# Articles

# TRIBAL DISOBEDIENCE

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## I. INTRODUCTION

The September 11, 2001 attacks on the United States changed life greatly for Americans and for people throughout the world. Following the events of that day ("9/11"), there have been a lot of actions taken – including military action – to ensure that that kind of attack never happens again. However, despite the considerable attention that has been given to fighting terrorism, not much attention has been paid to how responses to terrorism might affect Indigenous peoples. In the United States, foreign policy has focused on fighting a "war on terror" against both non-state terrorist organizations like Al-Qaeda and foreign states, such as Afghanistan and Iraq, that pose terrorism-related threats. In concert with this agenda, domestic policy has focused on enhancing national and individual security while at the same time seeking to minimize disruptions in everyday life. As has often been the case, little regard has been given in the formulation of these policies to the possible impact on the Indigenous peoples living within the United States. Existing primarily on the periphery of American society, the American Indian nations and their citizens are easily forgotten.

The War on Terror, however, has had important consequences for American Indians. Foremost, in my view, has been the erosion of the ability of Indians in the United States to protect and strengthen their inherent sovereignty and their treaty-protected rights. As has

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been true throughout history, Indian nations have relied upon a myriad of approaches for advocating and defending their desired policy agendas. In the modern era, perhaps the most important of these strategies has been "tribal disobedience."

Tribal disobedience is the process by which Indigenous people engage in "disobedient" actions against the colonizing government in order to protect and defend their inherent and treaty-recognized rights. In a post-9/11 world, I believe that the ability of American Indians to engage in tribal disobedience has been seriously undermined. The purpose of this essay is to highlight the historical importance of tribal disobedience to the survival of Indigenous peoples and explain how recent actions by the United States to defend itself from terrorist acts threaten the ability of Indigenous peoples to retain their status as sovereign nations.

## A. INDIGENOUS ADVOCACY STRATEGIES

Since the arrival of the European colonists, Indigenous peoples in the Americas have used a variety of strategies to advocate for and defend their interests. Strategies such as warfare, diplomacy, litigation, lobbying, participating in the American political system, and tribal disobedience.

*Warfare.* Perhaps the most obvious and long-established strategy embraced by Indigenous peoples for achieving desired political objectives has been warfare.[1] Warfare is the engagement in systematic violence against one's enemy – either to kill them or to destroy their property – to such an extent that they capitulate.[2] Warfare, of course, is as old as humanity. Before Europeans landed on the shores of the "New World," there was warfare amongst the various Indigenous nations over land, resources and other matters.[3] When the Europeans arrived, warfare continued over the same land and resources. In the beginning, the Indigenous population held a significant numerical advantage, and the colonists found it very difficult to achieve their objectives.[4] Eventually, of course, the

1. *See, e.g.* Armstrong Starkey, European and Native American Warfare, 1675-1815 (1998) (describing the successful use of warfare by Indigenous peoples against Europeans for two centuries).

2. *See* Merrion Webster Dictionary 827 (5th ed. 1997, Frederick C. Mish, ed.)

3. Frederick E. Hoxie, Warriors and Warfare in Encyclopedia of North American Indians, Warriors and Warfare 666-68 (1996).

4. The Vinland Sagas: The Norse Discoveries of America 99 (Magnus Magnusson & Herman Palsson trans., 1965). Indeed, it took 500 years from the time of the first European attempt to colonize North America – the ill-fated "Vinland" settlement of the Vikings at

colonists –aided by diseases that decimated the Indigenous population[5] – were able to militarily neutralize the Indigenous nations. Nonetheless, official warfare against the Indian nations in the United States did not end until 1913 when the last Indian prisoners of war – Geronimo's people, the Chiracahua Apache – were released from federal prison.[6] The Iian nations eventually entered into treaties and agreements by which they accepted a life of peace with the Americans.[7]

*Diplomacy.* Despite its prevalence, warfare has not been the exclusive means by which Indigenous peoples have interacted with colonizers and other Indigenous peoples. War is expensive in terms of its human, economic and social costs, and so more efficient advocacy strategies have been utilized. Diplomacy is a companion strategy to warfare. Diplomacy has many dimensions.[8] One of these dimensions anticipates the maintenance of lines of communication between potentially disputing peoples.[9] Regular communications with one's potential adversaries can do much to prevent suspicion from elevating into distrust and distrust from elevating into aggression or open warfare. Another dimension reflects the process by which diplomatic relations evolve into the negotiation phase, leading to the formation of treaties.[10] Such formal and informal agreements have long been the basis by which Indigenous nations have preserved and promoted important sovereign interests. Indeed, for many Indigenous peoples, the pursuit of peace with other peoples has been the hallmark of their political philosophy.

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L'Anse Aux Meadows – before Columbus finally "succeeded" in European efforts to secure the continent for settlement. See Christopher Columbus, The Four Voyages of Christopher Columbus (J.M. Cohen ed. and trans., 1969).

5. A variety of authors have analyzed the developments that gave Europeans success over the indigenous peoples of America. *See generally* Russell Thornton, American Indian Holocaust and Survival: A Population History from 1492 (1987); Jared Diamond, Guns, Germs, and Steel: The Fates of Human Societies (1999); *see also* William H. McNeill, The Rise of the West: A History of the Human Community (1992); *see also* William H. McNeill, Plauges and Peoples (1998).

6. H. Henrietta Stockel, Shame and Endurance: The Untold Story of the Chiricahua Apache Prisoners of War 144 (2004).

7. *See* 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 35 (1984).

8. Smith Simpson, The Nature and Dimensions of Diplomacy, 380 Annals of the Am. Acad. of Pol. and Soc. Sci. 135 (1968); *see also* U.S. Advisory Commission on Public Diplomacy, 2005 Report of the Advisory Commission on Public Diplomacy, http://www.state.gov/r/adcompd/rls/55903.htm [hereinafter 2005 Report]

9. Simpson at 137 (describing the trans-cultural nature of diplomacy).

10. *See id.* at 137-44. *See also* 2005 Report at 10 (recommending increasing language training and cultural sensitivity to better effectuate beneficial diplomatic results). For development of Indian specific treaties, *see also* Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994).

*The Transition Away from Warfare and Diplomacy.* Throughout the 19th century, the United States engaged in a systematic process of subjugating the Indigenous peoples, those that survived the hostilities, in order to facilitate further settlement of the continent. In all cases, this process culminated in American military domination.[11] While domination sometimes occurred as the result of an Indian military defeat, in many other situations this outcome was the result of a negotiated settlement, initiated in some cases by the Indians.[12] In exchange for promising peace and giving up control of territory, the Indian nations became political allies of the United States and received a specific promise that remaining Indian lands would be protected from trespass by American citizens.[13] Unfortunately, the American agenda was continued expansion and so very little effort was given to satisfying this protective obligation.[14] Instead, new treaties that ceded even more land were eventually negotiated.[15] By 1830, the American policy regarding Indigenous peoples focused on their removal and relocation to lands in the West.[16] By the beginning of the 20th century, all of the Indian nations within the United States had been militarily neutralized.[17]

*Litigation.* With the end of military parity Indian nations and individual Indians began to enter the court systems of their colonizers for redress of grievances.[18] Intuitively, this made very little sense. One would hardly expect the courts of one's adversary to be impartial in deciding matters that might ultimately be against the national interest. Regardless, in the absence of warfare or diplomacy as viable means to resolve disputes with the colonists, litigation was pursued in the hopes of obtaining redress of grievances.

One of the earliest and most significant of these lawsuits involved the Mohegan Tribe, which entered the British courts in 1704 to obtain a ruling stating that they were rightfully in possession of

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11. Prucha, *supra* note 7, at 270-283.

12. *See generally* Prucha, *supra* note 10.

13. Felix S. Cohen, Handbook of Federal Indian Law xxvi-xxvii (1945).

14. *See* Vine Deloria, Jr. and Clifford M. Lytle, The Nations Within: The Past and Future of American Indian Sovereignty 10-11 (1984).

15. *See* Christine Bolt, American Indian Policy and American Reform: Case Studies of the Campaign to Assimilate the American Indians 25-28 (1987).

16. *See, e.g.* Robert V. Remini, Andrew Jackson and His Indian Wars 226-27 (2001).

17. *See* Prucha, *supra* note 7 at 437, 482, 560-561.

18. Vine Deloria, Jr. and Clifford M. Lytle, American Indians, American Justice 126-27 (1983).

disputed land located within the colony of Connecticut.[19] The case was contested for almost 70 years, and was finally decided against the Mohegans by the Crown in 1773.[20]

A similar action took place in the United States in 1831 when the Cherokee Nation brought suit against the State of Georgia in the Supreme Court.[21] The Cherokee Nation sought to invoke the Court's original jurisdiction,[22] which under the United States Constitution extends to cases "between a state, or the citizens thereof, and foreign states, citizens or subjects.[23] The Cherokees took the position that given that the United States had first recognized the independent statehood of the Cherokee Nation when it entered into the Treaty of Hopewell in 1795, the constitutional provision applied to them, enabling them to bring suit.[24] The Supreme Court, however, disagreed and dismissed the petition, holding that the Cherokee Nation did not constitute a "foreign state" for jurisdictional purposes.[25] Instead, the Court concluded that the Cherokee Nation was merely a "domestic dependent nation" for purposes of American law.[26]

Despite these early efforts to seek justice in American courts, few cases were brought by Indian nations. This was due in significant part to the fact that Indian nations were not viewed as having the capacity to bring suits in their own name due to their

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19. *See* Mark D. Walters, Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America, 33 Osgoode L.J. 785, 803 (1995).

20. *Id.* at 805. Between Old John Uncas, Young John Uncas, and Several Other Mohegan Indians, on the Behalf of Themselves and the Rest of their Tribe, by John Mason and Samuel Mason, the Trustees for and Guardians of the Said Tribe and the Governor and Company of the English Colony of Connecticut in New England in America, and Others. The Summary of the Case of the Respondents, the Landholders, [1770]. MSS 233., Bibliography of Native American Land Issues in Mashantucket Pequot Museum And Research Center Archives & Special Collections 9, http://www.pequotmuseum.org/uploaded_images/CC2DB15E-FC71-4988-BC3D-4481CE33CA70/landnew.pdf

21. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

22. *See id.* at 14.

23. U.S. Const. art. III, §2, cl.1. ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.")

24. *See* Cherokee Nation, 30 U.S. at 4-5.

25. *See id.* at 20.

26. *Id.* at 17.

"dependent" status.[27] Moreover, the sovereign immunity of the United States barred claims that Indian nations might bring against it.[28] For Indian nations to bring suit in American courts against the United States, Congress first had to enact specific authorizing legislation.[29] Congress enacted many of these authorizing statutes in the late 19th and early 20th centuries and focused primarily on actions brought in the Court of Claims.[30] It was not until 1966 that Indian nations were authorized to bring suit in federal court in their own name.[31]

*Lobbying.* In a broad sense, Indian nations have always lobbied American officials in attempts to gain favor and alter American policy. Early in European colonization, leaders from both the colonial governments and the Indian nations met regularly to discuss matters of mutual concern.[32] Indian nations routinely sent delegations to meet with Dutch, British, French, Spanish, and later, American officials, in an effort to influence government policy.[33] These diplomatic envoys could be said to be the first form of "lobbying" activity.

Presently, however, lobbying has come to mean more than merely engaging in formal diplomatic discussions. Lobbying reflects the process by which private parties – both individuals and organizations – seek to influence and otherwise persuade public officials to support their self-interested agendas.[34] This process has and continues to hinge on the transfer of money and political

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27. *Id.*

28. Indian Claims Commission Act, Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. 70-70v-3 (1988)).

29. *See, e.g.* Act of March 3, 1881, 46 Cong. Ch. 139, 21 Stat. 504 (authorizing suit involving "all questions of difference arising out of treaty stipulations" involving the Choctaw Nation).

30. *See id.; see also, e.g.* Act of June 28, 1898, 55 Cong. Ch. 517, 30 Stat. 495 (authorizing the Delaware Indians to bring suit against the Cherokee Nation in the Court of Claims with respect to the rights of the Delawares in land and funds in custody of the Cherokee Nation).

31. *See* Pub. L. 89-635, §1, 80 Stat. 880 (codified at 28 U.S.C. § 1362) ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.")

32. *See generally*, Prucha, *supra* note 10 at 23-24.

33. Francis Jennings, The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League xiii-xiv (William N. Fenton, Mary A. Druke, and David R. Miller eds., Syracuse University Press 2d ed. 1995).

