher, the issue was whether a state court had jurisdiction over adoption proceedings that involved only tribal members.36 Holding that the state court did not have jurisdiction over adoption proceedings involving only tribal members, the Court noted that “[s]tate-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the

26. Id.
27. Id.
29. Id. at 220.
30. Id. 217-18.
31. Id.
32. Id. at 218.
33. Id. at 223.
34. Id.
36. Id. at 383.
reservation among reservation Indians to a forum other than the one they have established for themselves.”

From Worcester until 1978, the Court did not place further significant limitations on tribal court jurisdiction. However, in Oliphant v. Suquamish Indian Tribe, the Court considered whether tribal courts could exercise criminal jurisdiction over non-members within the reservation. The Court placed further limitations on tribal sovereignty by holding that tribes lack jurisdiction and authority to prosecute non-members “absent affirmative delegation of such power by Congress.” In reaching this conclusion, the Court stated that “[w]hile Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

Only months later, in United States v. Wheeler, the Supreme Court considered the issue of whether double jeopardy precluded the prosecution of an Indian in federal court when he had previously been convicted of a similar offense in tribal court. The Court found that although tribes have given up some aspects of their sovereignty, they still retained power and authority over their members and their territory. The Court noted that the tribe is not an “arm of the Federal Government,” and therefore is its own sovereign when it prosecutes one of its own members for violation of tribal law. The Court proclaimed that “[s]ince tribal and federal prosecutions are brought by separate sovereigns, they are not ‘for the same offence,’ and the Double Jeopardy Clause thus does not bar one when the other has occurred.

Two years later in Washington v. Confederated Tribes of the Colville Indian Reservation, the Court continued to take away tribal sovereignty by allowing additional state regulation in tribal matters. In Washington, the Court held that both the tribes and the state had an interest in the taxation of cigarettes and other

37. Id. at 387-88.
39. Id. at 195.
40. Id. at 208.
41. Id. at 204.
42. 435 U.S. 313 (1978).
43. Id. at 314.
44. Id. at 323.
45. Id. at 329.
46. Id.
47. Id. at 329-30.
tobacco products and the revenue that it would provide.49 This state tax on certain items within the reservation would not be burdensome and would not impede on the tribes’ right to create laws and be governed by them.50

One year after Washington, the seminal case of Montana v. United States51 began eliminating Indian tribes’ sovereignty over relations with non-members. The Crow Indians had a resolution that prohibited hunting and fishing within the reservation by non-members.52 The Court found that the tribes could regulate hunting and fishing by non-members on land owned by the tribe or held in trust for it and could additionally prohibit non-member entry onto their land.53 However, tribes did not have the power to regulate hunting and fishing on land within the reservation that was owned by non-members.54 The general rule for determining whether a tribe has jurisdiction is that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”55

The Court also set forth two exceptions to this general rule. The Court stated that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands”56 when (1) non-members “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”57 or (2) non-members’ “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”58 The Court applied this test to the facts and found that non-Indian hunting and fishing on non-Indian fee land within Indian country had no clear relation to tribal self government or internal relations. Consequently, tribes were not empowered to regulate hunting and fishing on land located within their reservation owned by non-Indians.59

49. Id. at 156-57.
50. Id. at 157.
52. Id. at 549.
53. Id. at 557.
54. Id. at 566.
55. Id. at 564.
56. Id. at 565.
57. Id.
58. Id. at 566.
59. Id.
The Court continued to decrease tribal sovereignty over nonmembers in *Brendale v. Confederated Tribes & Bands of Yakima Nation.* 60 The Court considered whether Yakima County or the Yakima Nation had the authority to zone land located within the Yakima Reservation owned in fee by nonmembers. 61 The Court determined that tribes do not have the authority to zone lands located within the reservation owned in fee by nonmembers unless there is a threat to the tribe’s security, integrity, health or well-being. 62

