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# Indian Wars: Old & New

Matthew L.M. Fletcher\* & Peter S. Vicaire\*\*

## I. 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 Indians used in the First Seminole War to al Qaeda,<sup>1</sup> an argument the Court partially accepted in a companion case, *United States v. Hamdan*.<sup>2</sup> 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.<sup>3</sup> The military’s comparison of Indian tribes to modern international terrorist organizations strikes 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 continues to juxtapose the Indian warrior stereotype with modern law and policy, as this Article will demonstrate.<sup>4</sup> As our colleague Professor Wenona Singel asked, “Who would be persuaded by

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\* Professor of Law, Michigan State University College of Law; Director, Indigenous Law and Policy Center. Miigwetch to Wenona Singel, Kate Fort, Brian Gilmore, and Brent Domann, who assisted on the research for this paper.

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1. See Appellee’s Response to the Specified Issues at 25, *United States v. al Bahlul*, No. CMCr 09-001, 2011 WL 4916373 (U.S. Ct. of Military Comm’n Review Sept. 9, 2011), available at <http://turtletalk.files.wordpress.com/2011/03/bahlul-brief-irt-specified-issues-11-mar-2011.pdf>.

2. See *United States v. Hamdan*, No. CMCr 09-002, 2011 WL 2923945, at 52–53 (U.S. Ct. of Military Comm’n Review June 24, 2011), available at <http://turtletalk.files.wordpress.com/2011/07/hamdan-opinion.pdf>. The Military Commission Review Court eventually decided *al-Bahlul* and made no reference to American Indian wars. See *United States v. al Bahlul*, No. CMCr 09-001, 2011 WL 4916373 (U.S. Ct. of Military Comm’n Review Sept. 9, 2011), available at <http://turtletalk.files.wordpress.com/2011/09/al-bahlul-uscmcr-decision-sept-9-2011.pdf>.

3. Legality of the Use of Military Commissions To Try Terrorists, 25 Op. O.L.C. 1, 25 (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. BIRKHIRMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 353 (3d ed. 1914)).

4. Apparently, the military continues to fight Indian wars, as the code name for Osama bin Laden was “Geronimo.” See Mark Mazzetti et al., *Behind the Hunt for Bin Laden*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/03/world/asia/03intel.html>.

such an argument?”<sup>5</sup>

The United States historically has swept up American Indians and Indian tribes along with larger policy choices. The Indian “problem” of the Framers—acquiring valid title and control over American Indian resources<sup>6</sup>—eventually became the Indian “wars” of the latter half of the nineteenth century.<sup>7</sup> From the earliest days of European and American interaction with Indian people, the perceived violent, savage, and inferior character of Indians has dominated intergovernmental affairs between the two groups.<sup>8</sup> 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. In recent decades, major American domestic reform initiatives have come to resemble in rhetoric if not action the virulent opposition to Indians and tribes dating back to the nineteenth century.

This Article 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, as the United States often blindly pursues broad policy goals without input from tribal interests or consideration of 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 short, the trust relationship. The United States’s domestic wars, usually announced with much fanfare but without reference to Indian affairs, have alternately exploited 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 relying on one of these domestic wars. And in many of these instances, major shifts

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5. Interview with Wenona T. Singel, Assistant Professor of Law, Mich. State Univ. Coll. of Law & Assoc. Dir., Indigenous Law & Policy Ctr., in East Lansing, Mich. (Mar. 15, 2011).

6. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) (tracking the history of the transfer of tribal lands to the U.S. government from the seventeenth to the twentieth centuries).

7. See ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 233–83 (1970) (describing how the North Plains and Northwest Tribes fought for their land).

8. See generally PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* (2008) (describing conflicts between Indians and settlers in early America).

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 benefitted marginally in some eras. But when a domestic war that negatively affects Indian country is declared, the impacts are nothing short of devastating.

This Article 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 II 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 III describes the war on drugs, declared by the Reagan Administration, which had unusually stark impacts on reservation communities, both in terms of law enforcement and also on American Indian religious freedom. Part IV examines the ongoing war on terror, which Bush Administration officials opined has its legal justification grounded in part on the Indian wars of the nineteenth century. The war on terror marks the United States's return to fighting a new Indian war, where the adversary is illusive and motivated and where the rule of law is obliterated.

## II. THE WAR ON POVERTY

Although President Johnson's war on poverty was intended for broader, nation-wide purposes, it had an unintended but positive side-effect for Indians and Indian tribes: the nurturing of Indian self-determination. This was achieved by earmarking federal funds directly to tribal governments rather than to federal agencies, as the United States had always done, which infused tribal entities with new powers and responsibilities. But however good the war on poverty programs were for Indians and Indian tribes, with the changing of the political guard in Washington, D.C., they eventually withered away. Regardless, the war on poverty in Indian country brought about changes that in many ways transcended material impoverishment.

In 1970, when Edwin Starr belted out the soulful lyrics to the anti-Vietnam War song, *War*,<sup>9</sup> he likely had not considered the positive effects that the war on poverty had been having in Indian country since 1964. That year, President Johnson exclaimed, "This administration today, here and now, declares unconditional war on poverty in America."<sup>10</sup> It was a determined effort to address the chronic unemployment and poverty in many

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9. EDWIN STARR, *War, on WAR AND PEACE* (Gordy Records 1970) ("What is it good for? Absolutely nothing[!] Say it again, y'all[!]").

