Native America, United States Senate bill S.578 and the United States Supreme Court

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Abstract

In 2003, the United States Senate introduced bill S.578 and the House of Representatives introduced H.R. 2242, both of which were called the Tribal Government Amendments to the Homeland Security Act. In light of the attacks of September 11, 2001, the bills were designed to shore up the security of the United States, and specifically, allow greater authority and jurisdiction for Native American Nations to combat terrorism and the threat of terrorism on reservations. This article examines the impact of Section 13 of S.578, which was a re-affirmation of the principle of inherent tribal sovereignty and the congressional definition of ‘Indian country,’ and how it introduced a conflict of principles between the Legislature and the Judiciary, namely the United States Supreme Court. Only two years later, the U.S. Senate introduced a new bill, S.477, without the controversial Section 13 and prevented a crisis between two branches of the United States Government.

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The United States Congress has the authority to reverse United States Supreme Court case law and has exercised this right in Federal-Indian matters on several occasions between 1884 and 2004. However, to this day, Congress has yet to intervene and directly reverse Supreme Court case law dealing with the limitations imposed of inherent tribal sovereignty over non-members in the reservations and the issues of state rights over non-members in the reservations. The closest Congress came to reversing U.S. Supreme Court Federal Indian case law (termed here as the silent revolution), dating from 1973 to the present day, was in 2003, when the United States Senate introduced bill S.578 and the House of Representatives introduced bill H.R. 2242, both of which were called, Tribal Government Amendments to the Homeland Security Act. Within each of the bills proposed to Congress, there contained the controversial Section 13, which was a re-affirmation of the principle of inherent tribal sovereignty and the congressional definition of ‘Indian country,’ with provisions to reverse the silent revolution of the Supreme Court. Unfortunately, the language used in the two bills, and in particular Section 13, brought about ideological conflict between the United States Congress and the United States Supreme Court. As S.578 and H.R. 2242 threatened to overturn the case law of the Supreme Court’s silent revolution, many groups and individuals called for its abandonment including lawyers, the Congressional Research Service (CRS) and anti-tribal groups. In contrast, many Native American Nations, Native American organisations and individuals and the proposers of the bills themselves, some Senators and

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1 The use of the term non-members refers to non-Native Americans and the word state refers to one or more of the fifty States of the Union.
2 Dewi Ioan Ball, “The Silent Revolution: How the Key Attributes of Tribal Power have been Fundamentally Eroded by the United States Supreme Court from 1973”, PhD. diss., University of Wales, Swansea, 2007. Here it is argued that the opinions of the United States Supreme Court radically altered and circumscribed inherent tribal sovereignty, specifically in the areas of tribal criminal, civil and taxation authority over non-members inside the reservations. As a direct consequence, state law and states rights now play a large role inside the reservations, to the detriment of tribal sovereignty.
3 The CRS is an independent body of Congress which assesses congressional bills.
Congressmen, supported the measures and actively encouraged its introduction into law. Then in 2005, Congress introduced a similar bill, S.477, without the provisions to reverse the case law of the silent revolution. The fact that S.578 and H.R. 2242 were not introduced by Congress points towards the continuation of the U.S. Supreme Court’s silent revolution in congressional legislation.\(^4\)

Congress has reversed the case law of the U.S. Supreme Court on more than one occasion. In *Ex parte Kan-gi-Shun-ca, (Crow Dog) (1883)*\(^5\), the Supreme Court held that the United States did not have criminal authority to try a tribal member for the killing of another tribal member in a reservation and reversed the conviction of Crow Dog (Kan-gi-shun-ca) by the First District Court of Dakota. Indeed, the inherent sovereignty of tribes ousted federal law from the reservation.\(^6\) However, in 1885 Congress introduced the Major Crimes Act and explicitly overruled the *Crow Dog* opinion. The act read:

“...Be it enacted, &c. * * * That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor [sic] to the laws of such Territory relating to said crimes, and shall be tried therefor [sic] in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. [March 3, 1885].”\(^7\)