Ten years later, the Court continued to restrict tribal sovereignty over nonmembers when it reaffirmed previous case law and found that tribal courts do not have civil jurisdiction to decide claims that occurred on state highways which run through a tribe’s reservation. 63 The Court made a distinction between Indian land and Indian country. 64 “Indian country” as defined in 18 U.S.C. § 1151 includes all lands within the exterior boundaries of the reservation, regardless of whether the lands are privately owned or public highways cross the reservations. 65

This spectrum of cases demonstrates that the Supreme Court has eroded and minimized the concept of tribal sovereignty that the Marshall Trilogy set forth in the early nineteenth century. At the time *Hicks* was decided in 2001, tribal courts no longer had criminal jurisdiction over non-members 66 or civil jurisdiction over the activities of non-members occurring within Indian country on land not owned by the tribe. 67

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60. 492 U.S. 408 (1989).
61. *Id.* at 414.
62. *Id.* at 430-31.
64. *Id.* at 454 n.9.
65. 18 U.S.C. § 1151 (2000) (“Except as otherwise provided in sections 1154 and 1156 of this title [18 U.S.C. §§ 1154, 1156], the term "Indian country", as used in this chapter [18 U.S.C. §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”)
B. Tribal Government Amendments to the Homeland Security Act of 2002

Sen. Daniel Inouye (D.-Haw.) along with three co-sponsors68 introduced Senate Bill 578 on March 7, 2003, known as the Tribal Government Amendments to the Homeland Security Act of 2002.69 This bill was referred to the Committee on Governmental Affairs.70 However, it was never acted upon and was never reported out of committee.71 Aides of Senator Inouye anticipate that this amendment "might be re-introduced — possibly with some changes in language — as part of a package of amendments to the [Homeland Security Act]."72

The official summary of Senate Bill 578, as introduced to the Senate, provides that this bill amends the Homeland Security Act of 2002 to:

[I]nclude the participation of Indian tribes with respect to activities of the Secretary of Homeland Security, including information analysis and infrastructure protection, science and technology, the Directorate of Border and Transportation Security, emergency preparedness and response, treatment of charitable trusts for members of the Armed Forces and other governmental organizations, coordination with non-Federal entities, and training of law enforcement officers by the Bureau of Alcohol, Tobacco, and Firearms of the Department of Justice.73 Essentially, the goal of the (act) is to restore full tribal authority over Indian Country by: (1) declaring Indian Country as tribal jurisdiction; (2) declaring complete civil and criminal jurisdiction over all persons and activities occurring in Indian Country; and (3) declaring regulatory jurisdiction over taxation, environment, land use, water resources, hunting and fishing, business activities, state schools, and all fee land in Indian Country.74

69. Id.
70. Id.
72. Id. (citing Patricia Zell, a legal staffer for Sen. Inouye).
In a speech given to the National Tribal Summit on Homeland Security, Sen. Ben Nighthorse Campbell, a cosponsor of Senate Bill 578, stated that the purpose of Senate Bill 578 is "to ensure that Indian tribes are afforded full participation in the national effort to combat terrorism and protect our people and our Homeland." He explained that Senate Bill 578 would "make sure that there are no gaps in our security framework along our borders or inside our nation because of jurisdictional differences between the Federal, state, tribal and local governments."

The current Homeland Security Act of 2002 states that "tribal governments are included in the definition of 'local governments.'" However, the proposed amendments in Senate Bill 578 "would remove tribal governments from the definition of 'local governments'" and would instead insert tribal governments where relevant. This change to the current Homeland Security Act reflects the authors' belief that federal law should continue to distinguish "between local governments that are political subdivisions of the States and tribal governments." Ultimately, Senate Bill 578 ensures "that for purposes of homeland security, the United States recognizes the inherent authority of tribal governments to exercise jurisdiction currently with the Federal government to assure that applicable criminal, civil and regulatory laws are enforced on tribal lands."