10. President Lyndon B. Johnson, State of the Union Address (Jan. 8, 1964), *available at* [http://www.pbs.org/wgbh/amex/presidents/36\\_1\\_johnson/psources/ps\\_union64.html](http://www.pbs.org/wgbh/amex/presidents/36_1_johnson/psources/ps_union64.html) (providing a transcript of the address).

areas of the nation. The declaration was just one facet of the “Great Society,” an was an expansive set of domestic programs that Johnson proposed or enacted, which in addition to poverty, included education, civil rights, healthcare, arts and cultural interests, transportation, the environment, and consumer protection, as well as various urban-renewal projects and job-training programs.<sup>11</sup>

The war on poverty was warmly received in Indian country, so long as it preserved the tribal–federal relationship and did not “terminate” Indian tribes.<sup>12</sup> But it is not clear that President Johnson’s awareness of the effects of the war on poverty in Indian Country even mattered. As this Article will show, the war on poverty would still pay off great dividends for Indians outside the boundaries of material poverty, even saddled with Johnson’s benign indifference. It would be “the harbinger of tribal self-determination.”<sup>13</sup>

Born and raised in Texas, a state with no Indian population,<sup>14</sup> Johnson seemingly did not develop much concern for Indian people. His own biographical account of his presidential years says nothing of Indian tribes,<sup>15</sup> 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 American Indian Chicago Conference (AICC),<sup>16</sup> a week-long gathering of 467 Indians hailing from ninety different Indian communities from across the country.<sup>17</sup>

Johnson and the AICC members discussed the AICC’s *Declaration of*

11. See generally JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY (1999) (describing Great Society programs of the 1960s); THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM (Sidney M. Milkis & Jerome M. Mileur eds., 2005) (reviewing the Great Society’s domestic programs).

12. See generally Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995) (describing the federal programs supporting tribal self-governance).

13. 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 & RES. J. 71, 71 (1998).

14. 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.

15. LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963–1969* (1971).

16. Cobb, *supra* note 13, at 72.

17. Laurence M. Hauptman & Jack Campisi, *The Voice of Eastern Indians: The American Indian Chicago Conference of 1961 and the Movement for Federal Recognition*, 132 PROC. AM. PHIL. SOC’Y 316, 316 (1988).

*Indian Purpose*<sup>18</sup> and “how future legislation could incorporate the need for tribal self-determination, local control of resources, and federal assistance with economic development.”<sup>19</sup> Most importantly, the *Declaration* called for the programs to be developed by the Indians themselves and was based on the notion that “[w]hat we ask of America is not charity, not paternalism, even when benevolent. We ask only that the nature of our situation be recognized and made the basis of policy and action.”<sup>20</sup> The AICC’s *Declaration* condemned the termination era, called for new policies that 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.<sup>21</sup> Perfectly timed for the oncoming war, the *Declaration* encapsulated a significant departure from the status quo of the early 1960s.

It is unknown how much the AICC’s *Declaration* swayed Johnson. As noted above, he did not mention Indians at all in his biography, let alone the AICC, and he took no action after the meeting. In fact, after a quick fifteen minutes with the delegation, he was already on the phone dealing with other matters.<sup>22</sup> However, three years later, as President, he specifically mentioned Indian reservations in his State of the Union address when he declared:

[O]ur 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.<sup>23</sup>

But that was the extent of Johnson’s attention to Indian affairs; he was much

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18. Declaration of Indian Purpose at the American Indian Chicago Conference at the University of Chicago, (June 13–20, 1961) [hereinafter *Declaration*] (condemning termination, calling for new policies based on a “broad educational process,” and providing specific recommendations in the areas of economic development, education, health, housing, and law, including treaty rights). A portion of the Declaration of Indian Purpose is available online. *Native American Voices*, DIGITAL HISTORY, [http://www.digitalhistory.uh.edu/native\\_voices/native\\_voices.cfm](http://www.digitalhistory.uh.edu/native_voices/native_voices.cfm) (last visited Mar. 28, 2012) (scroll down to “Part 5: The Struggle for Self-Determination” and then follow the “Declaration of Indian Purpose” hyperlink); see also THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969*, at 18 (2001).

19. Cobb, *supra* note 13, at 73.

20. Hauptman & Campisi, *supra* note 17.

21. See *Declaration*, *supra* note 18; see also CLARKIN, *supra* note 18.

22. CLARKIN, *supra* note 18, at 108.

23. LYNDON B. JOHNSON, *Annual Message to the Congress on the State of the Union*, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963–1964*, at 114 (1965).

more concerned with the African-American Civil Rights Movement.<sup>24</sup>

The Johnson Administration rarely mentioned American Indians in the war on poverty because it was trying to devise a poverty plan that was not based on race.<sup>25</sup> Civil rights were already a contentious issue, and the Johnson Administration did not want to enmesh the war on poverty with the more expansive civil rights legislation being fought in Congress at the same time.<sup>26</sup> 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."<sup>27</sup> 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 Democratic Party held a total of 295 seats in the House and sixty-eight in the Senate.<sup>28</sup> With this copious political ammunition at Johnson's disposal, Congress passed eighty-four of his eighty-seven legislative proposals.<sup>29</sup> Even though none were specifically aimed at Indians or Indian tribes, they were directed at helping the poor, which Indians certainly were.<sup>30</sup> And so, in 1964, war once again came to Indian country, heralded by Johnson's State of the Union address on January 8, 1964.<sup>31</sup>

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.<sup>32</sup> 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

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24. CLARKIN, *supra* note 18, at 108.

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

26. *Id.*

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

28. THOMAS C. REEVES, *TWENTIETH-CENTURY AMERICA: A BRIEF HISTORY* 181 (2000).

29. CLARKIN, *supra* note 18, at 106.

30. *See, e.g.*, Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286; Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. § 2701 (2006)).

31. *See* Johnson, *supra* note 10.

32. Interview by W.W. Moss with Stewart L. Udall, Former Sec'y of the Interior (1961-1969), in Washington, D.C. (Jan. 12, 1970), available at <http://archive1.jfklibrary.org/JFKOH/Udall,%20Stewart%20L/JFKOH-SLU-01/JFKOH-SLU-01-TR.pdf> (providing a transcript of the original interview).

edges of the thing.”<sup>33</sup> When Johnson assumed the presidency, many, including Udall himself, believed that he would dismiss Udall from his cabinet position for his political transgressions.<sup>34</sup> But corroborating Robert Burnette’s view of Johnson’s apparent “political considerations,” the President stated, ““you should know by now that I’m a better politician than to fire any of Kennedy’s cabinet at this time.””<sup>35</sup>

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.”<sup>36</sup> Interestingly, Johnson has been quoted as saying that “[a]s a matter of fact, to tell the truth, John F. Kennedy was a little too conservative to suit my taste.”<sup>37</sup> Therefore, as Thomas Clarkin has noted:

[T]he most important development in Indian affairs during the early years of the Johnson administration did not originate in the Interior Department; rather, 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.<sup>38</sup>

For tribes seeking a way to attain self-determination, Johnson’s unrelated political motivations were a welcome happenstance.

