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Indian Wars: Old and New

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Introduction

In March 2011, the United States submitted a brief in *United States v. al Bahlul*, a military commission case reviewing the conviction of a War on terror suspect, comparing the tactics used by Indians in the First Seminole War to al Qaeda.¹ As government lawyers had argued in the days following September 11, 2001, the government in *al Bahlul* argued that the Seminole Tribe in the 1810s engaged in a form of “irregular warfare” not for the purpose of establishing a nation or state, much like al Qaeda in the modern era.² The military’s comparison of Indian tribes to modern international terrorist organizations strike a divisive chord in Indian country and elsewhere, as modern Indian tribes are as far removed from al Qaeda as can be. And yet, the government in some contexts continues to juxtapose the Indian warrior stereotype with modern law and policy.

As our colleague Professor Wenona Singel asked, “Who would be persuaded by such an argument?”³

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¹ See Appellee’s Response to the Specified Issues, *United States v. al Bahlul*, No. 09-001 (U.S. Court of Military Commission Review, Mar. 11, 2011), available at <http://turtletalk.files.wordpress.com/2011/03/bahlul-brief-irt-specified-issues-11-mar-2011.pdf>.

² Office of Legal Counsel, Legality of the Use of Military Commissions to Try Terrorists 25 (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 464, 832 (2d ed. 1920), and WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 353 (3rd ed. 1914)).

³ Apparently, the military continues to fight Indian wars, as the code word for Osama bin Laden was “Geronimo.” See Mark Mazzetti, Helene Cooper, & Peter Baker, *Behind the Hunt for Bin Laden*, N.Y. TIMES, May 2, 2011, at <http://www.nytimes.com/2011/05/03/world/asia/03intel.html>.

The United States historically has swept up American Indians and Indian tribes along with larger American policy choices. The Indian “problem” of the Framers – acquiring valid title and control over American Indian resources – eventually became the Indian “wars” of the latter half of the 19th Century. The Indian wars over resources largely are over, but American “wars” – on poverty, drugs, and terror – continue to sweep up American Indians and Indian tribes into the morass of federal government policymaking.

This short paper analyzes American history from the modern “wars” on poverty, drugs, and terror from the perspective of American Indians and Indian tribes. These domestic “wars” are aptly named (it turns out), as the United States often blindly pursues broad policy goals without input from tribal interests, and without consideration to the impacts on Indians and tribes. With the possible exception of the “war on poverty,” these domestic wars sweep aside tribal rights, rights that are frequently in conflict with the overarching federal policy goals.

Modern federal Indian law and policy recognizes tribal self-determination and emphasizes government-to-government relations, called in shorthand the trust relationship. The United States’ domestic wars, usually announced with much fanfare but without reference to Indian affairs, have alternately exploited the trust relationship and ignored the trust relationship to advance national goals.

The “declaration” of the domestic wars is nothing more than a move toward the fundamental reconsideration of the foundations of the rule of law in these contexts. In innumerable instances relating to Indian affairs, the federal (and occasionally) state government has justified its actions on reliance to one of these domestic wars. And in many of these instances, major shifts in Indian law and policy occur that, absent the domestic war, would likely have been otherwise declared illegal. This is not to say that tribal interests have never benefitted from a domestic war, because they have, marginally in some eras. But when a domestic war is declared that negatively affects Indian country, the impacts are nothing short of devastating.

This essay explores three declared domestic wars, and their impacts on American Indian tribes and individual Indians, in loose chronological order, starting with the war on poverty. As Part 1 demonstrates, the Johnson Administration’s Great Society programs helped to bring American Indian policy out of the dark ages of the era of termination, in which Congress had declared that national policy would be to terminate the trust relationship. Part 2 describes the war on drugs, declared by the Reagan Administration, which had unusually stark impacts on reservation communities both in terms of law enforcement, but also on American Indian religious freedom. Part 3 examines the ongoing war on terror, which Bush Administration officials opined has its legal justification grounded in part on the Indian wars of the 19th century. The war on terror marks America’s return to fighting a new Indian war, where the adversary is illusive and motivated, and where the rule of law is literally obliterated.

I. The War on Poverty

In 1970, when Edwin Starr belted out the soulful lyrics to the anti-Vietnam war song, “War,” (“What is it good for? Absolutely nothing! Say it again, y’all!”) he likely hadn’t considered the positive effects that the “war on poverty” had been having in Indian country since 1964. That year, President Johnson exclaimed, “[t]his administration today, here and now, declares unconditional war on poverty in America.”⁴ It was a determined effort to address the chronic unemployment and poverty in many areas of the nation and was just one facet of the “Great Society,” an expansive set of domestic programs proposed or enacted by Johnson, which, in addition to poverty, included education, civil rights, healthcare, arts/cultural interests, transportation, the environment, consumer protection, as well as various urban renewal projects and job-training programs.

The war was warmly received in Indian country. Commissioner of Indian Affairs, Philleo Nash, exclaimed that “President Johnson’s declaration of unconditional war on poverty was welcomed as enthusiastically by the Bureau of Indian affairs as it was by the Indian people . . . we will fight this war side by side.”⁵ Secretary of the Interior Stewart Udall made clear that “we are here to plan how to integrate our Indian programs and Indian problems and Indian opportunities into the war on poverty.”⁶ Further, Udall also kept President Johnson abreast of his department’s efforts through weekly memos.⁷ But did Johnson’s awareness of the war on poverty in Indian Country even matter? As will be shown, even saddled with Johnson’s benign indifference, the war on poverty would still pay off great dividends for Indians outside the boundaries of material poverty. It would be “the harbinger of tribal self-determination.”⁸

Born and raised in Texas, a state with no Indian population,⁹ Johnson seemingly did not develop much concern for them. His own biographical account of his presidential years says nothing of Indian tribes¹⁰ and during his twenty-three years in Congress, (eleven years in the House of Representatives and twelve years in the Senate) he had no direct involvement with any Indian policies. However, in 1961, as vice-president, he did meet once with delegates from the

⁴ President Lyndon B. Johnson, State of the Union address (January 8, 1964).

⁵ Philleo Nash, Remarks at the American Indian Capitol Conference on Poverty (May 12, 1964).

⁶ Stewart Udall, Remarks to Indian Affairs Conference of Superintendents (June 16, 1964).

⁷ Stewart Udall, “Report to the President” (June 9, 1964).

⁸ Daniel M. Cobb, *Philosophy of an Indian War: Indian Community Action in the Johnson Administration’s War on Indian Poverty, 1964-1968*, 22 AM. INDIAN CULTURE AND RES. J. 71, 71 (1998).

⁹ During Johnson’s many years as a Congressman, (1937-1960) there were no federally recognized tribes in Texas. However, since the 1960s, the Alabama-Coushatta Tribes, the Kickapoo Traditional Tribe of Texas, and the Ysleta Del Sur Pueblo of Texas have been federally recognized.

¹⁰ LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963-1969* (Holt 1971).

American Indian Chicago Conference,¹¹ (AICC) a week-long gathering of 467 Indians hailing from 90 different Indian communities from across the country.¹²

Johnson and the AICC members discussed the AICC's *Declaration of Indian Purpose*¹³ and "how future legislation could incorporate the need for tribal self-determination, local control of resources, and federal assistance with economic development." Most importantly, the *Declaration* called for the programs to be developed by the Indians themselves, and based on the notion that "[what] we ask of America is not charity, nor paternalism, even when benevolent. We ask only that the nature of our situation be recognized and made the basis of policy and action."¹⁴ Their *Declaration* condemned the termination era, called for new policies which were based on a "broad educational process," and provided specific recommendations in the areas of economic development, education, health, housing, and law (including treaty rights). It encapsulated a significant departure from the status quo of the early 1960s and was timed perfectly for the oncoming war.

