

# WHAT CONGRESS GIVES, CONGRESS TAKES AWAY: TRIBAL SOVEREIGN IMMUNITY AND THE THREAT OF AGROTERRORISM

## I. INTRODUCTION

In February of 2009, the Arabic news network, Al Jazeera, aired a video made by an Al-Qaeda recruiter.<sup>1</sup> The recruiter told a room of supporters that the terrorist organization was assessing the United States-Mexico border for ways to infiltrate the United States, particularly through underground tunnels between the two nations.<sup>2</sup> The purpose of the attack was to spread biological agents: “Four pounds of anthrax . . . carried by a fighter through tunnels from Mexico into the [U.S.,] guaranteed to kill 330,000 Americans within a single hour if it is properly spread in population centers there . . . and then we’ll do these cries of joy. It will turn into a real celebration.”<sup>3</sup>

The fear that Al Qaeda or another terrorist organization can attack the nation’s food supply with a biological agent is shared by various food safety agencies, but not the general public.<sup>4</sup> In December of 2004, Tommy Thompson stepped down as Secretary of Health and Human Services, commenting on why the terrorists have not attacked the nation’s food supply.<sup>5</sup> Further, he pointed out it would be easy to do.<sup>6</sup> Thompson’s remarks concerning the vulnerability of the nation’s food supply was premised on the food industry’s clustering into a handful of

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<sup>1</sup> Sara Carter, *EXCLUSIVE: Al Qaeda Eyes Bio Attack From Mexico*, Wash. Times, June 3, 2009.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Peter Chalk, *The U.S. Agricultural System: A Target for Al-Qaeda?*, 3 Terror. Mon. (2005).

<sup>5</sup> *Id.* Thompson, during his farewell address, stated: “I, for the life of me, cannot understand why the terrorists have not . . . attacked our food supply because it is so easy to do. And we are importing a lot of food from the Middle East, and it would be easy to tamper with that.” See William Branigin, et. al., *Tommy Thompson Resigns From HHS*, Wash. Post, Dec. 3, 2004.

<sup>6</sup> Chalk, *supra* note 4. Despite an increase in food inspections, that number “is a very minute amount[.]” See Branigin, *supra* note 5.

geographic areas, where one facility may be compromised by disease which could then easily spread to nearby facilities due to their close proximity to one another.<sup>7</sup> Such a rapid compromise would cause a nationwide panic.<sup>8</sup>

Some distance away from biological terrorism, the nature of sovereign immunity possessed by Native American tribal nations is in a precarious position. During the early decades of our nation's relationship with Indian tribes, the relationship between the two parties was one of pupil and ward.<sup>9</sup> As unwanted burdens from the United States' conquests of North America, the United States had to provide Indian tribes with their daily necessities and political rights.<sup>10</sup> A major outcome of this relationship was the doctrine of tribal sovereign immunity.

Indian tribes were recognized as sovereigns prior to the existence of the United States which entitles them to some immunity from suit; however, unlike foreign nations, tribes are domestic dependent nations.<sup>11</sup> Their immunity from suit exists at the whim of Congress, the branch of the government that has the sole discretion to regulate commerce.<sup>12</sup> Modernly, however, courts construe sovereign immunity by avoiding "reliance on platonic notions" of the previous era of federal Indian jurisprudence.<sup>13</sup> For example, in the Ninth Circuit, statutes of general application will apply to tribes even though they do not deal directly with tribal sovereign immunity.<sup>14</sup>

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<sup>7</sup> Chalk, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *United States v. Kagama*, 118 U.S. 375, 382 (1886).

<sup>10</sup> *Id.* at 383-84.

<sup>11</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In his analysis, Chief Justice Marshall partitioned Indian tribes from foreign nations because they resided within the boundaries of the United States: "They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.* at 17. The Indians' dependency on the United States was derived from their need for the government's protection, "its kindness and its power," as well as appealing "to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States[.]" *Id.*

<sup>12</sup> *Id.*; *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

<sup>13</sup> *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). For example, Justice Marshall, writing for the majority in *McClanahan* stated that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *Id.* at 172.

<sup>14</sup> *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).

This Comment explores the collision of these two issues within the arena created by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (“Bioterrorism Act”).<sup>15</sup> The first post-9/11 bioterrorism threat to the nation occurred during the 2001 Anthrax Attacks.<sup>16</sup> The attacks showed that the nation’s infrastructure was ill-prepared to deal with a bioterrorism threat.<sup>17</sup> In response to this attack, and to deal with future problems, Congress passed the Bioterrorism Act, amending existing statutes such as the Federal Food, Drug, and Cosmetic Act.<sup>18</sup> The Bioterrorism Act allows the Secretary of Agriculture to make grants to Indian tribes allowing them to participate in food inspection, food safety surveillance, and improve linkages between the Secretary of Agriculture and Indian tribes.<sup>19</sup>

This Comment asks whether or not the sovereignty of an Indian tribe is abrogated when that tribe applies for a grant under the auspices of the Bioterrorism Act. Federal courts generally construe grants as binding contracts,<sup>20</sup> and tribes are immune to suit in contract disputes.<sup>21</sup> At the same time, is the Bioterrorism Act a law of general application that abrogates tribal sovereignty? The legislative history behind this act did not

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<sup>15</sup> Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (2002).

<sup>16</sup> C. STEPHEN REDHEAD ET AL., CONGRESSIONAL RESEARCH SERVICE, PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT (P.L. 107-188): PROVISIONS AND CHANGES TO PREEXISTING LAW 1 (2002).

<sup>17</sup> *Id.* at 2. The CRS report gives several factors on why the nation’s infrastructure was vulnerable to a biological attack: “[Public health experts] point out that there are too few medical personnel trained to spot biological attacks, a shortage of sophisticated laboratories to identify the agents, and inadequate supplies of drugs and vaccines to counteract the threat. They also contend that inadequate plans exist for setting up quarantines and emergency facilities to handle the sick and infectious victims.” *Id.* at 1.

<sup>18</sup> See Public Health Security and Bioterrorism Preparedness and Response Act. Notable among the changes is increased food inspections for the “detection of intentional adulteration of imported food[.]” REDHEAD, *supra* note 16, at 19. Another key change requires registration of food processing, packing and holding facilities to register with the government, whereas before, “only states have records of [such] facilities,” and the government had to ask the states for this information. *Id.* at 21. Another change requires food importers to give detailed notice to the government of what they are shipping, the identity of the manufacturer and shipper, and “if possible, the grower; the country of origin of the food; the country from which the article is shipped; and the anticipated U.S. port of entry.” *Id.* at 22. Other statutes were amended as well; for example, the Public Health Service Act, 42 U.S.C. § 201 et. seq. *Id.* at 6. (Requiring the Secretary of Health and Human Service to develop a National Preparedness Plan, and other provisions).

<sup>19</sup> See Public Health Security and Bioterrorism Preparedness and Response Act §§ 311, 312. See also REDHEAD *supra* note 16, at 23.

<sup>20</sup> See *Thermalon Industries, Ltd. v. United States*, 34 Fed.Cl. 411 (1995).

<sup>21</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998).

contemplate a situation involving the abrogation of tribal sovereignty.<sup>22</sup> This Comment's conclusion deals with a legislative scheme that would correct this confrontation between this nation's need to fight and defend against terrorism and tribal sovereign immunity. Notably, this Comment takes a pro-sovereignty stance not only because the United States must uphold its end of the guardian-ward relationship, but because it is inequitable to allow tribes to be sued when they have been significantly excluded from the United States' anti-terrorism infrastructure.

## II. AGROTERRORISM AND INDIAN COUNTRY

### A. Introduction to Agroterrorism

Agroterrorism is the "deliberate introduction of an animal or plant disease with the goal of generating fear over the safety of food, causing economic losses, and/or undermining social stability."<sup>23</sup> The threat posed by agroterrorism is substantial, not just because of the massive economic damage it can cause, but also because it is largely unknown to the American populace and because food related diseases and illnesses take too long to halt.<sup>24</sup> Congress, however, has taken some initiative in fighting bioterrorism,<sup>25</sup> particularly with the Bioterrorism Act, however this legislation has not solved all of this country's bioterrorism problems, particularly the issue dealt with in this Comment.

The agricultural industry is highly centralized and vulnerable to an agroterrorism attack.<sup>26</sup> The Congressional Research Service outlined the reasons why agroterrorism is an attractive option to terrorists.<sup>27</sup> First, there are more contagious biological agents affecting animals than there are affecting humans, thus giving terrorists the ability to manufacture these agents without fear of infecting themselves.<sup>28</sup> Second, the "inten-

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<sup>22</sup> See REDHEAD, *supra* note 16.

<sup>23</sup> JIM MONKE, CONGRESSIONAL RESEARCH SERVICE, AGROTERRORISM: THREATS AND PREPAREDNESS I (2007).

<sup>24</sup> Adam Stirrup, Comment, *Hidden Cargo: A Cautionary Tale About Agroterrorism and the Safety of Imported Produce*, 16 S.J. AGRIC. L. REV. 171, 182-83 (2007); Dr. Sheila Fleischhacker, Comment, *Food For Thought or Terror: The Legal Issues Surrounding Agroterrorism*, 16 S.J. AGRIC. L. REV. 79, 84 (2007).

<sup>25</sup> Aside from the Bioterrorism Act, Congress has also passed the Animal Enterprise Terrorism Act, 18 U.S.C. § 43, Pub. L. No. 109-374, § 2(a), 120 Stat. 2652 (2006); and the Homeland Security Act, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).