#### *A. The Office of Economic Opportunity*

Although 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.<sup>39</sup> Kevin Washburn

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33. *Id.*

34. *Id.*

35. CLARKIN, *supra* note 18, at 107.

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

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

38. CLARKIN, *supra* note 18, at 108.

39. See generally Christopher K. Riggs, *American Indians, Economic Development and Self-Determination in the 1960s*, 69 PAC. HIST. REV. 431 (2000) (describing the major policy changes in federal Indian affairs of the 1960s, the transition period between the anti-tribal era of “termination”



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.”<sup>40</sup>

The war on poverty entailed enactment of the Economic Opportunity Act (EOA) as an “umbrella” for the creation of a series of programs such as the Peace Corps, 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 healthcare centers, and social benefits stemming from the Food Stamp Act, Medicare and Medicaid, the Department of Housing and Urban Development, and the Fair Housing Act.<sup>41</sup> On the economic front, Johnson pushed EOA<sup>42</sup> 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.<sup>43</sup> The first director of the OEO, R. Sargent Shriver, tasked James Wilson with heading a department that concentrated solely on Indian country.<sup>44</sup> Wilson’s self-admitted flanking attack was to act as a “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.<sup>45</sup>

Although 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.”<sup>46</sup> “The drafters of the OEO bill, however, never thinking of tribes as

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of the 1950s to the pro-tribal era of “self-determination” of the 1970s).

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

41. S. Michael Miller & Martin Rein, *Will the War on Poverty Change America?*, 2 SOC’Y 17, 19 (1965); see also Hubert H. Humphrey, *The War on Poverty*, 31 LAW & CONTEMP. PROBS. 6, 8–16 (1966) (detailing the major programs in the war on poverty).

42. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C.).

43. SCOTT MYERS-LIPTON, *SOCIAL SOLUTIONS TO POVERTY: AMERICA’S STRUGGLE TO BUILD A JUST SOCIETY* 216 (Charles Lemert ed., 2007).

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

45. *Id.*

46. *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, Secretary of the Interior); see also Cobb, *supra* note 13, at 102–24 (describing the importance of Office of Economic Opportunity to Indian country).

governments, considered only three possible ways to deliver OEO services to Indians: through the [Bureau of Indian Affairs (BIA)], through the states, or through both the BIA and the states. In addition no one had consulted with tribal leaders.”<sup>47</sup> But in time, Indian-specific issues would necessitate the creation of “Indian desks” in the OEO and other agencies, such as the Departments of Agriculture, Commerce, Housing, Labor, and Urban Development.<sup>48</sup> The presence of these Indian 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.<sup>49</sup> The OEO put the engine, which was made with Indian parts, in place; it just needed some fuel, which would be delivered in short order and in a manner quite beneficial to Indian tribes.

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. Programs implemented community action programs (CAPs) to promote “maximum feasible participation” of the impoverished in both creating and implementing the actual programs.<sup>50</sup> 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.”<sup>51</sup> Shades of the earlier demands of the AICC as written in the *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. 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.”<sup>52</sup>

In May 1964, several Indian activists planned a gathering in Washington, D.C., which they named the *American Indian Capital*

47. Charles Wilkinson, “Peoples Distinct from Others:” *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 382 (2006).

48. Paul H. Stuart, *Government Agencies*, in *NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA* 210, 212 (Mary B. Davis ed., 1994).

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

50. Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 1 (2010).

51. CLARKIN, *supra* note 18, at 110.

52. Wilkinson, *supra* note 47, at 383.

*Conference on Poverty*.<sup>53</sup> 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.’”<sup>54</sup> They were successful in their goal by adding to EOA three seemingly innocuous words to the definition of who could receive OEO funds—those words being “a tribal government.”<sup>55</sup> 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.”<sup>56</sup> Thus, in a perfect storm of the national Civil Rights Movement, including the heady “Red Power” political activism of the time, the OEO provided funds and responsive federal representatives, and tribes gained a strong foothold in the pursuit of reclaiming their inherent rights of self-determination.<sup>57</sup>

Between 1964 and 1976, tribes became direct sponsors of several federally funded programs through which they ultimately received 122 million dollars.<sup>58</sup> But instead of the federal government funneling money through the BIA, as it always had, it directed money straight to the tribes themselves, creating tension between CAP administrators and BIA employees.<sup>59</sup> The influx of federal monies infused tribal governments with new, unseen powers. “Under the Indian Reorganization Act, tribal governments never really functioned. But when the OEO was established, tribal governments had the funds to begin . . . reservation economic development.”<sup>60</sup> Again, the engine was in place; the OEO provided the fuel.

The OEO also enabled several universities to bypass the BIA and provide workshops directly to tribal leaders for proposal writing, report

53. Shirley Hill Witt, *Nationalistic Trends Among American Indians*, 6 MIDCONTINENT AM. STUD. J. 51, 66 (1965).

54. Wilkinson, *supra* note 47; *American Indian Capital Conference on Poverty: A Statement Made for the Young People by Melvin Thom—May, 1964*, in RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM 65, 65–66 (Alvin M. Josephy, Jr., ed., 1971) [hereinafter RED POWER].

55. Wilkinson, *supra* note 47.

56. *Id.* (citing Economic Opportunity Act of 1964, 42 U.S.C. § 2790(a)-(f), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 519 (codified at 42 U.S.C. § 9902 (2000))).

57. “Red Power” is a term often attributed to noted Indian activist and author Vine Deloria, Jr. and represents a growing sense of pan-Indian identity during the late 1960s. For an interesting look at Red Power political activism, see RED POWER, *supra* note 54.

58. Alfonso Ortiz et al., *The War on Poverty*, in INDIAN SELF RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 220, 220 (Kenneth R. Philp ed., 1986) [hereinafter INDIAN SELF RULE].

