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## SOVEREIGNTY, SAFETY, AND SANDY: TRIBAL GOVERNMENTS GAIN (SOME) EQUAL STANDING UNDER THE HURRICANE SANDY RELIEF ACT\*

Heidi K. Adams\*\*

On January 29, 2013, President Obama signed the Sandy Recovery Improvement Act of 2013,<sup>1</sup> which includes a groundbreaking provision amending the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act)<sup>2</sup> to elevate the standing of American Indian tribes in dealing with disasters. Under the original Stafford Act, the President granted funds to states for disaster preparation and relief where state governors had requested such assistance.<sup>3</sup> State governors could apply for federal funding for “Pre-Disaster Hazard Mitigation” planning for local governments within their respective states,<sup>4</sup> or governors could appeal to the President for emergency funding through a disaster declaration on a statewide basis.<sup>5</sup> Both of these avenues for federal assistance forced tribes to appeal to their state governors in order to request federal disaster preparation and relief funds, as tribes were included within the Stafford Act’s definition of “local governments.”<sup>6</sup> This framework within the original Stafford Act slowed funding and response

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\* This is a follow-up piece to the author’s article, *Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts*, 1 AM. INDIAN L. J. 127 (2012),

<http://law.seattleu.edu/Documents/ailj/Fall%20Issue/Stafford%20and%20Homeland%20Heidi%20AdamsFinal.pdf>.

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<sup>1</sup> The Act is also known as the “Sandy Relief Act,” the “Hurricane Sandy Relief Bill,” and the “Disaster Relief Appropriations Act of 2013.” Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2012)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>2</sup> 42 U.S.C. §§ 5121–5207 (2012).

<sup>3</sup> *See generally id.*

<sup>4</sup> *Id.* at § 5133(d)(1)(A).

<sup>5</sup> *Id.* at § 5191(a).

<sup>6</sup> *Id.* at § 5122(7)(B).

times to emergencies in Indian country,<sup>7</sup> circumvented the special trust relationship between tribes and the federal government,<sup>8</sup> and ultimately threatened tribal sovereignty by making tribes subordinate to and dependent upon state officials.<sup>9</sup>

The Sandy Relief Act encompasses a \$50.5 billion package to assist northeastern states in recovering and rebuilding damaged infrastructure following the devastation of Hurricane Sandy in October 2012,<sup>10</sup> and also includes an amendment removing American Indian tribes from the Stafford Act's definition of "local governments" while listing them as separate government entities.<sup>11</sup> Additionally, the provisions include a section allowing the chief executive of a tribe to request directly from the President a major disaster or emergency declaration without the

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<sup>7</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 12 (June 2009), available at <http://www.gao.gov/new.items/d09551.pdf> (last visited Apr. 20, 2013) (describing the difficulty in providing funds under the Stafford Act to tribes in Alaska because many villages are so remote that they fail to qualify under the required cost-benefit analysis due to their isolation and harsh climate). Unless otherwise specified, "Indian country" as referred to in this piece is a combination of both the accepted legal definition under 18 U.S.C. § 1151, which includes Indian reservations, dependent Indian communities, and Indian allotments, and Indian lands not covered under this legal definition, particularly with regard to Alaska Native villages. See generally *Alaska v. Native Village of Venetie Tribal Government et al.*, 522 U.S. 520 (1998) (as a result of the holding in this case and the provisions of the Alaska Native Claims Settlement Act of 1971, many Alaska Native villages no longer qualify as "dependent Indian communities," thereby preventing most land held by Alaska Natives in that state from being considered part of "Indian country" for purposes of jurisdiction). "American Indians" and "Natives" as referred to in this paper are used interchangeably as all-inclusive terms for the sake of brevity, and should be considered to reference members of any Indian or Alaska Native tribe, band, nation, pueblo, village, or indigenous community.

<sup>8</sup> The Federal Emergency Management Agency (FEMA) has acknowledged this relationship and the federal government's responsibility to tribal governments throughout its policies. FEMA, FEMA TRIBAL POLICY 4 (June 29, 2010), available at [http://www.fema.gov/pdf/government/tribal/fema\\_tribal\\_policy.pdf](http://www.fema.gov/pdf/government/tribal/fema_tribal_policy.pdf) (last visited Apr. 20, 2013).

