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SENATE

{ REPORT
{ 109–208

AMENDING A PROVISION RELATING TO EMPLOYEES OF THE UNITED STATES ASSIGNED TO, OR EMPLOYED BY, AN INDIAN TRIBE, AND FOR OTHER PURPOSES

DECEMBER 15, 2005.—Ordered to be printed

Mr. MCCAIN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 1312]

The Committee on Indian Affairs, to which was referred the bill (S. 1312) to amend a provision relating to employees of the United States assigned to, or employed by, an Indian tribe, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The Reducing Conflicts of Interests in the Representation of Indian Tribes Act of 2005 (S. 1312) requires individuals who leave federal employment for employment as outside lawyers and lobbyists for Indian tribes to abide by the federal conflicts of interest laws as do other former federal government officers and employees.

BACKGROUND

Public Law 93–638, the Indian Self-Determination and Education Assistance Act, [hereafter, “the Act”] was enacted in 1975 in the 93rd Congress to provide for the maximum participation of Indian tribes in directing federal service to their communities. The Act permitted Indian tribes to contract programs or portions of programs that have been historically administered by the Department of the Interior for the benefit of Indian tribes.

Section 450i(j) of the Act provides an exemption from the federal conflict of interest laws in Title 18 U.S.C. sections 205 and 207 for all former federal officers and employees who “are employed by Indian tribes.” Section 450i(j) provides the exemption for “agents and

attorneys who appear on behalf of such tribes.” Section 205 of title 18 generally prohibits federal employees from representing parties against the federal government or benefitting from such claims while employed there. Section 207 bars certain communications and lobbying of the federal government by former federal officers or employees from periods of one year, two years, or for life, depending on the seniority of the former officer, the level of the employee’s participation with a particular matter, and the specific matter being addressed.

The House Report No. 93–1600 accompanying the Indian Self-Determination Act explained the intent of the exemptions in section 450i(j).¹ It observed that Indian tribes that took over the responsibility of operating programs traditionally fulfilled by the federal government would require the services of experienced individuals to administer these contracted or compacted programs. The exemption, therefore, helped facilitate federal government employees to become employees of the Indian tribe in order to continue the work they had previously been performing for the federal government on behalf of Indian tribes. The exception to the historic conflict of interest laws appears to recognize that an exemption to these laws was necessary to permit Indian tribes to recruit former federal employees to carry out the new tribal programs and functions that were formerly performed by the federal government.

In addition, in 1975, when the Indian Self-Determination Act was enacted, but for those employees of the federal government who worked in Indian tribal programs, relatively few lawyers or lobbyists had experience in federal Indian law or working for Indian tribes or on Indian tribal issues. It was likely assumed, therefore, that tribes would hire federal workers, not only as employees who could carry out contracted services and programs, but also as lawyers and agents who would represent the Indian tribe and its interests before the federal government. Over the last twenty-five years, however, the Indian law and lobbying practice has grown exponentially. Today, an abundance of lawyers and lobbyists without former federal service exists to represent Indian tribes.

The Committee believes that exempting lawyers and lobbyists from the federal conflict of interest laws has outlived its intended purpose and, in some instances, has validated the original concerns of the Congress when it enacted sections 205 and 207. The potential that federal employees would put, or would appear to have put, the interests of future employers above those of the federal government was of paramount concern. In enacting the conflict laws, the Congress sought to curb a practice whereby, at the time, persons who quit the federal government were free to involve themselves in any type of proceeding, irrespective of whether they may have participated directly in the very same proceeding on behalf of the federal government.²

The Committee is aware that the exemption to section 205 and 207 has resulted in improprieties, and the appearance of improprieties, by former officers and employees who left federal service to represent Indian tribes as lawyers or lobbyists. The Inspector General of the Department of the Interior, in a report issued in Feb-

¹ H.R. Rep. No. 93–1600, at 29 (1974).

² See H.R. Rep. No. 748 (1961); H.R. Rep. No. 2213 (1962).

bruary 2002, entitled “Allegations Involving Irregularities in the Tribal Recognition Process and Concerns Relating to Indian Gaming,” reported finding that several former Department of Interior employees engaged in improper contacts with the Bureau of Indian Affairs. The Report documented that while they were federal employees, some individuals were personally and substantially involved, on behalf of the federal government, in matters directly relating to an Indian tribe that the former employee went on to represent. Contacts on behalf of the tribes were made soon after the employee left the federal government and were made to the federal offices in which the former employee had exercised substantial responsibility. The Inspector General stated that but for the exemption from the conflicts laws in section 450i(j), the contacts would have been illegal.

In addition, early in the 109th Congress, in testimony before the Committee, the Inspector General again raised the issue of conflicts of interest and a “revolving door” effect that resulted from the exemption involving former Department of the Interior officials. The Inspector General explained that frequently, federal employees who handle sensitive tribal issues as federal employees often left to immediately represent the very same tribe on the same or similar issue before the federal government. Since the original exemption in section 450i(j) of the Act was recommended by the Department of the Interior and the General Accounting Office, such abuse of the exemption could not have been contemplated at the time.³

The Committee believes that in order for the federal government to function free from undue influence, and the appearance of undue influence, the Indian Self-Determination and Education Assistance Act must be amended. Therefore, S. 1312 reinstates the conflict of interest laws for former federal officers and employees who are retained by Indian tribes as outside lawyers, lobbyists, or other agents. In doing so, the Committee recognizes that a distinction exists between former federal employees who become employees of Indian tribal governments to further the compacting and contracting process and former federal employees who are not tribal employees but rather are retained or hired on contract for a limited purpose.

