

February 4, 2009

The Honorable Joseph Lieberman  
Chairman  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Byron Dorgan  
Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510

The Honorable Susan Collins  
Ranking Member  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable John Barrasso  
Ranking Member  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510

***Request for Joint Hearings on DHS Waiving of Laws Protecting Indian Rights***

Dear Chairman Lieberman, Senator Collins, Chairman Dorgan, and Senator Barrasso:

I am writing to convey the American Bar Association's concerns over the adverse impact on the rights of Native Americans resulting from the enactment of legislation to expedite the construction of barriers to secure the border between the United States and Mexico. Our concerns in no way detract from our support for many of the actions taken by the Congress and by the Department of Homeland Security (DHS) to keep the country safe.

As you know, Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act requires the Secretary of Homeland Security to secure our borders for the purpose of deterring illegal crossings into the United States. Section 102(b) of the Act specifically calls for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border located in the states of California, Arizona, New Mexico, and Texas, and Section 102(c) (the "waiver legislation") confers on the Secretary of Homeland Security the authority to waive all legal requirements that he determines necessary to ensure expeditious construction of barriers and roads along our borders.

In complying with his mandate to secure the border, the Secretary has waived many statutes that provide for or protect the rights of Indians, including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Religious Freedom Restoration Act. This is of great concern because long portions of our border with Mexico are adjacent to Indian Country, and in some instances transect Native American communities. According to the National Congress of American Indians, more than forty tribes are located on or near the international boundaries affected by this statute.

The Religious Freedom Restoration Act requires that the free exercise of religion (by Indians as well as others) shall not be limited unless there is a compelling federal interest that justifies the limitation and that the least restrictive means of protecting the federal interest is used.

The Act provides a right to judicial review and enforcement. By waiving this statute the Department of Homeland Security (DHS) is not required to prove that it has met the high legal standards required before an exception is granted, and any possibility of redress by the courts is eliminated. In cases involving security on the Mexican border, the hard-earned protections guaranteed by the Religious Freedom Restoration Act essentially become meaningless. The federal courts, including the U. S. Supreme Court, may only override waivers granted by the Secretary if they violate the U. S. Constitution.

Section 101(d)(6) of the National Historic Preservation Act requires consultation with any tribe that attaches religious or cultural significance to a historic property that may be affected by a federal undertaking. The Native American Graves Protection and Repatriation Act provides varying degrees of tribal control over human remains and cultural items. Lineal descendants or Indians under the Act have ownership or control over such remains that are discovered on tribal or federal lands. On tribal lands, tribal consent is required prior to excavation; on federal lands, items may be excavated only after notice to, and consultation with, the appropriate tribe. The waivers exercised by the Secretary with regard to these two statutes, likewise, have abolished these legal rights of Indians.

In recent years, Congress has emphasized that fairness to Indians and support of the governmental rights of Indian tribes is predicated on articulated federal policy objectives. In this case, however, Indian issues appear to have been ignored, possibly because there was insufficient opportunity to consider the potential negative impact that the waiver legislation could have on the dozens of tribes located on or near the borders.

Based on the foregoing concerns, the ABA respectfully requests that a joint hearing be held by your Committees to examine the effect of the waiver legislation on the tribes and their members. Specifically, the hearing should examine whether a federal compelling interest was served by waiving laws whose purpose is to protect Indian rights and, if so, whether less restrictive means might be used to accomplish the same purpose. We suggest that the hearing also consider whether the waiver legislation should be amended, without

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jeopardizing the national security, to limit DHS's prospective authority to waive laws protecting Indian tribes and their members.

If you have any questions or we can be of assistance, please contact Denise Cardman, Deputy Director of this office, at: 202/662-1761 or at: [cardmand@staff.abanet.org](mailto:cardmand@staff.abanet.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman  
Director