Therefore, Congress introduced legislation that allowed the United States legal system to try a Native American who committed certain crimes against another Native American. The process of legislation overruling case law occurred again in the twentieth century. In the Supreme Court case of *Duro v. Reina* (1990), Anthony Kennedy, the author of the opinion, held that “An Indian tribe may not assert criminal jurisdiction over a nonmember Indian.”\(^8\) However, in 1991 Congress passed specific

\(^4\) For the purposes of this article, the actions of Congress over S.578 will be examined rather than S.578 and H.R. 2242.

\(^5\) *Ex parte Kan-gi-Shun-ca, (Crow Dog),* 109 U.S. 556 (1883).


\(^8\) *Duro v. Reina,* 495 U.S. 676 (1990), 677.
legislation, explicitly reversing the Duro decree.\textsuperscript{9} The impact of the 1991 legislation was the focus of a 2004 Supreme Court case.

In \textit{United States v. Lara} (2004),\textsuperscript{10} the Supreme Court confirmed that the legislation introduced by Congress in 1991 was constitutional and it provided tribes with inherent sovereignty to prosecute non-tribal members who committed crimes within the reservations. The \textit{Lara} court held that “Congress has the constitutional power to lift the restrictions on the tribes’ criminal jurisdiction over nonmember Indians.”\textsuperscript{11} The 7-2 majority held that the actions of Congress overruled the 1991 Supreme Court case. Furthermore, the \textit{Lara} court ruled that Congress had plenary power over tribal affairs and consequently had the authority to restrict or relax the limitations imposed on tribal sovereignty.\textsuperscript{12} The key question answered by the Supreme Court was whether the legislation extended congressional authority to allow the tribes to prosecute tribal non-members or whether the legislation re-affirmed inherent tribal sovereignty. As Justice Stephen Breyer explained,

> “Section 1301(2) "recognize[s] and affirm[s]" in each tribe the "inherent power" to prosecute nonmember Indians, and its legislative history confirms that such was Congress’ intent. Thus, it seeks to adjust the tribes’ status, relaxing restrictions, recognized in \textit{Duro}, that the political branches had imposed on the tribes’ exercise of inherent prosecutorial power.”\textsuperscript{13}

Breyer concluded that the source of tribal power was inherent sovereignty, a separate and independent source of power from Congress, rather than a congressional delegation of power, which was an extension of congressional authority. In the practical sense, if congressional legislation allows tribes to do something, whether inherent sovereignty or not, it appears to agree with the rationale of the modern day Supreme Court which argues that Congress must act to allow tribal authority over non-members. Despite these Congressional steps to overrule certain Supreme Court cases, Congress has yet to reverse any of the case law from the period of the silent revolution. Such cases include \textit{Oliphant v. Suquamish Indian Tribe} (1978), \textit{Montana v. United States} (1981), \textit{Brendale v. Confederated Yakima Indian Nation} (1989), \textit{South Dakota v. Bourland} (1993), \textit{Strate v. A-1 Contractors} (1997), \textit{Atkinson Trading Co., v. Shirley} (2001) and \textit{Nevada v. Hicks} (2001).\textsuperscript{14} Similarly, Congress has neglected to introduce S.578, a bill that would have re-invigorated tribal sovereignty and reversed the case law of silent revolution.

The S.578 bill, developed in co-ordination with the Senate Government Affairs Committee, was announced in a Senate session on March 7, 2003 by Senator Inouye.

\textsuperscript{9} Public Law 102-137, 102\textsuperscript{nd} Cong., 1\textsuperscript{st} sess., (28 October 1991), the ‘Duro Fix,’ overturned \textit{Duro v. Reina} and re-instated the right of tribes to criminally prosecute tribal members as well as non-tribal members, Native Americans not a member of the tribe in question.


\textsuperscript{11} \textit{United States v. Lara}, 194.