34. *See, e.g. Id.* Code tit. 67, § 67-6602 (i) (2005). ("Lobby and lobbying each means attempting through contacts with, or causing others to make contact with, members of the legislature or legislative committees, to influence the approval, modification or rejection of any legislation by the legislature of the state of Idaho or any committee thereof.").

support to the public official in exchange for support of the lobbyist's agenda.[35] Unlike diplomacy, in which official diplomats engage in the lobbying process, lobbying is conducted almost exclusively by lawyers and non-lawyer representatives rather than the principal parties involved.[36]

It could be said that the era of Indian lobbying began in 1871, when the United States officially declared that it would no longer enter into treaties with Indian nations to address matters of mutual concern.[37] While some Indian nations have continued to appoint and send official ambassadors to the United States, these officials have not been formally received by the State Department in the manner accorded other foreign diplomats.[38] Nonetheless, Indian nations – both independently and through lobbying organizations – have intensified their efforts over the years to influence American officials.[39]

The most prominent lobbying organizations regarding Indigenous peoples' issues is the National Congress of American Indians ("NCAI"). Formed in 1944, the NCAI was founded for purposes of protecting treaty and sovereign rights of Indian nations.[40] Today, NCAI has over 250 member nations,[41] or nearly half of the 561 federally recognized Indian nations.[42] Other advocacy organizations focused on lobbying American officials on behalf of Indian concerns have formed over the years, including the Society for the American Indian, the Indian Rights Association, the National Indian Gaming Association, the United South and Eastern Tribes, the Native American Rights Fund, and the Morning Star Institute.[43]

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35. *See e.g.* Lobbying Disclosure Act (LDA) of 1995, 2 U.S.C. §§ 1601 et seq. (2006)

36. *See* "lobbying." Encyclopædia Britannica. 2006. Encyclopædia Britannica Premium Service. 10 Apr. 2006, http://www.britannica.com/eb/article?tocId=9370421.

37. *See* Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2000)) ("[H]ereinafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty.").

38. *See* 2 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 763-772 (1984).

39. *See, e.g.* Native Americans Gain Political Influence, Fox News, Dec. 2, 2003, available online at http://www.foxnews.com/story/0,2933,104526,00.html.

40. *See* NCAI, History, avalible at http://www.ncai.org/About_Us.8.0.html.

41. *Id.*

42. *See* http://www.doj.gov/bureau-indian-affairs.html.

43. For the National Indian Gaming Association, http://www.indiangaming.org/; For the United South and Eastern Tribes, http://www.usetinc.org/.; For the Native American Rights Fund, http://www.narf.org/; The Indian Rights Association ceased to exist in 1994; For the Morning Star Institute, http://www.divinehumanity.com/home.html.

These organizations monitor political activity and formulate strategies for influencing the political process in favor of their constituencies.[44] Because so much of what affects the fate of Indian nations emanates from the federal government, most lobbying activity has been directed towards influencing the Congress and the Executive branch, with particular emphasis on the Bureau of Indian Affairs within the Department of the Interior.[45]

In recent years, however, lobbying activity conducted by Indian nations has increased significantly at the state level.[46] Not surprisingly, this increase dovetails with the emergence of Indian gaming as the primary form of economic development within Indian country.[47] Because states hold veto power over Class III gaming activities conducted by the Indian nations within their boundaries,[48] Indian nations have aggressively sought to influence state officials. Overall, the growth in lobbying expenditures by Indian nations is staggering, rivaling that of the largest corporations in America.[49]

In addition to the focus on lobbying federal and state officials, some Indigenous peoples in the United States have also sought to influence international affairs. With the emergence of international organizations such as the League of Nations and the United Nations, some Indigenous nations – most notably the Haudenosaunee, or Six Nations Iroquois Confederacy – have pursued admission as a member state.[50] While this effort has not been successful,[51] in recent years American Indians – led by such non-governmental organizations as the Indian Law Resource Center – have promoted

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44. *See* NCAI, *supra* note 40.

45. *See, e.g.*, Controversial lobbyist had close contact with Bush team," USA Today, May 6, 2005, availible at http://www.usatoday.com/news/washington/2005-05-06-abramoff-bush_x.htm.

46. Russ Lehman, The Emerging Role of Native Americans in the American Electoral Process, 22-25 (2003), http://www.first-americans.net/ElectorP.pdf.

47. *See*, Controversial lobbyist, *supra* note 45.

48. *See* Seminole Tribe v. Florida, 517 U.S. 44, 48-49 (1996) (holding that states have a duty to negotiate but that Indigenous nations retain no remedy for breach such duty).

49. *See* Casinos/Gambling: Long-Term Contribution Trends, http://www.opensecrets.org/industries/indus.asp?Ind=N07 (Gaming interests gave approximately $15 million in 2002); also *see* Top All-Time Donor Profiles, http://www.opensecrets.org/orgs/list.asp?order=A (the top donor corporation gave $36 million, placing combined gaming interests among the highest donors).

50. *See* Grace Li Xiu Woo, Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations, 1 Law, Social Justice & Global Development Journal (2003), at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/woo/woo.rtf.

51. *See id.*

the adoption by the United Nations General Assembly of a Declaration governing the rights of Indigenous peoples.[52]

*Participation in the American Political System.* Indian advocacy groups have recently advocated participation in the American political system through voting and holding office.[53] As with lobbying, this development coincides with the emergence of gaming as a lucrative economic opportunity for some Indian nations.[54] Voting, of course, is not as heavily dependent upon possessing economic resources as is lobbying. But the efforts to "get out the Native vote" have been intensified by those with powerful economic and political agendas who seek to capture and develop a new and previously undeveloped voter block.[55] To date, the Democratic Party has paid the most attention to the development of Indian voters.[56]

For many reasons, Indians have not historically participated in American politics or run for American public office. The foremost reason is that Indians did not start becoming American citizens in significant numbers until the latter half of the 19th century.[57] Moreover, it was not until 1924 that all Indians became American citizens when Congress unilaterally naturalized all Indians, those then living and yet to be born.[58]

Yet, even with citizenship status, Indians infrequently exercised their political rights.[59] In some cases state laws that created burdens restricting the ability of Blacks to vote, such as literacy tests and poll taxes, also served to preclude Indians who might have been inclined to vote in American elections.[60] Ultimately, however, the desire to vote in American elections and run for American political office was restrained by the sense of exclusive political loyalty to one's own

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52. *See* http://www.indianlaw.org/united_nations.html.

53. *See, e.g.* National Congress of American Indians (NCAI), Native Vote Campaign, http://www.nativevote.org/; *see also* First American Education Project, NativeVote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved, 49 (2004), http://www.first-americans.net/Native%20Votes%20Report%2004.pdf. [hereinafter NativeVote 2004].

54. *See id.* at 4.

55. *See id.*

56. Lehman, *supra* note 46 at 17-19.

57. *See* Prucha, *supra* note 38 at 659-687.

58. *See* Act of June 2, 1924, 68 Pub. L. 175, 68 Cong. Ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(a)(2) (2005)).

59. *See generally* Orlan J. Svingen, Jim Crow, Indian Style, 11 American Indian Quarterly 275, 279 (1987); *see also* Helen L. Peterson, American Indian Political Participation, 311 Annals of the American Academy of Political and Social Science 116, 121-22 (1957).

60. *See* Peterson at 121.

Indian nation.[61] Until recently, it was understood that participating in the American political system could be construed as *de facto* abandonment of one's separate political status and treaty rights.[62]

In recent years, however, Indians have been participating in the American political system in increasing numbers. While the statistics evidencing this trend are elusive, it has been alleged that the "Native American" voter turnout is contributing to the election of "Indian-friendly" politicians.[63] In 2000, a Cherokee Indian, Brad Carson, was elected to Congress from Oklahoma.[64] Along with Cheyenne Indian Ben Nighthorse Campbell of Colorado,[65] the number of Indians in Congress increased to two.[66] In addition, there have been numerous Indians elected to state and statewide offices across the United States.[67] And in a few local districts, Indians control county wide offices such as Sheriff and District Attorney, and even, in a least one case, a county legislature in South Dakota.[68]

*Disobedience.* In addition to litigating, lobbying, and participating in the American political system, Indians have also engaged in what I call "tribal disobedience" to protect and defend their sovereign interests. This more aggressive approach to advocacy is akin to "civil disobedience" in the civil rights context, but is distinct in that it involves action taken by Indian nations and groups of Indians to safeguard their inherent and treaty-recognized rights.

A more refined definition of tribal disobedience can be derived from the foundational elements of what constitutes civil disobedience. Civil disobedience has been described as –

> an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have

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61. *See* Lehman, *supra* note 46 at 5.

62. *See* Robert B. Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples, 15 Harv. BlackLetter L.J. 107, 158-161 (1999).

63. *See* NativeVote 2004, *supra* note 53 at 4-7.

64. *See* http://www.fec.gov/pubrec/fe2000/okh.htm (election results for Oklahoma in 2000)

65. *See* http://www.powersource.com/campbell/default.html (profile on Sen. Campbell). Senator Campbell retired from the Senate in 2004.

66. Elizabeth Levitan Spaid, Native Americans Gaining New Electoral Ambitions, Christian Science Monitor, Oct. 21, 1992 at 7.

67. *See, e.g.* S.D. county elects Native leaders, Indianz.com, Nov. 8, 2002, avalible at http://indianz.com/News/show.asp?ID=2002/11/08/bennett.

68. *Id.*

> serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.[69]

From this definition, the contours of an act of civil disobedience emerge. Such an "act must be nonviolent, open and visible, illegal, and performed for a moral purpose to protest an unjust law or to object to the *status quo* and with the expectation of punishment."[70] As a result, certain acts do not posses the attributes necessary to constitute civil disobedience. "Mere dissent, protest, or disobedience of the law are not enough to qualify as civil disobedience."[71] On the other hand, purely violent acts go far beyond the concept of civil disobedience and fall into the realm of criminal activity.

Tribal disobedience is related to civil disobedience in that both are designed to protest the application of unjust laws. But tribal disobedience differs by virtue of its more narrow application to protests on behalf of Indigenous people. Moreover, the nature of the "unjust" laws at issue with respect to tribal disobedience relates specifically to the infringement by the colonizing government on the inherent and treaty-protected rights of sovereignty and self-determination. The acts of tribal disobedience are public and illegal, and generally, but not always, non-violent.

## II. EXAMPLES OF TRIBAL DISOBEDIENCE

It might be said that the era of tribal disobedience in the United States began when the period of formal warfare against the Indians ended. Pursuant to treaties entered into with the United States throughout the late 18th and 19th centuries, Indian nations invariably promised to live in peace with the Americans and not to exercise their inherent sovereign right to engage in warfare against them.[72] As a result, the treaties foreclosed official military action against the United States even if circumstances otherwise justified it. While this negotiated peace might have helped the Indian nations avoid direct military campaigns and further losses, it also caused the

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69. Carl Cohen, Civil Disobedience: Conscience, Tactics, and the Law 39-40 (1971).

70. Susan W. Tiefenbrun, On Civil Disobedience, Jurisprudence, Feminism and the Law in The Antigones of Sophocles And Anouilh, 11 Card. Stud. Law & Lit. 35, 36 (1999) (italics added).

71. *See id.*

72. *See generally* 2 Indian Affairs: Laws And Treaties (Charles J. Kappler ed., Government Printing Office 1904).

Indian nations to lose much of their ability to resist non-military encroachments such as illegal trespassing by the United States and its citizens.[73] Even in the face of overtly hostile actions by the American government – typified by such policies as Removal,[74] Allotment,[75] and forced assimilation through boarding schools[76] – the agreement by the Indian nations to live in peace put them at the mercy of the Americans.

This result became painfully obvious during the mid-20th century when the United States embarked upon its Termination Policy. This policy held as its fundamental purpose the elimination of Indigenous nation sovereignty and the full integration of all remaining Indigenous peoples into American society.[77] Given that all Indians became collectively naturalized as American citizens without their consent in 1924, "termination" involved the process of withdrawing federal recognition of tribal status and allotting any remaining tribally-owned lands.[78] This process did not occur through direct force, although it was threatened.[79] Indian nations that were "terminated" were coerced into accepting the relinquishment of their tribal status in exchange for some monetary payment and, or, land grants.[80] Invariably, this payoff materialized as a *per capita* distribution of the commonly-held tribal lands and financial assets.[81] By the time the American government implemented the Termination policy, Indian nation sovereignty had eroded so severely in the hearts and minds of many Indians that they were willing to accept money for the dissolution of their tribal nations and the relinquishment of their status as citizens of separate sovereign nations.[82]

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73. *See* Prucha, *supra* note 7 at 560-561 (detailing the collapse of the ability of Indigenous peoples to militarily resist the United States).

