

Tribal Self-Governance Under Trump: A Common Goal

By **Venus McGhee Prince and Claire Newman, Kilpatrick Townsend & Stockton LLP**

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Tribes are rightly concerned that federal programs benefiting tribal communities may become the target of budget cuts under the Trump administration and the Republican Congress, but tribes should not lose heart quite yet. With creative, strategic leadership from tribes, Trump's administration could rally around a key tribal priority: the pursuit of self-governance. By taking a pragmatic approach to Trump's regulatory reform agenda, laid out in recent executive orders and his "America First, Budget Blueprint,"[1] tribes may be able to achieve more to advance self-governance than they anticipate. The connection between tribes' long-term goal of self-governance and the Trump administration's regulatory reform agenda might not be obvious at first glance, but the Trump administration's regulatory reform agenda could potentially support tribes in a much needed evaluation and streamlining of burdensome regulations for tribal self-governance programs.



Venus McGhee
Prince

The Origin of Self-Governance Was Essentially Regulatory Reform

Self-governance is now a tribal "term of art" that broadly encompasses a panoply of statutes and regulations which transfer authority and funding to tribes to carry out governmental programs formerly delivered directly to tribes by the U.S. Department of Interior Bureau of Indian Affairs and the U.S. Department of Health and Human Services (DHHS) Indian Health Service (IHS). More specifically, self-governance rests on two statutes which amended the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA): Title IV, the Tribal Self-Governance Act of 1994[2] and Title V, the Tribal Self-Governance Amendments of 2000.[3]



Claire Newman

Title IV and Title V enable tribes to negotiate compacts with the BIA and IHS, respectively, to design, fund and administer programs and services tailored to meet the needs of their communities in a streamlined fashion. Titles IV and V were motivated in part by the dual frustration of tribes seeking greater autonomy over tribal services and frustration of Congressional representatives over the bloated bureaucracy that had built up around BIA's administration of self-determination contracts under Title I.[4] Over time, self-governance has proven not only to be a cost-effective model for service delivery in Indian country, but to actually generate jobs and boost economic activity on and around Indian reservations.[5]

Regulatory Reform is Clearly a Trump Priority

President Trump has taken no less than three executive actions in his first 100 days that express his desire to fulfill his campaign promise of streamlining the federal bureaucracy. In an executive order entitled “Reducing Regulation and Controlling Regulatory Costs,” President Trump set forth a policy of net zero cost of new regulations and a reduction in the number of federal regulations by two for every one new regulation proposed.[6] In a subsequent executive order aimed at “Enforcing the Regulatory Agenda,” President Trump declared a policy to “alleviate unnecessary regulatory burdens placed on the American people” and charged regulatory reform officers within each agency to carry out these reforms.[7] Trump’s budget proposal reflects this paired down approach to federal bureaucracy. With regard to the U.S. Department of Interior, the president’s budget blueprint offers to “[s]upport[] tribal sovereignty and self-determination across Indian Country by focusing on core funding and services to support ongoing tribal government operations.”[8] While these pronouncements have been criticized for their lack of detail, tribes can help shape the president’s regulatory reform agenda by offering their success in self-governance as an example of how self-governance complements Trump’s regulatory reform agenda. Tribes may encourage the Trump administration to partner with them to promote the legacy of one of his own — President Nixon — who ushered in the era of self-determination.

Self-Governance Both Supports Regulatory Reform and Puts Federal Dollars to Better Use

Self-governance achieves the twin goals of increasing tribal control over service delivery and economic development and reducing the role of the federal government. First, self-governance proceeds from the keen understanding that tribes can govern themselves, and when given the reins, they do so more effectively than the federal government.[9] During the first generation of tribal self-governance under Title I of the ISDEAA, known as self-determination, tribal governments suffered from piecemeal service delivery, restrictive regulations, inflexible funding and unnecessary reporting requirements from BIA and IHS. Titles IV and particularly Title V rid self-governance of this micromanagement in part by enabling tribes to design programs tailored to meet the needs of their unique communities and to allocate funding flexibly, and by reducing burdensome federal oversight. Self-governance also improves overall tribal governance because it compels tribal members to hold their elected officials accountable for their decisions as opposed to a BIA official in a distant office in its region or Washington D.C. This way, improved governance and fiscal accountability have become a byproduct of self-governance.