\textsuperscript{12} Ibid., 194.

\textsuperscript{13} Ibid.

and on behalf of Senator Ben Nighthorse Campbell, Senator Daniel Akaka and Senator Maria Cantwell. S.578, also known as the ‘Hicks fix,’ was designed to amend the original Homeland Security Act of 2002 and to allow the tribes to have the appropriate jurisdiction and authority inside the reservations and to respond to acts of terrorism in light of the attacks on New York, Washington and Pennsylvania on 11 September, 2001. As Senator Inouye explained, the purpose of the bill was to “amend the Homeland Security Act of 2002 to include Indian tribal governments amongst the governmental entities that are consulted with respect to activities carried out by the Secretary of the Department of Homeland Security.” In order for the tribes to be viewed as governmental entities under the auspices of the Homeland Security Act, they also had to have the requisite authority to counter terrorism inside their reservations. Senator Inouye believed that Congress had to re-instate tribal sovereignty to counter acts of terrorism, commenting that S.578 “…makes clear 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.” Senator Inouye’s words were in direct conflict with the Supreme Court’s silent revolution and formed the underlying principles of Section 13 of Bill S.578, entitled Congressional Affirmation and Declaration of Tribal Government Authorities,

“(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.”

It was clear that Section 13 supported the extension of tribal sovereignty over reservation lands and all of the people within those lands, subject only to federal law.

15 A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes, 108th Cong., 1st sess., S.578. The equivalent bill, H.R. 2242, was introduced in the House of Representatives on 22 May 2003.
16 Therefore, the bill was designed to amend existing statutes in order to comply with Homeland Security issues and policies.
19 S.578.
Furthermore, Section 13 re-affirmed the congressional definition of ‘Indian country.’ In 1948, Congress introduced a definition of what constituted ‘Indian country’ and simultaneously codified existing case law.\(^{20}\) The original definition of ‘Indian country’ only covered tribal criminal jurisdiction in the reservation. However, as a direct result of the opinion issued in *DeCoteau v. District County Court* (1975), the Supreme Court extended ‘Indian country’ to cover tribal civil jurisdiction in the reservation.\(^{21}\) Title 18, Part I, Chapter 53, Section 1151 of the United States Code defines ‘Indian country’ as,

“(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.”\(^{22}\)

In this definition, Congress had recognised the jurisdictional definition of tribal authority within Indian country. However, the silent revolution had undercut this definition legislated into law in 1948, which now comprises part of the United States legal code, and by re-affirming Indian country in Section 13 of S.578, Congress had introduced a bill that conflicted with and was antithetical to the principles of the Judiciary.

The dissonance between Section 13 of S.578 and the silent revolution mirrored the battle from 1973 between the application of the “integrationist trend,” a term used to describe the principles used by the U.S. Supreme Court to dramatically limit inherent tribal sovereignty, and the Indian sovereignty doctrine by the Supreme Court.\(^{23}\) The Congressional declarations and affirmations of Section 13 explicitly adhered to the application of the sovereignty doctrine rather than the “integrationist trend” which had been the key rationale of the silent revolution. The rationale of the “integrationist trend” arose from the presumption that tribes did not have inherent sovereignty until Congress specifically acted to allow tribal authority over non-members. Conversely,

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\(^{21}\) *DeCoteau v. District County Court*, 420 U.S. 425 (1975).