74. *See id.* at 183.

75. *See* Prucha, *supra* note 38 at 659.

76. *See id.* at 687.

77. *See id.* at 1013.

78. *Id.* at 1014.

79. *See* Kenneth R. Philp, Termination Revisted 165-166 (1999).

80. *See* Prucha, *supra* note 38 at 1049-51.

81. *Id.* at 1048.

82. *See* Menominee Indian History 1900-1959, available at http://www.menominee-nsn.gov/history/history/1900-1959.asp ("The Tribe petitioned Congress for a $1500 per capita payment of the award monies for each of the 3,270 enrolled Menominees. The request passed the House but when it reached the Senate it ran into a road block. Senator Watkins (R: Utah) attached a provision to the bill. This required the Tribe to accept the termination of federal supervision in order to get the payment they requested.").

However, as a general matter Indians did not support the Termination Policy. Various movements emerged in the 1950s that reflected both a backlash against the Termination policy and the development of an offensive strategy designed to revive tribal sovereignty before it was completely extinguished.[83] These resistance movements were direct challenges to the legal and political threats that the United States presented.

*Blackfeet Removal of BIA Officials.* One of the more prominent episodes of resistance to the Termination Policy involved the efforts of the Blackfeet Indians in Montana to achieve greater self-determination following World War II. The Commissioner of Indian Affairs at the time, Dillon Myer, firmly believed in the superiority of American philosophy and democratic institutions and thought that all people – including Indians – should adopt them.[84] Myer also believed that Indian culture was inferior and should be eradicated.[85] Both assimilation-minded non-Indians, like Myer, and many Indians themselves share the general belief that Indians should be liberated from federal government paternalism.[86] The difference, however, was that Indians sought to preserve self-government, while federal officials sought its elimination.

Following the establishment of their government under the Indian Reorganization Act (IRA),[87] the Blackfeet engaged in a series of questionable financial dealings that jeopardized the federal funds in their control.[88] While there may have been merit to some of the charges leveled against the Blackfeet Council by U.S. Interior Department officials,[89] the problems also appeared to be the direct result of the paternalism inherent in the Blackfeet IRA constitution.[90] This constitution, like all of the IRA constitutions adopted by nearly 200 Indian nations, preserved an intrusive and heavy-handed federal government presence in tribal decision-making.[91] The Blackfeet rebelled against these measures and sought a greater degree of

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83. *See* Prucha, *supra* note 38 at 1050-1085.

84. *See* R. Warren Metcalf, Termination's Legacy: The Discarded Indians of Utah 5 (2002).

85. *See* Philp, *supra* note 79 at 93-94, 168.

86. *See* Metcalf, *supra* note 84 at 78-80.

87. 25 U.S.C.S. § 461 et seq. (2005).

88. *See* Philp, *supra* note 79 at 126.

89. *Id.*

90. *See id.*

91. Philp, *supra* note 79 at 68-70. For example, federal officials cited the Blackfeet with mismanagement because the Blackfeet Council deposited $76,000 in a local bank without federal approval. *Id.* at 127. The Tribe's constitution only authorized them to handle $5,000 per transaction. *Id.*

autonomy over their own affairs. A struggle ensued with federal officials that resulted in efforts to amend the constitution over the objection of Commissioner Myer.[92]

The Blackfeet Council, led by Chairman George Pambrun, sought to take greater control over management of Blackfeet finances and other programs, such as the cattle repayment program and the handling of grazing leases.[93] Pambrun eventually went to Washington to testify before Congress about the mismanagement by Myer and other Interior Department officials.[94] Upon returning, Pambrun led the effort to take back control of a warehouse and other federal government buildings at the agency headquarters on the reservation.[95] Assisted by tribal attorney Felix Cohen, Pambrun directed Indian police to issue eviction notices to the federal employees working in the agency headquarters.[96] The Blackfeet Tribe's position was that the buildings were owned by the Tribe because of an offset from a prior settlement award and that the federal government, at least, should be paying rent to the Tribe.[97]

The BIA superintendent, Guy Robertson (who had previously served as director of a Japanese internment camp), threatened to arrest the Indians, their attorney, and even kill a tribal employee if the Blackfeet didn't stop the protest.[98] Eventually, Commissioner Myer intervened and insisted that the buildings remain under federal jurisdiction.[99] He nonetheless conceded that the Blackfeet had at least an "equitable interest."[100] This episode led to a more aggressive approach by Commissioner Myer, who later sought to organize the mixed-blood-hating full-blood Blackfeet for purposes of increasing his power over the Tribe.[101] While these strong-arm tactics made life difficult for the Blackfeet and other Indians subject to the pressures of the Termination Policy, Myer's approach drew the attention of the Congress.[102] As a result, it became more difficult for him to achieve

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92. *See id.* at 134-139.
93. *See id.* at 129-130.
94. Interior Department Appropriations for 1952: Hearings before the Subcommittee of the Committee on Appropriations, 82 Cong. 1228-29 (1951) (statement of George Pambrum).
95. See Philp, *supra* note 79 at 130-131.
96. *See id.* at 125.
97. *See id.* at 125, 130.
98. *See id.* at 131.
99. *Id.*
100. *Id.*
101. *See id.* at 135-138.
102. *See id* at 133.

his vision of terminating tribal sovereignty and transferring control of Indians and Indian territory to the states.[103]

*Fishing Rights Protests.* The simple act of fishing constituted some of the first most nationally prominent acts of tribal disobedience. Beginning in the mid-1960s, Indians in the Pacific Northwest began to assert their treaty rights to take fish.[104] These so-called "fish-ins" were led by the National Indian Youth Council and the Survival of American Indian Association.[105] The tribal disobedience was rooted in the claim that the treaties preserved a right to fish in waters located on lands that had been ceded.[106] Indians fished out of season, using techniques prohibited by state law, and took fish in excess of state-imposed bag limits.[107] Not surprisingly, local Whites were outraged by the flagrant disregard of state fishing regulations, which led to violent clashes and legal action.[108] Eventually, federal court actions vindicated the rights of the Indians.

One such "fish-in" took place in the Great Lakes area when Chippewa and Ottawa Indians began to take large quantities of white-fish and lake trout otherwise prohibited by state regulations.[109] The Indians referred to their right to fish in this manner as "treaty fishing."[110] Several court cases were brought by angry Whites in an effort to stop the treaty fishing.[111] The first court case in Michigan was brought in 1965, when William Jondreau, a member of L'Anse Chippewa band, argued that he was not subject to state laws by virtue of the Treaty of September 30, 1854.[112] Jondreau won the case in the Michigan Supreme Court in April 1971,[113] thus opening the door for other cases to follow. While not all of the cases brought were successful, eventually, the right of Indians to fish in waters

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103. *See id.* at 139.

104. *See* Robert Doherty, Disputed Waters: Native Americans and the Great Lakes Fishery 67 (1990).

105. *Id.*

106. *Id.*; *see also, e.g.* David E. Wilkins, American Indian Politics and the American Political System 213 (2002).

107. *See* Wilkins, *supra* note 106 at 213.

108. *See* id at 217.

109. Doherty, *supra* note 104 at 5.

110. *Id.*

111. *See, e.g.* Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165, 174-75 (1977); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 352-353 (7th Cir. 1983); and U.S. v. Michigan, 424 F.3d 438, 441-42 (6th Cir. 2005) (these cases recognized the Indigenous right to fish, finding that such rights had been retained during treaty negotiations).

112. People v. Jondreau, 384 Mich. 539, 541-43 (1971).

113. *Id.* at 552.

outside of their territory was upheld by the state and federal courts.[114]

The conflicts with Whites spawned by these acts of tribal disobedience focused most pointedly on Indian use of gill nets.[115] White sports fishermen engaged in a variety of acts designed to thwart the fish-ins, such as destroying boats and gear, threatening physical injury, and engaging in "night-riding vigilantism."[116] Verbal assaults were frequent during confrontations and anonymous phone calls were made to businesses that bought and sold Indian-caught fish (e.g. threatening to burn these businesses down).[117] Eventually, the Michigan governor became involved and issued warnings about harms that could be realized if the conflicts continued, specifically violence, negative environmental impacts, and financial harm.[118] The anti-Indian movement, however, couched their actions opposing Indian treaty fishing on the grounds of conservation.[119] Eventually, however, the exercise of treaty fishing rights by Indians became more normalized and violence was no longer a serious threat.[120]

*Takeover of Alcatraz Island.* The occupation of Alcatraz Island on November 20, 1969[121] is perhaps the most famous example of Indigenous civil disobedience. This occupation was the third and most successful attempt to take the Island back from the U.S. government.[122] The Indian community of the Bay Area organized the occupation in response to the San Francisco Board of Supervisors' continued neglect of the educational needs of American Indian students.[123] The demonstrators also wished to use Alcatraz as a powerful and unifying force among the urban Indian community.[124] The second occupation began on November 9, 1969 when Indians – calling themselves the Indians of All Tribes – crossed the bay and

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114. *See, e.g.* T. LaDuke, 1837 Treaty Rights upheld in U.S. Supreme Court, De Bah Ji Mon, 1, 15 (1999).

115. *See* Doherty, *supra* note 104 at 6, 100.

116. *Id.* at 6.

117. *Id.*

118. *Id.*

119. *See, e.g.* John Bickerman, Parties in United States v. Michigan, 1836 Treaty Great Lakes Fishing Issue, Agree to 20 Year Settlement, http://www.michigan.gov/dnr/0,1607,7-153-10364_36925-35091--,00.html. *See also* Mission Statement, http://www.perm.org ("PERM believes that our public resources should be managed for the benefit of ALL ...)

120. *See* Prucha, *supra* note 38, at 1186.

121. Troy R. Johnson, The Occupation of Alcatraz Island: Indian Self-Determination and the Rise of Indian Activism 50 (1996).

122. *Id.* at 4.

123. *Id.* at 51.

124. *Id.*

landed on Alcatraz.[125] The Indians left after being advised that they had a chance to get off of the island without being charged with breaking and entering and trespassing on federal property.[126]

As mentioned above, the most notable of the Alcatraz occupations was the third, beginning on November 20, 1969 and lasting nineteen months through June 11, 1971.[127] The main goal of the occupation was to further the local Indian community's requests for a cultural center and an Indian university.[128] Approximately one hundred Indian people participated in the occupation of Alcatraz Island, eighty of which were Indian students at the University of California's Los Angeles campus.[129] The U.S. government first asked the people to leave and attempted to barricade the island,[130] but this proved unsuccessful.[131] The occupiers were committed to staying on Alcatraz, gaining the deed to the island, an Indian university, a cultural center, and a museum.[132]

Ignoring the *Indians of All Tribes'* request for formal negotiations, the United States government chose instead to wait for the movement to disintegrate from within and lose support from those outside.[133] Eventually, President Nixon approved a removal plan.[134] On June 10, 1971, a group composed of armed federal marshals, FBI agents, and Special Forces police removed the remaining occupants.[135] While the demands of the group were never met, this act of civil disobedience had tremendous impact, including bringing awareness to the Indian's desperate situation, influencing government policy on tribal self-determination, and giving a unified voice to the Indian cause.[136]

*The Trail of Broken Treaties Caravan and Takeover of the BIA Building.* Inspired by the Alcatraz takeover, an Indian movement known as The Trail of Broken Treaties Caravan took over the BIA

125. *Id.* at 63.
126. *Id.* at 62.
127. Dr. Troy Johnson, The National Park Service, The Indian Alcatraz Occupation, http://www.nps.gov/Alcatraz/indian.html.
128. *Id.*
129. *See* American Indian Activism: Alcatraz to the Longest Walk 27-28 (Troy Johnson, Joane Nagel, and Duane Champagne eds., 1997) [hereinafter American Indian Activism].
130. *See id.* at 29.
131. *Id.*
132. *Id.*
133. *See id.* at 168.
134. Johnson, *supra* note 128.
135. *See* American Indian Activism, *supra* note 130 at 176.
136. *See id.* at 285.

building in 1972.[137] The protest came to life during the Rosebud Sioux summer festival in late August.[138] The planners of the Caravan sought to bring national attention to Indigenous issues and to encourage political leaders to be more sensitive and responsive to the plight of Indian people.[139] The planners believed that because a presidential election was to take place that November, they could garner significant media attention and support for their cause during the month preceding the election.[140] Moreover, this action occurred at a time when mass protests were a common form of activism that translated into tangible results.[141]

In September 1972, leaders of Indian activist groups met in Denver to officially plan the Caravan.[142] The takeover was orchestrated by eight different Indian organizations, including: the American Indian Movement ("AIM"), the National Indian Brotherhood (a Canadian organization), the Native American Rights Fund, the National Indian Youth Council, the National American Indian Council, the National Council on Indian Work, the National Indian Leadership Training, and the American Indian Committee on Alcohol & Drug Abuse.[143] Four additional groups were not involved in the planning stages, but supported the Caravan's purpose and plans, including the Native American Women's Action Council, United Native Americans, National Indian Lutheran Board, and the Coalition of Indian-Controlled School Boards.[144] Media attention, however, focused most intensely on AIM because of its history of armed resistance.[145]

The plan was for the Caravan to travel from three different cities on the West Coast to Washington, D.C.[146] They planned to participate in annual Indian ceremonies and festivals along the way and to cross historic areas, such as the Sand Creek and Wounded Knee massacre sites and the Trail of Tears.[147] The organizers

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137. *See* Vine Deloria, Jr., Behind the Trail of Broken Treaties: An Indian Declaration of Independence 43, 46, 54 (1985).