It is unknown how much Johnson was swayed, if any, by the AICC's *Declaration*. As noted above, he didn't mention Indians at all in his biography, let alone the AICC, and there was no action done on his part after the meeting. In fact, after the quick fifteen minutes with the delegation, he was already on the phone dealing with other matters.¹⁵ However, three years later, as president, he specifically mentioned Indian reservations in his State of the Union address when he declared, "our joint Federal-local effort must pursue poverty, pursue it wherever it exists - in city slums and small towns, in sharecropper shacks or in migrant worker camps, on Indian Reservations, among whites as well as Negroes, among the young as well as the aged, in the boom towns and in the depressed areas."¹⁶ But that was the extent of his attention on Indian affairs; he was much more concerned with the African-American civil rights movement.¹⁷

American Indians were rarely mentioned in the war on poverty because the Johnson administration was trying to devise a poverty plan that was not based on race. Civil rights was already a contentious issue and the Johnson administration did not want to enmesh the war on poverty with the more expansive civil rights legislation which was being fought over in Congress

¹¹ Cobb, *supra* note 8, at 72.

¹² Lawrence Hauptman & Jack Campisi, *The Voice of the Eastern Indians: The American Indian Chicago Conference of 1961 and the Movement for Federal Recognition*, 132 PROC. OF THE AM. PHIL. SOC'Y 316, 316 (1988).

¹³ That report condemned Termination, called for new policies based on a "broad educational process," and provided specific recommendations in the areas of economic development, education, health, housing, and law (including treaty right).

¹⁴ Hauptman & Campisi, *supra* note 12, at 316.

¹⁵ THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961-1969, at 108 (2001) (Daily Diary, 15 August 1962).

¹⁶ *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1963-1964: vol. 1—November 22, 1963 to June 30, 1964*, at 112-116 (Washington D.C.: United States Government Printing Office, 1965).

¹⁷ CLARKIN, *supra* note 15, at 108.

at the same time.¹⁸ After meeting with President Johnson, Robert Burnette, a Sicangu (Brulé) Sioux political leader and activist, felt that the president's "interest was motivated by political considerations rather than by a concern for Indian problems."¹⁹ But regardless of Mr. Burnette's opinion of Johnson's true machinations, Johnson's war on poverty would still have monumental, albeit unintended, effects in Indian country.

During the opening volleys of the war, Johnson had in his political arsenal, an impressive 61.1% of the popular vote, carrying forty-four states as well as the District of Columbia, while his Democrat Party held a total of 295 seats in the House and 68 in the Senate. With this copious political ammunition at Johnson's disposal, Congress passed 84 of his 87 legislative proposals.²⁰ And even though none were specifically aimed at Indians or Indian tribes, they were directed at helping the poor – which Indians certainly were. And so, in 1964, war once again came to Indian country.

One of Johnson's "generals" in the war on poverty was secretary of the interior, Stewart Udall, a Kennedy appointee who took the Arizona delegation for Kennedy from Johnson in the 1960 Democratic National Convention.²¹ Recalling a later encounter with President Johnson, Udall said that "it was very clear that he knew what I had done, and I was sort of on the edges of the thing."²² When Johnson assumed the presidency, many (including Udall himself) believed that he would dismiss Udall from his cabinet position for his political transgressions. But corroborating Robert Burnette's view of Johnson's apparent "political considerations," the president stated that "you should know by now that I'm a better politician than to fire any of Kennedy's cabinet at this time."²³

Consequently, Udall stayed on as Secretary of the Interior and served as a link for the direction of Indian affairs in the Kennedy and Johnson administrations. "Under JFK, Udall and his staff . . . had new ideas which had lain dormant. Under Johnson, new ideas were the order of the day, and when Johnson retained Udall as secretary of the interior the stage was set for the emergence of new thinking in Indian affairs."²⁴ Interestingly, Johnson has been quoted as saying that "[a]s a matter of fact to tell you the truth John F. Kennedy was a little too conservative for my taste."²⁵ Therefore, as Thomas Clarkin has noted, "the most important development during the early years of the Johnson administration did not originate in the Interior Department; rather,

¹⁸ IRWIN UNGER, *THE BEST OF INTENTIONS: THE TRIUMPHS AND FAILURES OF THE GREAT SOCIETY UNDER KENNEDY, JOHNSON, AND NIXON* 50 (1996).

¹⁹ ROBERT BURNETTE, *THE TORTURED AMERICANS* 82 (1971).

²⁰ CLARKIN, *supra* note 15, at 106.

²¹ Transcript of Stewart L. Udall Oral History Interview – JFK #1. 1/12/1970, 20-21 http://www.jfklibrary.org/NR/rdonlyres/763AFC06-0605-4C72-9EE9-FF6845076AC4/43986/UdallStewartLJFK1_oralhistory.pdf.

²² *Id.*

²³ CLARKIN, *supra* note 15, at 107.

²⁴ GEORGE PIERRE CASTILE, *TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960-1975*, at 24 (1998).

²⁵ Carl M. Bauer, *Kennedy, Johnson and the War on Poverty*, 69 J. OF AM. HIST. 98, 114 (1982).

Lyndon Johnson, a career politician with no background in Indian policy, brought the greatest changes to the lives of Native Americans through his commitment to battling poverty in America.” For tribes seeking a way to attain self-determination, Johnson’s unrelated political motivations were a welcome happenstance.

Though it was an unintended side-effect, the war on poverty was still an important factor in the emergence of self-determination for Indian tribes, made possible by the strengthening of the trust relationship between the United States and the various Native American nations.²⁶ Kevin Washburn believes that the initiatives created from the war on poverty had “more positive effects for Indian tribes than any federal ‘Indian policy’ initiative has ever had. Indeed . . . modern tribal governments were born from the War on Poverty programs.”²⁷

Specifically, the war on poverty entailed a multi-pronged attack which included an \$11 billion tax cut by way of the Revenue Act, social benefits stemming from the Food Stamp Act, Medicare and Medicaid, the Department of Housing and Urban Development, and the Fair Housing Act.²⁸ On the economic front, Johnson pushed the Economic Opportunity Act (EOA)²⁹ through Congress, of which its *pièce de résistance* was the creation of the Office of Economic Opportunity (OEO), the agency responsible for administering most of the war on poverty’s programs. The first director of the OEO, R. Sargent Shriver, tasked James Wilson with heading a department which concentrated solely on Indian Country. Wilson’s self-admitted flanking attack was to act as “small ‘a’ activist and a “big ‘M’ Manipulator” to manipulate the system of federal government dealings with Indians so they would eventually gain more political power.³⁰

Although the EOA itself made no specific mention of American Indians, tribes or reservations, its legislative history did establish that Indians were to be at “the forefront of the [Office of Economic Opportunity] program.”³¹ “The drafters of the OEO bill, however, never thinking of tribes as governments, considered only three possible ways to deliver OEO services to Indians: (1) through the BIA, (2) through the states, or (3) through both the BIA and the states. No one had consulted with tribal leaders.”³² But in time, Indian specific issues would necessitate the creation of “Indian desks” in the OEO as well as other agencies such as the Departments of Agriculture, Commerce, Housing, Labor, and Urban Development. The presence of these Indian

²⁶ Christopher Riggs, *Seeds of Self-Determination: American Indians and the War on Poverty in the 1960s*, 69 PACIFIC HIST. REV. 431(August 2000).