<sup>26</sup> See generally, MONKE, *supra* note 23; ALEJANDRO E. SEGARRA ET AL., CONGRESSIONAL RESEARCH SERVICE, AGROTERRORISM: OPTIONS IN CONGRESS (2001); Stirrup, *supra* note 24.

<sup>27</sup> SEGARRA, *supra* note 26, at 3.

<sup>28</sup> *Id.* at 4.

sive” methods of crop / livestock production and transportation allows plant and animal pathogens to spread quickly over vast expanses of land.<sup>29</sup> Normally these vast expanses would slow or stop the spread of such diseases.<sup>30</sup> Third, “[t]he mere presence, or even the rumor, of an ‘internationally quarantineable pest or disease,’” would have the power to seriously affect the United States economy and social fabric through heightened awareness or panic.<sup>31</sup> Also, it would increase security costs on farmers who would pass these expenses onto the public.<sup>32</sup> Finally, the United States’ excellent track record of keeping foreign livestock diseases from entering into the food supply would mean veterinarians would be hampered in recognizing symptoms of an intentional foreign disease and making government response to an agroterrorism attack slower and less effective.<sup>33</sup> Additionally, lack of livestock vaccination against foreign diseases would promote panic.<sup>34</sup>

The threat of bioterrorism emerged in the immediate aftermath of 9/11. Anthrax attacks highlighted just how vulnerable the United States was to this type of terrorism.<sup>35</sup> Agroterrorism is similar because it utilizes biological agents. Despite the potential for economic devastation, much of the American public has not taken this threat seriously.<sup>36</sup> Part of the problem stems from agroterrorism’s lack of “shock factor.”<sup>37</sup> Catastrophic displays of terrorism such as 9/11 rob civilians of their sense of safety in society.<sup>38</sup> This is true because terrorists are also civilians, who commit their attacks on other civilians, and then blend back into the population.<sup>39</sup> This clandestine nature of terrorism stymies law enforcement and national defense strategies because they cannot target potential terrorists without endangering innocents.<sup>40</sup>

Agroterrorism substantially departs from 9/11 imagery; it chooses the oft-ignored instrumentalities of the agricultural industry to deliver its attack.<sup>41</sup> An agroterrorism attack is “relatively easy to initiate and can cause serious political and economic devastation within the victim na-

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See REDHEAD, *supra* note 16, at 1.

<sup>36</sup> Fleischhacker, *supra* note 24, at 84.

<sup>37</sup> MONKE, *supra* note 23, at 1.

<sup>38</sup> WAYNE McCORMACK, LEGAL RESPONSES TO TERRORISM 3 (2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See generally SEGARRA, *supra* note 26, at 1.

tion.”<sup>42</sup> Economic effects include the loss of production and the cost of destroying infected plants and animals, not to mention the cost of quarantining them.<sup>43</sup> Losses also include the decline of the U.S. export market as importing countries refuse U.S. goods to prevent infection in their own countries.<sup>44</sup> “Multiplier effects could ripple through the economy due to decreased sales by agriculturally dependent businesses (farm input suppliers, food manufacturing, transportation, retail grocery, and food service).”<sup>45</sup> Federal and state governments pay the cost of quarantining and destroying infected food products and reimbursing food producers for their loss.<sup>46</sup> It is assumed that American taxpayers also shoulder this burden.<sup>47</sup> Finally, there would be a pronounced drop in consumer confidence in the U.S. food supply which, in turn, will cause a price drop in the affected food products’ industry.<sup>48</sup> This will also have a ripple effect on unrelated food products, shifting the demand burden from affected products to non-affected products.<sup>49</sup>

As an al-Qaeda recruiter told its supporters:

The Americans are afraid that the [weapons of mass destruction] might fall into the hands of ‘terrorist’ organizations like al Qaeda and others . . . There is good reason for [this]. [We had] laboratories in north Afghanistan. They have scientists, chemists and nuclear physicists. They are nothing like they are portrayed by these mercenary journalists – backward Bedouins living in caves.<sup>50</sup>

### *B. The Vulnerability and Liability of Indian Country*

Two methods of agroterrorism attack have come to light: 1) a deliberately infected food item is imported into the United States, passes through the food inspection and screening process and finds its way into the U.S. food supply, subsequently causing havoc; or 2) an individual cell or cells of a terrorist organization is able to infiltrate the United States and introduce a disease within the United States food supply.<sup>51</sup>

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<sup>42</sup> Stirrup, *supra* note 24, at 171.

<sup>43</sup> MONKE, *supra* note 23, at 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 8–10.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* (For example, chicken instead of beef).

<sup>50</sup> Carter, *supra* note 1.

<sup>51</sup> *See generally* LISA M. SEGHEIT ET AL., CONGRESSIONAL RESEARCH SERVICE, BORDER SECURITY AND THE SOUTHWEST BORDER: BACKGROUND, LEGISLATION, AND ISSUES 28 (2005).

Both methods involve penetration of the United States border, either through imported foods or physical border crossing.<sup>52</sup> It is in these areas that agroterrorism and Indian Country<sup>53</sup> intersect.

### 1. Indian Tribes and Food Production

The U.S. food supply and the agricultural industry are components within a broad concept known as “Farm to Table.”<sup>54</sup> Generally, the term refers to the growth or production of agricultural products on a farm and its subsequent journey to the consumer’s kitchen table via the agricultural industry’s processing and distribution systems.<sup>55</sup> Indian tribes are also part of this process because agriculture is Indian Country’s second largest employer.<sup>56</sup> Several tribes own farms and produce food that enters the nation’s food supply.<sup>57</sup>

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<sup>52</sup> Indian tribes and border security is an extensive subject involving matters of national security and tribal sovereignty. Some have advocated a total or partial abrogation of tribal sovereignty regarding these matters. However, this author is of the opinion that if due consideration is given to tribes and their sovereignty, then there is no need for a total abrogation. A partial abrogation should be implemented in the most dire circumstances. See generally BLAS NUNEZ-NETO ET AL., CONGRESSIONAL RESEARCH SERVICE, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER (2008); SEGHEITI, *supra* note 51, at 38–40; and William R. Di Iorio, Note, *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 (2007).

<sup>53</sup> “Indian Country” is broadly defined as Indian tribal territory. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 27 (Michie Bobbs-Merrill 1982) (hereinafter *Cohen*). See also 18 U.S.C. § 1151 (2009) (defining Indian Country as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities with 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”). The preceding statute is taken from the criminal code, however the definition given “applies also to questions of federal civil jurisdiction and to tribal jurisdiction.” COHEN, *supra*, at 27 (citing *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975)). See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478–79 (1976).

<sup>54</sup> FOOD SAFETY AND INSPECTION SERVICE, BEEF . . . FROM FARM TO TABLE (2009), [http://www.fsis.usda.gov/Factsheets/Beef\\_from\\_Farm\\_to\\_Table/index.asp](http://www.fsis.usda.gov/Factsheets/Beef_from_Farm_to_Table/index.asp).

<sup>55</sup> See FOOD SAFETY RESEARCH INFORMATION OFFICE, NATIONAL AGRICULTURAL LIBRARY, UNITED STATES DEPARTMENT OF AGRICULTURE, A FOCUS ON ANIMAL ELECTRONIC IDENTIFICATION (2004).

<sup>56</sup> *Fiscal 2010 Budget: Native American Tribal Priorities Before the S. Comm. on Indian Affairs*, 111th Cong. (2009) [hereinafter *Hearings*] (statement of Jackie Johnson-Pata, Executive Director, National Congress of American Indians).

<sup>57</sup> See Alicia D. Wrest, Comment, *Buyer Beware: The Liability Gap Created By Tribal Farming*, 18 S.J. AGRIC. L. REV. 103 (2009) (general article on waivers to sovereign immunity and potential liabilities faced by tribal farms).

A 2003 Food Safety Briefing, given by the Indian Health Service (“IHS”) noted there are 4,068 tribal food service establishments operated by 334 tribes.<sup>58</sup> In 2005, the Tulalip Reservation in Washington began to post notice to patrons of their food establishments when their businesses were last inspected by IHS.<sup>59</sup> Until that time, there were businesses whose premises were checked only once or twice a year with no notice of inspection findings, standards of review, or whether the facility passed.<sup>60</sup> In 1992, patrons of a restaurant on the Tulalip Reservation were warned to get Hepatitis A vaccinations after it was discovered a restaurant worker acquired the disease.<sup>61</sup> The Tulalip disaster exemplifies the potential consequences of lax tribal oversight.<sup>62</sup>

## 2. Indian Tribes and Border Security

Another concern is Indian tribes and their awkward role in border security.<sup>63</sup> Several Indian tribes are located near, on, or – in the case of the Tohono O’odham Reservation – on both sides of the United States-Mexico border.<sup>64</sup> The major problems of policing the border stem from jurisdictional issues, and law enforcement’s authority to handle a problem on Indian land “can change according to the civil/criminal nature of the offense, the seriousness of the offense, the tribal status of those involved, and the state in which the offense is committed.”<sup>65</sup> Some tribes are opposed to the building of border fences across tribal lands.<sup>66</sup> These entanglements make illegal migration into the United States easier because Indian tribes do not coordinate well, if at all, with border patrol.<sup>67</sup>

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<sup>58</sup> INDIAN HEALTH SERVICE, TRIBAL FOOD SAFETY ISSUES BY THE NUMBERS (2003), available at <http://www.foodsafety.gov/~dms/cadihs/sld024.htm>

<sup>59</sup> Christopher Schwarzen, *Tribes To Open Books On Food Inspections*, SEATTLE TIMES, May 4, 2005.