Second, by assuming the role of federal agencies in administering and operating governmental programs, tax dollars formerly paying the salaries and overhead of federal employees now pay tribal members’ salaries and consequently generate needed income in tribal communities. In fact, according to former Assistant Secretary Kevin Washburn, the BIA has reduced its workforce from around 17,000 employees in 1981 to around 7,500 employees in 2014.[10] In this way, reducing the payroll of federal employees through tribal self-governance achieves President Trump’s explicit objective to reduce the federal workforce.[11]

Of course, decreasing salaries in BIA regional offices and Washington D.C. should not be confused with a reduced need for overall program funding in Indian country. Unleashing tribal economies through regulatory reform will be realized only with full federal funding for tribal self-governance. For example, the Department of Interior reports that in fiscal year 2012, it contributed over “\$18 billion in economic activity and supported 93,000 jobs.”[12] In preparation for the upcoming federal budget process, the National Congress of American Indians has detailed the funding needed for tribes to undertake improvements to reservation infrastructure, social services, law enforcement, education, natural resource management and other areas, much of which can be achieved through the model of self-

governance.[13] Highlighting how self-governance can go hand-in-hand with regulatory reform should help tribes in their lobbying efforts to the administration and Congress for maintaining or increasing overall program funding.

Unfortunately, the Trump administration's most recent actions regarding tribal self-governance do not reflect its understanding that enhancing tribal self-governance will further the president's federal reform agenda.

The FAST Act's Unfulfilled Promise of Self-Governance Highlights the Present Disconnect

The most promising recent development in self-governance was the extension of self-governance to a new federal agency for the first time in over 20 years. On Dec. 4, 2015, Congress enacted the Fixing America's Surface Transportation Act, Public Law 114-94, which authorized tribes to enter into compacts with the U.S. Department of Transportation to carry out tribal transportation and transit programs, undertake construction and maintenance of roads and bridges, and conduct environmental mitigation and other transportation-related projects.[14] Due to the DOT's extensive experience working with tribes through the Federal Highway Administration to implement tribal transportation programs for years, and because the FAST Act adopted a tried and true administrative model in Title V, implementation of the FAST Act was eminently attainable. But not so.

Although the act is self-executing, the DOT has refused to compact until regulations are promulgated. And, although the Act requires DOT to promulgate regulations by September 2018,[15] the DOT has chosen not to fund the negotiated rulemaking committee charged with meeting that requirement. Nor has Secretary Chao appointed a deputy assistant secretary for tribal government affairs to help oversee tribal transportation within the DOT. The rulemaking process has now stalled, leaving tribes with the authority to compact for programs and services and moderately more funding, but without a willing federal partner. Indeed, increased funding for tribes under the act may expire before they have the opportunity to use the funding most efficiently according to the self-governance model promised to them under the act. If FAST Act regulations are ever promulgated, the scope of compacting appears to be limited to surface transportation and to exclude programs under other administrations within the DOT.

The present stalemate in the rollout of the FAST Act unfortunately comes as little surprise to those seasoned in self-governance. Tribes have labored for decades to expand the scope of compactable programs and services beyond those typically administered by the BIA.[16] The DOT's failure to complete the rule-making process is symptomatic of the federal government's historic reluctance to loosen its grip on tribally compactable programs to enable tribes to do more on their own.[17] In addition, the DOT's deprioritization of the rulemaking process may exemplify the mistaken belief that more regulations necessarily translate into more federal dollars going towards increased federal oversight when the exact opposite is true: tribes seek to compact with the DOT to streamline program funding and service delivery, to increase administrative flexibility, and to reduce federal involvement at the local level. Thus, the DOT should approach Trump's 2-for-1 rule regarding new regulations with common sense when new self-governance regulations in fact seek to reduce federal management of tribal programs and there are likely outdated DOT regulations that could be withdrawn. DOT could also take a fresh, hard look at whether new regulations are in fact needed for it to exercise the FAST Act authority to begin negotiating self-governance compacts with tribes.