²⁷ Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 792 (2006).

²⁸ It also created Head Start, Volunteers in Service to America (VISTA), Upward Bound, the Job Corps, Legal Services, the Neighborhood Youth Corps, the Community Action Program, the Work-Study program, Neighborhood Development Centers, small business loan programs, rural programs, migrant worker programs, remedial education projects, local health care centers, and others.

²⁹ Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. § 2790).

³⁰ DANIEL M. COBB, *NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY* 103 (2008).

³¹ Examination of the War on Poverty Program: Hearings on H.R. 10440 Before the Subcomm. on the War on Poverty Program, 88th Cong. 313 (1964) (statement of Stewart Udall, Sec’y of the Interior).

³² Charles Wilkinson, *Peoples Distinct From Others: The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 383 (2006).

desks meant that the funds were routed apart from the general, non-Indian programs, which in turn was a recognition of the distinct nature of tribes as self-governing, albeit poverty-stricken bodies.³³ The OEO put the engine in place; it just needed some fuel.

Therefore, where the Indian programs, from the onset, would be recognized as unique by their initial funding method, they would also assume a distinctly Indian character on the receiving end. Title II of the EOA “provided stimulation and incentive for urban and rural communities to mobilize their resources, public and private, to combat poverty through community action programs”³⁴ (CAPS). These CAPS were implemented in order to promote “maximum feasible participation”³⁵ of the impoverished in both creating and implementing the actual programs. Actual members of the community were themselves tasked with organizing community action agencies, developing proposals, applying for grants, and overseeing their programs without interference from local, state, or federal officials.³⁶ Shades of the earlier demands of the AICC as written in their *Declaration of Indian Purpose* were coming to fruition.

By giving tribes large amounts of federal funds and minimal interference from the federal government in their allocation, these CAPS effectively served as a backdoor to greater self-determination rights. And there were more unforeseen changes on the horizon; Indians wanted more than to just create and administer federal programs. “Indian country was beginning to stir, and the talk was about sovereignty, about tribal governments.”³⁷

In May 1964, several Indian activists organized a gathering in Washington, D.C. which they called the “American Indian Capital Conference on Poverty.” In attendance were Vice President Hubert Humphrey, Stewart Udall, and several influential members of Congress. The Indian leaders stated their case for self-determination, for the right to run their own programs, and “the right to be right and the right to be wrong.”³⁸ They were successful in their goal by adding to the bill three seemingly innocuous words to the definition of who could receive OEO funds – those words being “a tribal government.” According to Charles Wilkinson, these were “the very first words in the entire history of the Republic that Indian people had ever conceived of and lobbied into federal legislation.”³⁹ Thus, in a perfect storm of the national civil rights movement, the heady “Red Power” political activism of the time, funds provided for by the

³³ DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 207 (3rd ed. 2011).

³⁴ Pub. L. 88-452, 78 Stat. 508, 42 U.S.C. § 2701.

³⁵ “Maximum feasible participation” was at term coined by and written into the legislation by task force member Richard Boone. ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* 268 (Harper & Row 1984).

³⁶ CLARKIN, *supra* note 15, at 110.

³⁷ Wilkinson, *supra* note 32, at 383.

³⁸ *Id* at 382; Alvin M. Josephy, *Introduction to Melvin Thom, A Statement Made for the Young People, in RED POWER: THE AMERICAN INDIANS FIGHT FOR FREEDOM* 65-66 (Alvin M. Josephy ed., 1971).

³⁹ Wilkinson, *supra* note 32, at 382; Economic Opportunity Act of 1964, 42 U.S.C. § 2790(a), (f), repealed by Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357, 519 (codified at 42 U.S.C. § 9912 (2000)).

OEO, and responsive federal representatives, tribes gained a strong foothold in the pursuit of reclaiming their inherent rights of self-determination.

Between the years 1964 and 1976, tribes became direct sponsors of a several federally funded programs through which they would ultimately receive 122 million dollars.⁴⁰ But instead of being funneled through the BIA, as it had always been done, monies were directed straight to the tribes themselves – creating tension between CAP administrators and BIA employees.⁴¹ The influx of federal monies infused tribal governments with new, heretofore unseen powers. “Under the Indian Reorganization Act, tribal governments never really functioned. But when OEO was established, tribal governments had the funds to begin . . . reservation economic development.”⁴² Again, the engine was in place; and the OEO provided the fuel.

The OEO also enabled several universities⁴³ to bypass the BIA and provide workshops directly to tribal leaders for proposal writing, report filing, accounting, and creating a new class of Indian leadership.⁴⁴ Tribes “became quite skilled at . . . lobbying various federal agencies and Congress. As a result, [they] became eligible for virtually every new program authorized during the rush of social, educational, and economic legislation during this period.”⁴⁵ All the CAP action on reservations demonstrated to the tribes, the achievability of self-administration of federally funded programs.⁴⁶

D’arcy McNickle, a long-time employee of the BIA, opined of the OEO that the “transferral of authority and responsibility for decision making to the local community was an administrative feat which the Bureau of Indian Affairs, after more than one hundred years of stewardship, had never managed to carry out.”⁴⁷ Ladonna Harris recalled that the “OEO taught us to use our imagination and to look forward to the future as an exciting adventure”⁴⁸ while well-known Indian activist, Russell Means, claims that the OEO “was the best thing ever to hit Indian reservations.”⁴⁹ With a long-buried sense of autonomy reemerging, tribal governments finally “had money and were not beholden for it to the BIA. This created an enormous change in the balance of power on reservations and in Washington. . . . [The OEO] altered the nature of the

⁴⁰ Alfonso Ortiz, *The War on Poverty*, in INDIAN SELF RULE 220, 220 (Kenneth R. Philp ed., 1986).

⁴¹ See CLARKIN, *supra* note 15, at 117-122.

⁴² Ortiz, *supra* note 40, at 223.

⁴³ Arizona State University, University of Utah, University of South Dakota.

⁴⁴ Ortiz, *supra* note 40, at 223.

⁴⁵ DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 144 (2d ed. 2007).

⁴⁶ GEORGE PIERRE CASTILE, TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960-1975, at 41 (1998).

⁴⁷ D’ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS 119 (Oxford University Press 1973).

⁴⁸ LaDonna Harris, *The War on Poverty in INDIAN SELF RULE* 222, 224 (Kenneth R. Philp ed., 1986).

⁴⁹ RUSSELL MEANS & MARVIN J. WOLF, WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS 137 (St. Martin’s Press 1995).

[BIA] and the relationship between tribes and the federal government. . . . [It] changed the face of Indian affairs in a way that will never completely be reversed.”⁵⁰

However, even though there was a rush of social welfare funding and policy initiatives, many tribes and individual Indians were still not ready to assume autonomous financial and administrative responsibilities. As such, many reservations “have remained insular islands awash in adversity and poverty.”⁵¹ Further, one commentator has noted that the OEO caused an unforeseen problem when it “diverted the attention of Indian people from their sacred land. People ran over each other to get jobs at \$2.50 an hour. They forgot all of the things that they had learned as Indian people, because they were so eager for employment. Everybody wanted to go to work and move off their land.” Still, that same commentator acknowledged that the OEO produced many Indian leaders and “did a lot of good in the field of education and in the social service areas.”⁵²

Much like the month of March, the war on poverty came in like a lion and out like a lamb. Robert Burnette recalls that “I do not remember any tribe, individual, or organization recommending amendments to the OEO act. It faded away and nobody went to battle for it. There were no organizations set up to fight for the improvement of OEO.”⁵³ By 1966, it was apparent that Congress favored some programs over others and, unfortunately for Indian tribes, the CAPs fell into the “disfavored” pile. During President Nixon’s second administration, Congress replaced the OEO with the Community Services Administration (CSA) and hastened the process in which favored programs were moved to already established executive agencies, such as the Department of Health, Education, and Welfare. The death knell came in 1981 when President Reagan abolished the CSA, leaving only a few scattered remnants (Head Start and legal services) of the war on poverty.