59. See CLARKIN, *supra* note 18, at 117–22.

60. Ortiz et al., *supra* note 58, at 223.

filing, accounting, and creating a new class of Indian leadership.<sup>61</sup> 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.”<sup>62</sup> All the CAP action on reservations demonstrated that tribes could achieve self-administration of federally funded programs.<sup>63</sup>

D’Arcy McNickle, a long-time employee of the BIA, opined of the OEO that the “transferal of authority and responsibility for decision-making to the local community was an administrative feat that the Bureau of Indian Affairs, after more than one hundred years of stewardship, had never managed to carry out.”<sup>64</sup> Ladonna Harris recalled that the “OEO taught us to use our imagination and to look at the future as an exciting adventure.”<sup>65</sup> Well-known Indian activist Russell Means claimed that the OEO “was the best thing ever to hit Indian reservations.”<sup>66</sup> With a long-buried sense of autonomy reemerging, tribal governments finally

had money and were not beholden for it to the Bureau of Indian Affairs. This created an enormous change in the balance of power on reservations and in Washington. . . . [The OEO] altered the nature of the [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.<sup>67</sup>

### *B. The End of the War and Its Collateral Damage*

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

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61. *Id.* (noting the OEO enabled Arizona State University, the University of Utah, and the University of South Dakota to bypass the BIA).

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

63. CASTILE, *supra* note 36, at 41.

64. D’ARCY MCNICKLE, *NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS* 119 (1973).

65. Ortiz et al., *supra* note 58, at 224.

66. RUSSELL MEANS & MARVIN J. WOLF, *WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS* 137 (1995).

67. Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in *INDIAN SELF-RULE*, *supra* note 58, at 191, 196.

poverty.”<sup>68</sup> 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.<sup>69</sup>

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.”<sup>70</sup>

Much like the month of March, the war on poverty came in like a lion and went out like a lamb. Robert Burnette recalls, “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 the OEO.”<sup>71</sup> By 1966, it was apparent that Congress favored some programs over others, and unfortunately for Indian tribes, the CAPs fell into the “disfavored” pile.<sup>72</sup> In 1975, Congress dismantled the OEO and replaced it with the Community Services Administration (CSA). This sped up the process by which Congress transferred favored programs to already-established agencies, such as the Department of Health, Education, and Welfare.<sup>73</sup> The death knell came in 1981 when President Reagan abolished the CSA, leaving only a few scattered, emaciated remnants of the war on poverty.<sup>74</sup>

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.”<sup>75</sup> Of

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

69. Ortiz et al., *supra* note 58, at 226.

70. *Id.*

71. *Id.* at 227.

72. MICHAEL L. GILLETTE, *LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY* 360 (2d ed. 2010).

73. *Id.* at 401–02.

74. Dara Z. Strolovitch, *Politics and Federal Policy*, in 1 *POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS AND POLICY* 548, 550 (Gwendolyn Mink & Alice O’Connor eds., 2004).

75. President Ronald Reagan, Address Before a Joint Session of Congress on the State of the Union (Jan. 25, 1988), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=36035#axzz>

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 Administration's long-standing "less government" approach.<sup>76</sup> Taking an even more negative stance than Reagan, one commentator has argued that the social programs implemented during the "war" actually worsened the economic position of poor people.<sup>77</sup>

Regardless of the view that the war was ineffective at decreasing poverty, it did help Indian tribes in other ways. Although tribes still generally remain poor today,<sup>78</sup> the war on poverty brought about changes that in many ways transcended material impoverishment.

### III. THE WAR ON DRUGS

The Reagan Administration's war on drugs<sup>79</sup> had a major impact on the daily lives of American Indians. Even today the effects of the war on drugs continue to influence tribal public policy dramatically in relation to tribal-government employees, tribal law enforcement, and even tribal public-housing policy.<sup>80</sup> 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.<sup>81</sup> This Part examines American Indian tribes' use of drug testing and other tools in the war on drugs in two areas: (1) tribal-government employment and (2) tribal housing. The third subpart examines how the war on drugs has affected the United States and state government policies in Indian country.

It is no secret that many American Indians harbor addictions to drugs

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1X0sy07W0 (providing a transcript of the address).

76. In 1964, Ronald Reagan delivered a speech, *A Time for Choosing*, on behalf of and sponsored by Barry Goldwater's Republican presidential campaign. Ronald Reagan, *A Time for Choosing* (Oct. 27, 1964), available at <http://www.nationalcenter.org/ReaganChoosing1964.html> (providing the transcript of the speech). It was highly critical of Johnson's Great Society programs. *Id.* By the time Reagan dismissed Johnson's war on poverty in 1988, he had already declared his own war on organized crime in 1986. Ronald Reagan, *Declaring War on Organized Crime*, N.Y. TIMES, Jan. 12, 1986, § 6 (Magazine), at 26.

77. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984).

78. See Angelique 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, 825-29 (2010).

79. President Reagan may have escalated the war on drugs, see President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249 (Oct. 2, 1982), but it was President George H.W. Bush who actually appointed a "Drug Czar." See *Gun S., Inc. v. Brady*, 711 F. Supp. 1054, 1056-57 (N.D. Ala. 1989).

80. See *infra* Part III.A.

81. See *infra* Part III.

and alcohol.<sup>82</sup> These addictions are likely a product of many generations of poverty, disillusionment, and perhaps even centuries-old federal Indian policy.<sup>83</sup> Colonial and federal treaty negotiators used alcohol to fuel vast land cessions,<sup>84</sup> and Indian alcohol abuse has been used to exploit Indian people in a variety of contexts.<sup>85</sup> As a result, Indian tribes often dedicate significant tribal resources toward responding to alcohol and drug abuse, often going out of their way to divert first-time drug offenders to non-adversarial drug courts or to support tribal members and their families affected by addiction.<sup>86</sup> Many reservation communities established culturally specific and culturally appropriate treatment programs, with some outstanding results.<sup>87</sup> As tribal programs often are creative and beneficial, tribal governments have motivation to respond with every resource available because the future existence of tribal people depends on the success of these programs.<sup>88</sup>

However, the war on drugs initiated a few unusual habits among tribal governments, namely the policy of random drug testing of tribal employees in non-safety-sensitive positions, such as clerical or secretarial workers.<sup>89</sup> More recently, drug testing became a precondition to eligibility for tribal

82. 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).

83. 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).

84. See generally PETER C. MANCALL, DEADLY MEDICINE: INDIANS AND ALCOHOL IN EARLY AMERICA (1997) (explaining the influence of alcohol on treaty negotiations dating back to the seventeenth century).

