

The Federal-Tribal Relationship: The View from the Executive Branch

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Kevin K. Washburn, [*What the Future Holds: The Changing Landscape of Federal Indian Policy*](#), 130 *Harv. L. Rev. F.* 200 (2017).

In 2016, many thousands of Native people and their supporters traveled from across the country to protest construction of the Dakota Access Pipeline in North Dakota. It was the greatest display of unified Indian activism since the standoffs at Alcatraz and Wounded Knee. While Dakota Access set dogs on the protesters and North Dakota almost enacted a statute that would immunize those injuring protesters from liability, the federal government had a role as well. Because the pipeline ran over a section of federally-owned land, the U.S. had to grant an easement to build it, and needed to consider the impact on the Standing Rock Sioux, including sacred sites, drinking water, and treaty rights, before doing so. In the waning days of the Obama Administration, the EPA determined that it had not sufficiently considered all factors, and decided to delay the permit. In the first few days of the Trump Administration, the EPA reversed, ruling that the pipeline could go forward. After the pipeline was built (and already had its first leaks), a federal district court held that the U.S. had not sufficiently considered treaty rights and environmental concerns. But the court refused to halt the pipeline while considering the remedy, so gas continues to flow, and small leaks continue to occur.

As at Standing Rock, the federal government has tremendous power over the things most important to Native people. Five decades into the self-determination era, tribes still depend on the federal government to approve, regulate, or fund what tribes do with their businesses, land, natural resources, sacred sites, and police and social welfare services. The administration of this federal role in these matters is far from the common law doctrines that occupy most Indian law professors. Not so for Professor Kevin Washburn. Washburn recently returned to academia after several years as the Assistant Secretary of Indian Affairs, where he struggled first hand with the factors governing federal decision-making. *What the Future Holds: The Changing Landscape of Federal Indian Policy* benefits from this experience with an unusually nuanced and informed perspective on the federal administration of the federal-tribal relationship.

From the founding era to today, Supreme Court opinions, statutes, and executive documents have referred to the United States as a trustee to Indian tribes. As Professor Washburn says, the implicit paternalism of this idea has always fit uncomfortably with the concept of tribal sovereignty, and particularly so in the modern era of self-determination. Washburn also notes that the Supreme Court has pared away at the legal power of the trust relationship, limiting the power of tribes to demand compensation for federal actions taken with conflict of interests, or to subject the federal government to other common-law trust obligations.

But as the paternalistic rationale and legal enforceability of the trust responsibility has faded, Washburn argues, the trust responsibility has been transformed. The federal government is now less the manager than the “principal underwriter” of tribal affairs. Today, most services formerly performed by the federal government are managed by Indian tribes with federally-funded self-determination contracts. This shift has resulted in more effective, culturally appropriate, and profitable results for notoriously mismanaged programs. But it has also resulted in new questions about the role of the federal government.

First, some may ask whether the trust responsibility “to provide funding to tribes to meet federal responsibilities” can continue as the paternalistic elements of the trust responsibility diminish. For Washburn, the answer is “of course.” Washburn argues that federal funding can be seen as a moral “rent” on the lands and sovereignty taken from tribal nations, and this, rather than a paternal *noblesse oblige* was how Chief Justice Marshall originally conceived it. Because tribal administration of programs for Indians has been proven more effective and efficient than federal or state

administration, it also makes fiscal sense. But Washburn notes that even in the face of statutory promises to provide funding, the United States has repeatedly failed to appropriate enough money to fulfill its promises. In response, however, the Supreme Court has developed a new norm strictly holding the government to its fiscal promises to tribal nations.

A larger question arises regarding oversight of tribal governments. The general policy of the federal government today is to avoid interfering with tribal sovereignty. This policy is enshrined in statutes and executive orders, and increasingly expected by tribal nations. But numerous statutes still require federal approval for tribal projects, and the federal government can use this power to delay or shape negotiations so as to favor mining and other interests contracting with tribes. The federal approval power, even when it is not subject to conflicts of interest, adds time and expensive regulatory review to tribal actions. Washburn notes that there is a powerful case that this oversight is inconsistent with self-determination and tribal welfare.

At the same time (and this is one of the unique contributions of the essay), Washburn suggests that increasing tribal self-determination may argue for more federal oversight, not less. First, as we know from Spider-Man, with great power, comes great responsibility. Tribes increasingly have real power over peoples' lives. In some cases, Washburn speculates, this leads to greater federal accountability.

Despite this, he argues, the need for increased federal oversight may be less compelling that it appears. He investigates three distinct areas of concern.

The most prominent is the headline-making disenrollment of tribal members by some tribes. Washburn notes that although some characterize this crisis as a battle over gaming revenue, those who do so are likely unaware that "at least since the arrival of the Europeans, tribal politics has been a blood sport." In addition, to the extent that these are battles over gaming revenue, they are battles over a tribe's own money, and so the case for federal accountability is less than it was in cases like *Santa Clara Pueblo v. Martinez*, the case that originally established the non-interference rule. Nevertheless, he notes, to the extent such disenrollment violates human rights norms, there may be a case for intervention similar to that for any nation violating human rights.

Washburn also investigates the case for greater intervention in tribal criminal justice systems. One of Washburn's most important scholarly contributions before entering government service was in making the case for stronger tribal control in this area. Washburn now argues that the push for more tribal law enforcement power comes more from "activists" (and, he doesn't mention, scholars) than from tribal leaders. Washburn's original articles contributed to a movement that resulted in recent federal statutes and policies increasing tribal powers of prosecution and punishment. These statutes, however, impose greater federal oversight as a condition of exercising more power. "To exercise greater sovereignty," Washburn now writes, tribal governments "necessarily must accept ... outside interference by the federal government." The article does not make clear whether Washburn believes these "political compromises" are a good thing or not, but does suggest that his time in power may have softened his prior scholarly stance.

Finally, Washburn discusses an area that has not gained as much public attention: the federal government's role in land regulation. This is perhaps the most direct instance of the federal trust responsibility, as the federal government still actually owns most of Indian country in trust for either tribes or individual Indians. Washburn notes that the federal trust, and the regulatory apparatus that comes with it, actually reduce the value of land, perhaps a conflict of interest for the trustees. (Incidentally, one of the many contributions of Washburn's tenure was in lessening this regulatory burden.) Individual allottee interests in free use and alienation of their land may also conflict with those of the other trust beneficiaries, the tribes. Like Jessica Shoemaker's work ([reviewed by Ezra Rosser in Jotwell](#)), Washburn opens a new window into the reality of the trust status of Indian land.

Altogether, the strength of *What the Future Holds* is in providing new perspectives and asking hard questions rather than in providing answers. It also remains to be seen whether the Trump administration will undermine the new, less-paternalist trust relationship Washburn identifies. My guess is that it may lessen immediate support for tribes,

particularly in areas where mining interests and red states argue against tribes, but that the administration's attention span is too short to significantly change the trajectory of federal policy. But Washburn has identified important things for scholars to think about as we try to influence what the future holds, both for tribal nations and for those they govern.

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