<sup>60</sup> *Id.*

<sup>61</sup> *Hepatitis Alert For Patrons Of Tulalip Reservation Cafe*, SEATTLE TIMES, Oct. 23, 1992.

<sup>62</sup> UNITED STATES FOOD AND DRUG ADMINISTRATION, REAL PROGRESS IN FOOD CODE ADOPTIONS (2009), available at <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm>.

<sup>63</sup> See Di Iorio, *supra* note 52, at 422–28 (Noting tribes’ absence from border security planning and proposes: 1) limited abrogation of border tribes’ sovereignty towards border security; or 2) granting of total sovereignty to border tribes, making the border one of their primary responsibilities; or 3) legislative changes making tribes synonymous with States for purposes of funding and strategy planning).

<sup>64</sup> SEGHETTI, *supra* note 51, at 38.

<sup>65</sup> *Id.*

<sup>66</sup> NUNEZ-NETO, *supra* note 52, at 37.

<sup>67</sup> In August 2009, a rare and historic accord was reached between an Indian tribe and local law enforcement – whenever local police enter Indian land they may become depu-

Compounding the problem is the friendliness shown by Indian tribes to illegal immigrants because they are more “gracious” than the Border Patrol agents.<sup>68</sup> An agroterrorism attack originating from Indian land, via a successful border penetration, is a serious concern.

### 3. Indian Tribes and National Security

Adding to the problem is the lack of participation from Indian tribes in the national security infrastructure.<sup>69</sup> Indian Country’s lack of funding for their own homeland security measures makes them a liability to the United States.<sup>70</sup> An interview with the CEO of the National Native American Law Enforcement Association revealed a shortage of 1,854 tribal police to meet adequate law enforcement standards.<sup>71</sup> Information sharing is also lacking in basic communication devices such as radios and cell phones.<sup>72</sup> Anti-terrorism and law enforcement funding makes its way to tribes from particular government agencies whose share of the funding is already immense, leaving tribes without much money; and direct funding from Congress is virtually non-existent.<sup>73</sup> Tribes already face a crisis in providing for their own public safety,<sup>74</sup> and without money to combat foreign threats, Indian Country – and therefore the United States – is vulnerable to an agroterrorist attack.

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ties of the tribal police; and when tribal police proceed off reservation they may enforce state criminal law. Eric Newhouse, *Glacier County, Blackfeet Sign Historic Accord: Cross-Deputization*, GREAT FALLS TRIB., Aug. 7, 2009, at A1; *Tribe, County Pact Needs More Input From Legal Team*, GREAT FALLS TRIB., Aug. 11, 2009, at A4. Such cross-deputization is rare, but has existed through informal agreements. See also SEGHETTI, *supra* note 51, at 39. This instance marks the first time both tribe and local law enforcement have signed a written agreement stating as much. More time and research is needed concerning the legal issues these actions pose for tribal sovereign immunity.

<sup>68</sup> Di Iorio, *supra* note 52, at 422.

<sup>69</sup> See SEGHETTI, *supra* note 51, at 39; *Hearings, supra* note 56; *Intelligence, Information Sharing and Terrorism Risk Assessment Before the Subcomm. on Intelligence of the H. Comm. On Homeland Security*, 111th Cong. (2009) (statement of Gary L. Edwards, Chief Executive Officer, National Native American Law Enforcement Association); Daniel Fowler, *Tribes Look to Become Full Partners in Homeland Security*, CONG. Q., Apr. 17, 2009. See generally Courtney A. Stoff, Comment, *Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty*, 108 PENN ST. L. REV. 375 (2003); Jennifer Butts, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN. L. REV. 373 (2004).

<sup>70</sup> Fowler, *supra* note 69.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Hearings, supra* note 56.

### III. THE PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

On June 12, 2002, President George W. Bush signed the Bioterrorism Act into law.<sup>75</sup> Recognizing that biological weapons are “potentially the most dangerous weapons in the world,” the President’s signature on the Bioterrorism Act initiated the United States’ mission to protect the American food supply as a matter of national security.<sup>76</sup> However, the mission to protect America’s food supply has not engendered the organizational restructure that another 2002 bill, the Homeland Security Act, has provided.<sup>77</sup> While the Department of Homeland Security was able to amalgamate several agencies from various other Departments, the task of safeguarding the country’s food supply is spread out over several agencies.<sup>78</sup> The Bioterrorism Act does not seek to integrate food safety agencies, but rather reinforce the existing system.<sup>79</sup>

Some pre-existing statutes were amended while others were given new sections.<sup>80</sup> For example, section 311 of the Bioterrorism Act amended the Federal Food, Drug and Cosmetic Act to allow money grants to states and Indian tribes to take part in food inspection, whereas before only federal agencies had this power.<sup>81</sup> Section 312 amended the Public Health Service Act (“PHSA”) to allow states and tribes to participate alongside the federal government in food safety surveillance networks.<sup>82</sup>

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<sup>75</sup> REDHEAD, *supra* note 16, at 1.

<sup>76</sup> Statement by President George W. Bush Upon Signing H.R. 3448, 2002 U.S.C.C.A.N. 511, 512 (Jun. 12, 2002).

<sup>77</sup> See Stirrup, *supra* note 24, at 185–86. This is ironic given the President’s statement in signing the Bioterrorism Act that such an act was, in coordination with the creation of the Department of Homeland Security, meant to “reorganize our government.” Statement by President George W. Bush Upon Signing H.R. 3448, *supra* note 76, at 512.

<sup>78</sup> See Stirrup, *supra* note 24, at 179–80. The idea of a unified food agency has been addressed several times. See *id.* at 186; Fleischhacker, *supra* note 24, at 88–89; and Caroline Smith DeWaal, *Rising Imports, Bioterrorism, and the Food Supply*, 59 FOOD & DRUG L.J. 433, 435–36 (2004).

<sup>79</sup> REDHEAD, *supra* note 16, at 3.

<sup>80</sup> *Id.* at 6–30.

<sup>81</sup> The Food & Drug Administration has used monies obtained under section 311 to fund at least five different programs: Ruminant Feed Ban Support Program (BSE), Food Safety and Security Monitoring (FERN), Innovative Food Defense, Rapid Response Teams, and Food Safety Task Forces. Email from Kendra Fowler, Legislative Assistant, Office of Representative Devin Nunes, to Erick Rhoan (Oct. 6, 2009) (on file with author). See Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 311, 116 Stat. 594 (2002); and REDHEAD, *supra* note 16.

<sup>82</sup> *Id.* at 23.

Section 311 grants are limited to covering costs of conducting inspections; section 312 grants are not limited in this fashion.<sup>83</sup>

#### A. *Language of the Bioterrorism Act*

The statutory language of the Act itself deserves focus. Generally, courts presume that the plain text of the legislation reveals its intent.<sup>84</sup> The language used in the statute is assumed to bear its ordinary, contemporary and common meaning absent indication to the contrary.<sup>85</sup> Title I of the Bioterrorism Act is concerned with national preparedness for bioterrorism and other public health emergencies, amending the PHS Act by adding new sections dealing with developing coordinated strategies with state and local governments to effectively respond to bioterrorism emergencies.<sup>86</sup> Indian tribes are mentioned in Title I, making tribes eligible for money grants to develop and implement public access to defibrillation machines.<sup>87</sup> The grants subject to this Comment's analysis are located in Title III, labeled: "Protecting Safety and Security of Food and Drug Supply."<sup>88</sup> Thus far, President Bush's words before signing the Bioterrorism Act into law spell out the statute's primary concern: "We must and we will improve inspections of food entering our ports and give officials better tools to contain attacks on our food supply . . . Strengthening our protections against bioterror is part of a larger effort to deal with the new threats of the 21st century."<sup>89</sup>

#### B. *Interpretation of the Bioterrorism Act*

There is virtually no case law commenting on the Bioterrorism Act.<sup>90</sup> In *Cactus Corner, LLC v. United States Department of Agriculture*, 346

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<sup>83</sup> Public Health Security and Bioterrorism Preparedness and Response Act §§ 311, 312.

<sup>84</sup> See *Choteau v. Burnet*, 283 U.S. 691, 697 (1931) (In construing a tax statute against the petitioner, the Court pronounced that the "intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject-matter").

<sup>85</sup> *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997).

<sup>86</sup> See Public Health Security and Bioterrorism Preparedness and Response Act §§ 101-59.

<sup>87</sup> See *id.* § 159.

<sup>88</sup> See *id.* § 301.

<sup>89</sup> Statement by President George W. Bush Upon Signing H.R. 3448, *supra* note 76, at 512.

<sup>90</sup> See generally *Cactus Corner, LLC v. United States Department of Agriculture*, 346 F.Supp.2d 1075 (E.D. Cal. 2004), *aff'd* 450 F.3d 428 (9th Cir. 2006); and *Creekstone Farms Premium Beef, LLC v. United States Department of Agriculture*, 539 F.3d 492 (D.C. Cir. 2008).