138. B.I.A. I'm Not Your Indian Anymore 2 (Akwesasne Notes 1976); Mark Grossman, The Native American Rights Movement 368 (1996).

139. *See id.*

140. *Supra* note 139

141. *See id.* at 248.

142. *Supra* note 139

143. *Id.*; Grossman, *supra* note 139 at 368.

144. *See* Deloria, *supra* note 137 at 41.

145. *See, e.g.* William T. Martin Riches, The Civil Rights Movement: Struggle and Resistance, 157-160 (1988).

146. *Supra* note 139 at 3.

147. *See* Riches, *supra* note 146 at 158-59.

specifically invited all Indians to join the caravan, "excluding all persons who would 'cause civil disorder, block traffic, burn flags, destroy property, or shout obscenities in the street.'"[148]

On October 6, 1972, the journey began.[149] When they reached Minneapolis, more Indians joined the Caravan and the AIM leaders wrote the Twenty Points paper.[150] The paper detailed the purpose of the trip and the goals of the AIM activists, with an emphasis on promoting Indian nation sovereignty.[151] The paper set forth various demands, including the repeal of the 1871 federal statute that ended treaty making and a return to treaty negotiations as the central method of dealings between tribes and the federal government.[152]

Eventually, the Caravan – numbering nearly 1000 Indians – reached Washington at the beginning of November.[153] Despite advance planning, they found a lack of accommodations when they arrived, so they decided to go to the BIA offices.[154] Security guards attempted to drive out the mass of Indians that were assembling but were unable to do so.[155] At that point, the Indians took over the building.[156] The Caravan occupied the BIA for nearly a week before disbanding.[157] Negotiations with President Nixon's staff produced promises to consider and implement the Twenty Points paper.[158] These promises, however, were never kept.[159] All of the occupying Indians were granted immunity from prosecution and any civil liability and, in a few instances, they were given transportation back to their home communities.[160] Although the Caravan of Broken Treaties did not lead to induce specific changes in U.S. Indian policy, it can be said to have precipitated the emergence of the government's Self-determination Policy.[161]

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148. *Supra* note 139 at 3.
149. Deloria, *supra* note 137 at 47.
150. *Id.* at 48.
151. *Id.*
152. *Id.* at 48-53.
153. *Id.* at 53.
154. *See* James E. Officer, The Bureau of Indian Affairs Since 1945: An Assessment, 436 Annals of the American Academy of Political and Social Science 61, 69 (1978).
155. *Id.*
156. *Id.* at 69; *see generally* Laura Waterman Wittstock and Elaine J. Salinas, A Brief History of the American Indian Movement, http://www.aimovement.org/ggc/history.html.
157. *See* Officer, *supra* note 155 at 69.
158. *See* Prucha, *supra* note 38 at 1111-15.
159. *See id.* at 1118-1119.
160. *Id.*
161. *Id.*

*Gaming and Sales of Tobacco and Motor Fuel.* Beginning in the 1970s, Indian nations and individual Indians began conducting two forms of economic activities that greatly threatened state officials and non-Indian business owners.[162] The first involved the sale of tobacco products and motor fuel without the collection of state sales tax.[163] Because Indians are not taxable by the states with respect to activities taking place in tribal territory,[164] Indians were able to purchase large quantities of cigarettes and gasoline without the payment of any state sales taxes.[165] These goods ordinarily carry a heavy state tax and thus, the resale of these goods to non-Indians created a considerable market opportunity.[166] Non-Indians would drive for miles to purchase tax-free products from Indian smokeshops and gas stations.[167]

Eventually, however, the Supreme Court intervened to frustrate this commerce. In a series of rulings beginning in 1976,[168] the Court reinterpreted the rules governing the application of state power in Indian country to allow states to tax this commerce. Although the exemption for Indians purchasing goods for their own consumption was sustained, the Court concluded that Indians, as well as Indian nations, should be required to collect state-imposed taxes on sales made to non-Indians.[169]

This alteration in the legal landscape changed things considerably. Few Indians went out of business because too much revenue was being generated.[170] Instead, tribal governments entered into tax compacts with the states.[171] In these compacts the Indians agreed to either impose their own sales tax or collect the state sales tax on the retail transactions.[172] Whatever was collected was to be

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162. *See* Robert B. Porter, Indian Gaming Regulation: A Case Study in Neo-Colonialism, 5 Gaming L. Rev. 4:299-309.

163. *See, e.g.* American Indian Policy Review Commission, Task Force Four, U.S. Govt. Printing Office, Report on Federal, State, and Tribal Jurisdiction, 104-105 (1976).

164. *See, e.g.* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458-59 (1995).

165. *See id.*

166. *See, e.g.* Luke R. Spellmeier, A Winning Hand or Time to Fold? State Taxation of Fuel Sales on Kansas Indian Reservations, 43 Washburn L.J. 141, 142 (2003).

167. Agnes Palazzetti, Senecas and State Still Attempting to Avoid Confrontation, Buffalo News, Mar. 27, 1997 at 1B.

168. *See* Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976).

169. *See id.* at 482-83.

170. *See* Matthew L.M. Fletcher, The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements, 82 U. Det. Mercy L. Rev. 1, 4 (2004).

171. *See, e.g.* Tribal-State Compacts in Michigan, http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html.

172. *See* Fletcher, *supra* note 171 at 26-36.

shared with the state.[173] In addition, states were given specific information regarding the volume of transactions occurring so they could more easily identify illegal activities occurring within the state.[174] By the late 1980s, all states but New York had entered into some kind of tax agreement with the Indian nations located within their boundaries.[175]

The second economic activity that posed a threat was gaming. Gaming developed as a response to the dire financial situation in which most Indian nations found themselves during the late 20th century.[176] Congress had cut funding substantially to the BIA and other federal agencies that served Indians.[177] The decision to engage in gaming activities was controversial because an overwhelming number of states had made commercial gaming illegal.[178] Tribes staunchly defended their sovereign right to conduct gaming activity within their borders.[179] Statistics illustrating the increasing popularity of gaming show that between 1985 and 1995, the number of bingo halls decreased from 180 to 102, but tribes with full-scale casinos grew from 20 to 61.[180] In 1987, the U.S. Supreme Court upheld the right of Indian nations to conduct such gaming activities,[181] which led to an even greater increase in tribal, and individually owned, casino operations.[182] Not surprisingly, the federal government responded quickly, enacting the restrictive Indian Gaming Regulatory Act (IGRA) the following year.[183]

Notwithstanding the intense regulation to which Indian gaming is subject, controversy between anti-gaming interests and Indian nations has continued.[184] In 1996, New Mexico declared that several tribal casinos were operating in violation of the law because the gaming compacts with the state had never been approved by its

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173. *Id.*

174. *Id.*

175. *See* "Piecing Together State-Tribal Tax Puzzle," National Conference of State Legislatures, http://www.ncsl.org/programs/fiscal/sttribe_tax.htm ("Nearly every state that has Indian lands within its borders has reached some type of tax agreement with the tribes.").

176. Encyclopedia of American Indian Civil Rights 144 (James S. Olson, Mark Baxter, Jason M. Tetzloff, and Darren Pierson eds., 1997) [hereinafter Indian Civil Rights].

177. *Id.*

178. *Id.* at 144-45.

179. *Id.* at 145.

180. *Id.*

181. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-22 (1987).

182. Indian Civil Rights, *supra* note 177 at 145.

183. *See* Pub. L. 100-497, § 2, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 et seq.).

184. George Johnson, Dispute Over Indian Casinos in New Mexico Produces Quandary on Law and Politics, N.Y. TIMES, Aug. 18, 1996, at 24.

legislature.[185] Despite being declared illegal, many of the Pueblos continued to operate their casinos.[186] When told they had to close down their gaming facilities by January of 1996 or risk seizures of their operations, nine of the eleven gaming tribes brought suit in Federal Court claiming that the gaming agreements had been signed and were binding.[187]

Some tribes threatened to engage in tribal disobedience in addition to seeking legal action.[188] Specifically, the New Mexican Pojoaque Pueblo and Isleta Pueblo threatened to block the portions of state highways (including Interstate highways 10, 25, and 40) passing through their land when and if forced to close their casinos.[189] Randy L. Jiron, the First Lieutenant Governor of Isleta Pueblo stated, "[i]f it comes to going to jail or prison or dying on the line, we have to make a stand. Otherwise, we might as well kiss sovereignty goodbye."[190] Eventually, the Pueblos agreed not to obstruct traffic and to close their casinos if the agreements were found to be illegal.[191] Although agreement was seemingly reached, Federal District Court Judge Martha Vasquez stayed her decision, (which found the gambling pacts between states and tribes illegal) pending the appeal of the case, effectively allowing the "illegal" gaming to continue.[192] An agreement was finally reached in 1997 that legalized the casinos and required the Pueblos to pay 16% of their total revenues to the state.[193]

*Highway Blockage by Seneca Indians.* In 1992, Seneca Indians in New York State retaliated against the State's efforts to shut down their tax-free sales of tobacco products and motor fuel by blocking the two interstate highways crossing Seneca territory.[194] The action arose following a ruling by a State appellate court that affirmed the State's right to impose its sales taxes on on-reservation retail transactions.[195] While the ruling merely affirmed U.S. Supreme

185. *Id.*; Indian Civil Rights, *supra* note 177 at 145-46.

186. *See* Johnson, *supra* note 185.

187. *See id.*

188. *Id.*

189. *Id.*; *see also* Indian Civil Rights, *supra* note 177 at 146.

190. George Johnson, New Mexico's Indian Tribes Vow to Defy Move to Close Casinos, N.Y. TIMES, Dec. 21, 1995, at A18.

191. Johnson, *supra* note 185.

192. *Id.*

193. Brett Pulley, New Mexico and Tribes Quarrel Over Casinos, N.Y. TIMES, Feb. 27, 1999, at A8.

194. *See* Associated Press, Senecas Clash With Police Over Tax Ruling, N.Y. Times, July 17, 1992 at B4.

195. *See* Milhelm Attea & Bros. v. Department of Taxation & Fin., 181 A.D.2d 210, 212 (N.Y. App. Div. 1992).

Court decisions that had been in place for nearly twenty years,[196] it was the first time that a court had granted an injunction in favor of the State.[197] For nearly ten years, both individual Senecas and the Seneca Nation government had aggressively entered the retail cigarette and gasoline markets.[198] Hundreds of jobs were tied to this commerce.[199] The injunction imposed on such sales by the State court, effectively an embargo, ended all retail sales and precipitated an especially aggressive response.[200]

Initially, however, Senecas protesting the State's actions only sought to inform non-Indians of how the State's actions were affecting the Seneca economy and government operations.[201] Very quickly, however, these protestations became more dangerous as some Senecas lit tires and debris, and threw such debris off of the New York State Thruway (I-90) running through the Cattaraugus Territory, forcing its closure.[202] State police mobilized, precipitating a violent confrontation in which several Indians and troopers were injured.[203] I-90 was blocked for several hours, requiring traffic to be rerouted.[204] The next day, the protest spilled over to the Allegany Territory, where several hundred Senecas blocked the Southern Tier Expressway for over a day.[205] The disobedience ended only after a State Court of Appeals judge lifted the injunction.[206]

New York went on to lose the case in the New York State Court of Appeals[207] but prevailed in the U.S. Supreme Court.[208] Nonetheless, the State has never been able to collect any taxes from this commerce.[209] In 1997, several of the traditional *Haudenosaunee*

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196. *See* id at 211-12.