<sup>9</sup> See Heidi K. Adams, *Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts*, 1 AM. INDIAN L. J. 127, 141 (2012), <http://law.seattleu.edu/Documents/ailj/Fall%20Issue/Stafford%20and%20Homeland%20Heidi%20AdamsFinal.pdf> (last visited Apr. 20, 2013).

<sup>10</sup> John Rudolf, *Sandy Relief Passes House Despite Conservative Opposition*, HUFFINGTON POST, Jan. 15, 2013, [http://www.huffingtonpost.com/2013/01/15/sandy-relief-measure-passes\\_n\\_2480328.html](http://www.huffingtonpost.com/2013/01/15/sandy-relief-measure-passes_n_2480328.html) (last visited Apr. 20, 2013).

<sup>11</sup> See *infra* Part I.

involvement of state officials.<sup>12</sup> The Stafford Act amendments were thus designed to “treat all federally recognized Indian tribes as the sovereign governments that they are and [create] a mechanism that affords all tribes the option to request a disaster declaration when a state in which they are located fails to do so.”<sup>13</sup>

The language in these provisions of the Sandy Relief Act appears to close this gap in tribal authority created by the Stafford Act. Just as promising, the Federal Emergency Management Agency (FEMA) has already begun its consultations with tribes, and is currently soliciting for public comments to aid federal agencies in creating procedures for tribal emergency and disaster declarations.<sup>14</sup> Thus, while the new Stafford Act provisions are as yet untested in Indian country emergencies, FEMA’s proactive approach in partnering with tribal governments serves as an encouraging step for tribes.

At the same time, the Sandy Relief Act provisions fail to address the same issues within the realm of homeland security and acts of terrorism. Under the Homeland Security Act of 2002 (Homeland Act),<sup>15</sup> as with the original Stafford Act, tribes are defined as “local governments” and as such are subordinate to their respective state governments.<sup>16</sup> This system puts the United States at great risk, as “more than twenty-five Indian tribes have jurisdiction over lands that are either adjacent to international borders or are directly accessible to an international border by boat.”<sup>17</sup> Roads and critical infrastructure are easily reachable through

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<sup>12</sup> *Id.* Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5170, 5191 (2012)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>13</sup> 159 CONG. REC. H72 (statement of Rep. Rahall), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2013-01-14/pdf/CREC-2013-01-14.pdf> (last visited Apr. 20, 2013).

<sup>14</sup> Public comments are welcome through Apr. 22, 2013. See Solicitation for Comments Regarding Current Procedures to Request Emergency and Major Disaster Declarations, 78 Fed. Reg. 15,026 (Mar. 8, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-03-08/pdf/2013-05391.pdf> (last visited Apr. 20, 2013).

<sup>15</sup> 6 U.S.C. § 101(10)(A)–(B) (2003).

<sup>16</sup> *Id.* at § 101(11)(B).

<sup>17</sup> 151 CONG. REC. S1868 (statement of Sen. Dorgan, for himself and Sen. Inouye), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2005-03-01/pdf/CREC-2005-03-01-pt1-PgS1868.pdf> (last visited Apr. 20, 2013) [hereinafter Sen. Dorgan S. 477 Statement]. The U.S. General Accountability Office found in 2004 that “[o]f the 562 federally recognized Indian tribes, 36 tribes have lands that are close to, adjacent to, or [cross] over

these areas, leaving tribal lands without adequate protection against illegal border crossings. Moreover, the Homeland Act schema leaves tribes just as vulnerable to domestic acts of terrorism, where there is no clear jurisdictional authority over investigation, response, and prosecution of terrorist acts.<sup>18</sup>

This article first provides an analysis of the important amendments to the Stafford Act through the Hurricane Sandy Relief Act of 2013, showing how the key changes will hopefully trigger government-to-government cooperation between tribes and the United States in dealing with disaster preparation, response, and recovery. Second, this article explores the vulnerabilities of national and international security on tribal lands, as well as unsuccessful congressional attempts to alleviate these risks. This article concludes with suggestions for Congress and tribal advocates in using the success of the Stafford Act amendments to change the Homeland Act and Department of Homeland Security (DHS) policies and procedures in order to protect Indian country not only from natural disasters, but also from human-made emergencies.

