

American Indian Law Review

Volume 24 | Number 1

1-1-1999

"There is Hope": A Few Thoughts on Indian Law

Kevin Gover

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Kevin Gover, *"There is Hope": A Few Thoughts on Indian Law*, 24 AM. INDIAN L. REV. 219 (1999),
<https://digitalcommons.law.ou.edu/air/vol24/iss1/22>

This Special Feature is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

"THERE IS HOPE": A FEW THOUGHTS ON INDIAN LAW

Kevin Gover*

Thank you very much for giving me this opportunity to be here. I have a particular interest in and fondness for law school, obviously, having spent three years in law school myself. It is a little known fact, it used to be on my resume, but somehow dropped off, that I once won second place in the American Indian law writing competition which was conducted by the *American Indian Law Review*, and it was the first time I ever made any money doing legal research. So, that was a great thrill, and back then \$100 was a lot of money when you are a student. So, I have a fondness for the *American Indian Law Review* as well.

The law schools are so very important. I reflected one day as I was sitting in a meeting where the Justice Department was there, along with some folks from Capitol Hill, and the leadership of the Bureau of Indian Affairs were there, and I looked around the room and just started counting all the Indian lawyers that were in that room. Basically, all of us were Indian lawyers. Thirty years ago, there were less than a dozen Indian people who were attorneys, and look at us now. It was both a source of pride for me to realize that the vision had been achieved, that someday there would be Indian people who were representing tribal governments, and moreover, who were the insiders, were actually inside the system working on behalf of the tribes.

So, we have come an awful long way, and it is because of programs like this, the program at the University of Oklahoma Law School and the University of New Mexico. I was in South Dakota earlier this week, and they have a strong Indian law program. Also, the University of Iowa and Arizona State. More and more, we see these schools teaching Indian law as a basic part of the curriculum. Certainly, in New Mexico, where we have twenty-two tribal governments, it is simply unthinkable that a lawyer would go out into the world to represent clients in our state without at least knowing the basics of Indian law. If they don't, I would contend they are simply not yet qualified to represent clients in that state, because Indian tribes are so much a part of the economic and political fabric of the state.

We have come a very long way — Indian law is no longer sort of the arcane, odd little field with seminars of five to six people, but instead is very much a part and very central to both federal law, but increasingly to state law as well. And, of course, Justice Carter is one of our leading scholars on the

* Assistant Secretary of Indian Affairs, United States Department of the Interior. These remarks were delivered at the *American Indian Law Review's* 25th Anniversary Symposium, March 21, 1998.

state courts in this field. I think that the day is not perhaps far away when we will see more and more Indian people entering the state bench, and eventually serving on the state appellate courts. I think you all know, and I believe that it is true, that there has never been an Indian person as a federal judge, and I think that too will come to an end in the near future, which is something we can all look forward to. Again, it is because of programs like this and events like this where we come together, trade our stories, trade our information, and come away with a better understanding of how to solve the problems that are facing us.

The other thing I thought as I looked around the room, that day with all these middle-aged Indian lawyers, was that suddenly the baby-boom generation in Indian country was sort of in charge of things. It really came further home to me — you know, Liz Homer is our Director of American Indian Trust — she too, is an attorney and used to work with the Justice Department and now runs that office. Mike Anderson, a Creek Indian from here, is my Deputy Assistant Secretary; Hilda Manuel is the Deputy Commissioner of the Bureau of Indian Affairs, and she was an attorney from Arizona and a tribal judge who created one of the very early tribal courts that really set a high standard and established a lot of credibility for the tribal courts. We are all sort of in our forties, but the phrase that kept coming to mind was "boomer Indian lawyers from hell." So, that is for better or worse, who has their hands on the machinery in Washington right now.

Let me talk briefly about just a few things. I know that you have had a lot of good presentations this morning. I see more on the agenda for this afternoon. I would like to get a few things out there about where I think we are headed. It seems to me that we are in a very difficult time in Indian law, which I know is no revelation. We have a federal Supreme Court that, to my great disappointment, is not showing a great understanding of the role of tribal governments and the needs that they have. I remember in the 1980s being at a lecture presented by Eleanor Holmes Norton, who was a black woman then in charge of the EEOC, now she is the D.C. delegate to Congress. She was observing that even at that time, ten years ago or a little more than that, when we were starting to see something of a rollback on Fourth Amendment rights, and First Amendment rights, and the Court taking a more conservative trend. The Court seemed to have lost its ability to take the perspective of the outsider. That more and more of what we saw in the Court's decisions in these areas was in the perspective of the insider looking out on the rest of the world. Meaning, that the powerful, the affluent, the influential, were looking out from wherever it is those people are, and not having much sympathy for those who were less influential, less wealthy, less powerful, and that was a very unfortunate trend. Well, I think we are starting to see that now in the field of Indian law. We have the few justices on the Court who do have some direct experience in Indian country, or are at least from states where there are significant numbers of Indians, have basically let us know a long time ago

that they are not generally very supportive of Native American sovereignty. What I don't think we expected was to see some of the new justices show so very little interest in what the doctrine of tribal sovereignty means and why it is so necessary.

