

## COVID-19, Indian Reservations, and Self-Determination

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COVID-19 is the most recent example of the vulnerability of American Indian reservations to pandemic disease. The Navajo Nation's COVID-19 infection rate is higher than that of any US state—even New York.<sup>1</sup> This is especially puzzling when considering population density. The Navajo Nation encompasses over 27,000 square miles and has a population of about 150,000 people.<sup>2</sup> By contrast, New York City, where most of New York's COVID-19 cases are concentrated, has 8 million plus residents in just over 300 square miles.

The economic and health situation on reservations exacerbates the challenge of responding to the current pandemic. Tribal unemployment rates were 50 percent or higher on many reservations before the pandemic. According to the Indian Health Service, which serves approximately 2.6 million American Indians and Alaskan natives, reservation Indians suffer more from all major categories of disease than the rest of the United States.<sup>3</sup> For example, they have nearly triple the rate of diabetes compared to the US average. This disparity is significant, because diabetes is a major comorbidity with COVID-19 fatalities.<sup>4</sup>

Tribes are doing their best to protect their citizens from COVID-19. The Cheyenne River Sioux and Oglala Sioux have installed checkpoints on all roads leading into their reservations as part of their crisis response, though they only have a handful of cases on their reservations. Despite their vulnerability, South Dakota's governor, Kristi Noem, attempted to force the tribes to remove the checkpoints.<sup>5</sup> The federal government has also threatened to withhold aid from tribes unless they turn over tremendous amounts of data unrelated to COVID-19.<sup>6</sup> These actions symbolize much of Indian relations with the state and federal governments: a lack of respect for tribal sovereignty, even when it comes to preserving the health and safety of US citizens *on tribal land*.

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A central policy challenge is to alleviate the continued burden imposed on American Indian tribes by a uniquely complex federal legal structure. The Coronavirus Aid, Relief, and Economic Security (CARES) Act provides only temporary measures to increase tribal funding. Reducing long-run vulnerability to pandemic disease requires an affirmation of tribal sovereignty along with institution building that enables the tribes to respond to crises.<sup>7</sup> Recognizing tribal authority on tribal lands will enable tribes to effectively respond to reservation health problems; moreover, recognizing tribal sovereignty will enable tribes to rebuild their long-hobbled economies.

## **POLITICAL ASPECTS OF VULNERABILITY**

One of the most important justifications for government is the provision of certain goods and services that markets might have difficulty providing—rule of law, infrastructure, access to clean water, and so forth. Wealthier countries tend to provide more of such services.<sup>8</sup> Wealth, in turn, contributes to health: as wealth reduces poverty, health increases.<sup>9</sup>

Tribal governments often lack capacity to provide the services that better-funded governments do. Owing to inadequate tribal government funding, 48 percent of homes in tribal communities lack access to safe water.<sup>10</sup> Indian families are also more than twice as likely to live in overcrowded homes as other Americans.<sup>11</sup> Overcrowded homes without access to water present ideal conditions for COVID-19 spread. Plus, access to medical care is hampered by unpaved reservation roads.<sup>12</sup>

Challenges also arise from multiple governments having the ability to assert jurisdiction in Indian country.<sup>13</sup> Conflict and uncertainty over authority dissipate the quality of government services. Tribal roads are a good example, as roads in Indian country are among the most underdeveloped, unsafe, and poorly maintained roads in the United States.<sup>14</sup> Tribal governments, state governments, and the federal government, especially the Bureau of Indian Affairs, have all long asserted authority over roads. This uncertainty about authority increases the time it takes to agree on construction and contributes to a pass-the-buck mentality, both of which reduce the chances of project completion.

A more fundamental challenge is that tribes do not have the tax revenue to support large-scale improvements in public goods. Government capacity is typically defined by the extent of revenue collection capacity. While tribes have the power to levy taxes on activities within their borders, states can often tax economic activity that occurs within a reservation.<sup>15</sup> This double taxation makes reservation commerce more expensive and deters private investment. Thus, many tribes simply avoid taxing altogether. Instead, tribes are forced to operate businesses, such as casinos, to fund their governments.<sup>16</sup> A consequence is that the typical reservation does not have a robust economic foundation to support improvements in the quality of public-sector governance.