The distinction between a tribal government employee and one who is retained by a tribal government is an important one. A tribal government employee is under the day-to-day control of that government. As such, the employee is unaffected by the acts of an intervening agency, business or organization. The latter, however, in whole or in part, is controlled or supervised by an independent agency or contractor. That individual may be affected by other entities that function free of tribal government rule or regulation. In distinguishing between a tribal government employee and one who is retained by or under contract with a tribal government several factors may be considered including (1) who provides the person’s liability insurance; (2) who pays the person’s social security tax; (3) who pays for the person’s medical or other benefits and (4) whether the individual is authorized to contract for others.

The Committee believes this limited amendment will meet its intended purpose without unduly impeding tribes’ ability to hire qualified personnel. Former federal employees hired by Indian

³ H.R. Rep. No. 93-1600, at 21 (1974).

tribes to work in contracted or compacted programs will continue to be free to contact and interact with the federal government as required to administer the tribal program so long as the contact is made during the course of an official employment duty by the tribal employee or official.

Finally, the Committee recognizes that some Indian tribal governments have retained lawyers and lobbyists who have recently left federal employment. Therefore, the Committee believes that a sufficient grace period is required to permit former federal officers and employees to become familiar with the new law, to permit law and lobbying firms to redistribute work where feasible, and to permit Indian tribal governments to seek alternative representation if necessary. Therefore, the amendment will take effect one year after enactment of the law.

SUMMARY OF MAJOR PROVISIONS

The Reducing Conflicts of Interests in the Representation of Indian Tribes Act of 2005 removes from the exemption of conflict of interest laws former federal employees who work for Indian tribes in the capacity of outside counsel, lobbyists, or other agents.

LEGISLATIVE HISTORY

S. 1312 was introduced on June 27, 2005, by Senator McCain, and was referred to the Committee on Indian Affairs. On June 29, 2005, S. 1312 was unanimously passed out of the Committee on Indian Affairs and ordered reported without amendment.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents

This Act may be cited as the “Reducing Conflicts of Interest in the Representation of Indian Tribes Act of 2005.

Section 2. Additional employment rights

This section amends 25 U.S.C. § 450(j) by limiting the exemption from 18 U.S.C. §§ 205 and 207 to federal government employees who leave such employment to become employees of Indian tribal governments for the purpose of performing compacting or contracting services on behalf of the tribe. The section subject to the conflicts of interest those former federal workers who are employed by Indian tribes as outside counsel, lobbyists, or other agents.

Section 3. Effective date

This section provides a one year moratorium prior to the Act’s provisions taking effect.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 29, 2005, the Committee, in an open business session, considered S. 312 and unanimously voted to have the amendment favorably reported to the full Senate with a recommendation that the amendment do pass.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office has calculated the attached cost estimate for S. 312:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 21, 2005.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1312, the Reducing Conflicts of Interests in the Representation of Indian Tribes Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

S. 1312—Reducing Conflicts of Interests in the Representation of Indian Tribes Act of 2005

S. 1312 would amend the Indian Self-Determination and Education Assistant Act which currently provides an exemption from federal conflict-of-interest laws for former employees when they are acting on behalf an Indian tribe, as long as proper notification is provided to the agency. S. 1312 would limit the exemption to former federal employees who work for tribes pursuant to self-government contracts or compacts that they formerly performed for the federal government.

CBO estimates that implementing this legislation would have no significant cost and would not affect direct spending or revenues. S. 1312 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

S. 1312 would impose a private-sector mandate, as defined in UMRA, but CBO estimates that the direct cost of the mandate would be minimal and fall well below the annual threshold established by UMRA (\$123 million in 2005, adjusted annually for inflation).

S. 1312 would impose a private-sector mandate because some former federal employees would be prohibited from working on certain matters regarding Indian tribes. Former federal employees may continue to be employed by Indian tribes to perform services related to self-governance contracts or compacts. According to information from government sources, the number of persons affected by this prohibition is small, and the direct cost of complying with the mandate would be minimal.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs) and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee concludes that S. 1312 will reduce regulatory or paperwork requirements and impacts.

EXECUTIVE COMMUNICATIONS

The Senate Committee on Indian Affairs has not received official views or comments from the Department of the Interior as of the filing of this Report.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 1312, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC LAW 100-47

* * * * *

SECTION 450i OF CHAPTER 14 OF TITLE 5, UNITED STATES CODE

25 U.S.C. 450i

[(j) Additional employee employment rights. Anything in sections 205 and 207 of Title 18 to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of Title 5, or section 48 of this title and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection with any matter pending before any department, agency, court, or commission including any matter in which the United States is a party or has a direct and substantial interest: *Provided*, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.]

SEC. 2. ADDITIONAL EMPLOYMENT RIGHTS.

(a) *IN GENERAL.*—Notwithstanding sections 205 and 207 of title 18, United States Code, an officer or employee of the United States assigned to an Indian tribe under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. §48), or an individual that was formerly an officer or employee of the United States and who is an employee of an Indian tribe employed to perform services pursuant to self-governance contracts or compacts under this Act that the individual formerly performed for the United States, may communicate with and appear before any department, agency, court, or commission on behalf of the Indian tribe

with respect to any matter relating to the contract or compact, including any matter in which the United States is a party or has a direct and substantial interest.

(b) NOTIFICATION OF INVOLVEMENT IN PENDING MATTER.—An officer, employee, or former officer or employee described in paragraph (1) shall submit to the head of each appropriate department, agency, court, or commission, in writing, a notification of any personal and substantial involvement the officer, employee, or former officer or employee had as an officer or employee of the United States with respect to the pending matter.”

SEC. 3. EFFECTIVE DATE.

The effective date of the amendment made by this Act shall be the date that is 1 year after the date of enactment of this Act.