It has occurred to me over and over since I began really studying this area that what is absent in the Supreme Court's jurisprudence on these issues is a failure to understand that tribal governments really are intended to be permanent features of the American political governmental landscape. And if you don't believe that they are to be here always, then it becomes very easy to say, well, this power of civil adjudication of traffic accidents on state rights-of-way does not seem particularly important. So, it is no big deal if the Indians lose that. Or, this particular aspect of tribal sovereignty immunity is not particularly important — they'll get by without it. What they don't realize is that every nick, every cut, out of the group of powers that have constituted tribal self-government, tribal self determination, and tribal sovereignty over the years, could very well become a feature that is permanently lost. We rarely, in some affirmative way, gather new power into the tribes. Instead, we have long been playing defense, even before the last ten years, the last twenty years, when the conservative trend in federal Indian policy really began, we have still always been playing defense. So, that a victory in the Supreme Court means things stay the way they are. A loss in the Supreme Court means that we have lost some aspect of tribal sovereignty, perhaps on a permanent basis. If the court would instead take the view that these tribes are going to be here always, and ask themselves in each particular case, is this element of tribal sovereignty important in the long-run and into the future for the stability of these governments that are, after all, always going to be here, then perhaps the outcome would change.

In any event, we are in a situation where I do not think it is a very good time to be litigating. There are a number of reasons for that, and one of my few other law review efforts was an article I wrote about talking about the Indian Civil Rights Act. I wrote that maybe we shouldn't be so happy about the outcome in *Santa Clara Pueblo vs. Martinez*. As the lawyers and law students know, that is a case where the Court said that you cannot sue an Indian tribe under the Indian Civil Rights Act for a violation of due process or equal protection. That seemed like a victory at that time. And yet, I think in the long run, we are paying a very steep price for that victory. If the result in *Santa Clara* had been different, I think what we would be seeing today would be lawsuits where someone challenges a particular exercise of some tribe's authority — not in a broad way, but as to an individual person or group of people. And so, the attacks on tribal sovereignty would be very narrow, and the courts, if they had their full range of equitable powers to enforce the Indian Civil Rights Act, would be taking much smaller chunks out of the range of powers that constitute tribal sovereignty, so that they could, with some precision, remedy particular situations. But, they do not have that

authority under Santa Clara, and so what they do instead is not challenge the particular exercise of a particular power in a particular case; instead, they challenge the very existence of a broad range of civil, criminal, and regulatory authorities, depending on the circumstances.

And so, we have begun to pay a large price, I believe, for the victory in the Santa Clara case and we see it show up in cases like the A1 contractors case, where there was really no need for a simple civil tort to end up in the U.S. Supreme Court, and yet in the absence of the ability to narrowly review a tribe's assertion of authority, the court instead took the bludgeon and said we will wipe out that entire area of tribal authority. All of that advises that this is not a time to be going to the federal courts for relief.

I also think it is not much of a time, frankly, for progress in the Congress. I think that we fare better in Congress than a lot of people realize, and of course, this is a state that has a congressional delegation that is not overwhelmingly friendly to tribal sovereignty in many cases. Nevertheless, on the whole, the Congress right now probably has a higher level of understanding of tribal governments and tribal sovereignty than any other, certainly within my lifetime, and probably since back in the late nineteenth and early twentieth centuries when Indian policy was a very big deal in Congress. That can be both good and bad. There are a good many congressmen and senators of both parties who are very, very friendly to Indian causes and concerns, and very respectful of the tribal right of self-government. We saw that manifest itself in the Congress last year, when there were some key votes in the House of Representatives that were won by narrow margins — nevertheless, they were won, when in the previous year, they had been lost by six to eight votes. Now we are winning those by six to eight votes. So, progress is very incremental, and yet we are seeing that Congress has really begun to understand these issues. It is no longer a knee-jerk vote. You can no more assume that a Democrat is going to vote in favor of the tribe than you can assume that a Republican is going to vote against them. That is simply no longer the case. And, what we are seeing is each individual member is making their own judgment on these issues.