The lack of tax revenue to invest in infrastructure directly contributes to vulnerability to COVID-19. Unlike in many other areas, where quality roads and access to water are not an issue, many

reservation Indians do not have easy access to doctors and hospitals, and the quality of medical facilities on reservations is often lacking. The pandemic illustrates this vulnerability arising from lack of healthcare equipment: reservations were short of hospital beds, ventilators, and testing kits. President Trump issued \$40 million in assistance, though the aid was delayed, and the respirators received were expired.<sup>17</sup>

## **ECONOMIC ASPECTS OF VULNERABILITY**

Economies function most effectively when economic institutions (property rights, contract law, rules governing trade, etc.) enable people to do business at a reasonable cost. One of the virtues of the US economy is that institutions enable interactions in what F. A. Hayek called the “great society”: anonymous interactions among people who may not know each other but whose mutual interest brings them together in peaceful cooperation. Business easily occurs among strangers in large measure because of robust institutions that ensure economic freedom. The Uniform Commercial Code creates a steady interstate business climate, and judgments are easily enforced across state borders.<sup>18</sup> These institutions enable the market process to operate, giving rise to innovation and ultimately to prosperity.

The coherence of American economic institutions in large measure stops on reservations, creating obstacles to the market process.<sup>19</sup> Tribes existed as and were recognized as sovereigns long before the United States’ founding.<sup>20</sup> However, tribal sovereignty was severely diminished when the Supreme Court designated tribes as “domestic dependent nations” in 1831, meaning that tribes’ relationship to the United States is “that of a ward to his guardian.”<sup>21</sup> Fifty years later, the Supreme Court decided that Congress possessed extraconstitutional power to control the Indians because of “their very weakness and helplessness.”<sup>22</sup>

In the late 1800s and early 1900s, the United States wielded its “paramount power over the property of the Indians” to violate treaties and transfer Indian land to white Americans.<sup>23</sup> The General Allotment Act of 1887 had two goals: open “surplus” reservation lands to white settlers and compel Indians to adopt the ways of white yeoman farmers.<sup>24</sup> Allotment placed Indian lands in trust; consequently, Indian property rights were not able to evolve in response to local conditions.<sup>25</sup> Tribes lost 90 million acres of their best land through allotment.<sup>26</sup>

The Indian Reorganization Act of 1934 (IRA) was designed to counter the devastation caused by allotment. While the IRA prevented further tribal land loss, the IRA locked tribal lands in trust status.<sup>27</sup> Trust status greatly limits tribes’ ability to control their land as well as individuals’ ability to use their land for economic purposes. Furthermore, the IRA imposed culturally incompatible governance structures upon tribes. Tribes were all given the same constitutional framework, without opportunities to choose rules for self-governance through tribally legitimate procedures.<sup>28</sup> Although the IRA was intended to further tribal self-government, the IRA left federal officials in control of virtually all aspects of reservation life.

In the 1950s, the federal government sought to assimilate tribes into the United States mainstream. The United States legislatively terminated more than 100 tribes—that is, it ended the tribes’ government-to-government relationship with the United States. The United States also relocated Indians from their reservations to big cities.

Since the 1970s, the United States has favored tribal self-determination, a policy of empowering tribes to manage their own affairs as they see fit. Tribes now have more control over their own destiny than at any other point during the past 200 years, and many tribes have flourished. Nevertheless, tribes still face significant federally imposed obstacles to self-governance and economic development.

A major impediment is that federal laws and policies make doing business in Indian country especially challenging. For example, the trust status of tribal land makes obtaining a mortgage a Sisyphean task. This greatly limits access to capital in Indian country. Access to capital is further restricted by the uncertainty over whether contractual disputes should be resolved under tribal or state law. Starting and operating a business is immensely difficult without access to capital. Federally imposed red tape makes starting a business on a reservation more tedious than elsewhere in the United States and presents another challenge to tribal economic development.<sup>29</sup> Hernando de Soto referred to this as the challenge of dead capital: people cannot use their wealth because of inadequate legal infrastructure and bureaucratic regulations that undermine its collateralization.<sup>30</sup> Thus, the private sector is virtually nonexistent on Indian reservations.<sup>31</sup>

No private businesses means that there are no businesses to tax; instead, tribal government revenue comes almost entirely from federal transfers and tribal enterprise. Tribal casinos have been an important source of economic development on many reservations. Indeed, many tribes depend on casino revenue for basic government operations, so shutdowns caused by COVID-19 will have devastating impacts on numerous tribal budgets.

Casino reliance, while important to economic development as well as to providing more resources to strengthen local cultures, creates vulnerability. The COVID-19 pandemic illustrates why reliance on a single economic sector creates special vulnerabilities to crises. Weathering the economic lockdowns that governments imposed in response to the pandemic depended in part on ability to work remotely. There are few opportunities to work remotely with casinos, which are based on in-person interactions. Lockdowns also meant fewer travelers. Many tribes depend on hotels as well. Gaming and hotels are especially hard hit by economic lockdowns. An economy with more options to work from home is more resilient, but few reservations have diverse economies.