F.Supp.2d 1075 (E.D. Cal. 2004), *aff'd* 450 F.3d 428 (9th Cir. 2006), the plaintiffs filed suit against the government, challenging an administrative rule of the Animal and Plant Health Inspection Service ("APHIS") concerning the suspension of importation of Spanish clementines after Mediterranean fruit fly larvae were discovered.<sup>91</sup> The rule was implemented according to several statutory authorities, including the Bioterrorism Act.<sup>92</sup> The Court held that the APHIS acted properly in resuming Spanish clementines importation because the agency's job was to protect domestic agriculture from foreign infection.<sup>93</sup>

*Creekstone Farms Premium Beef, LLC v. United States Department of Agriculture*, 539 F.3d 492 (D.C. Cir. 2008), dealt with mad cow disease.<sup>94</sup> Plaintiff was a beef supplier who brought action against the government alleging the United States Department of Agriculture ("USDA") exceeded its authority under the Virus-Serum-Toxin Act ("VSTA") by denying plaintiff's request to purchase testing kits for mad cow disease.<sup>95</sup> The plaintiff argued that the Agricultural Bioterrorism Protection Act of 2002 ("ABPA"), which is part of the Bioterrorism Act, supported their claim that VSTA did not authorize the USDA's use regulation which they felt unfairly prevented them from purchasing the kits.<sup>96</sup> The court disagreed.<sup>97</sup> It reasoned that Congress intended ABPA to fortify VSTA by giving the USDA authority to regulate biological products.<sup>98</sup> Though sparse, the two courts paint a picture of the importance of protecting the United States' food supply from foreign infection, however they do not touch upon waivers of tribal sovereign immunity.<sup>99</sup>

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<sup>91</sup> *Cactus Corner*, 346 F.Supp.2d at 1078-79.

<sup>92</sup> *Id.* at 1101-02.

<sup>93</sup> *Id.* at 1102-03. Specifically, the court held the "nature and purpose of the Rule itself, aimed at the prevention of Medfly introduction into the United States, is designed to protect human health and the environment." *Id.* at 1122.

<sup>94</sup> *Creekstone Farms*, 539 F.3d at 493.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 501 & n. 11.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Poett v. United States*, 657 F.Supp.2d 230 (D.D.C. Sept. 29, 2009) is a recent case citing Title II, section 201(a) of the Bioterrorism Act. The plaintiff was a chemist of the United States Department of Agriculture seeking judicial review of an agency decision denying him access to various toxins and biological agents that he claimed were necessary to carry out his job duties. *Id.* at 234. The agency's decision was based on the plaintiff's previous association with a terrorist group. *Id.* at 234-35. As part of the statutory and regulatory scheme behind the agency's authority, the Court cited the Bioterrorism Act. *Id.* at 232. The Court ruled in favor of the United States' cross-motion for summary judgment and denied the plaintiff's cross-motion for summary judgment on constitutional and non-constitutional claims. *Id.* at 242.

Legislative hearings on Bioterrorism Act support the contention that the Act reflects the President's goal to protect Americans from adverse health consequences or death from imported foods.<sup>100</sup> The Bioterrorism Act also provides funding for more properly trained first responders to save lives and limit casualties after a terrorist attack.<sup>101</sup> In particular, "threats of agricultural bioterrorism should receive the same level of priority as other terrorist threats."<sup>102</sup>

#### IV. THE DOCTRINE OF TRIBAL SOVEREIGNTY IMMUNITY

##### A. *The Origins of the Immunity Doctrine*

Tribal sovereign immunity was an accident, "at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine."<sup>103</sup> The origins of this accident lie in a trio of United States Supreme Court cases well known to scholars of Indian law as the "Marshall Trilogy."<sup>104</sup> The first case, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) decided the issue of the validity of Indian land titles.<sup>105</sup> In *M'Intosh*, the Supreme Court held that Indians no longer possessed title to their land which they could convey to others as they wished.<sup>106</sup> The United States held superior title to the land by virtue of the "discovery doctrine" which states the conquering nation controls and dominates the land and its indigenous peoples.<sup>107</sup> Next, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Indian tribes' sovereignty was acknowledged to exist before the inception of the United States, however the relationship between Indian tribes and the United States was that of ward and guardian because as the conquering nation, the United States possessed sole control over Indian land.<sup>108</sup> Specifically, Indian tribes were to rely

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<sup>100</sup> 147 CONG. REC. E2387-01(2001) (statement of Rep. Shimkus).

<sup>101</sup> 148 CONG. REC. E427-01 (2002) (statement of Rep. Putnam).

<sup>102</sup> *Id.*

<sup>103</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-57 (1998).

<sup>104</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353 (2001). These cases are dubbed the "Marshall Trilogy," because the majority opinions for each case were written by Chief Justice John Marshall. See *United States v. Lara*, 324 F.3d 635, 642 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004).

<sup>105</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>106</sup> *Id.* at 587.

<sup>107</sup> *Id.* at 567.

<sup>108</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 3.

on Congress for their daily welfare and political rights.<sup>109</sup> Lastly, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), left no doubt that regulation of Indian tribes was the sole domain of Congress and not within the authority of the individual States.<sup>110</sup> These founding principles still exist in Indian law as Indian nations are still “domestic dependent,” and while their sovereignty still exists it is in a very limited form.<sup>111</sup> As such, tribes are still wards of Congress and it is only that branch of the United States government that sustains tribal sovereignty. However, continuing to uphold this doctrine has not been without criticism.

The criticism is aimed towards the immunity from suit that tribes enjoy because of their sovereignty. This immunity extends not just to the sovereign entity, but sometimes to its officers acting in their official capacity,<sup>112</sup> and in some jurisdictions, tribal corporations and their employees if acting in the scope of their employment.<sup>113</sup> The assumption that tribal nations were immune from suit arose in *Turner v. United States*, 248 U.S. 354 (1919), where the Creek Nation gave its citizens grazing rights on parcels of the Nation’s public lands.<sup>114</sup> One of those Creek Indians leased his grazing right to Turner, who was a non-Indian.<sup>115</sup> Turner built a fence around his land but Creeks tore it down, prompting a lawsuit.<sup>116</sup> The Supreme Court eventually resolved the suit, proclaiming that, “[l]ike other governments . . . the Creek Nation was free from liability for injuries to persons or property . . .”<sup>117</sup> Because of this, a plaintiff seeking recovery from a tribal nation will not be successful because the plaintiff, in absence of Congressional authorization, lacks a substantive right to file suit.<sup>118</sup> The Court, in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), nudged this idea away from assumption and towards actual doctrine.<sup>119</sup> However, the Court in *United States Fidelity* did not question *Turner*’s wisdom in carrying this immunity forward. Rather, *United States Fidelity* parrots *Turner*, offering no

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<sup>109</sup> *Id.* at 17.

<sup>110</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555, 557 (1832).

<sup>111</sup> *See, e.g., United States v. Lara*, 541 U.S. 193, 199–00 (2004).

<sup>112</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

<sup>113</sup> *Cook v. Avi Casino*, 548 F.3d 718, 725 (9th Cir. 2008) (“[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself”).

<sup>114</sup> *Turner v. United States*, 248 U.S. 354, 355 (1919).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 355–56.

<sup>117</sup> *Id.* at 356.

<sup>118</sup> *Id.* at 357–58.

<sup>119</sup> *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

analysis or reasons for its conclusion, but rather a mechanical application of *Turner's* "rule" to the facts in the case.

Nearly eighty years later, the Supreme Court re-examined tribes' sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). In *Kiowa*, the petitioner was an Indian tribe that defaulted on a promissory note made to the respondent.<sup>120</sup> This ordinary breach of contract suit was upheld in favor of the Kiowa, noting that tribes enjoy sovereign immunity against suit unless a tribe has waived that immunity.<sup>121</sup> While acknowledging tribal sovereign immunity was "settled law," the *Kiowa* court held that *Turner's* assumption of immunity was, "but a slender reed" supporting it.<sup>122</sup> The majority opinion on the doctrine is worth quoting in detail:

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.<sup>123</sup>

Despite *Kiowa's* begrudging acceptance of carrying tribal sovereign immunity forward, the majority noted that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities . . . ."<sup>124</sup> As *Kiowa* stated, tribes enjoy sovereign immunity from suit unless they have waived that immunity.<sup>125</sup> However, courts may construe that tribes' sovereignty was impliedly waived under a statute of general application.

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<sup>120</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753 (1998).

<sup>121</sup> *Id.* at 754.

<sup>122</sup> *Id.* at 757.

<sup>123</sup> *Id.* at 758 (Internal citations omitted).

<sup>124</sup> *Id.* at 760.

<sup>125</sup> *Id.* at 754.

*B. Congressional Abrogation via Statutes of General Application*

*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), provides the rule that a statute that is general in its terms and applies to all persons shall include Indian tribes in regards to that statute's application.<sup>126</sup> In *Tuscarora*, the United States and Canada entered into agreement to share hydroelectricity produced by a Niagara Falls power plant.<sup>127</sup> The power plant was destroyed in a rock slide and Congress quickly passed a statute mandating the Federal Power Commission to issue a license pursuant to the Federal Power Act to the Power Authority of the State of New York to build a new plant.<sup>128</sup> The plans for the new reservoir included the taking of 22% of lands belonging to the Tuscarora Indian Nation that were given to the tribe through a treaty with the United States.<sup>129</sup> Despite Tuscarora's objections, the Commission granted the license to the New York agency and Tuscarora filed suit claiming that its land was a "reservation" under the Federal Power Act which, unless the Commission found that granting a license would not interfere with the purpose for which the reservation was given to Indians, could not be taken for reservoir purposes.<sup>130</sup>

The United States Supreme Court held that the Federal Power Act applied to Indian tribes, giving the ruling regarding statutes of general applicability; it applied to the Tuscarora because the Federal Power Act specifically mentioned Indians and their land.<sup>131</sup> The lack of consideration given to Indian tribes in the lawmaking process has led to a split in the federal appellate circuits in applying the *Tuscarora* rule.<sup>132</sup> The Ninth Circuit's holding in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), requires a tripartite checklist, seeking to except a statute's applicability if:

- (1) [T]he law touches exclusive rights of self-governance in purely intramural matters;
- (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or
- (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their

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<sup>126</sup> *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), *reh'g denied* Apr. 18, 1960.