Ultimately, of course, poverty was not eliminated; the war was lost. Indeed, in 1988, twenty-four years after Johnson threw down the gauntlet, President Ronald Reagan delivered his own State of the Union address and claimed that the war on poverty had failed: “My friends, some years ago, the Federal Government declared war on poverty, and poverty won.”⁵⁴ Of course, Reagan’s address can be seen as merely a partisan attack on “big government” and the Democratic Party’s politics, which were in direct contrast to the Reagan’s long-standing “less government” approach.⁵⁵ Taking an even more negative stance than Reagan, one commentator

⁵⁰ Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in INDIAN SELF-RULE: FIRST HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN, 191, 196 (Kenneth R. Philp ed., 1986).

⁵¹ Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL’Y 8, 34 (2009).

⁵² Robert Burnette, *The War on Poverty in INDIAN SELF RULE* 220, 226 (Kenneth R. Philp ed., 1986).

⁵³ *Id.* at 227.

⁵⁴ President Ronald Reagan, State of the Union Address (January 25, 1988).

⁵⁵ In 1964, Ronald Reagan delivered a speech (“A Time for Choosing”) on behalf of, and sponsored by Barry Goldwater’s Republican presidential campaign. It was highly critical of Johnson’s “Great Society” programs. By the time Reagan dismissed Johnson’s “war on poverty” in 1988, he had already declared his own “war on organized

has argued that the social programs implemented during the “war” actually worsened the economic position of poor people.⁵⁶

Regardless of the view that the war was ineffective at decreasing poverty, it did help Indian tribes in other ways. Though tribes still generally remain poor today,⁵⁷ the war on poverty brought about changes that in many ways transcended material impoverishment.

II. The War on Drugs

The Reagan Administration’s war on drugs⁵⁸ had a major impact on the daily lives of American Indians, and even today its embers continue to dramatically influence tribal public policy in relation to tribal government employees, tribal law enforcement, and even tribal public housing policy. As a direct result of the public policies articulated during that period, Indian tribes continue to press for drug testing of tribal member employees and tribal housing occupants, even to this day.

It is no secret that many American Indians harbor addictions to drugs and alcohol,⁵⁹ likely a product of many generations of poverty, disillusionment, and perhaps even centuries-old federal Indian policy.⁶⁰ Colonial and federal treaty negotiators used alcohol to fuel vast land cessions,⁶¹ and the fact of Indian alcohol abuse has been used to exploit Indian people in a variety of contexts.⁶² As a result, Indian tribes often dedicate significant tribal resources to responding to alcohol and drug abuse, often going out of their way to divert first-time drug offenders to non-adversarial drug courts or supporting tribal members and their families affected by addiction.⁶³ Many reservation communities have established culturally-specific and culturally-appropriate treatment programs, with sometimes outstanding results.⁶⁴ Tribal programs

crime” in 1986. Ronald Reagan, *Declaring War on Organized Crime*, N.Y. Times Magazine, January 12, 1986, at Section 6, pg. 26.

⁵⁶ Charles Murray, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (Basic Books 1984).

⁵⁷ See Angeliqe Eaglewoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805 (2010).

⁵⁸ President Reagan may have announced the war on drugs, see President’s Radio Address to the Nation, 18 Weekly Comp. Pres. Doc. 1249 (Oct. 2, 1982), but it was the first President Bush who actually appointed a “Drug Czar,” see *Gun South, Inc. v. Brady*, 711 F. Supp. 1054, 1056-57 (N.D. Ala. 1989).

⁵⁹ See NATIONAL MUSEUM OF THE AMERICAN INDIAN, *DO ALL INDIANS LIVE IN TIPIS? QUESTIONS AND ANSWERS FROM THE NATIONAL MUSEUM OF THE AMERICAN INDIAN* 95 (2009).

⁶⁰ Cf. CHARLES E. CLELAND, *rites of conquest: THE HISTORY AND CULTURE OF MICHIGAN’S NATIVE AMERICANS* 133 (1992) (alleging that colonial alcohol policy may have been a cause of the 1763 war initiated in part by the Ottawa leader Pontiac).

⁶¹ See generally PETER C. MANCALL, *DEADLY MEDICINE: INDIANS AND ALCOHOL IN EARLY AMERICA* (1997).

⁶² See generally Robert J. Miller & Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L. J. 223 (1996).

⁶³ See Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997-2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2001-2002).

⁶⁴ E.g., Douglas K. Novins, et al., *Use of Biomedical Services and Traditional Healing Options Among American Indians: Sociodemographic Correlates, Spirituality, and Ethnic Identity*, 42 MEDICAL CARE 670 (2004). Cf.

often are creative and beneficial, and tribal governments have every motivation to respond with every resource available, for the future existence of tribal people depends on the success of these programs.

But the war on drugs initiated a few unusual habits among tribal governments, namely in the institution of random drug testing of tribal employees in non-safety-sensitive positions⁶⁵ and more recently as a precondition for eligibility for tribal public housing services. More often than not, tribal officials allege that the drug testing requirements are requirements for federal funding, perhaps misreading the regulations. Both of these tribal government policies have the potential to wreak great harm on Indian communities.

Along with harsh, zero tolerance criminal sentencing rules that have placed untold thousands of nonviolent, first time offenders in federal prisons,⁶⁶ random drug testing became a critical tool in the war on drugs.⁶⁷ It has become normal that persons in the criminal justice system from released convicts to first-time probationers be subjected to random and intrusive drug tests for years after their sentence. Within a decade, the Supreme Court would hear several challenges to random (and not-so-random) drug testing requirements from various federal employees and public officials.⁶⁸ Many state and federal government employers became enamored with the simple method of testing urine, blood, hair, and other organic materials as a means of demonstrating exactly who was taking drugs.⁶⁹ Of course, the tests were never full-proof, with false positives and negatives rendering the outcomes of the tests practically random, as drug users became exceptionally successful in developing ways to counteract the tests. One particularly unforeseen outcome to drug testing was that the occasional marijuana user would be encouraged to switch to a different, worse drug such as cocaine, which is processed through the human body faster than marijuana and therefore less detectable. Moreover, civil libertarians

Malcomb D. Holmes & Judith A. Antell, *The Social Construction of American Indian Drinking: Perceptions of American Indian and White Officials*, 42 SOCIOLOGICAL Q. 151 (2001) (publishing research suggesting that Indians and whites view the causes of American Indian drinking in dramatically different worldviews).

⁶⁵ See generally Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM RTS. L. REV. 1 (2003).

⁶⁶ See Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L. J. 353 (2010).

⁶⁷ Within in a few years of the declaration of the war on drugs, drug testing became pervasive in the American criminal justice system. See Eric D. Wish & Bernard A. Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, 13 CRIME & JUST. 321 (1990). Two decades later, even high schools now frequently (and with “fervor”) expose their students to random drug testing. See Susan P. Stuart, *When the Cure is Worse than the Disease: Student Random Drug testing & Its Empirical Failure*, 44 VAL. U. L. REV. 1055, 1061 (2010).