85. 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) (explaining how federal Indian alcohol policy perpetuates the myth of Indian alcoholism).

86. See generally Ronald Eagleeye Johnny, *The Duckwater Shoshone Drug Court, 1997–2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2002) (explaining the development of the drug war on the Duckwater Shoshone Drug Court and demonstrating the therapeutic value of the method).

87. 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 MED. CARE 670 (2004).

88. For example, many Indian tribes disfavor closed adoptions of Indian children in even the worst cases in order to preserve the remaining positive aspects of tribal family relationships. E.g., Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30, at 164 (Matthew L.M. Fletcher et al. eds., 2009).

89. 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) (criticizing the imposition of random drug tests by tribal governments on its employees).

public-housing services.<sup>90</sup> More often than not, tribal officials allege that drug-testing requirements are requirements for federal funding, perhaps misreading the regulations.<sup>91</sup> Both of these tribal-government policies can potentially 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,<sup>92</sup> random drug testing became a critical tool in the war on drugs.<sup>93</sup> 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 at the end of his or her sentence.<sup>94</sup> Within a decade, several federal employees and public officials challenged the constitutionality of random and pretextual drug-testing requirements in front of the Supreme Court.<sup>95</sup> 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 proving exactly who was taking drugs.<sup>96</sup> Of course, these tests are not infallible.<sup>97</sup> With false positives and negatives rendering the outcomes of the tests practically random, drug users became exceptionally successful in developing ways to counteract the tests.<sup>98</sup> One particularly unforeseen outcome to drug testing was that the

90. See *infra* Part III.B.

91. See *supra* Part II.

92. See generally 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) (discussing prison policies for drug offenders and the effect on the African-American community).

93. Within a few years of the declaration of the war on drugs, drug testing became pervasive in the American criminal justice system. See generally 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).

94. See Andrew J. Smith, *Unconstitutional Conditional Release: A Pyrrhic Victory for Arrestees’ Privacy Rights Under United States v. Scott*, 48 WM. & MARY L. REV. 2365, 2370 (2007).

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

96. Cf. John Edward Failla, Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U. L. REV. 322 (1987) (discussing the federal government approach to employee drug abuse).

97. Some studies indicate a high degree of false positives in random drug tests. See BEVERLY A. POTTER & SEBASTIAN ORFALI, *DRUG TESTING FOR WORK: A GUIDE FOR EMPLOYERS* 146 (1998).

98. See AMITAVA DASGUPTA, *BEATING DRUG TESTS AND DEFENDING POSITIVE RESULTS* 1–9 (2010).



occasional marijuana user would be encouraged to switch to a different, more dangerous drug, such as cocaine, which processes through the human body faster than marijuana, making it, therefore, less detectable.<sup>99</sup> Moreover, civil libertarians have repeatedly and persuasively attacked drug testing for the violations of privacy resulting from the test.<sup>100</sup>

### A. Tribal-Government Employees

Indian tribal governments often 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. Tribal-government employees, far more so than other reservation residents, are more likely to purchase a home in conjunction with accepting a tribal-government job. Other tribes require some form of drug testing during employment as well, such as the Eastern Band of Cherokee Indians and the Little River Band of Ottawa Indians, both of which impose random testing on all employees.<sup>101</sup> Other tribes, such as the White Mountain Apache Tribe, may subject tribal employees to random testing if reasonable suspicion exists.<sup>102</sup>

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. 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

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99. See Edward Shepard & Thomas Clifton, *Drug Testing and Labor Productivity: Estimates Applying a Production Function Model*, WORKING USA, Dec. 1998, at 69 (“[T]o avoid a negative result on a drug test, workers may switch to ‘harder drugs’, like heroin, cocaine, or amphetamines, which do not remain in the system as long. Or they might switch to alcohol, or drugs that are not tested for, which could have more significant adverse effects on performance and health.”).

100. E.g., *Privacy in America: Workplace Drug Testing*, AM. C.L. UNION (Mar. 12, 2002), [http://www.aclu.org/racial-justice\\_womens-rights/workplace-drug-testing](http://www.aclu.org/racial-justice_womens-rights/workplace-drug-testing); Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO INST. (Oct. 2, 1992), <http://www.cato.org/pubs/pas/pa180.pdf>.

101. See EASTERN BAND OF THE CHEROKEE NATION CODE, ch. 96, art. 9, § 9.05(B) (2010) (detailing the tribe’s drug and alcohol policy and stating that “[a]ll employees are subject to random, unannounced testing”), available at [www.narf.org/nill/Codes/ebcicode/96employees.pdf](http://www.narf.org/nill/Codes/ebcicode/96employees.pdf); 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://www.narf.org/nill/Codes/lrcode/lrcode6.htm>.

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

runs counter to tribal traditions.<sup>103</sup> Some forms of drug testing require the removal of a strand of hair, and in most Indian communities, hair is sacred; the forced removal of an Indian person's hair could be devastating.<sup>104</sup> The taking of urine samples is similarly rote with difficulty, given that Indian women are forbidden from certain ceremonies (even drug testing) during their monthly cycle.<sup>105</sup> The same goes for blood testing.<sup>106</sup> 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 persuasively wrote, 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, [sic] make the process a very expensive one. The tribe will also have 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 . . . 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.<sup>107</sup>

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.<sup>108</sup>

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103. See Fletcher, *supra* note 89, at 63–65.

104. *Id.* at 30.