197. *See id.*

198. *See* Eduardo Porter, Indian Web Sales Of Taxless Tobacco Face New Pressure, N.Y. Times, Sep. 26, 2004, §1, at 1.

199. *See id.*

200. *See e.g.* Jim Adams, Reborn NYS Tax Crisis is 10 Years in the Making, Indian Country Today, October 10, 2003, http://www.indiancountry.com/content.cfm?id=1065807604.

201. *See* Associated Press, *supra* note 194.

202. *See id.*

203. *See id.*

204. *Id.*

205. Lindsey Gruson, New Betrayal, Senecas Say, and New Rage, N.Y. Times, July 18, 1992 at 25.

206. *See* Terri Theiss, News Currents, Christian Science Monitor, July 20, 1992 at 2.

207. Milhelm Attea & Bros. v. Department of Taxation & Fin., 81 N.Y.2d 417, 427-28 (1993); 615 N.E.2d 994, 998-99 (1993).

208. *See* Dept. of Tax & Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 78 (1994).

209. *See e.g.*, Zogby Poll's Rallying Call For Tax Sovereignty, Indian Country Today, March 10, 2006, http://www.indiancountry.com/content.cfm?id=1096412626.

governments entered into a tax compact that would have regulated individual Indian businesses for the first time.[210] The Indian businesses, as well as the elected Seneca and Mohawk governments, opposed this proposed agreement.[211] More protests were launched, including periodic blocking of the interstate highways at the Seneca and Onondaga Nations.[212] After six weeks of trying to implement the agreement, the State capitulated.[213] Since that time, the Indians have expanded their tax-free commerce to the Internet, but the State has yet to collect any tax revenue despite continued effort.[214]

*Resistance to State Revenue Sharing by Mescalero Apaches.* In 1997, the New Mexico Mescalero Apache Tribe was presented with the same gaming compact problem as the other pueblos in the State.[215] The Apaches, however, refused to enter into the compromise agreement with New Mexico, the terms of which provided that the Apaches would pay the State 16% of their annual slot-machine proceeds.[216] The Tribe took the position that this payment was an illegal tax prohibited by IGRA and told the Governor that no payments would be forthcoming.[217] The State responded with a letter to the Tribe notifying them of their breach and seeking to invoke the arbitration clauses of the compact.[218]

Five months later, New Mexico Governor Gary Johnson agreed that the 16% revenue sharing requirement might be too high and thus illegal under IGRA.[219] He said that IGRA called for negotiations between Indian nations and states, and that in New Mexico's case, the State legislature had set the payment requirement without any meaningful negotiations.[220] He also stated, "[c]learly the Indians have a case that they don't owe the state of New Mexico

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210. *See* Joseph J. Heath, Review of the History of the April 1997 Trade and Commerce Agreement Among the Traditional Haudenosaunee Councils of Chiefs and New York State and the Impact Thereof on Haudenosaunee Sovereignty, 46 Buff. L. Rev. 1011, 1013 (1998).

211. *See id* at 1014-15, 1033-34, 1036.

212. *See* Dana Milbank, Native Americans' State Tax Breaks Provoke Disputes --- Indian Merchants in New York Can Offer Big Discounts to Rivals' Prices, Wall St. J., Jul. 20, 1992 at B2.

213. *See id.*

214. *See* Karen L. Folster, Just Cheap Butts, or An Equal Protection Violation?: New York's Failure to Tax Reservation Sales to Non-Indians, 62 Alb. L. Rev. 697, 711 (1998).

215. Chris Roberts, Mescaleros May Put Compacts At Risk, Tribes Fear, Albuquerque Journal, Nov. 14, 1997, at A1.

216. *See id.*

217. *See id.*

218. *See id.*

219. Activists Protest State Retreat on Reservation, Albuquerque Journal, May 6, 1998, at D3.

220. *Id.*

anything."[221] Influenced by the two year resistance of the Apaches, the other Indian nations in New Mexico either lowered their payments to the State or stopped making payments altogether.[222]

*Eviction Resistance by the Dann Sisters.* Another example of tribal disobedience is in the resistance to eviction of the Dann sisters. The United States government, through the Bureau of Land Management (BLM), continuously seeks to forcibly remove Shoshone Indians from their hereditary land.[223] The conflict has been going on for approximately thirty years.[224] The current fight against this removal has been led by two members of the Western Shoshone Tribe- Mary and Carrie Dann.[225] The Western Shoshone claim that the land in dispute still belongs to them under the Treaty of Ruby Valley,[226] which the Shosone assert established access and rights of passage to non-Indian settlers without surrendering ownership.[227] The BLM claims that the land is public land under a theory of "gradual encroachment" and has attempted to collect grazing fees from Shoshone ranchers that use the land.[228]

The most recent episode in this conflict, involved a 4 a.m. arrival of several sport utility vehicles, semi-trucks, helicopters, an airplane, all-terrain vehicles, and more than fifty uniformed federal agents armed with guns.[229] Their purpose was to forcibly remove the cattle in response to "illegal" use of public land, and to later auction the confiscated cattle in order to redeem the grazing fees.[230] An attorney for the Western Shoshone Defense Project stated in the article that observers were camped out in order to witness the assault because "[w]e are always peaceful and unarmed in our resistance, but you never know how these kinds of assaults will unfold."[231] According to Mary Dann, the federal government has not been able

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221. *Id.*

222. AG Threatens Fight on Gaming, Gambling Magazine, http://gamblingmagazine.com/articles/14/14-444.htm; Associated Press, History of Indian Gambling in New Mexico, Santa Fe New Mexican, Nov. 19, 1999, at A2

223. *See* Valerie Taliman, Feds Rustle Shoshone Livestock Again, Indian Country Today, Sept. 23, 2002, at A1.

224. *Id.*

225. *Id.*

226. Treaty with Western Bands of Shoshone Indians, 18 Stat. 689 (Oct. 1, 1863; ratified June 26, 1866).

227. Taliman, *supra* note 224.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

to provide transfer documents that prove the Shoshone relinquished their right to the land.[232]

In recent years, the Indian Law Resource Center took the Dann case to the Inter-American Commission on Human Rights (Commission).[233] The Commission is a part of the Organization of American States, of which the United States is a member.[234] A Commission report recently found that the United States is violating the human and civil rights of the Western Shoshone people.[235] It also found that the United States is using illegitimate means to claim ownership and gain control of Western Shoshone land and recommended that any remedy developed should respect those rights.[236]

## III. THE LIMITS OF INDIGENOUS ADVOCACY

Indigenous nations, like all sovereign nations, must have effective advocacy strategies for protecting and strengthening their inherent and treaty-protected rights of self-determination if they are to survive. Colonization, however, has neutralized the ability of the Indian nations to pose a credible military threat to the United States. In the face of such a profound limitation, alternative strategies, such as those discussed above, have emerged to fill the void. Unfortunately, the effectiveness of these strategies has been seriously eroded over time.

*Diplomacy*. Engaging in formal diplomatic relations with the United States is limited by the fact that the United States does not completely recognize the foreign character of Indigenous statehood. Since 1831, the United States has viewed the Indian nations as merely "domestic dependent nations," and not as foreign nations.[237] While it is true that the United States has long recognized the inherent nature of Indigenous nation sovereignty,[238] it has expressly refused to recognize the Indian nations as states since it ended Indian treaty-making as formal policy in dealing with the Indian nations in 1871.[239]

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232. *Id.*

233. Mark Fogarty, Calling on World Opinion in Western Shoshone Land Swindle, Indian Country Today, Nov. 22, 2002.

234. *Id.*

235. Taliman, *supra* note 224.

236. *Id.*

237. Cherokee Nation, 30 U.S. (5 Pet.) at 17..

238. *See, e.g.* Worcester v. Georgia, 31 U.S. 515, 561 (1832).

239. *See* Act of Mar. 3, 1871, *supra* note 37.

Notwithstanding this formal barrier to engaging in diplomacy, the Indian nations and the United States have nonetheless maintained a *de facto* state-to-state relationship to the present day.[240] American and Indigenous leaders routinely engage in consultations and negotiations over matters of mutual concern. So established is this diplomatic approach to maintaining relations that the United States has even relied upon diplomatic means when it has sought to terminate its recognition of the sovereignty of particular Indian nations.[241] Both the Allotment Policy, carried out in the late 19th century, and the Termination Policy of the mid-20th century were primarily characterized by negotiations between American and Indigenous leaders to extinguish federal recognition.[242]

In recent years, the diplomatic approach has re-emerged as the foundation of a new American policy predicated upon consultation and the maintenance of "government-to-government" relations with the Indian nations.[243] In many respects, the Consultation Policy was based on the Self-determination Policy that has been in place for the last thirty years.[244] The formal adoption of the Consultation Policy occurred during the administration of President George H.W. Bush and was reflected by the development and enactment of amendments to the 1975 Self-Determination and Education Assistance Act, which were spawned by discussions with Indigenous leaders.[245] The central feature of the Self-governance Policy is the ability to enter into a "self-governance compact" between the United States and the Indian nation.[246] This compact is the result of a legitimate, arms-length negotiating process, and is a striking symbol of a bilateral, as opposed to paternalistic, relationship. Indeed, the process of developing Self-governance compacts very much resembles the first American policy for dealing with the Indian nations– treaty making.[247]

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240. *See, e.g.* Douglas B. MacDonald, Secretary of Transportation, Executive Order E 1025.00, Feb. 19, 2003. (expressing the continued desire of the State to approach relations through government-to-government methods).

241. *See, e.g.* Prucha, *supra* note 10 at 1031.

242. *See, e.g.* Prucha, *supra* note 38 at 737, 1041-1045.

243. *See id.* at 1087-1088.

244. *See id.* at 1044-1046.

245. *See* Tribal Self-Governance Initiative, History, http://www.tribalselfgov.org/Red%20Book/The%20History%20&%20Goals/history_of_the_tribal_self.htm.

246. *See id.*

247. Robert B. Porter, A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law, 31 Univ. of Mich. J. L. Reform 899, 973 (1998).

The Consultation Policy appears to have sustained itself to the present. In 1994, President Clinton implemented a formal policy of consultation with the Indian nations,[248] which he affirmed in 2000 as he was leaving office.[249] President George W. Bush has not announced any change in this official policy for dealing with the Indian nations.

Regardless of the formal policy preference for diplomacy, however, dealing with the United States in this manner has limited effectiveness. The United States is stronger, larger, more populous, and wealthier than any Indigenous nation. At its choosing, it can simply ignore Indigenous diplomats and do whatever it sees fit. Not only is this a practical reality, this unilateralism is also supported by American law. The U.S. Supreme Court has developed the Plenary Power Doctrine that allows for the validation of any action relating to the Indian nations, including treaty abrogation and termination of recognition, so long as there exists a "rational basis" for such action.[250] Thus, even in instances in which Indians have an airtight claim such that justice would dictate that their demands be wholly vindicated, for example in the case of a breach of trust by the United States, Indian nations are forced to compromise.[251] The United States thus can wholly undermine the ability of Indian nations to utilize diplomacy to resolve disputes that may arise through the unilateral application of its plenary power.

*Litigation.* The secondary alternative to warfare, used when Indian nations are unable to resolve disputes with the United States through diplomacy, is litigation. This approach has occasionally produced victories for Indian nations, even in cases brought directly against the United States. Unfortunately, there are a number of reasons why litigation is a limited advocacy strategy as well.

The foremost limitation is the fact that nearly all litigation that Indian nations bring against the United States, the states, American citizens, and private corporations, is brought in the American court

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248. Government-to-Government Relations With Native American Tribal Governments,
Presidential Documents, Federal Register, Vol. 59, No. 85, Wednesday, May 4, 1994, avalible online at http://www.epa.gov/indian/clinton.htm

249. *See* Exec. Order No. 13,175, available at http://ceq.eh.doe.gov/NEPA/regs/eos/eo13175.html. ("to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications").

250. *See generally* Delaware Tribal Business Comm. v. Weeks, 430 US 73, 83-85 (1977).

251. *See id.* at 84.

system. Entering American federal, state and administrative fora gives power to American officials, not tribal officials, to shape the rules of decision, the substantive law, and thus the outcomes in any case in which Indian nations or individual Indians are parties. When presented with the opportunity, American judges have wasted little opportunity to stack the litigation game in favor of the United States.[252] Evidence of such bias can be seen in the U.S. Supreme Court's development of the Doctrine of Discovery,[253] the Indian Title Doctrine,[254] Domestic Dependent Nationhood,[255] the Trust Doctrine,[256] and the Plenary Power Doctrine[257] which ensure that the Indian nations are denied an equal opportunity to prevail in the American court system.