<sup>127</sup> *Id.* at 101.

<sup>128</sup> *Id.* at 103–04.

<sup>129</sup> *Id.* at 124. Twenty two percent of Tuscarora land approximates 1,388 acres.

<sup>130</sup> *Id.* at 105–07.

<sup>131</sup> *Id.* at 118.

<sup>132</sup> Clay Smith, *Tribal Sovereign Immunity: A Primer*, Advocate, May 2007, at 19, 21.

reservations.<sup>133</sup>

In *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. 2000), *reh'g en banc*, 276 F.3d 1186 (10th Cir. 2002) (“San Juan”), the Tenth Circuit excluded *Tuscarora* from an application of the National Labor Relations Act (“NLRA”) to an Indian tribe because the terms of the NLRA exclude states and territories from its application, thus distinguishing it from a statute of general application.<sup>134</sup> Specifically, section 14(b) of the NLRA retained sovereign rights of states and territories to forbid union security agreements, therefore, by implication, all sovereigns enjoy the same right.<sup>135</sup> Such means of “self-government and territorial management” are inherent attributes of tribal sovereignty.<sup>136</sup> Next, the court focused on the principle that when applying federal acts to Indian tribes, they must be “viewed in light of the federal policies which promote tribal self-government, self-sufficiency, and economic development,” unless Congress has abrogated tribes’ rights or preempted them via federal regulation.<sup>137</sup> Moreover, the Tenth Circuit distinguishes *Tuscarora* on the basis that the rule was made concerning tribal property rights and eminent domain, and not matters of self-governance.<sup>138</sup>

In another example, the District of Columbia Circuit held that *Tuscarora* went against established Indian law principles which required ambiguities in federal law to be construed in favor of Indians absent a “clear expression” of Congressional intent to abrogate a tribe’s sovereignty.<sup>139</sup> The primary difference between the Ninth Circuit and others is the others’ emphasis on construing federal law in favor of Indians as opposed to *Coeur d’Alene* where all a court has to do is find a way to conclude that the exceptions do not apply.

In analyzing the Bioterrorism Act’s application to Indian tribes we are left with *Tuscarora*’s broad rule concerning statutes of general application. However, there is also Supreme Court case law mandating a pro-sovereignty philosophy in applying statutes in absence of clear expres-

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<sup>133</sup> *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (internal quotations omitted).

<sup>134</sup> *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1284.

<sup>138</sup> *Id.* at 1198–99.

<sup>139</sup> *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, 1311 (D.C. Cir. 2007), *reh'g denied en banc* Jun. 8, 2007.

sion of abrogation.<sup>140</sup> Yet, the modern attitude is to look past “platonic notions of Indian sovereignty,” and towards the statutory language itself for guidance.<sup>141</sup> There is also *Kiowa*’s provision that tribes are immune from suit on contract disputes, “whether those contracts involve governmental or commercial activities . . . .”<sup>142</sup> Yet, the Supreme Court has also warned that when a tribe is engaged in off-reservation commercial conduct, their claim to sovereign immunity is at its weakest.<sup>143</sup> Considering the strengths and weaknesses of tribal sovereign immunity, uncertainty arises when federal acts such as the Bioterrorism Act seem to abrogate tribal sovereignty when tribes and the federal government agree to contract.

#### V. DOES THE BIOTERRORISM ACT ABROGATE TRIBAL SOVEREIGNTY?

Consider the following scenario: an agroterrorism event has occurred within the United States. Deliberately infected food has entered the United States after making its way past inspection. Many people are killed or made gravely ill all over the United States. The United States agricultural industry and economy is seriously harmed. Terrorist groups come forward claiming responsibility for the attack. It is discovered that the infected food was inspected or examined by tribal nations using grant money obtained under Section 311 of the Bioterrorism Act. Lawsuits are filed against the Indian tribes responsible for letting the infected food pass from their reservations into the American food supply; however tribes are protected by sovereign immunity. Resourceful attorneys will discover that statutes of general application waive a tribe’s sovereignty if certain conditions are met.<sup>144</sup>

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<sup>140</sup> See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978), *superseded by statute on other grounds*, Indian Civil Rights Act, 25 U.S.C. § 1302, *as stated in* *United States v. Lara*, 541 U.S. 193 (2004) (Concerning the doctrine of Dual Sovereignty).

<sup>141</sup> *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973).

<sup>142</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998). See also *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

<sup>143</sup> *San Manuel*, 475 F.3d at 1312–13 (*citing* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)).

<sup>144</sup> This Comment discusses how a litigant may overcome tribal sovereign immunity if the Bioterrorism Act, as a statute of general application, has been found to abrogate it. However, the parties’ efforts in establishing subject matter jurisdiction will depend on whether litigating party is the federal government or a private plaintiff. See *Wrest*, *supra* note 57, at 106 n.27. Whenever the federal government chooses to bring suit against an Indian tribe, their immunity is not a bar to suit. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994); *Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001). However, tribes enjoy immu-

A. *The Bioterrorism Act as a Statute of General Application*

*Tuscarora* ratified a well-established principle that a general statute “in terms applying to all persons includes Indians and their property interests.”<sup>145</sup> The broad language used was culled from, *inter alia*, citing references to taxation cases.<sup>146</sup> Based on the jurisprudence imbued into the *Tuscarora* holding, it is reasonable to think that the rule applies across a broad spectrum of statutory language and interpretation.<sup>147</sup> *Tuscarora* also stood for including Indians within statutes of general application if they were “complete and comprehensive” plans that neither overlooked nor excluded Indians.<sup>148</sup> In a scenario where tribes are sued over an agroterrorist attack, plaintiffs’ attorneys may take comfort in the fact that the Bioterrorism Act “neither overlooks nor excludes Indians or lands owned or occupied by them.”<sup>149</sup> The language of Section 311 explicitly mentions tribes as potential recipients for grants.<sup>150</sup> *Tuscarora*’s broad language and history also support the notion that it can be applied in an agroterrorism context.<sup>151</sup> Nonetheless, pleading challenges will

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nity from private suits. *Id.* at 1075 (citing *Santa Clara Pueblo*, 436 U.S. at 58). Private parties will only be able to seek redress against an Indian tribe in violation of the Bioterrorism Act if that Act has implied a private right of action. *See Cort v. Ash*, 422 U.S. 66, 78 (1975) (Establishing four factors to determine whether a statute has implied a private right of action; one of them being whether there was legislative intent to expressly or impliedly create such a right). However, in his concurrence in *Thompson v. Thompson*, 484 U.S. 174, 189 (1988), Justice Scalia noted: “It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.”

<sup>145</sup> *Tuscarora*, 362 U.S. at 116.

<sup>146</sup> *See* Superintendent of Five Civilized Tribes, For Sandy Fox, Creek No. 1263 v. Commissioner of Internal Revenue, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691, 697 (1931); and *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

<sup>147</sup> *See Five Civilized Tribes*, 295 U.S. at 419–20 (citing *Choteau*, 283 U.S. at 697) (Taxation statute must show that “[t]he intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject-matter”); *Oklahoma Tax Commission*, 319 U.S. at 604 (Taxation statute does not exempt Indians from it because the “legislative history of the Act refutes the contention that an exemption was intended . . .”).

<sup>148</sup> *Tuscarora*, 362 U.S. at 118.

<sup>149</sup> *See id.*

<sup>150</sup> *See* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 311, 116 Stat. 594 (2002).

<sup>151</sup> *See Tuscarora*, 362 U.S. at 116; *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985); *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, 1309 (D.C. Cir. 2007); *National Labor Relations Board v. Pueblo of San Juan*, 280 F.3d 1278, 1283–84 (10th Cir. 2000).

arise depending upon the particular jurisdiction in which the plaintiff is filing the suit.

### 1. Examining and Applying the *Donovan* Factors

*Donovan's* three considerations<sup>152</sup> were carried into their current civil context from a criminal context.<sup>153</sup> In *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980),<sup>154</sup> the defendants, who were Indians running an illegal gambling shop, were convicted under a federal criminal statute.<sup>155</sup> The Court in *Farris* outlined the first factor exempting Indian tribes from federal statutes of general application, hinging on "purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians."<sup>156</sup> "Purely intramural matters," pertained to tribal membership,<sup>157</sup> inheritance rules,<sup>158</sup> and "domestic relations."<sup>159</sup> *Farris* eliminated gambling as intramural or essential to self-government.<sup>160</sup> The second prong exempted tribes from a general application statute if it abrogated treaty rights with the United States.<sup>161</sup> The third prong relating to legislative history was regarded as a non-sequitur since "it defies reason to suppose that Congress intended such an exemption."<sup>162</sup> Perhaps there is some irony to this statement because *Farris*

<sup>152</sup> See *Donovan*, 751 F.2d at 1116.

<sup>153</sup> See *id.* at 1114 (9th Cir. 1985) (Application of the Occupational Safety & Health Act).

<sup>154</sup> *Farris* was superseded by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, as stated in *United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996); *abrogation recognized by Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009). Defendants' petitions for certiorari to the United States Supreme Court were denied by 449 U.S. 1111 (1981).

<sup>155</sup> *United States v. Farris*, 624 F.2d 890, 892-93 (9th Cir. 1980).

<sup>156</sup> *Id.* at 893.

<sup>157</sup> *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978)).