## **SOCIAL ASPECTS OF VULNERABILITY**

Social capital is a feature of communities, an asset much like any other. Federal policies, such as those that created Indian boarding schools, have undermined social capital in tribal communities.<sup>32</sup>

Several federal policies are especially challenging. One is the creation of “artificial states” by forcing separate tribes together on a single reservation, which increases governance challenges.<sup>33</sup> Tribes were also given constitutions by the federal government. Hence, there was no real constitutional deliberation on many reservations. A consequence is that many of the tribal constitutional rules do not reflect the tribe’s culture, even during the era of self-determination.<sup>34</sup> These developments undermine the social capital necessary to respond to COVID-19, thereby making pandemic response more challenging, as communities often have an especially important role in responding to crises.

## **THE POLICY RESPONSE**

The institutional environment described earlier provides a context to understand why the pandemic has hit reservations especially hard as well as a critical frame to understand the policy response and its limitations. The CARES Act established an \$8 billion tribal government relief fund to help tribes and tribal communities provide government services, especially in response to declining casino revenue, with funds administered by tribal leaders, the US Department of the Treasury, and the US Department of the Interior.

Congress used aspects of the act to address many challenges on reservations. The government’s loan guarantee program provided relief to small businesses and forgives loans to businesses that keep paying workers, though there was confusion about whether forgiveness applies to casinos because they derive revenue from gambling. At least \$125 million has been set aside for tribal health services. Nearly \$1 billion was allocated to Indian Health Services, in addition to aid from the Centers for Disease Control and Prevention to respond to COVID-19 (\$125 million). The US Department of Agriculture provided \$100 million in support for food and improvements in equipment, while the Bureau of Indian Education received \$69 million to support its COVID-19 response effort, as well as \$150 million to fund programs. The act also promised \$453 million to fund tribes under 638 federal contracts from the Bureau of Indian Affairs.<sup>35</sup>

## **FROM TEMPORARY RELIEF TO REDUCED VULNERABILITY**

The Indian country provision of the CARES Act helps address reservation vulnerability to COVID-19. However, it does not address the institutional problems that have created the vulnerability. For sovereign Indian nations to respond to pandemics more effectively, tribal governments need greater sovereignty and stronger economies. Eliminating paternalistic federal regulations in favor of tribally developed rules is the key to self-governance and igniting reservation economies. After all, making tribal law the governing force in Indian country simplifies business transactions. Simplicity will attract businesses to reservations, and this will create jobs that can provide the money to improve housing conditions. Private-sector jobs are also critical for establishing the tax base needed to fund roads and other public goods. Preempting state taxation of tribal commerce would

go a long way toward this end too. In this regard, COVID-19 illustrates the essential need to reform federal Indian policy and free Indian country from state taxes and excessive federal regulation.

The Hoover Institution's Alliance for Renewing Indigenous Economies provides a useful guide for thinking about these issues.<sup>36</sup> The project suggests four key aspects of change to address vulnerability on reservations: secure land title, clear recognition of tribal authority over tribal lands, customs and culture informing tribal governance, and fiscal power to set local priorities and meet community needs.

Each is critical, and each requires institutional reform. The current pandemic highlights the ongoing challenges caused by the incoherence of institutions on reservations. Without reform in each of these dimensions, vulnerability to pandemic disease will remain a fact of life in Indian country.

## CONCLUSION

As Werner Troesken articulated in *The Pox of Liberty: How the Constitution Left Americans Rich, Free, and Prone to Infection*, disease containment depends in part on infrastructure to prevent movement and economic freedoms that contribute to poverty reductions that in the long term reduce vulnerability. Such analysis is especially relevant to contemplating the tradeoffs associated with economic lockdowns to prevent the spread of disease.<sup>37</sup> Yet on reservations, most tribes have neither the capacity to implement robust public health measures nor economic freedoms. Hence, what remains is a state of vulnerability.

Improved economies will provide tribal governments with more resources to provide more and better services. Economic improvement will also lead to better housing conditions and a reduced risk of COVID-19 and other viral diseases. Improvements in the quality of economic institutions promise more revenue and hence greater ability to provide infrastructure to ensure better sanitation and healthcare. Yet the improvement in economic institutions depends on political reform. Tribal sovereignty needs to be respected, because this will enable tribes to develop economic frameworks that facilitate exchange and innovation. This requires empowering tribal governments and getting the federal bureaucracy out of reservations.

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