### **I. SANDY RELIEF ACT RESTORES TRIBAL SOVEREIGNTY THROUGH STAFFORD ACT AMENDMENTS**

The Sandy Relief Act amends the Stafford Act in two important ways for tribal governments. First, the term “local governments” throughout the Stafford Act has been altered, identifying tribal governments as entities separate from state and local governments.<sup>19</sup>

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international boundaries with Mexico or Canada.” U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS GAO-04-590, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS 5 (June 2004), *available at* <http://www.gao.gov/assets/250/243053.pdf> (last visited Apr. 20, 2013).

<sup>18</sup> The Homeland Act defines terrorism as “any activity that (A) involves an act that (i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and (ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and (B) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.” Homeland Security Act of 2002, sec. 2(15), Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101 (2012)), *available at* [http://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf) (last visited Apr. 20, 2013).

<sup>19</sup> Sandy Recovery Improvement Act of 2013, sec. 103, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. § 5123 (2012)), *available at*

Second, Congress has added a section to the Stafford Act specifically authorizing tribal executive officials to make requests directly to the President for a major disaster or emergency declaration.

### A. “Local Governments” and References

Under Section 103, “References,” the Sandy Relief Act stipulates (amending 42 U.S.C. § 5123): “Except as otherwise specifically provided, any reference in this Act to ‘State and local’, ‘State or local’, ‘State, and local’, ‘State, or local’, or ‘State, local’ (including plurals) with respect to governments or officials and any reference to a ‘local government’ in sections 406(d)(3) [of the Stafford Act] is deemed to refer also to Indian tribal governments and officials, as appropriate.”<sup>20</sup> While the language in this stipulation appears to maintain the status quo set by the original terms of the Stafford Act, this definitional construction is not triggered because of other linguistic changes throughout the Act. Instead, each reference in the newly amended Stafford Act specifies “State, Tribal, and local” throughout the text, unless the provision applies only to Tribal governments and officials.<sup>21</sup>

Also under this section, the Act directs that “[i]n issuing the regulations, the President shall consider the unique conditions that affect the general welfare of Indian tribal governments.”<sup>22</sup> While the directive for the President to “*consider* the unique conditions” seems somewhat flaccid, the use of “shall” indicates a legal requirement to do so, which may inform a system of accountability through the President’s policies and enforcement.<sup>23</sup> The fact of this addition also represents and further solidifies the federal government’s aim to treat tribal governments as sovereign nations, symbolizing the federal commitment to strengthening meaningful government-to-government relationships with tribes.<sup>24</sup>

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<http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2012)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>22</sup> *Id.* at sec. 103(e)(2).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> The Navajo Nation issued a press release following the passage of the Sandy Relief Bill, calling it “a welcoming sign of the blossoming recognition nationally of the sovereignty of the Navajo Nation as a co-equal government within the United States.”

***B. Section 1110: Tribal Requests for a Major Disaster or Emergency Declaration***

Sections 401 and 501 of the Stafford Act, respectively pertaining to major disaster declaration requests and emergency declaration requests, now allow that “[t]he Chief Executive of an affected Indian tribal government may submit a request for a declaration by the President.”<sup>25</sup> Rather than requiring tribal governments to ask their state governors to submit these requests as under the former framework, tribes now have the option to submit requests directly to the President. By using the term “may” in this provision, tribes can continue working with their state governors if they so choose or they can exercise their authority to contact the President’s office without notice to or permission from state governments. The choice provided to tribes in this provision thus strengthens tribal governmental sovereignty, allowing tribal leaders full control over actions on behalf of their communities.

Importantly, tribes wishing to request a major disaster or emergency declaration from the President may do so notwithstanding the legal status of the affected tribal land. Many federal laws, including environmental statutes, confine tribal authority to the boundaries of “Indian country” as defined in 18 U.S.C. § 1151.<sup>26</sup> Statutes restricting tribal jurisdiction to Indian country thus only apply to reservations, trust allotments, and dependent Indian communities where the federal government holds superintendence over the land and has set aside the area “for the use of the Indians as Indian land.”<sup>27</sup> Because of this system and the unique status of lands in Alaska following the Alaska Native Claims Settlement Act of 1971, Alaska Native tribes are either excluded or require special statutory provisions referring to their non-Indian country

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Jared King, *Bipartisan Disaster Relief Bill Approved: Tribes To Be Treated Like States, Navajo President Encouraged*, NAVAJO NATION WASHINGTON OFFICE, Jan. 29, 2013, <http://nnwo.org/content/bipartisan-disaster-relief-bill-approved> (last visited Apr. 20, 2013).