105. *Id.*

106. *Id.*

107. Adrea Korthase, Random Drug Testing 1 (2010) (unpublished manuscript) (on file with authors).

108. The drug testing of tribal-enterprise employees, especially casino employees, on the other

### B. Tribal-Housing Tenants

In recent years, increasing numbers of tribal governments are imposing drug testing as a precondition for tribal public-housing eligibility, ostensibly under the theory that federal law and regulations require such testing.<sup>109</sup> For example, the Umatilla Reservation Housing Authority initiated a drug testing requirement in 2010.<sup>110</sup> Other tribes require applicants for tribal rental housing to pass a preliminary drug screen as well, including the Muckleshoot Indian Tribe.<sup>111</sup> The Umatilla announcement noted the presence of drugs and gangs on the reservation, suggesting that a constitutional challenge to the requirement could be defended by claims that public safety is a sufficiently compelling governmental interest.<sup>112</sup>

In comparison, non-tribal public-housing programs, such as those in certain areas of Chicago, occasionally require drug testing.<sup>113</sup> Public-housing programs have also denied access to public housing to people who have a drug conviction.<sup>114</sup> But even though governments have long imposed various forms of zero tolerance on their public-housing tenants, to dramatic effect,<sup>115</sup>

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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.*, *Techlowec v. Mashantucket Pequot Gaming Enter.*, 4 Mash. Rep. 197, No. 2003-0176, 2004 WL 5374145 (Mashantucket Pequot Trib. Ct. 2004) (upholding the termination of an employee); *Louchart v. Mashantucket Pequot Gaming Enter.*, 3 Mash. App. 7, No. 1999-0161, 2000 WL 35571834 (Mashantucket Pequot Ct. App. 2000) (reversing termination on basis of positive drug test where management had no "reasonable suspicion" to test employee); *Burns v. Mashantucket Pequot Gaming Enter.*, 3 Mash. Rep. 208, No. 1999-0114, 2000 WL 35571835 (Mashantucket Pequot Tribal Ct. 2000) (affirming employment termination despite policy violation by management).

109. We thank Brian Gilmore, the Director of the Michigan State University Housing Clinic, for bringing this to our attention.

110. *See URHA Starts Drug-Test Policy: Housing Cracks Down on Drug Use in Rentals*, XIII CONFEDERATED UMATILLA J., no. 3, Mar. 2010, at 1, available at <http://www.umatilla.nsn.us/CUJ2010March.pdf>.

111. *Housing Division*, MUCKLESHOOT INDIAN TRIBE, [www.muckleshoot.nsn.us/services/community-development/housing-division.aspx](http://www.muckleshoot.nsn.us/services/community-development/housing-division.aspx) (last visited Mar. 28, 2012).

112. *Cf.* Fletcher, *supra* note 89, at 59–60.

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

114. 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) (2006)).

115. *See* Dep't of Hous. & Urban Dev. 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*

drug testing does not appear to be an integral part of public-housing policy.

Although more tribes now rely on drug testing, the most successful tribal drug-control programs in tribal housing completely exclude drug testing.<sup>116</sup> Instead, these drug-control programs focus on culturally appropriate measures that include law enforcement and children's education.<sup>117</sup> Some evidence suggests a hardline war on drugs in Indian country is unnecessary.

At least one tribal court has addressed the importance of drug testing tribal-housing tenants and ruled against an effort by a tribal-housing authority to evict a tenant for the use of drugs.<sup>118</sup> In *Washoe Housing Authority v. Sallee*, tribal police stopped a tribal-rental-housing tenant who was traveling as a passenger in a car.<sup>119</sup> As a matter of common practice, the tenant submitted to a "presumptive drug test," and the results tested positive for trace amounts of illegal drugs.<sup>120</sup> After the tribal-housing authority initiated eviction proceedings based on tribal policy that prohibited the "use" of illegal drugs "on or near project premises," the court rejected the housing authority's claims, holding instead that the policy never defined those terms, nor did the drug test serve as sufficient proof of the tenant's drug use.<sup>121</sup>

### C. American Indian Religious Freedom

The Reagan-Era war on drugs had an additional impact on Indian country: restrictions on religious freedom.<sup>122</sup> This impact was likely far greater in symbolic terms to American Indian people than drug testing. In a shocking move in 1990, the Supreme Court decided *Employment Division v. Smith*, which struck down key components of First Amendment jurisprudence previously enjoyed by the supporters of the separation

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*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).

116. See VALERIE SENECA & LEEANNA ARROWCHIS, NAT'L AM. INDIAN HOUS. COUNCIL, BUILDING THE FRAMEWORK: SIX CASE STUDIES: TRIBAL SELF-DETERMINATION UTILIZING NAHASDA ACTIVITIES 30-34 (2002), available at [www.naihc.net/uploads/research/CaseStudyfinal.pdf](http://www.naihc.net/uploads/research/CaseStudyfinal.pdf).

117. See *id.*

118. See *Washoe Hous. Auth. v. Sallee*, No. ICTN/AC CV-03-022, 2006 WL 6351179 (Nev. Inter-Tribal Ct. App. 2006).

119. *Id.* at \*2.

120. *Id.*

121. *Id.* at \*3.

122. See generally FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 32-36 (2007) (describing *Employment Division v. Smith* and its impact on religious freedom).

between church and state.<sup>123</sup> In a fairly significant move, Congress enacted the Religious Freedom Restoration Act (RFRA) as an overt attempt to overturn the decision, an effort that only affected federal government actions.<sup>124</sup> *Smith* not only changed the character of the national debate over religious freedom, but it also 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 and intended to provoke the Supreme Court into action against the Native American Church practitioners who were seeking protection.<sup>125</sup> 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, "[a]s 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

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123. See *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

124. The Supreme Court, in *City of Boerne v. Flores*, struck down RFRA as applied to states, but the statute remains viable as applied to the federal government. *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997); see also *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. (2006), and the constitutionality of that statute as applied to states has not yet reached the Supreme Court.

125. 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).

neutrality.”<sup>126</sup>

Professor Levinson noted that eighteen months after the oral argument in *Smith*, the Oregon Department of Justice had the opportunity to support its anti-drug position when requested to offer testimony to the Oregon legislature about an amendment to the state’s drug laws.<sup>127</sup> However, Oregon declined to mention anything relating to the compelling interest noted above, provoking Levinson to argue:

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.<sup>128</sup>

The *Smith* decision contributed to a long history of disrespect for American Indian religions. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA),<sup>129</sup> a statement of policy supporting Indian religious freedom in light of concerted efforts by federal agencies and officials to thwart it.<sup>130</sup> AIRFA defined the practice of “traditional religions” to include without limitation “access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>131</sup>

The impetus for 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.<sup>132</sup> First, federal agencies

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126. *Id.* at 1054–56 (footnotes omitted).

127. *See id.* at 1056.

128. *Id.* at 1058–59 (footnotes omitted).

129. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006).

130. *Id.*; H.R. REP. NO. 95-1308 (1978), *available at* 1978 WL 8715.