⁶⁸ See *Chandler v. Miller*, 520 U.S. 305 (1997); *Nat’l Treasury Employees Union Ass’n v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989).

⁶⁹ Cf. John Edward Failla, Note, *A Proposal for Mandatory Drug Testing of Federal Civil Employees*, 62 N.Y.U. L. REV. 322 (1987).

repeatedly and persuasively attacked drug testing for the violations of privacy accompanied by the test.⁷⁰

Tribal Government Employees. Indian tribal governments often have succumbed to random drug testing as a means of combating drug and alcohol addiction within their jurisdictions. Many tribes require drug testing as a precondition of employment, causing lenders to drug test some soon-to-be tribal government employees before their employment as a precondition to a home ownership loan. Other tribes require some form of drug testing during employment as well, including for example the Eastern Band of Cherokee Indians⁷¹ and the Little River Band of Ottawa Indians,⁷² both of which impose random testing on all employees. Other tribes, such as the White Mountain Apache Tribe may subject tribal employees to random testing, if reasonable suspicion exists.⁷³

There is every reason to believe that random drug testing of employees of tribal governments is exceptionally harmful on a number of levels. As a matter of logic, few if any tribal employees demonstrate any drug or alcohol problems, or else they would not be employed in the relatively few on-reservation jobs available. And any addicted employees have numerous means to avoid or obfuscate the results of drug tests, no matter how random. Additionally, for tribal employees that are tribal members, drug testing is inherently invasive and runs counter to tribal traditions. In most Indian communities, hair is sacred, and the forced removal of an Indian person's hair could be devastating. The taking of urine samples is similarly rote with difficulty, given that Indian women are foreclosed from certain ceremonies (even drug testing) during their monthly cycle. The same goes double for blood testing. Finally, random drug testing generates a fear of a false positive in all employees, for many people know (or inflate) the fallibility of the test.

Additionally, as our former student Adrea Korthase wrote persuasively, the financial cost to the tribal government is substantial, in addition to the social and cultural impacts:

[T]he cost of random drug testing [is] \$42 per person plus many other costs. Making sure that confidentiality is maintained as well as ensuring that there are no false positive, make the process a very expensive one. The tribe will also have

⁷⁰ E.g., Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Institute Policy Analysis No. 180 (Oct. 2, 1992), available at <http://www.cato.org/pubs/pas/pa180.pdf>; American Civil Liberties Union, *Privacy in America: Workplace Drug Testing* (Mar. 12, 2002), available at <http://www.aclu.org/racial-justice/womens-rights/workplace-drug-testing>.

⁷¹ See EASTERN BAND OF CHEROKEE INDIANS CODE, ch. 96, art. 9 (“Drug and Alcohol Policy”); *id.* § 9.05(B) (“All employees are subject to random, unannounced testing...”), available at www.narf.org/nill/Codes/ebicode/96employees.pdf.

⁷² See LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCES AND REGULATIONS, ch. 600, § 9.11 (1998) (“Any person employed by the Little River Band of Ottawa Indians may be tested at random...”), available at <http://narf1.securesites.net/nill/Codes/lrcode/lrcode6.htm>.

⁷³ See WHITE MOUNTAIN APACHE TRIBE, PERSONNEL POLICIES AND PROCEDURES MANUAL § IX(B)(8)(i) (2005), available at <http://wmat.us/Legal/PersonnelPolicy.html>.

to hire people to administer the drug tests. [There is] an even higher cost to “catch” a drug user. It is an expensive process and may force the tribe to make some financial concessions.

Random drug testing may also force the tribe, and its members, to make some concessions when dealing with the community. These concessions may turn out to be even more costly than the financial commitment. From a physical standpoint, tribal members may be opposed to giving up hair or urine samples because of religious and cultural beliefs. From a societal standpoint, it is probable that a friends and family may have to order, or submit to, drug tests on one another. This may create an irreparable tension. Worse yet is the possibility that younger people may have to order drug testing on tribal elders who are well respected pillars of the community. In such a small community, these are issues that the tribal council should not take lightly.⁷⁴

And yet many tribal governments proceed to initiate random drug testing without serious consideration of these concerns, perhaps on the theory that tribal government employees, as pillars of the community, must be proven to tribal constituents to be absolutely clean.⁷⁵

Tribal Housing Tenants. In recent years, more and more tribal governments are imposing drug testing as a precondition for eligibility for tribal public housing, ostensibly under the theory that federal law and regulations require such testing.⁷⁶ For example, the Umatilla Reservation Housing Authority initiated a drug testing requirement along these lines in 2010.⁷⁷ Other tribes require applicants for tribal rental housing to pass a preliminary drug screen as well, including the Muckleshoot Indian Tribe.⁷⁸ The Umatilla announcement noted the presence of drugs and gangs on the reservation, suggesting that a constitutional challenge to the requirement could be defended against with claims that public safety is a sufficiently compelling governmental interest.

⁷⁴ Adrea Korthase, *Random Drug Testing*, unpublished manuscript (2010) (on file with author).

⁷⁵ The drug testing of tribal enterprise employees, especially casino employees, on the other hand, might not have the same impact, given that Indian gaming is a cash-heavy business prone to attracting nefarious criminal elements. That said, enterprise employees still have many of the same due process and privacy concerns, as multiple complex cases decided by the Mashantucket Pequot tribal courts demonstrate. *E.g.*, *Louchart v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. App. 7, 2000 WL 35571834 (Mash. Pequot Ct. App. 2000) (reversing termination on basis of positive drug test where management had no “reasonable suspicion” to test employee); *Techlowec v. Mashantucket Pequot Gaming Enterprise*, 4 Mash. Rep. 197, 2004 WL 5374145 (Mash. Pequot Tribal Court 2004) (upholding termination of employee); *Burns v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 208, 2000 WL 35571835 (Mash. Pequot Tribal Court 2000) (affirming employment termination despite policy violation by management).

⁷⁶ We thank Brian Gilmore, the director of the MSU Housing Clinic, for bringing this to our attention.

⁷⁷ See *URHA Starts Drug-Test Policy: Housing Cracks Down on Drug Use in Rentals*, CONFEDERATED UMATILLA J., March 2010, at 1 (on file with author).

⁷⁸ See Muckleshoot Indian Tribe, *Housing Division*, available at www.muckleshoot.nsn.us/services/community-development/housing-division.aspx.

In comparison, non-tribal public housing programs occasionally require drug testing, as in certain areas of Chicago,⁷⁹ and deny anyone with a drug conviction access to public housing.⁸⁰ But even though governments have long imposed various forms of zero tolerance on their public housing tenants, to dramatic effect⁸¹, drug testing does not appear to be an integral part of the toolkit.

Ironically, as more and more tribes are relying upon drug testing, the most successful tribal drug control programs in tribal housing completely excluded drug testing, and instead focused on culturally-appropriate measures that included law enforcement and children's education.⁸²

At least one tribal court has addressed the import of drug testing of tribal housing tenants, and ruled against an effort by a tribal housing authority to evict a tenant for the use of drugs. In *Washoe Housing Authority v. Sallee*,⁸³ a tribal rental housing tenant was traveling as a passenger in a car stopped by tribal police.⁸⁴ As a matter of practice, or what the court referred to as a "presumptive drug test," the tenant tested positive for trace amounts of illegal drugs.⁸⁵ After the tribal housing authority initiated eviction proceedings based on tribal policy that prohibits the "use" of illegal drugs "on or near project premises," the court rejected the housing authority's claims, holding that the policy never defined those terms, nor did the drug test serve as sufficient proof of the tenant's drug use.⁸⁶

American Indian Religious Freedom. The Reagan-era war on drugs had an additional impact on Indian country, an impact likely far greater in symbolic terms to American Indian people than drug testing. In 1990, the Supreme Court decided *Employment Division v. Smith*,⁸⁷ a well-nigh shocking decision from the Court on religious freedom that struck down key components of First Amendment jurisprudence holy to the supporters of the separation between church and state. In a fairly significant move, Congress enacted the Religious Freedom

⁷⁹ See Lisa T. Alexander, *A Sociolegal History of Public Housing Reform in Chicago*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 155, 160 (2007-2008).