III. Nevada v. Hicks

A. Facts and Procedural History

Floyd Hicks was a member of Fallon Paiute-Shoshone Tribe of Western Nevada who lived on the reservation. He was suspected of having committed a misdemeanor under Nevada state law — killing a protected California big horn

B. Procedural History

Hicks contended that his conviction was invalid because it was obtained in violation of his Fifth Amendment right to a grand jury indictment. The Supreme Court of Nevada disagreed, holding that Hicks's tribal status did not entitle him to a federal grand jury. The Court of Appeals affirmed, and the Supreme Court granted certiorari to consider the issue of tribal grand jury rights.

C. Analysis

The Court of Appeals acknowledged that tribal governments are political subdivisions of the States, but noted that Congress has the power to create a federal grand jury system for Indian tribes. The Court of Appeals concluded that Congress had not done so, and that therefore Hicks was not entitled to a federal grand jury.

D. Conclusion

The Supreme Court agreed, dismissing Hicks's argument as a matter of federalism. The Court noted that Congress has the power to create a federal grand jury system for Indian tribes, but that it had not done so. Therefore, Hicks was not entitled to a federal grand jury.


76. Id.

77. Id.

78. Id.

79. Id.

80. Id.

81. Id.

sheep off the reservation. Upon hearing rumors that Hicks had killed a big horn sheep, a Nevada state game warden obtained a search warrant from Nevada state court. However, this warrant was subject to tribal court approval. The state court judge found that tribal court authorization was necessary due to the fact that the state court had no jurisdiction on the Fallon Paiute-Shoshone reservation.

A search warrant, therefore, was obtained from the tribal court. The state game warden and a state police officer subsequently searched Hicks' premises and took possession of a mounted big horn sheep head. However, this sheep head was an unprotected species and consequently was returned to Hicks.

One year later, a tribal officer informed the game warden that Hicks had two mounted big horn sheep heads in his home. Another search warrant was sought from the state court along with approval from the tribal court. The second search consisted of tribal police officers and state game wardens. As in the first search, the mounted big horn sheep heads were taken into possession by officials but later returned to Hicks' because these too were found to be of an unprotected species. Hicks subsequently sued the tribal judge, the state wardens, the tribal officers, and the State of Nevada in tribal court.

Many of Hicks' claims were voluntarily dismissed but the claims against the state game wardens in their individual capacities as defendants remained. The tribal court held that it had jurisdiction over the claims and this was later affirmed by the Tribal Appeals Court. However, the State and the game wardens sought declaratory judgment from the federal district court on the basis that the tribal court lacked jurisdiction.

83. Id. at 356.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 357.
96. Id.
97. Id.
Hicks filed for summary judgment on the issue of jurisdiction and the court subsequently granted summary judgment in favor of Hicks. The Ninth Circuit affirmed on the basis that the tribal court had jurisdiction over the claims because Hicks resided on tribe-owned land within the tribe’s reservation. The State and game wardens appealed to the U.S. Supreme Court where the Court ultimately held that tribal courts have no jurisdiction for claims arising from state officials’ conduct in executing process (warrants) because it is not crucial to tribal self government or administration of internal control.

B. Majority’s Analysis

Nevada v. Hicks was decided by a unanimous vote. Justice Scalia wrote the majority opinion, joined by four other justices, while four separate concurrences were written by Justices Souter, Ginsburg, O’Connor, and Stevens, respectively. In Hicks, the Supreme Court held that the Fallon Paiute-Shoshone Tribal Court had no subject matter jurisdiction over civil claims against state game wardens’ actions. Furthermore, the Court held that the tribal court also had no jurisdiction to adjudicate claims arising under 42 U.S.C. § 1983.

The Court first considered the question of whether tribal courts had jurisdiction over the state game wardens’ tortious conduct on tribal owned land. The Court held that “tribal authority to regulate state officers in executing process relating to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations.” The Court applied Montana and Oliphant in reaching this conclusion. It should be noted that Oliphant was a criminal case whereas Montana was a civil case. In Montana, the Court applied Oliphant and held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” Moreover, the Montana Court allowed an

98. Id.
99. Id.
100. Id. at 364-65.
101. Id. at 354.
102. Id.
103. Id. at 374.
104. Id. at 369.
105. Id. at 364.
106. Id. at 359-60.
107. Id. at 359 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)) (internal quotations omitted).
exception to this rule when nonmembers "enter consensual relationships with the tribe or its members through [such things as] contracts."  