<sup>158</sup> *Id.* (citing *Jones v. Meehan*, 175 U.S. 1 (1899)).

<sup>159</sup> *Id.* (citing *United States v. Quiver*, 241 U.S. 602 (1916)).

<sup>160</sup> It may be interesting to note that in *Cook v. Avi Casino Enterprises*, the Court seemingly upheld the tribe's argument that tribal corporations employed in legalized gambling are "competing in the economic mainstream," and that while *Kiowa* begrudgingly accepted tribes' entry into areas beyond what was needed to safe-guard tribal government, the tribal entity conducting the activity was shielded by the tribe's immunity because, as an arm of the tribe, the entity's activities were also those of the tribe. *Id.* at 725. This idea would apply in an agroterrorism context because tribal food production and inspections may be carried out by tribal corporations, incorporated by the tribe for these purposes; and therefore, are entitled to immunity.

<sup>161</sup> *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980).

<sup>162</sup> *Id.* at 893-94 (citing *United States v. Montana*, 604 F.2d 1162, 1168 (9th Cir. 1979), *cert. granted* by 445 U.S. 960 (1980), *rev'd.* 450 U.S. 544 (1981) (internal quotations omitted)). Among *Montana's* findings: "We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the

relied on proclaiming this opinion was overruled by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981):

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction . . . . A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.<sup>163</sup>

As previously stated, *Kiowa* grants tribes sovereign immunity concerning contract disputes.<sup>164</sup> It is also worth noting that federal grants made to private parties are construed as binding contracts.<sup>165</sup> Despite this principle, the *Donovan* court referenced the *Farris* factors without explaining their blemishes or benefits.<sup>166</sup> In *Donovan*, the Coeur d'Alene Indian tribe operated a tribal farm that produced food for sale both inside and outside the state of Idaho.<sup>167</sup> An Occupational Safety & Health Administration ("OSHA") inspector fined the tribe for possessing faulty grain elevators, and after exhausting their administrative remedies, the tribe sued, claiming OSHA did not apply to tribes.<sup>168</sup> The Court applied *Tuscarora* and the first *Farris* factor, and determined that OSHA applied to

twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, Viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians." *Montana*, 604 F.2d at 1169.

<sup>163</sup> *Montana*, 450 U.S. at 565.

<sup>164</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998).

<sup>165</sup> See *Thermalon Industries, Ltd. v. United States*, 34 Fed.Cl. at 414-15 (Federal courts construe grants as binding contracts). In *Thermalon*, the National Science Foundation ("NSF") offered research grants to small science-based and high technology businesses. *Id.* at 413. *Thermalon Industries* submitted a research proposal which the NSF found agreeable and awarded *Thermalon* the grant pursuant to their authority under the National Science Foundation Act. *Id.* at 413. Performance of the grant work commenced, but the NSF refused to pay *Thermalon's* invoices and, in turn, *Thermalon* suspended its performance. *Id.* at 414. NSF terminated the grant, and after *Thermalon* exhausted all of its administrative remedies against NSF, it filed a breach of contract action seeking expectancy and consequential damages. *Id.* The court's analysis utilized textbook examples of offer, acceptance and consideration. *Id.* Offer and acceptance were found in the solicitation process; specifically, *Thermalon's* submitted proposal was an offer to contract. *Id.* at 414-15. "Because plaintiff ultimately commenced work under the grant; there was an offer and acceptance under either alternative." *Id.* at 415. The grant conditions and terms constituted the underlying consideration and with a valid offer and acceptance, the grant was a valid contract. *Id.* at 414.

<sup>166</sup> *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

<sup>167</sup> *Id.* at 1114.

<sup>168</sup> *Id.*

the Coeur d'Alene because operating a tribal farm that sold produce on the open market and in interstate commerce does not touch upon "conditions of tribal membership, inheritance rules, and domestic relations . . .

<sup>169</sup>

*Donovan* makes no sense because it is an inferior mimic of *Farris*, but without *Farris*' attempt to rationalize its own rule set. In outlining the first prong, *Farris* listed various factors that may pertain to "exclusive rights of self-governance in purely intramural matters," such as tribal membership and inheritance rules, but also alluded to a more general theme: "Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation."<sup>170</sup> As stated earlier, agriculture is Indian Country's second largest employer.<sup>171</sup> A tribe that produces its own food for daily sustenance is not to be overlooked because it does not fit into *Donovan*'s categorization of "intramural affairs." Furthermore, commercial activities such as food production are protected by a tribe's sovereign immunity.<sup>172</sup> *Donovan* took what it wanted from *Farris* while ignoring *Farris*' open-ended inquiry into a broader sense of tribal government matters.<sup>173</sup> The *Donovan* rule set has the potential to be effortlessly applied without tackling more thoughtful and moral issues; its only redeeming value is its inclination to one's logic, but done with a mechanical superficiality.<sup>174</sup>

A tribe's ability to enter into a governmental contract should be protected by its sovereign immunity because it is a matter of self-governance.<sup>175</sup> However, the ability to contract is not among the factors

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<sup>169</sup> *Id.* at 1116. The Court did apply the second *Farris* factor and found OSHA did not interfere with any treaty rights between the Coeur d'Alene and the United States because there was no treaty present. *Id.* at 1117.

<sup>170</sup> *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) (citing *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 684 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970)).

<sup>171</sup> *Hearings*, *supra* note 56.

<sup>172</sup> *See Donovan*, 751 F.2d at 1114.

<sup>173</sup> *See id.* at 1116.

<sup>174</sup> Justice Murphy's dissent in *San Juan*, remarked that *Donovan* "appropriately limit[s] the Tuscarora presumption by preserving tribal sovereignty over purely intramural matters even in the face of comprehensive federal regulation. A limited notion of tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters. Any concerns about abrogating tribal powers of self-governance by implication are fully addressed by the [*Donovan*] exceptions." *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1206 (10th Cir. 2002). However, as this Comment explores, not all is as Justice Murphy would believe.

<sup>175</sup> *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998).

listed as a “purely intramural” matter.<sup>176</sup> Thus, the Bioterrorism Act, without further analysis of the remaining *Donovan* factors, would apply to tribes and abrogate their immunity from suit. While later Ninth Circuit holdings expanded their view of what is an intramural matter,<sup>177</sup> exemptions were only allowed in rare circumstances where the “immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.”<sup>178</sup> Lastly, whether the Bioterrorism Act would interfere with the treaty rights of individual tribes will perhaps be a non-issue because it is scarcely cognizable that there is an Indian treaty provision discussing food inspection for purposes of avoiding a bioterrorism attack.

While Section 311 of the Bioterrorism Act expressly includes Indian tribes, it does not say anything concerning inherent sovereignty.<sup>179</sup> However, from *Tuscarora* and *Donovan* we are left to presume that such an express mention of tribes is enough to signify Congressional intent for the Bioterrorism Act to abrogate immunity.<sup>180</sup>

## 2. Applying Other Circuit’s Considerations

On rehearing before the Tenth Circuit, sitting en banc, the court in *San Juan* affirmed the lower court’s decision granting summary judgment to the tribe claiming the National Labor Relations Act (“NLRA”) did not apply to it.<sup>181</sup> *Tuscarora* was cast aside because it “dealt solely with issues of ownership, not with questions pertaining to the tribe’s sovereign authority to govern the land.”<sup>182</sup> In this case, the San Juan Pueblo leased

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<sup>176</sup> See *Donovan*, 751 F.2d at 1116.

<sup>177</sup> See, e.g., *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) (FLSA does not apply to tribes regarding tribal law enforcement because law enforcement is an intramural matter).

<sup>178</sup> *Solis v. Matheson*, 563 F.3d at 430 (citing *Snyder*, 382 F.3d at 895) (Holding the FLSA does apply regarding wage and hour laws because business owned by tribal members was a “purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians”).

<sup>179</sup> Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 311, 116 Stat. 594 (2002).

<sup>180</sup> See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); *Donovan*, 751 F.2d at 1115–16.

<sup>181</sup> *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002).

<sup>182</sup> *Id.* at 1198. “Proprietary interests and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a sovereign, and a government may exercise sovereign authority over land it does not own. *Tuscarora* mentions no attempts by the tribe to govern the disputed land, nor does it take cognizance of any argument that taking the land would incidentally infringe on tribal sovereign authority to govern.” *Id.* at 1198–99.

their lands to non-tribal corporations in order to generate income and employment for their members.<sup>183</sup> The tribal council passed a “right to work” ordinance that allowed members to avoid union membership and forbade unions from enacting such agreements.<sup>184</sup> The National Labor Relations Board (“NLRB”) filed suit against the tribe, claiming that, pursuant to the Supremacy Clause, the NLRA preempted the ordinance.<sup>185</sup> The court held that the language of the NLRA did not manifest Congressional intent that was clear and unambiguous to restrict tribal sovereign immunity.<sup>186</sup> Moreover:

Where tribal sovereignty is at stake, the Supreme Court has cautioned that we tread lightly in the absence of clear indications of legislative intent. The Court’s teachings also require us to consider tribal sovereignty as a backdrop against which vague or ambiguous federal enactments must always be measured, and to construe ambiguities in federal law ... generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence. Courts are consistently guided by the purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow. We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.<sup>187</sup>

If the United States Constitution is any indication, the realm of contractual agreement is within the power of a sovereign.<sup>188</sup> There is no express language in the Bioterrorism Act indicating abrogation of tribes’ sovereign immunity.<sup>189</sup> Therefore, tribes’ powers inherent to the reciprocity of nations (domestic-dependant, or otherwise) should not be infringed; especially where tribes retain sovereignty not expressly or necessarily withdrawn.<sup>190</sup> Simply, when Indian tribes take grants from the federal government for the purposes of food inspection they do not waive their immunity because the Bioterrorism Act does not clearly and unambiguously state that their sovereignty is abrogated.<sup>191</sup> If *San Juan* stands for the rule that federal statutes must be construed in favor of tribal sovereignty, then Section 311 grants under the Bioterrorism Act should not be viewed as a waiver of immunity, but as an example of tribal self-

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<sup>183</sup> *Id.* at 1188–89.