<sup>25</sup> Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5170, 5191 (2012)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>26</sup> *See, e.g.*, 40 C.F.R. § 144.3 (2011), which instructs the Environmental Protection Agency (EPA) to use the 18 U.S.C. § 1151 definition of “Indian country” when determining what constitutes “Indian lands” under the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901–6992 (as amended through Pub. L. No. 107-377) (2012), and the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j (2012).

<sup>27</sup> 18 U.S.C. § 1151 (2006); *Alaska v. Native Village of Venetie Tribal Government et al.*, 522 U.S. 520, 527 (1998).

lands.<sup>28</sup> But the Sandy Relief Act amendments to the Stafford Act do not constrain tribal governments by linking their authority to lands within the definition of Indian country; instead, the amendments center around a definition of “Indian tribal government” as “the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. § 479a et seq.).”<sup>29</sup> Through the Sandy Relief Act, Congress thus uses “Indian tribal governments” as the defining factor triggering the use of the Stafford Act in a major disaster or emergency, rather than tying tribal power to a land base that could exclude various tribes. This is vital not only in elevating tribes to a status equal to that of states, but also in ensuring that the 565 federally recognized tribes in the United States are treated equally to each other under this law.

## II. DANGEROUS GAPS IN HOMELAND SECURITY REMAIN FOR AMERICAN INDIAN TRIBES

Building on the momentum of the Stafford Act amendments, Congress should also amend the Homeland Act to elevate the standing of tribes within the paradigm of national security. Three bills have been introduced in Congress attempting to amend the Act since its enactment in 2002, but none have successfully passed House and Senate votes.<sup>30</sup> The current iteration of the Homeland Act thus puts Indian tribes, and the rest of the United States, at risk for illegal border crossings and international and domestic acts of terrorism.

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<sup>28</sup> 43 U.S.C. §§ 1601–1633 (2012).

<sup>29</sup> Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. § 5122 (2012)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited Apr. 20, 2013).

<sup>30</sup> See Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf> (last visited Apr. 20, 2013); H.R. 2242, 108th Cong. (2003), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-108hr2242ih/pdf/BILLS-108hr2242ih.pdf> (last visited Apr. 20, 2013); S. 477, 109th Cong. (2005), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-109s477is/pdf/BILLS-109s477is.pdf> (last visited Apr. 20, 2013).

### A. *The Homeland Security Act of 2002*

The Homeland Act, signed by President George W. Bush and enacted on November 25, 2002, in response to the 9/11 terrorist attacks, was intended to consolidate all national security responsibilities into one manageable agency.<sup>31</sup> To that end, the Homeland Act established the Department of Homeland Security (DHS), which is currently tasked with five core missions: “(1) Prevent terrorism and [enhance] security; (2) Secure and manage our borders; (3) Enforce and administer our immigration laws; (4) Safeguard and secure cyberspace; [and] (5) Ensure resilience to disasters.”<sup>32</sup> In fulfilling these missions, DHS is not responsible for investigating, enforcing, and prosecuting specific homeland security issues and incidents; instead, the Homeland Act requires that DHS coordinate and support the efforts of federal, state, and local law enforcement agencies.<sup>33</sup>

Similarly to the original Stafford Act definition, “local government” under the Homeland Act includes “an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation.”<sup>34</sup> And as with the pre-Sandy implementation of the Stafford Act, the Homeland Act allows federal agencies to distribute funding to states for use by state and local governments in preparing for and responding to homeland security threats, thereby treating tribes “as if tribal governments were political subdivisions of each State.”<sup>35</sup> Thus, despite the positive amendments in 2013 to the Stafford Act, DHS-supported prevention, preparedness, recovery, and response mechanisms to terrorism-related disasters still subject tribes to state supervision and control, and continue to controvert tribal sovereignty and federal law and policy.<sup>36</sup>

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<sup>31</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, *available at* [http://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf) (last visited Apr. 20, 2013); *see* President’s Message to the Congress Transmitting Proposed Legislation to Create the Department of Homeland Security, 1 PUB. PAPERS 1006 (June 18, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/PPP-2002-book1/pdf/PPP-2002-book1-doc-pg1006-2.pdf> (last visited Apr. 20, 2013).

<sup>32</sup> *Our Mission*, U.S. DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/our-mission> (last visited Apr. 20, 2013).

<sup>33</sup> Homeland Security Act of 2002 sec. 101(b)(2), Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 111 (2012)), *available at* [http://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf) (last visited Apr. 20, 2013).