The Court considered who owned the land where the conduct of the state game wardens occurred in deciding whether tribal regulation over the state game wardens' conduct was necessary to protect the tribe's self-government or internal control. Hicks' lawyer argued that "the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry." The Court rejected this argument but instead found that "ownership status... is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal government or control internal relations.'" However, the majority pointed out that in other instances land ownership alone may be significant enough to be dispositive. After determining that ownership alone could not allow regulatory jurisdiction over non-members, the Court applied a balancing test and stated that "the State's interest in execution of process is considerable enough to outweigh the tribal interest in self-government even when it relates to Indian-fee lands." The Court also considered "whether regulatory jurisdiction over state officers... is 'necessary to protect a tribe's self-government or to control internal relations,' and if not, whether such regulatory jurisdiction has been congressionally conferred." After examining a number of previous cases, the Court noted that "[o]ur cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border." Although the Court conceded that precedence did not clearly indicate whether state officials have "the corollary right to enter a reservation (including Indian fee lands) for enforcement purposes," they did explain that precedence tended to suggest that state officials did have that right. Ultimately, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government on internal relations." Furthermore, the Court found that "[t]he State's interest in execution of process is considerable,

108. Id. (quoting Montana, 450 U.S. at 565) (internal quotations omitted).
109. Id. at 359.
110. Id. at 360 (emphasis added) (quoting Montana, 450 U.S. at 564).
111. Id. at 370.
112. Id. (internal quotations omitted).
113. Id. at 360 (quoting Montana, 450 U.S. at 564).
114. Id. at 361.
115. Id. at 363.
116. Id. at 364.
and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal laws impairs state government.\textsuperscript{117}

In considering whether Congress has conferred regulatory jurisdiction, the Court pointed to 25 U.S.C. § 2806 which affirms that “law enforcement, investigative, or judicial authority of any ... State, or political subdivision or agency thereof” is altered by provisions of that statute.\textsuperscript{118} The Court therefore concluded that “no statutory scheme prescribes or even remotely suggests, that state officers cannot enter a reservation ... to investigate or prosecute violations of state law occurring off the reservation.”\textsuperscript{119}

The second issue the Court considered was whether a tribal court had jurisdiction to hear 42 U.S.C § 1983 claims.\textsuperscript{120} Hicks argued that tribal courts were courts of general jurisdiction.\textsuperscript{121} The Court rejected this argument and instead found that relating to non-members, “a tribe’s inherent adjudicative jurisdiction ... is at most only as broad as its legislative jurisdiction.”\textsuperscript{122} Tribal courts have been given some adjudicative authority to hear federal law claims by Congress, but § 1983 claims are not a part of this adjudicative authority.\textsuperscript{123} Additionally, tribal courts lack jurisdiction over § 1983 claims because 28 U.S.C. § 1441\textsuperscript{124} does not provide for removal from a tribal court to a federal court.\textsuperscript{125} The allowance of jurisdiction to tribal courts over § 1983 claims would result in “serious anomalies” because defendants could not remove the case to federal court if they were hauled into tribal court.\textsuperscript{126} The Court found that “the simpler way to avoid the removal problem” was to not allow tribal courts jurisdiction over § 1983 claims.\textsuperscript{127} Therefore, the Court held that tribal courts cannot adjudicate § 1983 claims since they are not courts of general jurisdiction and do not have the ability to remove cases to a federal forum.\textsuperscript{128}