Since the federal courts were opened to Indian nations in 1966, there have been periods in which the Indian nations have won with some regularity.[258] But recently, the U.S. Supreme Court has become so hostile to claims involving Indian nations, that criminals now have a better chance of prevailing before the Court than do Indians.[259] The situation has deteriorated to the point that advocates for Indian nations have begun to recommend that legal action in the U.S. courts be avoided lest there be a certain defeat.

This state of affairs should not be surprising. The legal doctrines for deciding cases involving Indians that have been developed during the last 200 years have foremost served American,

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252. *See, e.g. id.*

253. *See* Worcester, 31 U.S. at 543-44.

254. *See id.* at 584.

255 *See* Cherokee Nation, 30 U.S. (5 Pet.) at 17..

256 *See id.*

257 *See* United States v. Kagama, 118 U.S. 375, 379-80 (1886).

258 *See* David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice 186 (1997).

259 *See* David H. Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values, 86 Minn. L. Rev. 267, 280-281 (2001):

> Beyond the departures from settled law, the cases show a stunning record of losses for Indians. Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82% of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases. It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court. Convicted criminals achieved reversals in 36% of all cases that reached the Supreme Court in the same period, compared to the tribes' 23% success rate.

not Indian, interests.[260] Even rules of decision that favor the Indians – such as the canon of construction that ambiguous treaty and statutory provisions must be construed in favor of the Indians – are increasingly meaningless.[261] As a result, Indians entering the American court system seeking justice run the same risks as the gambler at the casino. While it is, in fact, possible to "beat the house" on occasion, any long term player is going to lose everything because of the built-in house advantage.

*Lobbying.* The most significant limitation on lobbying by Indian nations is the fact that lobbying success is tied directly to financial resources.[262] It takes a lot of money to have an impact on the American political system and only a handful of Indian nations have the money that it takes to make a significant impact on the system.[263] Indeed, in recent years, gaming revenues have allowed a few Indian nations to rival some of the largest corporations in America in terms of lobbying expenditures.[264] For most Indian nations, however, devoting considerable resources to lobbying is outside of their means.

Some Indian nations have sought to overcome this problem by pooling their resources and forming lobbying alliances.[265] The establishment of these umbrella organizations suggests that there are ways in which Indian nations can leverage their resources in order to have an impact on the American political system. Indeed, evidence suggests that this strategy works. The debate over Indian gaming regulation the last few years is illustrative.

States have been opposed to IGRA almost from the time it was enacted in 1988.[266] The opposition centers on the fact that Indians can conduct gaming activities in a manner contrary to state public policy.[267] Moreover, states object to the fact that the federal regulatory scheme—at least in theory—gives control of the federal agency in charge of the regulation, the National Indian Gaming

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260. *See id.* at 268-69.

261. *Id.* at 267-68.

262. *See, e.g.*, Jason Method and Gregory J. Volpe, Influence Pays in Trenton: Donations part of the game, Home News Tribune, April 2, 2006.

263. *See* Top All-Time Donor Profiles, *supra* note 49.

264. *See* Casinos/Gambling: Long-Term Contribution Trends, *supra* note 49.

265. *See, e.g.* Alliance of California Tribes, http://www.allianceofcatribes.org/about.htm (coordination for advancement of "cultural, economic, political and social agendas").

266. *See, e.g.* Gary C. Anders, Reconsidering the economic impact of Indian casino gambling, in The Economics of Gambling 204-205 (Leighton Vaughan Williams ed., 2003).

267. *See id.*

Commission (NIGA), to the Indians.[268] To date, there have been no major amendments to the IGRA despite serious pressure from states.[269] It is arguably the case that organizations such as NIGA have successfully been able to "freeze" the existing law and prevent further dilution of the tribal regulatory advantage preserved under IGRA.

It also true that individual Indian nations have been successful over the years at obtaining individualized legislative attention from Congress.[270] Some of this is true, in part, due to the fact that the U.S. Senate has a standing committee that is exclusively devoted to handling Indian issues.[271] But it is also true that such specialized legislation only comes about through tenacious advocacy by Indian leaders to induce federal officials to take action.[272]

Despite these apparent advantages, however, the lobbying approach carries the formidable limitation that success is ultimately tied to economic and political resources. Indian nations, even the extremely wealthy ones, will never be able to fully offset the economic and political advantages possessed by non-Indians even if they pool their resources. Like litigation, the American political system is designed primarily to serve American interests and the rule of the game – that money buys success – is reflective of that priority. As a result, on any issue in which more than parochial interests are implicated, American political officials will be able to align their influence if needed to effectively thwart any coordinated Native lobbying agenda.

Once again, Indian gaming illustrates this point. IGRA was passed not to further Indian gaming interests, but to thwart them.[273] Following the Supreme Court's *Cabazon*[274] decision in 1987, Congress acted quickly to suppress the sovereign right to conduct gaming activities within Indian territory in an attempt to appease the

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268. *See* "Disputed gaming rules pushed through", FRIDAY, JUNE 14, 2002, available at http://indianz.com/News/show.asp?ID=2002/06/14/nigc.

269. *See* IGRA Amendments Up For Critical Committee Vote, Indian Country Today, Mar. 29, 2006 (Senate currently debating S.2078 and the possibility of amending IGRA).

270. *See, e.g.* Mashantucket Pequot Indian Land Claims: Hearing Before the Select Committee on Indian Affairs, U.S. Government Printing Office, 1984. (the hearings that eventually spawned into the Congressional recognition of the Mashantucket Pequot Nation).

271. *See* Senate Select Committee on Indian Affairs, http://indian.senate.gov/public/index.cfm?FuseAction=About.History.

272. *See, e.g.*, Kim Isaac Eisler, Revenge of the Pequots: How a Small Native American Tribe Created the World's Most Profitable Casino 135 (2001).

273. *See* Porter, *supra* note 162.

274. Cabazon Band of Mission Indians, 480 U.S. at 216-22..

states and gaming interests in Las Vegas and Atlantic City that were threatened by the emerging Indian gaming industry.[275] Even outside of the gaming context, it is remarkable that the Mashantucket Pequot Tribal Nation – probably the wealthiest Indian nation in the United States[276] – is unable to break through the political logjam necessary to have a mere 165 acres of their own land taken into trust for them.[277]

Lobbying carries at least one other important limitation. In subtle ways, engaging in partisan lobbying activity must be seen as devaluing Indigenous nationhood. To the extent Indigenous nations are viewed by American officials on par with American corporations, public interest organizations, and citizens groups, Indian nations may be viewed not as sovereign nations, but merely as "special interest groups." This effect is accentuated by the fact that lobbying activity is rarely done directly by Indigenous leaders but is instead conducted by paid professional lobbyists.[278] In contrast, direct consultations between Native leaders and American officials tend to support Indigenous nationhood. Simply hiring a lobbyist to represent tribal interests, without active engagement by tribal officials, tends to blur the line between being perceived as a sovereign entity and being perceived as simply a private organization.

*Participation in the American Political System.* Voting in American elections and holding American political office carries the same limitations for Indigenous peoples as does lobbying. Even if all Indians were to fully exercise their rights as American citizens, it would always be the case that the Indian vote would be heavily diluted by the non-Indian vote. Moreover, holding American public office ensures that an Indian office holder will also represent those non-Indians who vote for them. Invariably, such officials are compromised in their ability to defend and protect purely tribal interests.

At least some situations exist in which this limitation may not come into play. In voting districts where Indians make up a majority of the electorate, it is possible to literally take control of local political offices such as district attorney, sheriff, school board

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275. *See id.*

276. *See* Eisler, *supra* note 272 at 16.

277. *See, e.g.*, Pequot Trust Land Lawsuit Delayed, June 29, 2001, Indianz.com, http://www.indianz.com/News/archive.asp?ID=law/6292001-4&day=6/29/01.

278. *See, e.g.*, David E. Rosenbaum, At $500 an Hour, Lobbyist's Influence Rises with G.O.P., N.Y. Times, Apr. 3, 2002, at A1 (chronicling role of Washington D.C. lobbyist Jack Abramoff in representing Indian nations).

member, or county or state legislator. In such a situation, however, one must assess whether Indian nation interests are being effectively advocated. An Indian district attorney might take a "friendlier" approach and exercise prosecutorial discretion in cases regarding Indians than a non-Indian district attorney might. Of course, it is also possible that this prosecutorial discretion could be exercised more harshly as well.

Such a possibility is applicable with regard to Indians holding state or federal office as well. Regardless of what might be the official position of an Indian nation on a particular issue, Indians holding American political offices might very well take less favorable action on Indian issues.[279] Fundamentally, Indians elected to American political office are elected on the basis of their direct relationship with the voters. The Indian nation governments do not play a direct role in this process and thus no assurance can be given that a continuity of viewpoint will exist between the Indian elected official and the Indian nation affected by the policies that the official supports.[280]

In the aggregate, then, it is very likely that participating in the American political system serves to undermine Indigenous sovereignty. This is the case regardless of the fact that Indians elected to American political office might better serve their Indian constituents than their non-Indian (and maybe Indian-hating) counterparts. Whether taking this approach furthers the self-determination of the Indian nation is doubtful. Whatever benefit might be gained is more than offset by the erosion of the line that exists between the Indigenous nation and the United States.

*Limitations with Advocacy Strategies Generally.* The heart of the limitation associated with the various advocacy strategies outlined above is that Indians are at a comparative disadvantage in their advocacy capacity. Primarily, this is due to the fact that the American definition of Indian sovereignty is much more limited than the Indian definition of Indian sovereignty.[281] It is a truism that the United States will never subscribe to any definition of Indigenous sovereignty that might threaten American interests, however those

279. *See, e.g.*, William E. Unrau, Mixed-Bloods and Tribal Dissolution: Charles Curtis and the Quest for Indian Identity (1989) (describing Charles Curtis, a Kaw Indian and Vice-President of the United States. As a Senator from Kansas, Curtis led the effort to destroy the governments of the Indian nations located in what is now Oklahoma).

280. *See id.* at 168.

281. *See* Robert Odawi Porter, The Inapplicability of American Law to the Indian Nations, 89 Iowa L. Rev. 1595 at 1599 (2004).

interests may be defined. What this means in the long run, then, is that the Indian definition of sovereignty can never diverge from the American definition. Were such a divergence to occur, under American law, the Indian nation would be acting illegally.[282]

Thus, litigation, lobbying, voting and holding office are advocacy strategies that are ultimately successful only to the extent that the United States allows them to be successful. If Indians, say, want to take a litigation position at odds with federal law that furthers their interests – for example, suing federal officials for treaty violations in tribal court – such a position will ultimately be quashed because it presents too great a threat to American interests. To be sure, the denial of such authority will occur judicially on the innocuous grounds that it is outside of the Indian nation's jurisdiction. But the ultimate outcome is that the rules governing the litigation of Indigenous rights will turn on an American, and not Indigenous, view of Indian sovereignty.

To the extent that Indigenous peoples accept this formulation of their sovereign capacity and become completely "obedient" to the American conception of their authority, there is created a very real limitation on the scope of their inherent authority. This psychological acceptance invariably leads to the adoption of equally obedient advocacy strategies such as those described above. While it might be the case that the degree of Indian acculturation to date has resulted in a complete harmonization of the American and Indigenous views of sovereignty – such that any distinction between the two is merely academic – it might still be true that Indigenous nations and peoples seek to pursue self-determination in a manner different from what the United States "allows." Litigation, lobbying, voting, and holding office will ultimately fail to allow Indians to maximize their full measure of self-determination because engaging in these activities, over time, has the effect of promoting obedience to the colonial power.

## IV. ASSESSING THE UTILITY OF TRIBAL DISOBEDIENCE

In light of the limitations associated with the obedient forms of advocacy, the utility of tribal obedience as an advocacy strategy must be fully assessed. While it might seem absurd to assert that the Indian nations could ever somehow "force" the United States to do anything against its will, it is a historical fact that Indians have

282. *See id.* at 1602.

periodically engaged in such disobedience with success. Aside from whatever benefit the pure publicity of being disobedient might bring, a full assessment of tribal disobedience as an advocacy strategy must explore its primary benefits and costs. Only then can the overall utility of the strategy be assessed.

*Affirmation of Indigenous Perspective on Sovereignty.* The most significant benefit of tribal disobedience is that it allows for the generation and affirmation of uniquely Indigenous interpretations of inherent and treaty-recognized rights.[283] A hallmark attribute of the right of self-determination possessed by any people is their ability to interpret the scope of their own authority.[284] This attribute may seem benign, but it is essential to engaging in meaningful self-determination. At a minimum, failing to generate autonomous views on the scope of ones' own sovereignty makes it impossible to displace colonial conceptions of Indigenous sovereignty. At worst, it makes Indigenous nations and peoples mere pawns of the colonizing nation.

