

THE ROLE OF TRIBAL GOVERNMENT IN REGULATING RESEARCH

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The regulation of research by government raises sensitive issues. Society places strong value on academic freedom. Research, it is felt, leads to future scientific and technological developments which benefit society as a whole. Government regulation causes concern about the prospect of political or bureaucratic interference with the purely scientific considerations that should govern research policy. But recent revelations of abuses of human rights by researchers have made us realize that science has no more right to be free of accountability than any other social institution. So the federal government, through its power to place conditions on the use of federal funds, has acted to ensure the protection of the rights of human subjects of research by requiring the establishment of Institutional Review Boards to review proposed federally funded, conducted, or sponsored research, including research involving Indian people and communities.

Regulation of research in an Indian context raises additional issues. Size makes a difference. A society of 250 million people can regulate research wholesale, but regulation of research affecting Indian communities is much more direct and personal. It is difficult to relate particular actions to general guiding principles because of the relatively small number of communities and individuals affected. Other questions arise. Is there a special need for protection of Indian individuals and communities because of unique aspects of Indian culture, because people fear the consequences of declining to participate in federally-sponsored research when the IHS is central to the Indian health system; because depressed economic conditions in Indian communities render some Indian people relatively powerless? Does the federal government's trust responsibility (in the larger sense) entail a special obligation to protect Indian people and communities that it might not have with respect to the larger society? And, should the federal government assume the full obligation of regulation or is there a necessary role for tribal governments? Is the special obligation of the federal government, if any, the result of the trust responsibility or simply because the federal government is presumed to have the expertise or the resources to hire the expertise?

Federal regulation in the interest of Indian people is not totally effective. The federal government has a fundamental obligation to support research in the public interest and to support academic freedom. This obligation sometimes may conflict with the special duties to Indian people, and history has shown that the Indian people often are dissatisfied with the result of the balancing process when the federal government balances its duty to Indians with its duty to the general public interest. Despite its many years of experience with Indian people, the federal government cannot be presumed to know the needs of each Indian community and the values they wish to protect in a research situation, and it is unlikely ever to exercise its powers to regulate research broadly enough to reach privately sponsored research, which can also be a source of great annoyance to tribes. Tribes can and should act to ensure that the IRBs function as effectively as possible and reflect their needs and interests. But the fundamental responsibility to articulate the interest of Indian communities lies in these communities themselves, acting through their tribal councils and other bodies, to articulate the conditions in which research will be permitted.

Do Indian tribes have the power to protect their communities and their citizens by regulating research? Under general principles of federal Indian law, the initial inquiry is not whether tribes have a power but whether they have lost it. They have all the powers of internal self-government except those which have been surrendered by treaty or agreement, limited by federal law, or are inconsistent with tribal status as domestic dependent nations. There is no federal law expressly limiting tribal regulation of research. The "inconsistent with tribal status" test should not present a barrier. The Indian Civil Rights Act has language similar to the U.S. Constitution's First Amendment, and it not a general barrier to tribal regulation of research.

Assuming no barrier in federal law, the next step is to determine whether a particular tribal government has been given the power by its people to regulate research. If the tribe has a written constitution, it should be examined for language in the “Powers” section. Most tribes have provisions to promote the general welfare of the tribe, to maintain peace and order, or to protect individual and tribal rights, any of which could be interpreted to include the power to regulate research. Many tribes also have the power to require licenses or impose taxes and fees on those doing business on the reservation. And finally, one of the fundamental tribal governmental rights that has always been recognized in federal law has been the right to exclude outsiders from the tribe’s territory. Implicit in the power of removal is the power to determine the conditions in which outsiders will be allowed to enter the reservation and remain. The removal power must be exercised according to an ordinance that accords due process of law to those affected and that spells out the conditions in which non-members are allowed on the reservation.

Most tribes have power to regulate research on the reservation, especially research involving the Indian people themselves. Tribes must address various underlying policy considerations in deciding how to exercise this power. What specific rights of the people require protection? What is the tribe’s obligation to participate in research for the good of humanity, and how will this obligation be balanced against the interests of the Indian people? What constitutes informed consent to participate in research? How can tribal powers be enforced other than in the decision to let researchers into the community in the first place? Are economic and employment considerations relevant? Can the tribe hope to realize economic benefit from research? Will strict regulations deprive the people of the opportunity to participate in research which may benefit them? Must research show an immediate benefit? Do tribal members have an individual right to participate in research despite tribal opposition? Does the tribe have access to technical assistance to enable it to make informed decisions regarding particular research proposals?

These questions must be addressed as tribes develop a regulatory scheme which makes researchers appropriately accountable to the Indian community. Tribes should review their procedures periodically and adjust them as circumstances warrant. But, despite the skepticism of some academics about the appropriateness of tribal involvement in this area, it seems fundamental that Indian tribal governments have both the power and the duty to address this important area on their own in addition to the steps they take to ensure the effectiveness of federal regulatory efforts.