\textsuperscript{117} Id.
\textsuperscript{118} Id. at 366 (quoting 28 U.S.C. § 2806 (2000)).
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 367.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 367-68.
\textsuperscript{124} This is a removal statute that allows the defendant to have the case heard in federal court even when the plaintiff originally filed the suit in state court.
\textsuperscript{125} Nevada v. Hicks, 533 U.S. 353, 368 (2001).
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 369.
\textsuperscript{128} Id.
IV. Analysis

A. Senate Bill 578 Would Effectively Reverse Hicks and Twenty Years of Supreme Court Jurisprudence

Although the drafters and proponents of the Tribal Government Amendments to the Homeland Security Act of 2002 (Senate Bill 578) insist that this bill is essential to the safety and security of the nation, Senate Bill 578, in its current form, would effectively reverse Hicks and twenty years of Supreme Court jurisprudence, taking away the constitutional rights and personal protections of many non-tribal members. In order to protect the constitutional rights of millions of citizens and to maintain longstanding judicial decisions from the United States Supreme Court, Senate Bill 578, or any similar measure must not be allowed to become law.

Section 13129 of Senate Bill 578 is one of the most controversial aspects of the bill. In Section 13(a), the Amendment proposes that Congress "declare[] that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil, and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government." This subsection alone would reverse a number of Supreme Court decisions including Montana, Strate, Oliphant, and Hicks.130 This subsection alone would reverse a number of Supreme Court decisions including Montana, Strate, Oliphant, and Hicks.130 In

129. S. 578, 108th Cong., infra note 6. The relevant portion (Section 13) requires:
   (a) IN GENERAL — For the purpose of this Act, Congress affirms and declares that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil, and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government, except as expressly and clearly limited by —
      (1) a treaty between the United States and an Indian tribe; or
      (2) an Act of Congress.
   (b) SCOPE — The authority of an Indian tribal government described in subsection (a) shall —
      (1) be concurrent with the authority of the United States; and
      (2) extend to —
         (A) all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government; and
         (B) any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government, to ensure protection of due process rights.

Id. 130. Id. (emphasis added).

131. Senate Bill 578 Will Strip One-half Million U.S. Citizens of Their Constitutional Protections, at http://www.citizensalliance.org/The%20Hicks%20Fix/S.578/S.578%20Detailed
each of these cases, the Supreme Court held that Indian tribes do not have jurisdiction over non-members and the land of non-members. Based on the plain interpretation of section 13(a), this bill would provide tribes with “inherent sovereign authority” and thus reverse the holdings in the aforementioned cases.

The effect of this provision is to give tribes civil, criminal, and regulatory jurisdiction over any citizen of the United States who is within the jurisdiction of the Indian tribal court.

Furthermore, sections 13(b)(1) and 13(b)(2)(A) state that the authority of an Indian tribal government shall “be concurrent with the authority of the United States” and “extend to all places and persons within the Indian country.” As previously mentioned, “Indian country” includes all lands within the exterior boundaries of the reservation, regardless of whether the lands are privately owned or are public highways crossing reservations. In effect, this provision would make a person subject to tribal jurisdiction because of his presence in Indian country, whether he lives within Indian country or is merely passing through. If this bill were to be passed, “non-Indians who commit crimes within reservation boundaries will be prosecuted in tribal, instead of state or federal courts.” Based on a 1990 Census, almost 400,000 American citizens live on reservations but are not members of any Indian tribe. Therefore, these 400,000 American citizens living on Indian reservations would be subject to tribal jurisdiction.

The jurisdiction of tribal governments over non-members would actually extend to “any person, activity, or event having sufficient contacts with the land,
or with a member of the Indian government." Therefore, non-Indians who neither live within Indian country nor travel within it would also be subject to tribal court jurisdiction for merely having "sufficient contacts" with the tribe. This provides too much power and jurisdiction to tribal governments and tribal courts. Therefore, "tribal governments would apparently replace or control state and local governments in reservations and other areas of Indian country." 38

Due to the nature of tribal governments, these 400,000 American citizens living on reservations and the unknown number who merely have "sufficient contacts" with the Indian tribes would be subject to the laws of the tribal government, yet would not be given the right to participate in the tribal government. This is due to the unique nature of tribal governments. A vast number of Indian tribes exist throughout the United States. Although some of these tribes are quite sophisticated and have legal systems similar to federal, state, and local governments, many others are much less sophisticated. Unfortunately, what works for some tribal governments will not work for others due to their differences in membership, money, and their overall philosophy in government. Therefore, it is not acceptable for these tribal governments that vary so much in sophistication to be given authority over nonmembers, who have no right to participate in tribal governance.