\(^{23}\) Ball, *Silent Revolution*, “This integrationist trend has four key interchangeable principles, which between them turned the Indian sovereignty doctrine on its head. The principles are:
1) If the tribes relied on congressional authority to oust state law from the reservation then by default the state had general authority in the reservation.
2) If the states had general authority in the reservation they also had authority over non-members in the reservation.
3) If the tribes had authority over only tribal members in the reservation, then by default they had no power over non-members inside the reservation.
4) If the tribes did not have inherent sovereignty over non-members in the reservation then the inherent sovereignty of the state automatically applied to non-members in the reservation.” 106-107. In addition, the sovereignty doctrine was a judicial principle which rested on the idea that tribes had inherent sovereignty until it was explicitly revoked by Congress.
the rationale of the sovereignty doctrine began from the presumption that the tribes had inherent sovereignty unless or until Congress expressly legislated and reversed tribal sovereignty or it was reversed by treaty. Section 13 did not conform to the silent revolution but adhered to the application of the traditional sovereignty doctrine applied in Williams v. Lee (1959). Therefore, the Legislature was doctrinally at odds with the Judiciary regarding the relevant tribal powers over reservation lands and over non-members in the reservations. However, this conflict of principles ended when S.578 and its controversial section 13 was not passed into law.

The primary reason for the withdrawal of Section 13 was that it threatened to overrule Supreme Court case law which had protected non-members from tribal sovereignty and allowed state law to operate inside the reservations. Lawyers, the Congressional Research Service (CRS) and anti-tribal groups interpreted Section 13 as directly overruling Supreme Court case law, namely Oliphant v. Suquamish Indian Tribe (1978) and Nevada v. Hicks (2001). Thomas B. Heffelfinger, United States Attorney for the District of Minnesota believed that Section 13 overruled case law, pointing out that it was “a legislative overturn” of Oliphant and was “an attempt to deal with the Oliphant issue head-on.” Furthermore, Heffelfinger explained that in 2003 the Native American Issues Subcommittee (NAIS) formed an Oliphant Working Group. This group concluded that “section 13 as currently written is too broad.” M. Maureen Murphy, legislative attorney in the American Law Division of the Congressional Research Service, believed that Section 13 overturned specific case law, stating that bill S.578 “raised concern in some quarters that it would overturn Nevada v. Hicks…or otherwise expand Indian tribal sovereignty.” Furthermore, Murphy was concerned that the expansion of tribal sovereignty in S.578 was contrary to the limitations imposed by the Supreme Court in criminal and civil case law. She noted that Section 13 of S.578 “appeared to endorse a view of tribal criminal and civil jurisdiction inconsistent with Supreme Court rulings on the subject of tribal jurisdiction.” Furthermore, while in 2003, a CRS report was ambivalent about the overall effect of Section 13, it, in part supported the view that Section 13 overruled case law. It was pointed out in the CRS report that Section 13 was in conflict with certain Supreme Court cases, “Some language in the legislation that appears to endorse a view of tribal sovereignty that seems inconsistent with Supreme Court rulings on the subject.” The CRS believed that this conflict revolved around the fact that the way the legislation was drafted allowed the tribes to have authority over non-members inside the reservations, contrary to the case law of the silent revolution. The CRS report noted that Section 13 appeared “…to confer, reinstate, or delegate to

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26 Ibid., 24.
27 Ibid.
29 Ibid., 1.
tribes authority over nonmembers and non-Indian fee land that the courts have found to have been divested.31 However, the CRS believed that Section 13 was limited by the words, “For the purpose of this Act” and intimated that Section 13 “may be found to be limited, should the courts be called on for interpretation.”32 In addition, some anti-tribal groups such as the Citizens Alliance interpreted Section 13 as an overturn of Supreme Court case law which protected the constitutional rights of American citizens in the reservations. The Citizens Alliance believed that Section 13 would allow arbitrary tribal authority to exist over state and American citizens in the reservations and pointed out that Congress was abscording on their moral and legal duty to protect approximately 500,000 non-members living on the reservations. Specific concerns included not being able to vote in tribal elections or participate in tribal or reservation life. The Supreme Court upheld these concerns in Oliphant (1978) and ruled against the tribes accordingly.33