131. 42 U.S.C. § 1996.

132. H.R. REP. NO. 95-1308 (1978), *available at* 1978 WL 8715.

such as the U.S. Forest Service, National Park Service, and the Bureau of Land Management frequently prevented Indians from entering federal land where sacred sites were located.<sup>133</sup> Moreover, the agencies refused to allow the burial of tribal leaders in tribal cemeteries located on federal land.<sup>134</sup> 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.<sup>135</sup> Federal officials also confiscated animal parts, such as turkey and eagle feathers, from endangered species that Indians used in religious ceremonies.<sup>136</sup>

Third, the House of Representatives found that federal agents directly and indirectly interfered with tribal ceremonies and religious practices.<sup>137</sup> 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 ceremonies.<sup>138</sup> These law and order codes were enforced in Courts of Indian Offenses, with judges hand-picked by federal officers.<sup>139</sup> Federal courts in cases such as *United States v. Clapox* upheld federal regulations allowing the prosecution of Indians engaging in traditional religious practices.<sup>140</sup> 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.<sup>141</sup> Federal law enforcement officers would also do little or nothing to stop unwelcome onlookers from interfering in tribal religious ceremonies.<sup>142</sup> The House also found that federal officials had either directly interfered or allowed interference in tribal religious practices because they personally rejected Indian religions.<sup>143</sup>

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133. See *id.* at \*2.

134. See *id.*

135. See *id.*

136. See *id.* at \*3.

137. *Id.*

138. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 230–39 (1983).

139. *Id.*

140. See *United States v. Clapox et al.*, 35 F. 575, 577 (D. Or. 1888).

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

142. *Id.*

143. See H.R. REP. NO. 95-1308 (1978), available at 1978 WL 8715, at \*3.

## IV. THE WAR ON TERROR: THE NEW INDIAN WAR?

The modern war on terror is a war that defies definition and has no obvious termination point, boundary, or even a determination of 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 nineteenth century fought by the United States against Indian people.<sup>144</sup> 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. For some, it is logical that the legal principles that supposedly justified the Indian wars now are used to justify the war on terror. Part IV.A quickly reviews the history of wars between the United States and Indian tribes as a lead-in to the modern version of the “Indian war”—the war on terror.

A. *Old Indian Wars*

In general, Indian wars involved Indian tribes both within and outside 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),<sup>145</sup> much like the modern enemies of the United States cross borders with impunity.<sup>146</sup> Indian tribes, sometimes highly hierarchical and organized and other times disparate and dynamic, do not always meet a traditional definition of “state” at any given time, much like modern American enemies.<sup>147</sup> Perhaps most importantly, Indian tribes fought guerrilla wars, what American leaders and commentators would now refer to as terrorism.<sup>148</sup> In short, many legal advisers in both the nineteenth and twenty-first centuries have held international norms and rules of war not to apply in each respective case.

Consider the mass executions of Dakota Indians at Fort Snelling in

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144. *E.g.*, *United States v. Hamdan*, No. CMCR 09-002, 2011 WL 2923945, at 52–53 (U.S. Ct. of Military Comm’n Review June 24, 2011), *available at* <http://turtletalk.files.wordpress.com/2011/07/hamdan-opinion.pdf>.

145. *E.g.*, *Akins v. Saxbe*, 380 F. Supp. 1210, 1213–14, 1219 (D. Me. 1974).

146. *Cf.* Peter Andreas, *Redrawing the Line: Borders and Security in the Twenty-First Century*, 28 INT’L SECURITY, no. 2, 2006 at 78.

147. *See* Steve Russell, *The Racial Paradox of Tribal Citizenship*, 46 AM. STUD., no. 3, 2005 at 177–78 (discussing “Westphalian” statehood and Indian tribes). *Cf.* Sanford Levinson, *Shards of Citizenship. Shards of Sovereignty: On the Continued Use of an Old Vocabulary*, 21 CONST. COMMENT. 601, 602 (2004) (detailing “Westphalian” borders).

148. *E.g.*, Barry M. Pritzker, *First Seminole War*, in *THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN WARS, 1607–1890: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 715, 716 (Spencer C. Tucker ed., 2010).



1862 and the internment and forced removal of hundreds of other Dakotas at the same time.<sup>149</sup> In the months 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.<sup>150</sup> Additionally, the United States's promised treaty annuities were late in coming, a tactic that Indian agents had repeatedly used to extract concessions or punish the Dakota people.<sup>151</sup> The inevitable conflict that followed involved the killing of hundreds on both sides.<sup>152</sup> Eventually, roughly 2000 Dakotas gave up the fight and the American military took them into custody.<sup>153</sup> The sham trials that took place after the Dakota surrender are well documented, and the execution of thirty-eight Dakota Indian men followed.<sup>154</sup> The American military then incarcerated 1600 Dakota Indians who had survived the executions in internment camps in Iowa and South Dakota and imprisoned dozens of others in military jails.<sup>155</sup>

The Fort Snelling executions and the incarcerations of the Dakota people parallel modern American prisons at Guantánamo Bay and elsewhere. The facts of both events involve people held for many years, almost always without charge.<sup>156</sup> The government charges such prisoners under military commissions without adequate due process or criminal procedure rights.<sup>157</sup> At least some of the prisoners are American citizens or can stake a claim to American citizenship.<sup>158</sup> And the prisoners are declared prisoners of war, despite the lack of a congressional declaration of war, or worse, they are "unlawful enemy combatant[s]."<sup>159</sup> In the case of the Dakota prisoners, their only hope was a pardon or commutation of sentence from the

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149. See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 15–46 (1990).

150. *Id.* at 17.

151. See *id.* at 15–17.

152. *Id.* at 21–22.

153. *Id.* at 21.

154. See *id.* at 22–37.

155. See Chomsky, *supra* note 149, at 38.

156. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 646 (2006) (Kennedy, J., concurring) (noting that Salim Hamdan had been held for four years without charge).

157. See Chomsky, *supra* note 149, at 94.

158. *E.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004) (noting José Padilla is an American citizen).