<sup>34</sup> *Id.* at sec. 2(10)(B) (codified as amended at 6 U.S.C. § 101 (2012)).

<sup>35</sup> Sen. Dorgan S. 477 Statement, *supra* note 17.

<sup>36</sup> Adams, *supra* note 9, at 137–41.

### ***B. Security Vulnerabilities in Indian Country***

Tribal communities and lands are just as vulnerable to acts of terrorism as other parts of the country, and potential threats to critical infrastructure and international borders on tribal lands place both tribal communities and surrounding areas at risk.<sup>37</sup> Aside from the more than twenty-five tribal communities on United States borders with Canada and Mexico, most tribal lands contain resources or infrastructure that could cripple entire regions of the country if targeted by terrorists. These risk points include “dams, water impoundments, reservoirs, and electrical generation plants,” oil and gas fields and pipelines, major transportation lines, communications systems, agricultural sources, and tourist attractions.<sup>38</sup> Moreover, “as tribal communities rank at or near the bottom of nearly every social, health and economic indicator, and as tribal communities are confronted with rather complex, misunderstood and confusing jurisdictional issues, their tribal lands and the borders to which their lands are adjacent or in close [proximity] may only be minimally protected.”<sup>39</sup>

While many tribes have taken the initiative to train law enforcement in routing out national security breaches and responding to terrorism in Indian country, most lack the funding and support from other jurisdictions

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<sup>37</sup> For more discussion and specific instances of homeland security breaches on tribal lands, see William R. Di Iorio, *Mending Fences: The Fractured Relationship between Native American Tribes and the Federal Government and Its Negative Impact on Border Security*, 57 SYRACUSE L. REV. 407 (2006–2007); see also Jennifer Butts, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373 (2003–2004); see also Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the “Jurisdictional Maze” in Indian Country: Case Studies on Methamphetamine Use and the Pressures to Ensure Homeland Security*, 54 APR FED. LAW. 48 (2007).

<sup>38</sup> NAT’L NATIVE AM. LAW ENFORCEMENT ASS’N, TRIBAL LANDS AND HOMELAND SECURITY REPORT 6–7 (Oct. 2002), available at <http://www.nnalea.org/hlsecurity/summitreport.pdf> (last visited Apr. 20, 2013). For a thorough analysis of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594, which allows federal grant funding directly to Indian tribes upon tribal government request and application in preventing and responding to acts of bioterrorism (and potential dangers to tribal sovereign immunity through the grant process), see Erick J. Rhoan, *What Congress Gives, Congress Takes Away: Tribal Sovereign Immunity and the Threat of Agroterrorism*, 19 SAN JOAQUIN AGRIC. L. REV. 137 (2009–2010).

<sup>39</sup> NAT’L NATIVE AM. LAW ENFORCEMENT ASS’N & THE NAT’L CONGRESS OF AM. INDIANS, THE IMPORTANCE OF TRIBES AT THE FRONTLINES OF BORDER AND HOMELAND SECURITY 4–5 (Mar. 2006), available at <http://www.nnalea.org/tbsp/tbspreport.pdf> (last visited Apr. 20, 2013) [hereinafter TBS PILOT PROGRAM].

necessary to operate fully functioning systems of terrorism prevention, response, recovery, and prosecution.<sup>40</sup> Through the Department of Homeland Security Appropriations Act of 2010 and the Implementing Recommendations of the 9/11 Commission Act of 2007, DHS instituted the Tribal Homeland Security Grant Program (THSGP) in 2010.<sup>41</sup> These statutes amended the Homeland Act of 2002, allowing DHS to award federal grants directly to eligible tribes.<sup>42</sup> But the grant application requirements are stringent, requiring tribes to “ensure consistency with any applicable State homeland security plan” by forcing tribal governments to submit their federal grant applications to their respective states for approval before DHS accepts the tribal applications.<sup>43</sup> If a state governor does not approve of a tribe’s federal grant application, it can notify DHS of its objections and potentially influence the DHS grant-making authority.<sup>44</sup>

This system allows states to interfere with matters that should be relegated entirely to the tribal-federal relationship. While the Homeland Act does set forth a valid goal—to ensure multi-jurisdictional consistency in homeland security planning—its process for meeting this objective is misguided. Instead of requiring tribes to tailor its security plans and federal grant applications to the plans set by states, which creates a gross power disparity between different government entities, tribes and states should both be required to work together with federal agencies to create comprehensive, jurisdictionally cooperative security plans. In order to achieve this end, the Homeland Act must be amended to place tribes on an equal plane as state governments when working with DHS and other federal authorities. Allowing discretionary grant funds on a limited budget as through the current version of the Homeland Act will only placate those