⁸⁰ See Robin Levi et al., *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 UCLA WOMEN'S L. J. 1, 13 (2010) (citing the Housing Opportunity Program Extension Act of 1995, 42 U.S.C. § 1437d(s)-(t)).

⁸¹ See HUD v. Rucker, 535 U.S. 125 (2002). See also Regina Austin, "Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing, 14 YALE J. L. & FEMINISM 273 (2002) (discussing how innocent family members of drug law violators are evicted from public housing as well); Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 492-94 (2006) (noting that persons with prior drug convictions are banned from public housing).

⁸² See LeeAnna Arrowchis et al., *Six Case Studies: Tribal Self-Determination Utilizing NAHASDA Activities*, National American Indian Housing Council Research Report 30-34 (2002), available at www.naihc.net/uploads/research/CaseStudyfinal.pdf.

⁸³ No. ICTN/AC CV-03-022, 2006 WL 6231179 (Nev. Inter-Tribal Ct. App. 2006).

⁸⁴ See *id.* at *1.

⁸⁵ *Id.*

⁸⁶ *Id.* at *2.

⁸⁷ 494 U.S. 872 (1990).

Restoration Act as an overt attempt to overrule the decision, an effort successful only as to federal government actions.⁸⁸ *Smith* not only changed the character of the national debate over religious freedom, but it sharply circumscribed the constitutional protection afforded American Indian religious practitioners.

It should be noted that Oregon employed a litigation strategy relying heavily on the war on drugs that was patently intended to provoke the Supreme Court into action against the Native American Church practitioners that were seeking protection. Famed legal commentator Sanford Levinson described this strategy:

Oregon's brief in *Smith* is certainly replete with language suggesting the magnitude of its interests. Beginning with mention of the "drug crisis pervading every facet of our citizens' lives," Attorney General David Frohnmayer, the principal signatory of the brief (and the oral advocate before the Court in *Smith IV*), goes on to note that Oregon, like the United States, includes peyote in the list of so-called Schedule I drugs – those presenting the greatest danger to users. Interestingly enough, the argument against "accommodating" Native American users of peyote is directed far less at any dangers presented by Native Americans themselves, or potential costs to the state were only Native Americans exempted, and far more at the impossibility of limiting exemptions in this manner. That is, "as a constitutional matter, any protection extended to Native Americans for their religious peyote use should honor not only their claim to religious freedom, but it should honor all others on like terms." Given the wide number of religious sects that incorporate drug use into their ceremonies or rituals, though, this reasoning would, if taken seriously, wreak havoc with Oregon's "compelling interest in comprehensive drug control." If not taken seriously – that is, if exemptions as a matter of fact were limited to Native Americans – then the victim would be the Establishment Clause's requirement of "religious neutrality."⁸⁹

Professor Levinson noted that 18 months after the oral argument in *Smith*, the Oregon Department of Justice had the opportunity to support its anti-drug position after being requested to offer testimony to the Oregon legislature about an amendment to the state's drug laws, but declined to mention anything relating to the compelling interest noted above, provoking Levinson to argue:

⁸⁸ The Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down RFRA as applied to states, but the statute remains viable as applied to the federal government. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). Congress attempted to reverse *Boerne* in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq., and the constitutionality of that statute as applied to states has not yet reached the Supreme Court.

⁸⁹ Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1054-55 (1994) (footnotes omitted).

I find it difficult to interpret Mr. Lidz’s testimony as other than a denial of central aspects of Oregon’s case as presented to the Supreme Court eighteen months before. The interests of Oregon so vividly and passionately portrayed to the Court, including the “devastating” impact a general religious exemption would have on Oregon’s “compelling interest in controlling dangerous drugs,” have, in effect, disappeared from view. There is nothing said to remind the legislators of the Department’s 1987 opposition, presumably based on these same law-enforcement concerns, to the proposed grant by the Oregon Board of Pharmacy of an exemption to the Native American Church for its use of peyote. To be sure, the Department never once indicates its actual support for the exemption, but this absence of overt support seems secondary to the silence that has almost deafeningly replaced the Department’s former statements.⁹⁰

The *Smith* decision contributed to a long history of disrespect for American Indian religions. In 1978, Congress enacted the American Indian Religious Freedom Act,⁹¹ a statement of policy supporting Indian religious freedom in light of concerted efforts by federal agencies and officials to thwart them. The AIRFA defined the practice of “traditional religions” to include without limitation “access to sites, use and possession of sacred objects, the freedom to worship through ceremonials and traditional rites.”⁹²

The impetus for the AIRFA was a study conducted by the House of Representatives that concluded the federal government was restricting Indian religious freedom in at least three ways.⁹³ First, federal agencies such as the United States Forest Service, National Park Service, and the Bureau of Land Management frequently prevented Indians from entering federal land where sacred sites were located.⁹⁴ Moreover, the agencies refused to allow the burial of tribal leaders in tribal cemeteries located on federal land.⁹⁵ Second, federal law enforcement officials regularly confiscated substances, such as peyote, used by Indians for religious purposes, even though federal cases had protected the use of these substances as a bona fide religious sacrament.⁹⁶ Federal officials also confiscated the use of animal parts, such as turkey and eagle feathers, from endangered species that Indians used in religious ceremonies.⁹⁷

Third, the House found that federal agents directly and indirectly interfered with tribal ceremonies and religious practices. For example, federal officers had a long history of opposing and restricting the practice of tribal religions through the enforcement of Bureau of Indian Affairs-authored reservation law and order codes that flatly prohibited most tribal religious

⁹⁰ *Id.* at 1057-58 (footnotes omitted).

⁹¹ 42 U.S.C. § 1996.

⁹² *Id.*

⁹³ House Report No. 95-1308 (1978), 1978 WL 8715.

⁹⁴ *See id.* at 1978 WL 8715, * 2.

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.* at 1978 WL 8715, * 3.

ceremonies.⁹⁸ These law and order codes were enforced in of Courts of Indian Offenses, with judges hand-picked by federal officers. Federal courts in cases such as *United States v. Clapox* upheld federal regulations allowing the prosecution of Indians engaging in traditional religious practices.⁹⁹ On-reservation federal Indian agents, as a matter of administrative practice, obstinately remained on the grounds at Rio Grande pueblos during religious ceremonies requiring that no non-Indian be present.¹⁰⁰ And federal law enforcement officers would also do little or nothing to stop unwelcome on-lookers from interfering in tribal religious ceremonies. The House also found that federal officials had either directly interfered or allowed interference in tribal religious practices because they personally rejected Indian religions.¹⁰¹

III. The War on Terror: The New Indian War?

It is the modern war on terror – a war that defies definition and that has no obvious termination point, or boundary, or even whether the enemy is foreign or American. The modern war on terror is both a domestic and foreign war. For many in the federal government, the closest analogs to the war on terror are the Indian wars of the 19th century fought by the United States against Indian people. The worst violations of the rule of law by the United States – indefinite detention without charge, torture, and indiscriminate killing – appear in both the war on terror and the Indian wars, so for some it is logical that the legal principles that supposedly justified the Indian wars now are used to justify the war on terror.