159. See, *e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (adjudicating the status of "enemy combatants").

U.S. President, much like Guantánamo Bay detainees.<sup>160</sup> Finally, even the prisoners who are pardoned by the U.S. President or subject to a release order from a federal court are sent away to a foreign land<sup>161</sup>—in the case of Guantánamo detainees, any nation that will accept their presence, except their homelands.<sup>162</sup>

The Dakota military trials are not the only cases in which the United States overreached in exercising executive (military) authority to punish American Indians. In the Modoc Indian War of 1873, for example, 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.<sup>163</sup> President Andrew Jackson even convened a military commission to try two non-Indians (English subjects) that had incited Creek Indians to war.<sup>164</sup> Congress has expressly authorized military actions against Indian tribes in other contexts as well.<sup>165</sup>

The Bush Administration's attorneys used the United States's 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 nineteenth century were "closely analogous" to the 9/11 attacks:

American precedents also furnish a factual situation that is more

160. See Maeve Herbert, *Explaining the Sioux Military Commission of 1862*, 40 COLUM. HUM. RTS. L. REV. 743, 777–83 (2009) (discussing President Lincoln's views on pardoning the Dakota in 1862).

161. See generally William E. Lass, *The Removal from Minnesota of the Sioux and Winnebago Indians*, 38 MINN. HIST. 353 (1963) (discussing removal of Sioux and Winnebago Indians from their homeland).

162. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (involving the government's detention of Chinese Uighurs); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 369–70 n.73 (2010).

163. *E.g.*, *The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249, 253 (1873).

164. *Legality of the Use of Military Commissions To Try Terrorists*, 25 Op. O.L.C. 8 (2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (citing WINTHROP, *supra* note 3 and BIRKHIMER, *supra* note 3); Memorandum from Patrick Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs, Swift Justice Authorization Act 4 (Apr. 8, 2002) (citing BIRKHIMER, *supra* note 3), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020408.pdf>.

165. See Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 10 n.15 (Oct. 23, 2001) (citing Abraham D. Sofaer, *The Power over War*, 50 U. MIAMI L. REV. 33, 41 (1995)), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011023.pdf>.

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 tribe rebels attempting to establish states. 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*, 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.”

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. 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 military authority.” Several Indian prisoners were tried by military commission and executed.<sup>166</sup>

Relying upon a century-old Attorney General opinion, this author either did not know about, or was not persuaded by, the fact that the Modoc people had been victimized by the slaughter of forty-one Modocs during a similar “peace parley” in 1852, an enormous part of the reason for the Modoc Wars of 1871–1873.<sup>167</sup> To this day, the trials of the Modoc leaders who

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166. Legality of the Use of Military Commissions To Try Terrorists, *supra* note 164, at 25–26 (citations omitted).

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

participated in the 1852 peace parley killings are 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.<sup>168</sup>

Had the memo writer described the events surrounding the Modoc war-crimes trial, the underlying legal authority would have collapsed. The leader in charge of the military commission in 1873, General 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.<sup>169</sup> After the War Department forced him to initiate war-crimes trials using a military commission, General Davis appointed military men with deep emotional 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.<sup>170</sup> Thus the conviction and execution of the Modocs 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. In the recent prosecution by military commission of two alleged terrorists, 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 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

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168. Doug Foster, *Imperfect Justice: The Modoc War Crimes Trial of 1873*, 100 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).

169. *Id.* at 258.

170. *Id.* at 258–60.

punishable.<sup>171</sup>

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 statement:

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.<sup>172</sup>

Professor Deborah Rosen noted that Americans "vigorously debated" General Jackson's decision to execute two British subjects,<sup>173</sup> suggesting that the government's Seminole precedent is perhaps even weaker than the Modoc precedent. General Jackson affirmed the court martial's death sentence of Arbuthnot.<sup>174</sup> While doing so, General Jackson overrode the court martial sentence of fifty lashes for Ambrister and instead imposed a death sentence by firing squad.<sup>175</sup> There was no written authority for General Jackson 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.<sup>176</sup> Moreover, contemporaneous critics argued that a court martial could only be used against American military officers, and so Jackson had no authority to try the two men.<sup>177</sup> Finally, unlike General

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171. Appellee's Response to the Specified Issues, *supra* note 1.

172. Letter from John H. Dossett, Gen. Counsel, Nat'l Congress of Am. Indians, to U.S. Court of Military Comm'n Review 1-2 (Mar. 17, 2011), available at <http://turtletalk.files.wordpress.com/2011/03/ncai-amicus-letter-in-al-bahlul.pdf>.

173. 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).

174. *Id.* at 563.

175. *Id.*

176. *Id.* at 565.

177. *Id.* at 567.

Davis, General Jackson never sought the advice or command of the President and instead executed the men without presidential approval.<sup>178</sup>

### *B. New Indian Wars*

The war on terror's latest event—the capture and killing of Osama bin Laden by American military forces—unfortunately continues the stereotyping of American Indians as enemies of the United States. 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.<sup>179</sup>

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 [sic] their “capture.” The paper work flowed in rivers of telegrams from army posts to Washington; since then it has

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178. Rosen, *supra* note 173, at 568–69.

179. Mazzetti et al., *supra* note 4.

burgeoned into many books.<sup>180</sup>

For the American military, at least as a symbolic manner, the code-name designation of Osama bin Laden as Geronimo makes perfect, logical sense. Yet the Chiricahua Apache people remain, as do the Modocs and the Seminoles and the Dakotas, now all American citizens, and many are conflicted in sharing in the celebrated capture and killing of an American enemy because of the unnecessary designation of the American enemy as an Indian.

## V. 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 allowed by the federal government. Finally, the current war on terror has resurrected many of the stereotypes and philosophies of the eighteenth and nineteenth century Indian wars in surprising and disappointing ways.

This Article serves as a survey of the impacts of these domestic wars on Indian people. American political rhetoric seems to vacillate wildly between treating American Indian tribes and Indian people with respect and treating Indians and tribes as extinct or warlike, vicious savages—sometimes in the same political discussion. The United States cannot seem to separate the violent origins of the American Republic and the equally violent dispossession of Indian lands, celebrating them openly even as a significant portion of its citizenry continue to suffer the after-effects. 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. Indian tribes are timeless entities, and Indian people will outlast any war thrown their way.

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180. ANGIE DEBO, *GERONIMO: THE MAN, HIS TIME, HIS PLACE* 3 (1976).