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<sup>40</sup> For instance, the National Native American Law Enforcement Association partnered with the National Congress of American Indians and, with the support of DHS, created the “Indian Country Border Security and Tribal Interoperability Pilot Program” (TBSPP) to “comprehensively [assess] tribal border security preparedness generally and in relation to the evolving National Preparedness Goal.” The TBSPP thus set a series of baseline measurements for future tribal homeland security program efforts. *See id.* at 1.

<sup>41</sup> *FEMA Fact Sheet: FY 2010 Tribal Homeland Security Grant Program (THSGP)*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.fema.gov/pdf/government/grant/tHSGP.pdf> (last visited Apr. 20, 2013).

<sup>42</sup> *Id.*

<sup>43</sup> 6 U.S.C. § 606(c) (2012).

<sup>44</sup> If DHS determines that a tribe’s application outweighs any state objections and awards grant funds to a tribe, DHS must distribute the funds directly to the tribe, rather than through the state. *Id.* at § 606(d).

who call for recognition of tribal sovereignty and meaningful government-to-government collaboration.

***C. Conclusion: Celebrate the Stafford Act Amendments; Push for Homeland Security Changes***

At least three bills have been introduced and subsequently died in Congress to amend the Homeland Act that would have ensured full participation of tribal governments in homeland security activities.<sup>45</sup> The late Senator Daniel Inouye of Hawaii co-sponsored two of the senate bills, arguing that “[h]omeland security presents an opportunity to secure a status under federal law that will not only recognize [tribal] powers and responsibilities as sovereign governments, but will strengthen [tribal] position and . . . status in the family of governments that make up the United States.”<sup>46</sup> The amended Stafford Act will do just that in the realm of natural disasters and emergencies, allowing tribes the option to exercise their sovereignty by working directly with the federal government to meet the needs of tribal lands and communities.

The Homeland Act should be amended in a way that will reach this same goal; but doing so may not be as tidy as the Stafford Act amendments. Unlike the Stafford Act, the Homeland Act pertains to human-made threats and disasters, and as such, contains a potentially criminal element not present in natural disasters. Thus, tribal government amendments to the Homeland Act must necessarily address the issue of criminal and civil jurisdiction over both Indians and non-Indians, a long-standing point of contention in federal Indian law and policy.<sup>47</sup> Whether members of Congress push for amending the Homeland Act to elevate the standing of tribal governments in dealing with homeland security problems as a means to more aggressively extend tribal jurisdiction over non-

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<sup>45</sup> See Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), available at <http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf> (last visited Apr. 20, 2013); H.R. 2242, 108th Cong. (2003), available at <http://www.gpo.gov/fdsys/pkg/BILLS-108hr2242ih/pdf/BILLS-108hr2242ih.pdf> (last visited Apr. 20, 2013); S. 477, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s477is/pdf/BILLS-109s477is.pdf> (last visited Apr. 20, 2013).

<sup>46</sup> *Inouye Ties Sovereignty to Homeland Security*, INDIANZ.COM, Feb. 25, 2003, <http://www.indianz.com/News/show.asp?ID=2003/02/25/inouye> (last visited Apr. 20, 2013).

<sup>47</sup> A plethora of publications exist documenting these issues, many of which have been shaped by federal statutes and US Supreme Court decisions over the past 190 years.

Indians,<sup>48</sup> or if Congress plans to confer to tribal courts and law enforcement limited jurisdiction over non-Indians in terrorism-related cases,<sup>49</sup> some change must be made. Tribal sovereignty and nationwide homeland security depend upon it.

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<sup>48</sup> As in Senator Inouye's first iteration of the bill, which extends the authority of Indian tribal governments over "(A) all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the current jurisdiction of the United States and the Indian tribal government; and (B) any person, activity, or event having sufficient contacts with the land, or with a member of the Indian tribal government, to ensure protection of due process rights." See Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf> (last visited Apr. 20, 2013).

<sup>49</sup> As in the Violence Against Women Reauthorization Act of 2013, Title 9, Pub. L. 113-4, *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf> (last visited Apr. 20, 2013).