The downside is, of course, that given the particular leadership, especially in the Senate, that the opportunities for new and aggressive legislation in support of tribal sovereignty simply are not there. In fact, we generally find ourselves on the defensive. That is not a good place to spend too much time, but that is sort of the state of play, I believe, right now in the Congress. I don't think we will have in the near future any ringing endorsements from Congress for tribal sovereign immunity, tribal authority, tribal immunity from taxation, and that sort of thing, which means that Congress is also not a place to look for a lot of aggressive, progressive movement in the field of Indian law.

So that leaves the administration. I must say, in all candor, while I am very proud to be a part of this administration, and I think this administration

has a better, more broad and comprehensive relationship with tribal governments than any before, that is very much a matter of comparison. Certainly, by comparison to the Bush Administration and the Reagan Administration, things are much, much better in terms of the relationships with the tribes. That is in no small part because the President himself is very much interested in the welfare of Indian people. I think it is even more true because the President, having indicated his interest through the executive memorandum in 1995 concerning the government-to-government relationship, that a good many of the federal agencies, who never had much of an interest in Indian affairs, suddenly are very, very interested in Indian affairs. And so, now most of the federal departments have their own government-to-government policy with the tribes. It was an idea that began back in the late 1970s and early 1980s with the Environmental Protection Agency. Now, the EPA is not the only non-BIA agency that has an Indian policy. In fact, all of the departments, with a couple of notable exceptions, do.

On the other hand, where the leadership in a department does not make Indian affairs a priority, we don't do particularly well. I think that is the case in the Department of Health and Human Services. For some reason, the Indian Health Service does not do well in the annual game that goes into developing the federal budget. The BIA did quite well this year, and the President proposed a significant increase for the Bureau. Unfortunately, the Indian Health Service got basically no increase at all. Not that I would, but it does not mean that I get to go off and say "I got mine," because what is going to happen is we end up in front of the same appropriations committee and I guarantee you that the Bureau's budget request will be reduced in order to supplement the bad budget request that was made for the Indian Health Service. So, we find ourselves in a zero sum game that is very unfortunate, and they will rob Peter to pay Paul to make up for the inadequacy of the IHS budget.

Let me talk briefly about what our budget says and what I see happening for basically the next year. We established three priorities in the BIA budget, or three priorities for the changes that are in the BIA budget. You should know that we made a request for a general increase in tribal priority allocations. That request did not survive the internal review of the Administration, and so, there is only a nominal increase for tribal priority allocations. That, obviously, is not good.

There are some high points, though, in the budget. First of all, I think you all know about the big law enforcement initiative. The one thing we know, and unfortunately the evidence is not as accurate as we would like for it to be, but in general, we know that crime is dropping throughout the country, but both crime, violent crime, and youth crime are all on a dramatic rise in Indian country. The President directed the Secretary and the Attorney General to develop a plan for attacking that problem. After some months of work, an executive task force which included several tribal leaders, came up with two

alternatives for attacking this problem. The first alternative was to basically take the BIA's law enforcement program and transfer it to the Justice Department, add some additional resources, and let the law enforcement department really take charge of law enforcement in Indian country. The other proposal was that the program remain with the BIA, but that additional resources be put into the program, and some very important management initiatives be undertaken regarding who manages the law enforcement authorities for the Bureau. The one option that was not explored was leaving things as they are, which, obviously, is good.

When I came into office, this was still a live debate, as to whether we were going to transfer the program to the Department of Justice or keep it in the Bureau. My attitude is very simple. I am a little tired of this tendency that we see in other areas of the federal government to regard the BIA as a flea market, where they come by and pick the things they kind of like and leave all the other stuff there for us to contend with. This seemed to me to be just another example of that, where the Justice Department would have come along, taken the Indian law enforcement money, and left the Bureau just a little bit weaker and a little less expansive and a little less capable of coordinating the many services that go into the reservation communities. I also believe, sort of philosophically, that it is a real mistake to pick apart the BIA, because it remains the central agent, the primary agent, of the relationship between the tribes and the federal government. While it is certainly true that every federal department has a trust responsibility to the tribes, the more we diminish the primary agency of that trust responsibility, the more we weaken the visibility, presence and influence of Indian affairs throughout the government. So, I will continue to resist any efforts to pull different aspects of BIA programs out of the Bureau and transfer them to other agencies.