In general, Indian wars involved Indian tribes both within and without the boundaries of the United States, including its territories. Indian people, often unaware or uninterested in artificial boundary lines, crossed over borders (even into Canada and Mexico), much like the modern enemies of the United States cross borders with impunity. Indian tribes, sometimes highly hierarchical and organized and other times disparate and dynamic, might or might not meet a Westphalian definition of “state” at any given time, much like modern American enemies. Perhaps most importantly, Indian tribes fought what we now know of as guerrilla wars, or what American leaders and commentators would now refer to as terrorism. In short, the international norms and rules of war are held by both 19th and 21st century American legal advisers *not to apply*.

Consider the mass execution of Dakota Indians at Fort Snelling in 1862, along with the internment and forced removal of hundreds of other Dakotas at the same time.¹⁰² In the months

⁹⁸ See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 230-39 (1983).

⁹⁹ See 35 F. 575, 577 (D. Or. 1888).

¹⁰⁰ See Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 359 (1953).

¹⁰¹ See House Report 95-1308 (1978), 1978 WL 8715, * 3.

¹⁰² See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990).

leading up to the conflict between the Dakota people and the United States, American traders exploited and cheated Dakotas without objection or interference from the American military and Indian agents tasked with maintaining the peace.¹⁰³ Additionally, the United States' promised treaty annuities were late in coming, a tactic that had been used repeatedly by Indian agents to extract concessions or punish the Dakota people.¹⁰⁴ The inevitable conflict that followed involved hundreds of killings on both sides.¹⁰⁵ Eventually, several hundred Dakotas gave up the fight and the American military took them into custody.¹⁰⁶ The sham trials that took place after the Dakota surrender are well documented elsewhere, and the execution of 38 Dakota Indian men followed.¹⁰⁷ The American military then incarcerated 1600 Dakota Indians that survived the executions in internment camps in Iowa and South Dakota, and imprisoned dozens of others in military jails.¹⁰⁸

The Fort Snelling executions and incarceration of four bands of Dakota people parallels the modern American prisons at Guantanamo Bay and elsewhere. The facts of both cases involve people held for many years, almost always without charge. The prisoners that are charged are tried under military commissions without adequate due process or criminal procedure rights. At least some of the prisoners are American citizens, or can stake a claim to American citizenship. And the prisoners are declared prisoners of war, despite a lack of a Congressional declaration of war. With the Dakota prisoners, their only hope was of a pardon or commutation of sentence from the President, much like Guantanamo Bay detainees. Finally, even the prisoners who are pardoned by the President or subject to a release order from a federal court are sent away to a foreign land – in the case of the Dakotas, internment in Iowa or South Dakota; in the case of Guantanamo detainees, any nation that will accept their presence, but not their homelands.

The Dakota military trials are not the only cases where the United States overreached in exercising executive (military) authority to punish American Indians. In the Modoc Indian War of 1873, the Attorney General opined that Indians accused of killing American negotiators under a flag of truce had engaged in a war with the United States, and so could be subject to a military trial and executed without Congressional authorization but under the laws of war.¹⁰⁹ President Andrew Jackson even convened a military commission to try two non-Indians (English subjects) that had incited Creek Indians to war.¹¹⁰ Congress did expressly authorize military actions against Indian tribes in other contexts.¹¹¹

¹⁰³ See *id.* at 17.

¹⁰⁴ See *id.* at 15-17.

¹⁰⁵ See *id.* at 21-22.

¹⁰⁶ See *id.* at 21.

¹⁰⁷ See *id.* at 22-37.

¹⁰⁸ See *id.* at 38.

¹⁰⁹ See *The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249 (1873).

¹¹⁰ See Office of Legal Counsel, *Legality of the Use of Military Commissions to Try Terrorists* 8 (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 464, 832 (2d ed. 1920), and WILLIAM E. BIRKHMIR, *MILITARY GOVERNMENT AND MARTIAL LAW* 353 (3rd ed. 1914)); Office of Legal Counsel, Memorandum for Daniel J. Bryan re: Swift Justice Authorization

The Bush Administration lawyers used the United States' often vicious response to various Indian wars as a close analog to the war on terror. Consider this Office of Legal Counsel memorandum declassified and made public in 2009, expressly stating that Indian wars of the 19th century were "closely analogous" to the 9/11 attacks, arguing:

American precedents also furnish a factual situation that is more closely analogous to the current attacks to the extent that they involve attacks by non-state actors that do not take place in the context of a rebellion or civil war. The analogy comes from the irregular warfare carried on in the Indian Wars on the western frontier during the nineteenth century. Indian "nations" were not independent, sovereign nations in the sense of classical international law, nor were Indian tribes rebels attempting to establish states. *Cf. Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (describing Indians tribes as "domestic dependent nations"). Nevertheless, the Supreme Court has explained that the conflicts between Indians and the United States in various circumstances were properly understood as "war." Thus, in *Montoya v. United States*, 180 U.S. 261 (1901), the Court (for purposes of a compensation statute passed by Congress) examined whether certain attacks were carried out by Indians from tribes "in amity" with the United States, which the Court approached by determining whether the Indians were at "war." The Court explained that the critical factor was whether the Indians' attacks were undertaken for private gain or as a general attack upon the United States: "If their hostile acts are directed against the Government or against all settlers with whom they come in contact, it is evidence of an act of war." *Id.* at 266; *see also id.* (critical factor is whether "their depredations are part of a hostile demonstration against the Government or settlers in general, or are for the purpose of individual plunder").

Similarly, after the Modoc Indian War of 1873, the Attorney General opined that prisoners taken during the war who were accused of killing certain officers who had gone to parley under a flag of truce were subject to the laws of war and could be tried by a military commission. *See The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249 (1873). The attorney general acknowledged that "[i]t is difficult to define exactly the relations of the Indian tribes to the United States," but concluded that "as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by

Act 4 (April 8, 2002) (citing BIRKHIMER), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020408.pdf>.

¹¹¹ See Office of Legal Counsel, Memorandum for Alberto R. Gonzales re: Authority for the Use of Military Force to Combat Terrorist Activities Within the United States 10 n. 15 (October 23, 2001), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011023.pdf> (citing Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 41 (1995)).

military authority.” *Id.* at 253. Several Indian prisoners were tried by military commission and executed.¹¹²

Apparently, this memo writer, relying upon a century-old Attorney General opinion, either did not know about (or was not persuaded by) the fact that the Modoc people had been victimized by the slaughter of 41 Modocs during a very similar “peace parley” in 1852, an enormous part of the reason for the Modoc Wars of 1871-1873.¹¹³ To this day, the trials of the Modoc leaders who participated in the 1852 peace parley killings is controversial – and even hypocritical:

The two sides in the Modoc wars crimes trial were also mismatched, for the Modoc defendants were not represented by counsel and the United States government held them to a higher standard than it did its own soldiers. The U.S. soldiers who violated the rules of war during the Modoc ... wars were never tried and punished as war criminals.¹¹⁴

Ironically, had the memo writer described the events surrounding the Modoc war crimes trial, the underlying legal authority would have collapsed. The military leader in charge of the military commission, Gen. Jefferson Davis, complained to the press that he would have preferred summary executions of the Modocs, and that any trial would take several months of unduly burdensome due process.¹¹⁵ After being forced by the War Department to initiate war crimes trials using a military commission, Gen. Davis appointed military men with deep emotion hatred toward the Modoc defendants, and hastened the opening of the trial to prevent an attorney hoping to represent the Modocs from arriving on time.¹¹⁶ Their conviction and execution was inevitable. This is a sad legal precedent upon which the modern American government relied.