> The examples of tribal disobedience discussed above speak to this reality. The Indians who took over Alcatraz were first moved by their belief that they had the inherent right to do so.[285] The Indians who went fishing out of season and used gill nets in violation of state law were first moved by the same belief.[286] And the Indians who blocked the highways to keep the state from taxing their cigarette trade possessed this belief as well.[287] That they took these actions reveals the degree to which they possessed uniquely Indigenous interpretations of their own capacity to self-determine as peoples.

Obedient forms of Indigenous advocacy fail over time to preserve autonomous interpretations of inherent and treaty-recognized rights. Such forms of advocacy require acceptance of the self-serving interpretations of Indigenous nation sovereignty that have been developed by the colonizer to subjugate the Indigenous nations. It is naive to suggest that adherance to the wholly illegitimate conceptual machinery of American colonization reflected

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283. *See, e.g.*, Robert B. Porter, Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation, 8 Kan. J.L. & Pub. Pol'y. 97, 99-100 (1999).

284. *See id.* at 99.

285. *See* Johnson, *supra* note 122.

286. *See* Prucha, *supra* note 38 at 1186.

287. *See* Folster, *supra* note 214 at 697-98.

by the Doctrine of Discovery, Domestic Dependent Nationhood, the Trust Responsibility, and the Plenary Power Doctrine will not have an impact on one's thinking about Indigenous sovereignty over time. Certainly it is possible that one could accept these notions for working purposes and still hold true to one's own Indigenous perspective on sovereignty. But this is a short term ability. In the long run, the Indigenous perspective will conflict with and run contrary to the more restrictive American interpretations. Inevitably, the distinct Indigenous perspective will succumb to the American perspective through continued application of the colonial doctrines.[288]

In contrast to this approach, engaging in tribal disobedience has the effect of furthering the retention, and further development, of distinct Indigenous views of sovereignty.[289] Certainly it is true that not all acts of tribal disobedience will succeed and thus, there arises the possibility that innovative sovereignty affirming thoughts and beliefs will be chilled. But successful efforts breed innovation and will have a rejuvenating quality on the people. Engaging in tribal disobedience, then, allows for the preservation and regeneration of uniquely Indigenous conceptions of self-determination.

*Transcending the Colonial Authority.* The second major benefit associated with tribal disobedience is the possibility that the will and ability of the colonial authority to suppress Indigenous sovereignty can be transcended. For the self-determination of any people to be meaningful, their belief in self-determination must be translated into action. But the action to be taken must itself be meaningful. Simply acting in accordance with the strictures imposed by the colonial legal system generates, at best, a mirror image of what the colonizing nation deems appropriate.[290] Meaningful self-determination for any people requires struggle against the forces that would restrain

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288. Interestingly enough, the primary agent of this limiting influence is the Indian nation's own attorney. Armed with an understanding of "federal Indian law" derived from Supreme Court decisions and acts of Congress, the tribal attorney is well versed in telling the Indigenous client what they can not do and not so much what they can do. *See* Robert B. Porter, Tribal Lawyers as Sovereignty Warriors, 6 Kan. J.L. & Pub. Pol'y 7, 11-13 (1997). To the extent that the client seeks to pursue an advocacy strategy that might run afoul of federal law, the tribal attorney is often the one to squelch that initiative. *See id.* Of course, to the extent that the tribal attorney adequately represents the Indigenous viewpoint, the judge, legislature, or electorate will make sure that American interests are ultimately vindicated. *Id.* at 10.

289. *See, e.g.* Adams, *supra* note 200.

290. *See, e.g. id.*

them.[291] Thus, Indigenous nations and peoples must engage in struggle – and even provoke it – if they are to safeguard and strengthen their sovereignty.

As a result, relying on obedient forms of advocacy will fail to preserve Indigenous sovereignty over time because it avoids the ultimate struggle with the colonizer. A prime example of this failure is the litigation of Indigenous claims in the American court system. Litigation in the American courts will ultimately fail to achieve any meaningful outcomes because it is first necessary to pay homage to the foundational principles underlying America's Indian subjugation jurisprudence before "justice" can be dispensed. To be sure, there will be instances in which these doctrines can be interwoven with clever legal arguments that might convince a court in a particular case that it should grant the relief requested. But the ultimate measure of success is not whether particular legal battles are won, but whether the long term struggle is successful. The United States wins this struggle when it has convinced all of the Indigenous peoples that justice can be achieved by invoking the legal machinery that rationalizes their own subjugation.

Similar arguments can be made with respect to the other forms of obedient advocacy such as voting and holding office. American efforts to destroy Indigenous nationhood will have succeeded when all Indians have become convinced that their lives will be better off if they abandon tribal political life and simply vote in American elections and hold American political office. Certainly there will be instances in which Indians can take control of local, state, and possibly even federal offices. But engaging in those practices ignores the underlying reality that Indians are far outnumbered by non-Indians in America and will never be able to out-vote them to achieve success.[292] It is a rare event when any American politician stands up to defend an assertion of Indigenous sovereignty that is at odds with his or her constituents.

In contrast to the obedient approach, tribal disobedience allows for the possibility that Indigenous assertions of rights might be *completely* vindicated. The instances of tribal disobedience described above all generated varying degrees of success. It could not be said, for example, that Alcatraz, the Trail of Broken Treaties or the takeover of the BIA building generated any meaningful

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291. *See, e.g.* Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 197-98 (2005).

292. *See* NativeVote 2004, *supra* note 53 at 49.

outcomes at the time. American officials eventually prevailed in neutralizing the disobedience and then did very little in response to redressing the underlying conditions. But it certainly can be said that this disobedience unleashed a quest for greater freedom and power that led to the demise of America's Termination Policy and the emergence of the Self-Determination and Self-Governance Policies.[293] Moreover, there have been instances of tribal disobedience that have resulted in complete or substantial vindication of Indigenous sovereignty. Certainly the removal of BIA officials by the Blackfeet, the exercise of off-reservation fishing rights by Indians in Washington and Wisconsin, and the selling of state tax-free cigarettes by the Indians in New York constitute instances in which treaty rights have been affirmed by acts of tribal disobedience.

The vindication of any divergent viewpoint can only come about through conflict and struggle. While it may not be the case that the colonial government and its officials will accept all assertions of Indigenous sovereignty, tribal obedience at least assures the possibility that these assertions *might* be accepted. In contrast, obedient advocacy strategies will fail in the long run to preserve such assertions. While there may be short term benefits, such benefits are outweighed by the degree to which "success" in such a case comes at the price of obedience.

*The Costs of Disobedience.* Engaging in tribal disobedience certainly carries risks that must be taken into account. Much of the risk, of course, depends on the nature of the disobedient action contemplated and its duration. The risks of engaging in tribal disobedience fall into a number of categories: physical risk, economic risk, reputation risk, and psychological risk.[294]

Physical risks involve the likely possibility that tribal disobedience may result in physical injury to the participants.[295] Economic risk includes the costs of engaging in tribal disobedience, including the costs of materials, food, lost wages, legal fees, and opportunity costs.[296] Reputation risk involves the possibility that

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293. *See* Wilkinson, *supra* note 291 at 169.

294. This cost-benefit analysis is performed in a variety of professions, particularly in the psychological and medical professions when analyzing human subjects. *See e.g.* San Diego State University Graduate and Research Affairs Review Board, Risks and Benefits, http://gra.sdsu.edu/irb/tutorial/m4s2.htm ("a subject may be exposed to physical, psychological, social and/or economic risk")

295. *See* Elliot N. Dorff and Arthur Rosett, A Living Tree: The Roots and Growth of Jewish Law 50 (1988) ("such a person will comply only if the risks of disobedience in terms of pain or loss are greater than the potential rewards of defiance").

296. *See id.*; *see also* Tim Wu, When Code Isn't Law, 89 Va. L.Rev. 700 (2003).

disobedience may result in being perceived as "crazy Indians" who are not stable and cannot be dealt with in a rational manner (a reputation, of course, which can cut both ways).[297] And psychological risk relates to the potentially devastating effect of failing to meet the objectives of the disobedient action.[298]

Many of these risks associated with tribal disobedience are similar to the risks associated with engaging in obedient forms of advocacy. Litigating and lobbying, of course, carry considerable economic risk. While voting carries no economic risk, running for public office does, given the potential expense involved. Risks to reputation are also possible, such as the negative effect of inflaming one's non-Indian neighbors by filing a lawsuit against them. Psychological risk may also be significant, as losing a big case can be just as damaging to the psyche as failing to achieve the goals of the disobedient advocacy. But over all, such advocacy – by virtue of being "obedient" – is less likely to induce extreme, long term reactions.

No doubt the most significant potential risk associated with tribal disobedience lies in the possibility of physical harm. In each of the acts of disobedience described above, the Indians involved incurred very serious risk to themselves and to others they cared about. It is this willingness to incur physical harm that makes tribal disobedience potentially much more effective than any other form of Indigenous advocacy. If a people feel that there is no other choice but to engage in acts that may threaten their physical well-being, then they have reached a level of maximum personal dedication to the cause. Indians engaging in tribal disobedience in the past have, in effect, dared colonial authorities to kill them in order to stop from engaging in the disobedience.[299] Whether it was taking over Alcatraz, facing angry, White, Indian hating "sportsmen," or blocking interstate highways to oppose state taxation efforts, it was the willingness to incur physical harm that has ultimately been the foundation of successful disobedient advocacy.

Putting one's body at risk to defend his or her nation should not sound strange. Indeed, it is what national armies are all about – citizens willing to put their lives at risk to defend their nation and

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297. *See, e.g.* Wounded-Knee Massacre: Hearings Before the Committee on the Judiciary of the United States Senate 161 (1976).

298. *See* Robert W. White, Sheldon Stryker, Timothy J. Owens eds., Self, Identity and Social Movements 217 (2000) (interestingly the authors also suggest that such negative impact can also serve to later reunify the social group).

299. *See* Johnson, *supra* note 122 at 173-174.

their way of life. Such a commitment is asked of all naturalized citizens of the United States when they take the citizenship oath.[300] It is also asked of all natural-born American citizens as paid volunteers,[301] and as conscripts if necessary.[302] The foundation of Indigenous survival may be the willingness of individual Indigenous people to make the same sacrifice for their nations. The unwillingness to make such a sacrifice reflects a mentality that has been created through generations of colonial subjugation.[303] Viewed this way, the risks to one's body associated with engaging in acts of tribal disobedience are not extraordinary; they are the ordinary costs associated with being a free people.

*Why Disobedience Is Necessary.* Ultimately, the only worthy reason for pursuing tribal disobedience is because of its beneficial impact on the ability of Indigenous peoples to survive. If Indigenous peoples rely only on obedient advocacy strategies, they will only be able to preserve an existence consistent with the desires of the colonizing society. Put another way, tribal disobedience is essential for preserving a distinct Indigenous existence.

For some Indigenous peoples today, being "obedient" – and thus embracing only obedient forms of advocacy – is the default response. After suffering through generations of targeted assimilation policies, these Indians have substantially internalized the primary American policy objective – the desire for "life, liberty and the pursuit of happiness."[304] As a result, when they engage in obedient forms of advocacy to achieve that outcome, they are actually acting in a manner that serves the American national ideology. Although obedient advocacy approaches may not always seem to result in short-term successes,[305] they ultimately do succeed in one sense because engaging in obedient forms of advocacy further incorporates them into the American polity.[306]

For some Indigenous peoples, however, being obedient will be insufficient to fully effectuate their vision of what it means to be a

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300. *See* Naturalization Oath of Allegiance to the United States of America, http://uscis.gov/graphics/aboutus/history/teacher/oath.htm ("that I will bear arms on behalf of the United States when required by the law").

301. *See* 10 U.S.C. § 502 (2005).

302. *See* Selective Service Act, 50 U.S.C. App. § 451 et seq. (2005).

303. *See* Porter, *supra* note 62 at 110.

304. The Declaration of Independence para. 2 (U.S. 1776).

305. *See, e.g.* Moorhead Kennedy, R. Gordon Hoxie eds., The Moral Authority of Government 107 (2000) (describing the various social movements in the twentieth century and how the right-wing pickets of abortion clinics, while not entirely effective, operate as the crystallization of good civil disobedience – picketing, but not breaking the law).