In addition to stalemate on the implementation of the FAST Act, President Trump's budget blueprint proposes to reduce DOI's budget by 11.7 percent and to reduce the DOT's budget by 12.7 percent. The

president appears not to fully understand that “alleviating unnecessary regulatory burdens” within Indian country requires him to fully embrace the principle of tribal self-governance — and the funding necessary to support it. For example, the administration should support tribes’ legislative efforts to make self-governance under Title IV consistent with Title V, to enhance opportunities for employment, workforce training and economic development on reservations under Public Law 102-477, and to expand the self-governance model to agencies outside the BIA. In addition, the president should support the DOI’s efforts to revise outdated Indian Trader regulations, which restrict business on reservations and stymie economic innovation.

Better Framing Can Advance Self-Governance in This Administration

Today, tribes’ unwavering resolve to assume control over a greater number of programs traditionally provided by the federal government and to reduce federal oversight may in fact reflect the zeitgeist of the new Trump administration. Although sweeping new legislation or significantly increased funding might not be as attainable as tribes would like, tribes can reframe how self-governance fits into the new administration’s regulatory reform goals and how it can promote economic development and the streamlining of federal bureaucracy.

Tribes have their work cut out for them to make this vision a reality. They must educate a new, not-yet-appointed cadre of federal officials on the success of tribal self-governance and emphasize that its reform and expansion complements effective tribal governance and economic growth not only in Indian country but in the surrounding local communities.

Venus McGhee Prince is counsel in Kilpatrick Townsend & Stockton LLP’s Washington, D.C. office and a member of the firm’s Native American affairs practice. She is a member of the Poarch Band of Creek Indians. Claire Newman is an associate in Kilpatrick Townsend’s Seattle office and a member of the firm’s Native American affairs practice.

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[1] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

[2] 108 Stat. 4250.

[3] 25 U.S.C. § 405.

[4] Geoffrey D. Strommer, Stephen D. Osborne, The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act, 39 Am. Indian L. Rev. 1 (2014-2015) at *30 (citing concern of Senators regarding contract monitoring bureaucracy, unduly burdensome reporting requirements, and failure to fund indirect costs).

[5] See U.S. Dep’t of Interior, Economic Report, FY 2012 (July 29, 2013).

[6] Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017) §§ 1, 2(b).

[7] Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017) §§ 1,2.

[8] Id. at 28.

[9] Self-Governance, the Next Chapter, available at <https://vimeo.com/24939409>.

[10] <https://indiancountrymedianetwork.com/news/politics/bias-funding-maze-hampers-tribal-self-governance/>. See also, Fiscal Year 2015 Self-Governance Report To Congress available at https://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/2016_Letters/48202-8_FY2015_SG_ReportToCongress.pdf

[11] Budget Blueprint at 7.

[12] U.S. Dep't of Interior, Economic Report, FY 2012 (July 29, 2013) (cited in National Congress of American Indians (2017) Fiscal Year 2018 Indian Country Budget Request: Investing in Indian Country for a Stronger America at 5 available at <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf>).

[13] See generally, National Congress of American Indians (2017) Fiscal Year 2018 Indian Country Budget Request: Investing in Indian Country for a Stronger America.

[14] 23 U.S.C. § 207.

[15] Id. § (n)(1)(C).

[16] Under Section 403(c), tribes may compact for programs and services administered by DOI other than through the BIA that are not specific to Indians may be included in Title IV agreements, but only at the discretion of the BIA. See note 12 *supra* at 67.

[17] See note 12 *supra* at 56.