Unfortunately, the federal government continues the long-standing practice of invoking the Indian warrior stereotype in its efforts to try and prosecute individuals captured in the current War on Terror. As noted in the introduction, government attorneys invoked precedents from the First Seminole War:

Ambrister and Arbuthnot, both British subjects without any duty or allegiance to the United States, were tried and punished for conduct amounting to aiding the enemy. Examination of their case reveals that their conduct was viewed as wrongful, in that they were assisting unlawful hostilities by the Seminoles and their allies. Further, not only was the Seminole belligerency unlawful, but, much like modern-day al Qaeda, the very way in which the Seminoles waged war

¹¹² Office of Legal Counsel, Legality of the Use of Military Commissions to Try Terrorists 25-26 (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.

¹¹³ ALTON PRYOR, CALIFORNIA’S HIDDEN GOLD: NUGGETS FROM THE STATE’S RICH HISTORY 174 (2002).

¹¹⁴ Doug Foster, *Imperfect Justice: The Modoc War Crimes Trial of 1873*, 100:3 OR. HIST. Q. 246, 248 (1999). *See also id.* at 256, 258-60 (detailing a litany of substantive errors during the trial that made any assertion of fairness a sad joke).

¹¹⁵ *See id.* at 258.

¹¹⁶ *See id.* at 258-60.

against U.S. targets itself violated the customs and usages of war. Because Ambrister and Arbuthnot aided the Seminoles both to carry on an unlawful belligerency and to violate the laws of war, their conduct was wrongful and punishable.¹¹⁷

As with the Modoc precedent, this history is incomplete without additional context. The National Congress of American Indians immediately responded to the government's reliance upon the Seminole precedent with this context:

This is an astonishing statement of revisionist history. General Jackson was ordered by President Monroe to lead a campaign against Seminole and Creek Indians in Georgia. The politically ambitious Jackson used these orders as an excuse to invade Spanish-held Florida and begin an illegal war, burning entire Indian villages in a campaign of extermination. The Seminole efforts to defend themselves from an invading genocidal army could be termed an "unlawful belligerency" only by the most jingoistic military historian. General Jackson narrowly escaped censure in the U.S. Congress, was condemned in the international community, and his historical reputation was stained with dishonor.¹¹⁸

Professor Deborah Rosen noted that Americans "vigorously debated" Gen. Jackson's decision to execute two British subjects,¹¹⁹ suggesting that the government's Seminole precedent is perhaps even weaker than the Modoc precedent. Gen. Jackson affirmed the court martial's death sentence of Arbuthnot, and overrode its sentence of 50 lashes to death by firing squad.¹²⁰ There was no written authority for Gen. Jackson's actions to try these British subjects by court martial during the Seminole War, and so his decision may or may not have been consistent with the laws of war at the time.¹²¹ Moreover, contemporaneous critics argued that a court martial could only be used against American military officers, and so had no authority to try the two men.¹²² Finally, unlike Gen. Davis, Gen. Jackson never sought the advice or command of the President, and instead executed the men without Presidential approval.¹²³

¹¹⁷ Appellee's Response to the Specified Issues at 25, *United States v. al Bahlul*, No. 09-001 (U.S. Court of Military Commission Review, Mar. 11, 2011), available at <http://turtletalk.files.wordpress.com/2011/03/bahlul-brief-irt-specified-issues-11-mar-2011.pdf>.

¹¹⁸ Letter from John H. Dossett, General Counsel, National Congress of American Indians to United States Court of Military Commission Review at 1-2 (March 17, 2011), available at <http://turtletalk.files.wordpress.com/2011/03/ncai-amicus-letter-in-al-bahlul.pdf>.

¹¹⁹ See Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. EARLY REPUBLIC 559, 559 (2008). See also *id.* at 560 (noting that the controversy was as important to some as the admission of Missouri into the Union as a slave state).

¹²⁰ See *id.* at 563.

¹²¹ See *id.* at 565.

¹²² See *id.* at 567.

¹²³ See *id.* at 568-69.

The War on Terror's latest event – the capture and killing of Osama bin Laden by American military forces – unfortunately continues this trend. As the *New York Times* reported:

On Sunday afternoon, as the helicopters raced over Pakistani territory, the president and his advisers gathered in the Situation Room of the White House to monitor the operation as it unfolded. Much of the time was spent in silence. Mr. Obama looked “stone faced,” one aide said. Vice President Joseph R. Biden Jr. fingered his rosary beads. “The minutes passed like days,” recalled John O. Brennan, the White House counterterrorism chief.

The code name for Bin Laden was “Geronimo.” The president and his advisers watched Leon E. Panetta, the C.I.A. director, on a video screen, narrating from his agency's headquarters across the Potomac River what was happening in faraway Pakistan.

“They've reached the target,” he said.

Minutes passed.

“We have a visual on Geronimo,” he said.

A few minutes later: “Geronimo EKIA.”

Enemy Killed In Action. There was silence in the Situation Room.¹²⁴

Geronimo, of course, is a major hero to many American Indians. But to the American military – and likely the vast majority of other Americans – Geronimo symbolizes the ultimate American military foe, one who evades capture after years fighting and eventually succumbs to American military might. As Angie Debo described the import of Geronimo's capture:

“APACHE WAR ENDED!” “GERONIMO CAPTURED!” Never were so many headlines owed by so many to so few. From the time these Indians had broken away, five thousand men of the regular army, a network of heliograph stations flashing mirror messages from mountain to mountain, and false promises at the end were required to effect their “capture.” The paper work flowed in rivers of telegrams from army posts to Washington; since then it has burgeoned into many books.¹²⁵

For the American military, at least as a symbolic manner, the code-name designation of Osama bin Laden as Geronimo makes perfect, logical sense.

¹²⁴ Mark Mazzetti, Helene Cooper, & Peter Baker, *Behind the Hunt for Bin Laden*, N.Y. TIMES, May 2, 2011, at <http://www.nytimes.com/2011/05/03/world/asia/03intel.html>.

¹²⁵ ANGIE DEBO, *GERONIMO* 3 (1976).

And yet the Chiricahua Apache people remain, as do the Modocs and the Seminoles and the Dakotas – all now American citizens, many conflicted in their sharing in the celebrated capture and killing of an American enemy because of the unnecessary designation of the American enemy as an Indian.

Conclusion

It seems clear that the Indian wars of early American history continue to leave a footprint on modern American law and policy, just as war appears to symbolize American focus on a particular problem such as poverty or drugs. For American Indians, this fixation on war – and especially Indian wars – has been at best a mixed bag. The war on poverty helped American Indians mobilize toward a goal of tribal self-determination, and blazed a trail for the federal government's efforts to support tribal self-sufficiency. The war on drugs has seemingly persuaded tribal governments concerned about drug and alcohol abuse in Indian country to go full bore in expanding drug testing to tribal government employees and tribal housing occupants in a manner not otherwise required (or allowable) by the federal government. Finally, the current War on Terror has resurrected many of the stereotypes and philosophies of the 18th and 19th century Indian wars in surprising and disappointing ways.

The purpose of this paper is survey the impacts of these domestic wars on Indian people. It is certain that Indians and wars will be linked together by American policymakers for some time, but it is also certain that Indian people and Indian tribes will continue to oppose the perpetuation of negative stereotypes.