<sup>184</sup> *Id.* at 1189.

<sup>185</sup> *Id.* at 1189–90.

<sup>186</sup> *Id.* at 1194.

<sup>187</sup> *Id.* at 1195 (citations and quotations omitted).

<sup>188</sup> U.S. Const. art. I, § 10.

<sup>189</sup> See *San Juan*, 276 F.3d at 1192.

<sup>190</sup> *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

<sup>191</sup> See Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 311, 116 Stat. 594 (2002).

government, self-sufficiency, and economic development.<sup>192</sup> Specifically, the United States is encouraging tribes to participate in the national security structure of the nation by allowing them to help inspect imported food entering the country.<sup>193</sup> As such, entering into governmental contracts is an aspect of tribal-self government and tribes are immune to suit concerning their performance under such contracts.<sup>194</sup>

The District of Columbia Circuit essentially adhered to *San Juan's* principles but held that the NLRA applied to tribal casinos.<sup>195</sup> In *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007) (“*San Manuel*”), the San Manuel Indian Bingo and Casino, a California casino operated on the San Manuel reservation, however this action was transferred to the D.C. Circuit.<sup>196</sup> The suit in *San Manuel* stems from casino security guards denying a labor union (“HERE”)<sup>197</sup> access to the Casino’s employees while another union was given access, and was allowed to distribute advertisements and literature.<sup>198</sup> HERE charged the casino for “[interfering] with, [coercing] or [restraining] employees in [exercising their collective bargaining rights].”<sup>199</sup> The NLRB held that, despite the tribe’s argument the NLRA did not apply to it, *Tuscarora* and *Donovan* were dispositive in holding the NLRA applicable to the tribe.<sup>200</sup> Further, “[b]ecause here the casino is a typical commercial enterprise [that] employs non-Indians[ ] and . . . caters to non-Indian customers, the Board found the exercise of jurisdiction appropriate.”<sup>201</sup> “The Board issued a cease-and-desist order,” but the tribe decided to bring action in district court.<sup>202</sup>

The case dealt with conflicting Supreme Court decisions, *Tuscarora* and numerous other decisions citing that “ambiguities in a federal statute must be resolved in favor of Indians,” and a “clear expression of Congressional intent is necessary before a court may construe a federal statute

<sup>192</sup> See *San Juan*, 280 F.3d at 1284.

<sup>193</sup> See Public Health Security and Bioterrorism Preparedness and Response Act § 311.

<sup>194</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998).

<sup>195</sup> See *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, 1311–15 (D.C. Cir. 2007).

<sup>196</sup> *Id.* at 1309.

<sup>197</sup> Hotel Employees & Restaurant Employees International Union. *Id.* at 1308.

<sup>198</sup> *Id.* at 1309.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* While the NLRB used a *Tuscarora / Donovan* framework to reach their decision, the court in *San Manuel* did not use *Donovan* and, as will momentarily be shown, adopted its own framework.

<sup>201</sup> *Id.* at 1310 (quotations omitted).

<sup>202</sup> *Id.*

ute so as to impair tribal sovereignty.”<sup>203</sup> *San Manuel* attempted to find a middle ground: *Tuscarora* may apply to “constrain the actions of a tribal government without at the same time impairing tribal sovereignty.”<sup>204</sup> From this, a balancing test emerged:

The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians [such as employment of non-Indians] then application of the law might not impinge on tribal sovereignty. Of course, it can be argued any activity of a tribal government is by definition “governmental,” and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term “governmental” in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope.<sup>205</sup>

From here, the Court held that the NLRA applied to the *San Manuel* tribe because while the NLRA might impinge some aspects of tribal government, the casino was primarily commercial that predominately attracted large amounts of non-Indian patronage<sup>206</sup> and “[employed numerous non-Indians].”<sup>207</sup>

Whether accepting federal grants for the purposes of conducting imported food inspection is a commercial or governmental activity is an issue that has yet to see any judicial coverage. Using *San Manuel* to distinguish, it may be obvious on its face that food inspection is far removed from a casino operation. However, according to *Donovan*, activities involving food for both intratribal and interstate commerce was enough to apply a federal statute to a tribe.<sup>208</sup> More specifically, the only requirement for OSHA to apply to the Coeur d’Alene was the presence of a faulty grain elevator.<sup>209</sup> An argument arises when the Bioterrorism Act should apply to a tribe over faulty food inspection. The facts in *Donovan* and *San Manuel* involved operations that employed non-Indian

<sup>203</sup> *Id.* at 1311.

<sup>204</sup> *Id.* at 1312.

<sup>205</sup> *Id.* at 1313.

<sup>206</sup> *Id.* at 1308. Listed in the facts was a casino advertisement: “Over 1 BILLION Dollars in Cash and Prizes awarded since July 24th, 1986.” *Id.*

<sup>207</sup> *Id.* at 1315. Other factors *San Manuel* listed as commercial, non-governmental activities: off-reservation fishing, investments in non-residential private property, and commercial enterprises “that tend to blur any distinction between the tribal government and a private corporation.” *Id.* at 1314.

<sup>208</sup> See *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1114 (9th Cir. 1985).

<sup>209</sup> See *id.*

workers, or shipping food into interstate commerce.<sup>210</sup> Arguments may arise whether food inspection is a commercial activity since food that successfully passes through inspection later enters the stream of commerce.<sup>211</sup> A tribal defendant may take refuge in the position that the Bioterrorism Act was enacted primarily to secure the nation's food supply, and in relation to that, to allow tribes to partake in the national security of the United States.<sup>212</sup> Providing aid for the national defense is purely a government function and not related to economics.<sup>213</sup>

### B. Which Circuit is Correct? Does it Matter?

Each circuit's methodology in applying *Tuscarora* varies.<sup>214</sup> *Donovan* is logical but morally bankrupt; its strict classification may please some willing to look no further into an American culture they do not understand, and because of this, lacks imagination.<sup>215</sup> *San Manuel*'s balancing test appears to be a better approach but, as will be discussed *infra*, matters of terrorism will most likely render an unfavorable verdict against tribes' sovereign immunity.<sup>216</sup> *San Juan* is the most liberal view, generous in its support of tribal sovereignty, but perhaps too naïve to recognize that matters of national security have often dispelled even the most time honored traditions.<sup>217</sup> As for the foundation laid by *Tuscarora* itself,

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<sup>210</sup> See *id.* at 1116; *San Manuel*, 475 F.3d at 1307–08.

<sup>211</sup> See *Wrest*, *supra* note 57, at 104.

<sup>212</sup> See, e.g., Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, §§ 301, 302, 116 Stat. 594 (2002).

<sup>213</sup> See, e.g., Executive Order 13228, Establishing the Office of Homeland Security and the Homeland Security Council (66 FR 51812).

<sup>214</sup> See, e.g., *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116–18 (9th Cir. 1985); *San Manuel*, 475 F.3d at 1312; *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1198–00 (10th Cir. 2002).

<sup>215</sup> See *Donovan*, 751 F.2d at 1116–18.

<sup>216</sup> See *San Manuel*, 475 F.3d at 1313.

<sup>217</sup> See *San Juan*, 276 F.3d at 1189–00; Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, United States Dep't of Justice to Alberto Gonzales, United States Att'y Gen., *Authority for Use of Military Force to Combat Terrorist Activities* (Oct. 23, 2001) (Advising the President that use of military troops within the United States is constitutional if used against "terrorist threats," and that military commanders are not bound by Fourth Amendment requirements such as finding of probable cause or having a warrant to conduct raids within the United States); Memorandum from John Bybee, Assistant Att'y Gen., Office of Legal Counsel, United States Dep't of Justice to Alberto Gonzales, United States Att'y Gen., *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. (Advising the President that interrogation techniques used at Guantanamo Naval Base and other extraterritorial locations may be cruel, inhuman and degrading but not legally considered "torture").

*Donovan* embraced it as well-settled principle of law.<sup>218</sup> *San Manuel* considered it dictum, “given the particulars of that case.”<sup>219</sup> *San Juan* determined *Tuscarora* had nothing to do with tribal sovereignty.<sup>220</sup>

*Tuscarora* proclaimed that statutes of general application apply to Indians.<sup>221</sup> In its reasoning, the Court concluded that it would have been “very strange,” if the United States, “in the execution of its rightful authority, could exercise the power of eminent domain [in states but not in] territory occupied by an Indian [tribe], the members of which were wards of the United States, and directly subject to its political control.”<sup>222</sup> It would not be difficult to apply this similar logic to any circumstance that a court may find reasonable to divest an Indian tribe of its sovereign immunity. It is the underlying attitude that birthed this “rightful authority” that may provide the ultimate conclusion.