Many tribal governments are exclusive about membership within the tribe in order to preserve their tribal identity, traditions, and culture. 39 A number of characteristics of some tribal governments are not conducive to allowing tribal governments to exercise jurisdiction over non-members. 40 First, in many tribes, membership is by blood only and therefore no non-member without the required heritage could ever become a member. 41 Second, few of the tribal governments publish their court decisions and statutes and consequently many citizens are unaware of the laws of the particular tribal government. 42 Third, many of the tribes are small and consequently do not have the financial or human resources to effectively administer the plenary system of laws as the state and federal governments are able to do. 43 Fourth, many tribal governments can intentionally discriminate legally against non-members in order to preserve their

138. Id.
139. Darling, supra note 136.
140. Id.
141. Id.
142. Id.
143. Id.
traditions and culture.\textsuperscript{144} Last, many tribes do not operate in an “open” form of government.\textsuperscript{145} For those tribal governments that adhere to a “closed” government, tribal meetings are not open to non-members (or even to members) and finances remain hidden from members and non-members alike.\textsuperscript{146} Based on these exclusive and clandestine characteristics of some tribal governments, tribal governments should not be given the sovereignty to retain jurisdiction over non-members who happen to be traveling or living within the confines of the reservation.

As a result of the structure and implementation of many tribal governments, nonmembers would lose fundamental rights afforded by the Bill of Rights.\textsuperscript{147} Additionally, non-members would be deprived of equal protection of the laws as guaranteed to United States citizens by the Fifth and Fourteenth Amendments.\textsuperscript{148}

B. Insufficient Justification of Senate Bill 578 By Sen. Daniel Inouye (D.-Haw.) and Other Proponents

As justification for Senate Bill 578, Senator Inouye claimed in an interview with \textit{The Las Vegas Review-Journal} that this senate bill legislation “won’t expand tribal jurisdiction over non-Indians.”\textsuperscript{149} Rather, he argues that “this bill only allows tribes to arrest those engaged in terrorist activities [but] [t]he federal courts would retain jurisdiction.”\textsuperscript{150} Furthermore, he claimed that “only those engaged in terrorist activities would be subject to Indian arrest. Offenders would be tried in federal court.”\textsuperscript{151}

Senator Inouye contends that the primary purpose of Senate Bill 578 is to provide sufficient and necessary funding to the tribes so that they can be adequately prepared to combat terrorism. Senate Bill 578 would simply “reclassify tribal governments as ‘states’ under the [Homeland Security Act], so tribes can receive sufficient funding and technical expertise to play a meaningful

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} CERA Analysis, supra note 137.
\textsuperscript{148} Id.
\textsuperscript{150} Id.
role in fighting terrorism." Currently, tribal governments apply for funds for purposes of homeland security through county governments. However, because these county governments also require necessary funds for emergency equipment and training, tribal governments are not able to acquire the necessary funds to adequately protect their Indian lands from terrorism. Donna Cossette, a tribal chairwoman for the Fallon Paiute-Shoshone Tribe of Western Nevada, stated that her tribe is a "sovereign government" in the [United States] and should be able to [obtain] federal funding for protecting their homeland from terrorism rather than seeking this funding from county governments.

Senator Inouye has essentially presented Senate Bill 578 as a "technical change" to the Homeland Security Act of 2002. The technical change is merely to reclassify tribal governments as states in order that they can begin to receive federal funding for homeland land security purposes. Inouye claims that "[n]ot giving Indian tribes funding to police more than 2,000 miles of reservation borders with Mexico and Canada would be like 'putting up a sign saying terrorists welcome. Go through this gate.'"