306. *See* Native Vote Campaign, *supra* note 53 (assimilation into American polity).

free people.[307] In its most basic form, such a vision is consistent with a position espoused by Blackfeet leader George Pambrun: "[w]e want the right to handle our own affairs. We even want the right to make mistakes."[308] In the modern era, generations of forced assimilation policies have made it increasingly more difficult for Indians to imagine the ways in which their lives might be different and separate from Americans.[309] Nonetheless, the crux of the desire to "handle our own affairs" is rooted in the desire to preserve a unique economic, political, cultural, and spiritual identity.[310]

Economically, Indigenous societies that seek economic sovereignty at odds with what American law and policy allow – say, the ability to engage in certain forms of commerce not subject to federal or state regulations – are obvious candidates for engaging in tribal disobedience. But the desire to make a lot of money alone, given that such a single desire bears no relation to the goal of being a separate sovereign nation, is the least defensible justification for engaging in tribal disobedience.

The more justifiable basis for engaging in tribal disobedience is the desire to preserve a distinct political, cultural, and spiritual identity. At some level, the desire for Indigenous nationalism, culturalism, and spiritualism is rooted in a respect for the fact that the history and tradition of Indigenous peoples is distinct from that of American society. A distinct political identity is necessary because believing in an exclusive notion of Indigenous citizenship is the most compelling foundation for preserving the inherent and treaty-recognized political status of a nation. A distinct cultural identity is necessary because sustaining a unique cultural presence (i.e., through their ability to speak their own language) is the most compelling basis for arguing that Indigenous peoples are different from American people. And a distinct spiritual identity is necessary because preserving unique spiritual beliefs (i.e., non-Christian) not only furthers the argument for difference, but also ensures, in

307. *See, e.g.* Encyclopedia of North American Indians, *supra* note 3 at 23 (summarizing the American Indian Movement).

308. Philp, *supra* note 79 at 125 (quoting George Pambrun in a Statement before the U.S. Senate Interior and Insular Affairs Committee, Apr. 15, 1952).

309. *See* Porter, *supra* note 284 at 134.

310. *See* Robert B. Porter, Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples, 5 Yale H.R. & Dev. L.J. 123 at 124.

accordance with some Indigenous faiths,[311] the very existence of the people themselves.

Indigenous political, cultural, and spiritual sovereignty have long been under attack and will likely be exposed to further attack in the future. It is not hard to imagine the kinds of assaults that might arise in the future since many of those threats would be similar to ones in the past. It is likely that Indigenous peoples will have to contend with English-only laws that threaten Indigenous languages,[312] economic development and tourism that threaten Indigenous sacred sites,[313] and court decisions that continue to erode recognition of Indigenous nation sovereignty.[314] When such threats arise, invariably some consideration will be given to filing a lawsuit, or lobbying Congress or the like. However because of the limitations discussed above, these efforts are likely to fail and Indians will be left with little choice but to accept the oppression, or strategically resist it in a way that might allow for the vindication of their fundamental freedoms. Tribal disobedience will be the only viable option.

## V. THE "PROBLEM" WITH TRIBAL DISOBEDIENCE AFTER 9/11

Regardless of the potential benefits associated with tribal disobedience, the changed political landscape in the United States following the September 11th attacks threatens its utility as an advocacy strategy in the future. While certainly there have been times in the recent past when Indians have been subjected to intense scrutiny by the United States – such as in the 1970s when the FBI systematically monitored American Indian activists[315] – a new era has dawned in which both government officials and the general citizenry are preoccupied with national security. As can be imagined, acts of tribal disobedience run counter to the efforts taken recently to minimize social disruptions. Seizing abandoned federal property, blocking highways, and resisting law enforcement personnel for

311. *See, e.g.* Anna Birgitta Rooth, The Creation Myths of North American Indians, in Sacred Narrative: Reading in the Theory of Myth 166-81 (Alan Dundes ed. 1984).

312. *See, e.g.* English Language Unity Act of 2005, H.R. 997, 109th Cong. (2005).

313. *See, e.g.* Mark LeBeau, Protecting American Indian Sacred Places and cultures in California, Indian Country Today, June 2, 2003 (describing fight over geothermal mining company's application to mind in sacred Indian places).

314. *See, e.g.* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005). (Supreme Court denied that the purchase of land within historic land-claim area reverted the land to sovereign Oneida land).

315. *See generally*, Ward Churchill and Jim Vander Wall, Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement (2d ed. 2001).

political purposes are extraordinary actions that can easily be misconstrued. Indeed, it is possible in this day and age that acts of tribal disobedience could easily be mistaken for acts of terrorism.

In the wake of 9/11, the U.S. Congress enacted a variety of legislative measures designed to promote a national defense against terrorism.[316] The most far-reaching legislation is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[317] As a general matter, the Act gives federal law enforcement officials tremendous new powers to combat domestic and international terrorism.[318] Critics have called it the most sweeping erosion of civil rights since Japanese internment.[319]

From a straight-forward reading of the Act, it is easy to see how an act of tribal disobedience could be interpreted as an act of terrorism. The Act defines "domestic terrorism" to include activities that –

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
> (B) appear to be intended –
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
> (C)occur primarily within the territorial jurisdiction of the United States.[320]

When one considers historical acts of tribal disobedience, it is easy to see how particular acts of tribal disobedience in the future could be construed as acts of terrorism. Consider, for example, a situation where Indians decide to block the interstate highway

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316. *See, e.g.* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (amending 18 U.S.C. §2331) (2001).

317. *See id.*

318. *See id.*; *see also e.g.* Thomas W. Joo, Presumed Disloyal: Executive Power, Judicial Deference, And The Construction Of Race Before And After September 11, 34 Colum. Human Rights L. Rev. 1, 35-36 (2002).

319. *See* Freedom Challenged: Due Process of Law During War, Lewis S. Ringel, White
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320. *Supra* note 317 at § 802.

running through their territory to protest efforts by the state to restrict their gaming rights. No weapons are utilized in doing so, but Indians bring heavy equipment in to move concrete barriers onto the highways and hundreds of Indians mass on those highways. The objective, of course, is to inconvenience motorists and to disrupt the economy to such a degree that it puts political pressure on American politicians to further Indian goals. Assuming that motorists are given some notice that the barriers are in place, blocking interstate highways is not inherently an "act[] dangerous to human life." Moreover, such an act is not committed with the intent requisite to constitute an act of terrorism because it is not committed with intent to "intimidate or coerce a civilian population" nor is it committed with the intent to "affect the conduct of a government by mass destruction, assassination, or kidnapping."

But it does not take much to see how such an act of tribal disobedience could be construed as an act of "domestic terrorism." The first prong of the USA PATRIOT Act definition could be satisfied because law enforcement officials could charge those involved with blocking the highways with criminal trespass or obstruction of governmental administration. Given the very real possibility that individual Indians and non-Indians could be injured in the course taking such action, United States government could construe the tribal disobedience as manslaughter and thus an act "dangerous to human life that [is] a violation of the criminal laws of the United States or of any State."[321]

The second prong of the definition is more easily satisfied. Clearly, blocking interstate highways is designed to pressure American political officials to stop engaging in harmful action towards Indigenous peoples. Such a desire can easily be interpreted as designed "to influence the policy of a government by intimidation or coercion."[322] This is even more so in light of the fact that the USA PATRIOT Act does not require that acts of domestic terrorism be committed with the intent to intimidate or coerce. Such acts need only "*appear to be intended*" to intimidate or coerce.[323]

And lastly, while the Indians may deny that their territory is located within the United States, prosecuting officials will surely view the highway running through the Indian territory as located within the United States.[324] Thus, blocking the highways will have

321. *Id.* at § 802(a)(5)(A).
322. *Id.* at § 802(a)(5)(B)(ii)
323. *Id.* at § 802(a)(5)(B) (italics added)
324. *See* Kagama, 118 U.S. at 379-80 .

"occur[red] primarily within the territorial jurisdiction of the United States."[325]

On the basis of this rudimentary analysis, what might otherwise constitute a simple act of tribal disobedience could be construed by American officials as an act of domestic terrorism. American officials, with only minimal manipulation of what constitutes an act of tribal disobedience, could satisfy each of the elements necessary to sustain the definition of an "act of terrorism." This is especially possible in light of the more aggressive approach being taken by American law enforcement officials in dealing with potential terrorist situations.[326] As one senior FBI official is quoted as saying –

> We used to have what some called a pipe-smoking approach to investigation. We'd spend time waiting, triangulating and pondering (the suspects') next move. . . . The new approach is more like, "Who cares where it goes? Let's go get the bastards."[327]

Such an aggressive approach to rooting out suspected terrorists makes the exercise of tribal disobedience fraught with greater difficulty and risk than ever before. Regardless of whether acts of tribal disobedience actually fall within the realm of "domestic terrorism," the reality seems to be that American law enforcement officials are more likely than ever to err on the side of reaching such a conclusion. While it has always been true that engaging in tribal disobedience might result in arrest, prosecution, and incarceration, the authority given to law enforcement officials by laws like the USA PATRIOT Act gives government officials tremendous new power to deprive individuals of their liberty even if they are only suspected of being terrorists or supporters of terrorist activities.[328] It no longer seems to be the case that government officials will lightly tolerate

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325. *See id.*; but *see* Ex Parte Crow Dog, 109 U.S. 556, 568-72 (1883).

326. *See, e.g.* Christopher P. Raab, Fighting Terrorism In An Electronic Age: Does The Patriot Act Unduly Compromise Our Civil Liberties? 2006 Duke L. & Tech. Rev. 3, at 2; *see also* Joo, *supra* note 319 at 37-46.

327. Toni Locy and Kevin Johnson, How U.S. watches terrorist suspects, USA Today, Feb. 12, 2003, at 1A.

328. *See* Attorney General John Ashcroft, Testimony before U.S. House of Representatives Committee on the Judiciary (June 5, 2003) (arguing for the investigative and detention powers under the USA PATRIOT Act for those who merely assist suspected terrorists).

politically motivated acts of tribal disobedience. The operative paradigm for the future will be "arrest first, ask questions later."

Against this backdrop, the fundamental challenge of engaging in tribal disobedience may be that it has been made extinct as an effective advocacy strategy. Historically, the risk of arrest and incarceration may have been justified when weighed against the possibility that American officials might eventually relent in their efforts to suppress Indigenous sovereignty. If the United States can justify taking control of Afghanistan and Iraq in the name of national security, it certainly seems true that arresting an entire Indian nation – if need be – would not be out of the question.

To be sure, arresting Indians *en masse* would be a bit different politically than detaining members of Al-Qaeda. From a public relations perspective, Indians are American citizens, Indians are no longer a military threat to the United States, and Indians are increasingly integrated into the American economy.[329] But it seems it would take very little in an increasingly fearful and defensive American political environment to move beyond the soft and fuzzy images of Indians as victims to the hard and gritty image of Indians as terrorists hell-bent on avenging their historic grievances. Given the power of media images, it might not take much coverage of disobedient actions to change long held and generally sympathetic perceptions of Indians.[330] This change in reality means that what were once potentially successful acts of tribal disobedience may have now become guaranteed trips to jail that not only fail to generate public sympathy but also undermine the underlying political struggles at issue.

## VI. CONCLUSION

The effect of the September 11th terrorist attacks on the United States has raised the stakes associated with engaging in tribal disobedience. As the result of laws such as the USA PATRIOT ACT, committing acts of tribal disobedience may now be construed as a threat to American national security rather than principled objections to unjust laws affecting Indigenous nations and peoples. This construction is likely to justify immediate and aggressive responses by government officials to suppress such activities. It is

329. *See* NativeVote 2004, *supra* note 53 at 49.

330. For the malleability of Indian Images, *see* Dressing in Feathers: The Construction of the Indian in American Popular Culture 1-12 (Elizabeth Bird ed., 1996).

also likely to seriously restrict the willingness of Indians to partake in acts of tribal disobedience to the point that tribal disobedience may no longer be a viable advocacy strategy for Indigenous peoples.

The resulting effect of the possible loss of this advocacy strategy is to induce greater reliance on the obedient advocacy strategies – litigation, lobbying, voting, and holding political office – as the primary means of protecting and asserting Indigenous rights. Unfortunately, these strategies over time will only serve to further incorporate Indigenous peoples into American society and thereby undermine aboriginal Native sovereignty. Because the United States has been allowed to write the rules of engagement for participating in its political and legal system, this is but another means by which the United States is able to exert its control over Indigenous nations and peoples. Tribal disobedience is an important tool for ensuring Indigenous survival. The open question is whether it is lost forever, or simply dormant, in light of recent events.