#### VI. CONCLUSION: “REASONS TO DOUBT THE WISDOM OF PERPETUATING THE DOCTRINE”<sup>223</sup>

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1981), the Supreme Court held that “[o]nly the Federal Government may limit a tribe’s exercise of its sovereign authority.”<sup>224</sup> It further held that the government could modify tribal sovereignty whenever it was “inconsistent with overriding national interests . . . [However,] [t]his concern is not presented here.”<sup>225</sup>

It may well be the case here. The advent of agroterrorism has signified that terrorist groups such as al-Qaeda are considering lower profile, yet highly devastating means of destroying the United States economy.<sup>226</sup> In a Senate hearing on agroterrorism, Susan M. Collins, Chairman of the Committee of Government Affairs, remarked:

In the war on terrorism, the fields and pastures of America’s farmland might seem at first to have nothing in common with the towers of the World Trade Center or our busy seaports. In fact, however, they are merely different manifestations of the same high priority target, the American economy. Even as he celebrated the toppling of the pillars of our economic power in the

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<sup>218</sup> *Donovan*, 751 F.2d at 1115.

<sup>219</sup> *San Manuel*, 475 F.3d at 1311.

<sup>220</sup> *San Juan*, 276 F.3d at 1198.

<sup>221</sup> Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

<sup>222</sup> *Id.* at 121–22.

<sup>223</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998).

<sup>224</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).

<sup>225</sup> *Id.* at 147 n.13.

<sup>226</sup> Chalk, *supra* note 4.

videotape released shortly after September 11, 2001, Osama bin Laden urged his followers to hit hard the American economy at its heart and core.<sup>227</sup>

Collins also noted that terrorist hideouts in Afghanistan contained hundreds of pages of United States agricultural documents which demonstrated that the 9/11 hijackers considered using crop dusting aircraft to spread biological agents.<sup>228</sup> Documents published through underground presses containing detailed instructions to make plant and livestock diseases using commonly available materials were also found among terrorist groups.<sup>229</sup> The Bioterrorism Act was composed to address these types of concerns; indeed, its purpose is to improve the ability of the United States to prevent, prepare for, and respond to bioterrorism.<sup>230</sup>

What all of this leads to is that terrorism is far too important to let something like tribal sovereignty to get in the way. After all, the courts may not care about tribes' sovereign immunity when they have the power to determine whether Congress impliedly abrogated it. One commentator noted that the *Kiowa* majority "practically begg[ed] Congress to modify tribal sovereign immunity by legislation while at the same time acknowledging that the Court is constrained by precedent not to do so."<sup>231</sup> Nothing would stop courts, however, from construing a "national security" exception to determine the Bioterrorism Act, or any act relating to terrorism, abrogated sovereign immunity. It cannot be fairly determined that Congress abrogated tribes' sovereign immunity with the Bioterrorism Act, particularly when tribes have been left out of national security planning.<sup>232</sup> Part of the reason stems from the inherent racism lingering in Indian law jurisprudence that still applies the Marshall Trilogy view of Indians as inferior pupils.<sup>233</sup> When Indians are viewed as

<sup>227</sup> *Agroterrorism: The Threat to America's Breadbasket: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 1 (2003) (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Governmental Affairs).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> 107TH CONGRESS, 2ND SESSION, SESSION HIGHLIGHTS (2002).

<sup>231</sup> Sarah Krakoff, *Undoing Indian Law One Case At A Time: Judicial Minimalism And Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1249 (2001).

<sup>232</sup> See, e.g., Stouff, *supra* note 69; Butts, *supra* note 69.

<sup>233</sup> See, generally, GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 42-71 (Thompson-West 2005) (1979) (Outlining the image of the Indian "savage" from its origins in medieval, anti-Muslim "infidel" context, to American colonization, ending with the Discovery Doctrine in *Johnson v. M'Intosh* and its persistence in modern Indian law); COHEN, *supra* note 53, at v ("Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith . . ."); and Stacy Leeds, *The More Things Stay The Same: Waiting On Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 75 (2002). See also Peter

legally inferior to “overriding national interests,”<sup>234</sup> it can hardly be said that tribes’ interests would stand a chance against fighting terrorism. To be fair, however, terrorism is not to be taken lightly – it will continue to be the United States’ primary homeland security issue for the foreseeable future.<sup>235</sup> Agroterrorism provides another unique threat: diseases maliciously introduced into plants and animals may mutate into more lethal strains.<sup>236</sup> In light of this, tribes have an important role to play in the national security structure if the Bioterrorism Act’s inclusion of them into its language is any indication.<sup>237</sup>

On March 24th, 2009, H.R. 1697 was introduced to Congress for consideration.<sup>238</sup> Titled as the “Tribal Government Homeland Security Coordination and Integration Act,” its purpose is to ensure the coordination and integration of Indian tribes into the homeland security structure of the United States as well as add the Office of Tribal Government Homeland Security within the Department of Homeland Security.<sup>239</sup> The bill would have tribes treated as states for purposes of consultation, funding and planning.<sup>240</sup> It would also allow Indian tribes to apply for, receive, direct, and supervise any homeland security-related Federal grant programs.<sup>241</sup> The proposed statute is ambiguous on sovereign immunity; however, the language treating tribes as states for purposes of bioterrorism preparedness and grant funding is encouraging.<sup>242</sup> H.R. 1697 appears to be a step in the right direction, however, as the bill winds its way through Congress it is unknown what changes will be made or whether it passes Congress at all.

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d’Errico, *Advocacy and Change in Federal Indian Law*, IND. COUNTRY TODAY, Jun. 26, 2009, available at <http://www.indiancountrytoday.com/opinion/49177617.html> (Indian law is crippled by a “pretense of conquest” carried forward from *Johnson v. M’Intosh*; stating that Indian law is merely a “system designed to suppress sovereignty of Indian nations in keeping with a tradition of Papal Bulls and Christian political theology”).

<sup>234</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 n.13 (1982).

<sup>235</sup> Harvey Kushner, *Assaying the Terrorism Threat: The Next Five Years*, RIGHT SIDE NEWS, Sept. 28, 2006, available at <http://www.rightsidenews.com/200905164794/homeland-security/assaying-the-terrorism-threat-the-next-five-years.html> (Testimony before the Future of Terrorism Task Force, Department of Homeland Security).

<sup>236</sup> See, e.g., Donald G. McNeil, Jr., *How a Mild Virus Might Turn Vicious*, N.Y. TIMES, June 9, 2009 (Concerning recent Swine Flu outbreaks).

<sup>237</sup> See Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat.594 (2002).

<sup>238</sup> Tribal Government Homeland Security Coordination and Integration Act, H.R. 1697, 111th Cong. (2009).

<sup>239</sup> H.R. 1697.

<sup>240</sup> H.R. 1697.

<sup>241</sup> H.R. 1697.

<sup>242</sup> H.R. 1697.

The Bioterrorism Act, though not clear in its language concerning tribal sovereign immunity, may be upheld as a Congressional waiver of immunity. If a high court decides that *Tuscarora* is not mere dictum or inapplicable to sovereign immunity, but rather the expression of a well-established principle of Indian law, then the Bioterrorism Act will serve as a statute of general application. While such a decision will comport with logical, legal reasoning it does not mean that such reasoning is equitable. The Bioterrorism Act should not be held to abrogate a tribe's sovereign immunity when a tribe applies for a grant under the Act. Tribes should not be punished for inadequate participation in the national security structure of the United States if they were intentionally or negligently excluded from that structure in the first place. If Section 311 of the Bioterrorism Act was meant to include Indians in this country's fight against agricultural and biological terrorism, then they should be allowed to do so without the fear that helping the United States invites their own governmental degradation.

*Tuscarora* is too broad, and like *Donovan*, does not take into account more serious moral issues.<sup>243</sup> Such decisions are an example of the Supreme Court failing to uphold Congressional intent to the detriment of tribal sovereignty. It is the duty of Congress to step up and exercise its plenary authority because it is the Legislative Branch, not the Judicial, which has the power of "life and death dimensions," over tribes.<sup>244</sup> Whether it is through H.R. 1697, or an amendment to the Bioterrorism Act that upholds or abrogates tribes' sovereign immunity when applying for Section 311 grants, Congress has the ultimate duty to regulate Indian affairs. Congress may even fully step into its position as guardian over its Indian wards by taking on liability for all suits targeted at Indians arising from terrorist attacks via the Federal Tort Claims Act.<sup>245</sup> Whatever the solution, tribal sovereignty must be upheld by Congress and not entrusted to the courts. As Supreme Court Justice Antonin Scalia re-

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<sup>243</sup> See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119–24 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115–18 (9th Cir. 1985).

<sup>244</sup> COHEN, *supra* note 53, at 47.

<sup>245</sup> The Indian Self Determination Act may already contain such a provision. In the Ninth Circuit, the Indian Self Determination Act ("ISDA"), 25 U.S.C. §§ 450 – 458bbb-2 (2009), was held to protect tribes under the Federal Tort Claims Act. In *Waters v. United States*, 812 F.Supp. 166, 168-69 (N.D. Cal. 1993), it was held that the "ISDA provides that any civil action against an Indian contractor operating under contract with the Indian Health Service shall be deemed an action against the United States and the United States shall be substituted as defendant. Such actions shall be afforded the full protection of the Federal Tort Claims Act . . . ." *Id.* at 168. See also Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Application of Indian Self-Determination and Education Assistance Act*, 190 A.L.R. Fed. 249, §24 (2003).

marked in a dissenting opinion, the means of fighting terrorism should not lie “with the branch that knows least about the national security concerns that the subject entails.”<sup>246</sup> Nor should it lie with the branch that knows only to abide by an inherently racist precedent.

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<sup>246</sup> *Boumediene v. Bush*, --- U.S. ---, 128 S. Ct. 2229, 2296 (2008) (Scalia, J., dissenting).