Boiled down to a simpler phrase, I met with a number of the U.S. attorneys for Indian country about this issue. They made the point, which is of course true, that the Justice Department is the expert in law enforcement, that they know more about law enforcement than we are ever going to know in the BIA. I replied that that is true. However, on the other hand, the BIA knows more about tribal governments than the Department of Justice will ever know. So, I will continue to take that attitude. I also should say that my basic outlook on the situation is that the BIA, in its relationships with the tribes, is sort of providing the base funding that the tribes need. Base meaning the very minimal that is available, that will allow a tribe to operate a government. That is what we see with the base funding concept that we came up with for the small tribes. No one is ever going to get rich on BIA money.

On the other hand, that leaves the opportunity for the other agencies in the federal government to put support on top of what we are doing. And, that is the solution that we finally came up with on the law enforcement initiative. The Bureau has made a request for a modest increase, really, we were appropriated something in the mid-seventies this year and we are asking for

something in the mid-nineties for FY 99. That is not a lot of money, but money is money, and that is an increase. But the real heart of the initiative will still come from the Department of Justice. They have proposed to put something over \$100 million into various programs that the Justice Department operates. Well, that is a perfectly satisfactory outcome to me. Now, I would have preferred, of course, to get the extra \$150 million myself, but I think that the Bureau suffers from a very serious credibility problem on the Hill, and for us to go to the Hill and say, Senator, give me another \$150 million and I'll solve the crime problem in Indian country, well, they would pat me on the head and say "isn't he a funny little guy?" But, when the Justice Department says it, it's a little different. And so, our cut was that we would keep the basic law enforcement program in the Bureau, but allow the Justice Department to use all the muscle it has and, let's face it, more money for cops is good politics in an election year, and giving money to the Justice Department is a much more saleable political proposition than was a major increase in the Bureau's budget. So, we were able to accomplish both — protect the Bureau of Indian Affairs' program and keep the agency whole, and provide the additional resources to Indian country that are so badly needed.

Our second initiative is in the area of trust improvement. I could go into some detail with charts and graphs and all that, but the bottom line is we need to start doing things much, much better than we have. The Bureau lost the trust funds management program because it did such a lousy job of it. Now, I am one of those people who very strongly believes that Congress never really gave the Bureau the resources that it needed to carry out that function properly. However, it is the function of the political leadership of the BIA to make the case to get that money and to make it enough of a priority that Congress does listen. And so, I think it is not enough to just say we blame the Congress because we never had the resources. We have to make the case.

So, this year we are asking for approximately \$10 million additional to upgrade the way we are managing the individual trust lands. There are a lot of zeros in terms of the numbers of documents that we have to review, catalogue, and put in some electronic format in order to just get the system up to where it ought to be by the year 2000. It is a monumental job and it is going to involve a lot of people sitting in a big warehouse, literally, with thousands of boxes of documents relating to trust lands. That is going to take some time, but we want to get that process underway and we are coordinating that effort with the office of the special trustee and the office of trust funds management. At some point, ideally before the turn of the century, what I picture is this huge computer with an integrated resource management system, where we have the trust lands documents able to communicate with the IIM accounts, with the GIS, and with other information and data bases that really are needed to do the kind of comprehensive trust resource management functions that we ought to be able to do. It will look very much, I think, like

the trust function in a private bank with, of course, the exception that the Bureau will continue not to charge for that service.

The final initiative that we had is in the area of education. I have spent a lot of time in these first few months of my administration talking and visiting with tribal leaders about schools, visiting the schools themselves, visiting with the school boards, and most happily, visiting with the students. We are proposing some significant increases, both in school construction, school operating funds, and most importantly, in school maintenance and repair. We have something like an \$850 million backlog in needed repairs to BIA facilities. Eighty-five percent of those facilities are schools. So, we have in the neighborhood of a \$725 million list of things that we need to do to repair these schools. Last year, we got \$34 million. Well, you can do the math. It will take us an awful long time to do the job. In fact, we are losing ground at this point.

So, we have proposed to double the funds that go into maintenance and repair in FY 99, and are looking to future increases in order to eliminate the backlog within the next seven years. Now, I am not naïve. I don't think we're going to get all of that money, but I do think we are going to see some real increases. And, the reason is simple. That while there is not a lot of good will on the Hill for the Bureau of Indian Affairs, there is a lot of good will for Indian people, Indian tribes, and especially for Indian kids. And, that means that more money for education is a relatively easy sell, especially because the vast majority of that money ends up right in the hands of the tribal school boards, and the BIA is not deeply involved in the day-to-day administration of these schools.