Although Senator Inouye claims the purpose of this bill is to ensure homeland security, his real intentions are evidenced by comments he has made to Indian groups and supporters of the bill. In speech given at the National Congress of American Indians (NCAI), Inouye claimed that the goal of Senate Bill 578 "was to overturn recent Supreme Court rulings by recognizing that tribes have primary law enforcement duties on their lands." He went on to say that "[h]omeland security presents an opportunity to secure a status under federal law that will not only recognize [Indian tribes'] powers and responsibilities as sovereign governments but will strengthen [their] position and [their] status in the family of governments that make up the United States."

Although Senator Inouye and the other supporters of the bill have claimed that the purpose of Senate Bill 578 is purely for purposes of receiving funding to secure their Indian lands from

153. Young, supra note 151.
154. Id.
155. Id. (quoting Donna Cossette, Tribal Chairwoman).
156. Id.
157. Id.
158. Id. (quoting Sen. Inouye).
160. Id.
terrorism, his statements to supporters of the bill clearly indicate that the Homeland Security Act is merely a bridge being used to strengthen the sovereignty of the tribal governments.

Furthermore, Senator Inouye claimed that tribal governments should “be as sovereign as any state in the union.”\(^{161}\) Again, it appears that Senator Inouye is utilizing the continued concerns of homeland security as a result of September 11, 2001, as a way to further his own and the tribal courts’ agendas of regaining some of the sovereignty lost as a result of twenty years of Supreme Court jurisprudence.

\[V.\ \textbf{Conclusion}\]

The potential passage of Senate Bill 578 would have significant consequences on the recent \textit{Nevada v. Hicks}\(^{162}\) decision as well as over twenty years of Supreme Court jurisprudence. Although the Marshall Trilogy set forth the concept of tribal sovereignty in the early nineteenth century, later Supreme Court jurisprudence has eroded this idea of tribal sovereignty one case at a time. Even before \textit{Hicks} was decided in 2001, the Supreme Court had previously held that tribal courts no longer had criminal jurisdiction over non-members.\(^{163}\) Moreover, the Court also held that tribal courts no longer had civil jurisdiction over the activities of non-members occurring within Indian country on land not owned by the tribe.\(^{164}\) The Supreme Court in \textit{Hicks} continued to limit tribal sovereignty when it found that state officers may enter a reservation without tribal permission to investigate or prosecute an off-reservation violation of state law.\(^{165}\)

An amendment to the Homeland Security Act of 2002 that overturns \textit{Nevada v. Hicks} and twenty years of previous Supreme Court decisions should not be allowed to become law. The Supreme Court has had numerous opportunities to consider and reconsider its position on tribal sovereignty, and \textit{Hicks} is simply the latest evidence that the continual limiting of tribal sovereignty is still good law.

Some may say that federal law enforcement oversight is currently so ineffective on some reservations that Senate Bill 578 is needed to allow Indians to take care of themselves and to protect the homeland from terrorism. “[W]ith the existing Homeland Security Act, not all critical infrastructure is adequately...

protected. Borders are still open to illegal immigrants." Furthermore, "[w]ith miles and miles of open terrain bordering both Canada and Mexico, terrorists have an easy way to pass into the country undetected. The imagination runs wild with possible scenarios of illegal migrants entering the country to cause great tragedy and devastation." Despite the fact that there are miles and miles of unprotected borders and that federal and state law enforcement cannot sufficiently protect these borders, the solution is not to amend the Homeland Security Act with a bill that potentially eliminates a significant portion of constitutional rights for hundreds of thousands of Americans. The concerns raised are legitimate, and appropriate action should be taken by the United States government to remedy such security issues at the borders. However, remediing these security issues at the expense of individuals' constitutional rights is not acceptable.

167. *Id.* at 375.