Despite the concerns expressed by many people, in reality, Section 13 was limited by its own terminology and did not sanction unchecked tribal sovereignty over non-members within the reservations. Although Section 13 appeared to return tribal authority over non-members in the reservations to pre-1973 standards, in fact, it was explicitly qualified in stating that tribal authority existed “…except as expressly and clearly limited by”34 two important caveats, a treaty or an act of Congress. Therefore tribal sovereignty existed unless or until Congress acted to reverse tribal sovereignty. This qualification undermined the dominant perception of exclusive tribal authority over parts of American society. Inherent tribal authority over state and American citizens in the reservations would have worked alongside the authority of the United States. As Senator Maria Cantwell commented in 2004, “The bill affirms general tribal sovereignty and provides that federal and tribal court have concurrent jurisdiction over Indian crimes on tribal lands, within the Homeland Security Act of 2002.”35 In fact, Section 13 was explicit about the concurrent nature of the law where non-members were concerned and defined inherent tribal authority as authority over “any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government.”36 However, this form of tribal authority over reservation lands and the people on those lands was guaranteed to be “…under the concurrent jurisdiction of the United States.”37 The importance of concurrent tribal and federal jurisdiction was “to ensure protection of due process rights.”38 Therefore inherent tribal sovereignty was limited not only by treaty and by acts of Congress but it was to be exercised in a concurrent manner with federal laws to ensure the protection of the rights of due process. The fears of unabridged tribal authority over non-members in the reservations were cautioned by the explicit terminology within Section 13 to the contrary.

Despite these qualifications, on March 1 2005, Congress introduced bill S.477 as a direct replacement for S.578 and resolved the ideological conflict between the

31 Ibid, 5.
32 Ibid.
33 Oliphant v. Suquamish Indian Tribe.
34 S.578.
36 S.578.
37 Ibid.
38 Ibid.
Supreme Court and Congress. This process suggests the beginnings of the establishment of the silent revolution in Congressional legislation.\(^{39}\) As a result of the conflict between Congress and the Judiciary and the diverse interpretations of Section 13, Congress introduced a new bill without the contentious Section 13 of S.578. The introduction of S.477 solved the conflict between the two institutions of government. Although the current federal governmental policy era of tribal self-determination had been re-affirmed by both the Legislature and the Executive from 1970, it had been limited by the silent revolution.\(^{40}\) However, Congress refused to redress the issue. In contrast to S.578, M. Maureen Murphy pointed out that S.477 did not contain a “direct statement specifically granting or delegating a particular law enforcement authority to tribes or overruling any named Supreme Court case.”\(^{41}\) The purpose of the new S.477 bill was not to overrule Supreme Court case law but to ensure the participation of the tribes in the protection of the United States against terror.\(^{42}\) Although Congress bowed to pressure to withdraw Section 13 of S.578, by introducing a new bill S.477, it still retains the ultimate authority to overrule Supreme Court case law.

Unless the U.S. Supreme Court changes direction, the survival of Native American sovereignty and possibly Native America itself relies on representations to Congress. As John R. Wunder said, “Indian legal strategy must necessarily turn to Congress to hold off the Supreme Court’s 1990s forced acculturation charge.”\(^{43}\) Without congressional modification of the U.S. Supreme Court’s silent revolution or a change in direction by the U.S. Supreme Court, the current situation and impact of U.S. Supreme Court case law, as William C. Canby said, “…leaves the tribe with almost no governmental power at all.”\(^{44}\) Although the silent revolution has impacted on the politics of Congress, there remains the hope that Congressional legislation or decisive action from Native America can overturn the effects of the silent revolution. Indeed, the sense of hope and renewal in American politics since the election and inauguration of President Barack H. Obama in 2009 may be an epiphany for those in Indian country that begins to address and reverse the process of “The Silent Revolution.”\(^{45}\)

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\(^{39}\) A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes., 109\(^{th}\) Cong., 1\(^{st}\) sess., S.477.


\(^{42}\) Ibid.


\(^{44}\) Senate Committee on Indian Affairs. Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S Supreme Court and the Future of Indian Tribal Governments in America. 107th Cong., 2d sess., 27 February 2002, 46.

\(^{45}\) Ball, Silent Revolution, 5.