This job is actually a lot of fun. People ask me how I like it, and they're surprised when I say that it is fun. But, it is. It is a lot different than being an attorney, and I haven't quite pieced together why that is, but it has something to do with this. Which is that rather than sitting there in my office and sort of thinking through how to persuade somebody to make the decision that my client would like for that decision-maker to reach, you actually get to decide it yourself. That is a lot of fun. What also is fun is the diversity — you wouldn't believe the diversity of issues that come before the central office in Washington. I thought I had a very diverse law practice before, and I did, but it was nothing compared to the kind of diversity of issues I see now. We have one reservation that is sort of sliding into the Pacific right now, literally, and that I had no idea about. We have endangered species issues. We have very, very complex water rights issues throughout the Northwest. And then, of course, the whole field of gaming is a tome in itself, because the situation is so different from state to state.

But, there are downsides to the job. There are two that come to mind immediately. One is that from time to time, much more often than any of us would like, we have to say no when a tribe makes a request of us. And I wish that it weren't so, and I could always say, "Yes, I will give you \$3

million to fund this project that you want to do, or I'll make sure that the Justice Department does what you want them to do," and we are just not able to do that. So, that's a disappointment. But the hardest thing of all, quite frankly, is to go out and see what's going on at the reservations with some of these children. We are now in a time when we are seeing climbing rates of drug abuse, alcohol abuse, various substances — we've got kids blowing their brains out sucking on solvents on the reservations. And, you know what is going on here — that is learned behavior. They didn't come into the world wanting to drink and use drugs, and so they are learning that in their homes. They are in home situations that are so grim that they can't think of anything better to do than drink and use drugs.

I was at a reservation in South Dakota and met with the student leaders and asked them what they most needed for their school. I was thinking, well, it's going to be some new classrooms or science labs, computers, books, more teachers. But, you know what they wanted? They wanted a dorm and they wanted it because they said our classmates need a safe place to be at night. They're afraid to go home. They are in danger in their homes. There can be no greater failure of a community than the failure to protect these children. Because, after all, the children have no choices. They don't make the decisions about where they live or how they're going to eat tonight, or how they're going to get their clothes, or what they're going to do during the day. They have no power. The adults have the power. And, we are failing them miserably. We are seeing the results of it on a number of reservations. I think a number of you have probably heard about the suicide epidemic on the Standing Rock Reservation. That is only the tip of the iceberg, and as I speak with other tribal leaders, they say, yeah, that happened to us a couple of years ago, and another one says, oh yes, we had some suicides this year, too. I had a tribal leader point to a kid who was playing basketball and say, "I don't expect that kid to live through the summer because he is a suicide risk. His parents are alcoholics; he is abused at home; the kid doesn't have a chance." This was a thirteen-year-old, and we might lose him this year. He was a bright kid. It is just heartbreaking.

So, the one thing that is most important to me, and the call is upon all of us to do, is to begin the focus on these issues. You know, sovereignty is very interesting, very fun; it is very inspiring and good work, and it feels very important. The same goes for gaming compacts and jurisdiction issues, water rights, and all of that. But, none of those is nearly as important as this issue of protecting these kids and their alcohol and drug abusing families. I hope that all of you will take at least some part of your time away from these other seemingly larger issues and maybe spend some time thinking about and doing something about how we can help these kids, how we can help these schools, and how we can reconstruct these families that are in such terrible condition.

There is hope. The Oklahomans for Indian Opportunity last night sponsored a reception and they had two groups of kids come in. One was a

group of young people and they were pow-wow dancers, and they announced as they came in that they had declared war on drugs. There was another group, the United National Indian Tribal Youth, who also talked about their commitment to alcohol and drug-free life. The neatest thing of all were these little four- and five-year-olds in a Comanche language class, who came in and sang these nursery rhyme songs in Comanche, just absolutely beautiful children. One thing that I think we need to consider very carefully, and what these kids were saying, is that we're going to call upon our traditions and our ways and values that our people have always had, and maybe we're beginning to forget about, in order to maintain a healthy lifestyle and maintain our physical, spiritual, and mental wellness. These kids have got it. They understand what is going to be necessary. So, there is hope.

One last thought I would like to leave you with. We all know the thought that Indian people always think about the impact of their decision-making on the next seven generations ahead. Well, the seventh generation, since the Native American holocaust in the nineteenth century, are probably among us now. If they are not, they soon will be. This generation of young children really are that seventh generation, and I think that it is helpful for us to think that, and ask ourselves, are these children the seventh generation, are they what our ancestors must have wanted them to be when they were going through the most grim time of Indian history. I think if we focus on that, and ask ourselves, "What can I do today to try to help these children get to the place that our ancestors must have wanted for them?" Then we will do well, things will get better, and in the future, we will see a healthier and more prosperous Native American people.