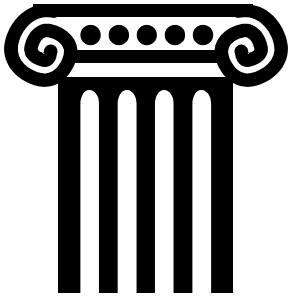

Tribal Self Determination At the Cross-roads

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TRIBAL SELF DETERMINATION AT THE CROSSROADS

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The tribal self determination initiative that began transforming federal Indian policy thirty years ago has reached a crossroads. Despite its transformative effects on tribal governments and the widespread belief that self determination has been a successful federal approach to Indian affairs, no new self determination initiatives have occurred, at least at the Congressional level in several years. This Essay looks to self determination's past to gain insights about its future and concludes that far more work needs to be done to achieve tribal self determination. Drawing on the author's broader work, it argues that one fruitful subject for further work is the area of tribal criminal justice.

INTRODUCTION

Most students of Indian law learn that American history can be divided into several distinct "eras" of federal Indian law and policy.[1] While this kind of summary analysis is necessarily contrived and ultimately somewhat artificial, it serves as a useful shorthand for understanding the vicissitudes of American Indian policy. Though the time periods are difficult to demarcate with great precision, scholars

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[1] *See generally* Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie, *American Indian Law: Nation Nations and the Federal System*, Revised 4th Ed. (2005); William C. Canby, Jr., *American Indian Law* (2004); Conference of Western Attorneys General, *American Indian Law Deskbook*, 2d Ed. (1998); David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr. *Case and Materials on Federal Indian Law*, 4th Ed. (1998); Judith Royster, *The Legacy of Allotment*, 27 Ariz. St. L. J. 1 (1995); Wilcomb Washburn, Ed., *History of Indian-White Relations*, Vol. 4, Handbook of North American Indians (1988); Francis P. Prucha, *The Great Father: The United States Government and the American Indians* (1984); Felix S. Cohen, *Handbook of Federal Indian Law* (1982); S. Lyman Tyler, *A History of Indian Policy* (1973); Angie Debo, *A History of the Indians in the United States* (1970).

tend to fix these eras by describing a particular legislative or executive action that sets a clear direction.

In most cases, it is far more simple to identify the beginning point of such an era than an end point. Presidents and legislators tend to be more clear in declaring the birth of a new policy and less so in declaring the death of an old one. Often, the new "era" begins with a clear declaration of policy and a flurry of new legislative initiatives.[2] After the initial flurry of activity, momentum eventually begins to wane as specific legislative initiatives dwindle. Eventually, enthusiasm gives way to ennui and a new approach takes its place.

Take, for example, the so-called Allotment/Assimilation Era.[3] This era is usually characterized as beginning as early as 1871, when Congress declared its refusal to deal further with Indian tribes as separate nations through treaties,[4] and as starting in earnest in 1887 with adoption of the General Allotment Act,[5] which created a framework for the allotment of individual parcels of reservation lands to individual Indians.[6] The end date of the era is often characterized as 1928, when the Meriam report excoriated the allotment policies and suggested numerous reforms.[7] The Meriam report is a useful ending point because it represented a clarion call for rejection of allotment policies as it forecasted a radical new federal approach to Indian tribes. Truth be told, however, federal allotment efforts had begun to dwindle a decade or so earlier.[8] Moreover, the next "era" did not officially begin until

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[2] Likewise, the Indian Reorganization Period (1934-1940) began with the passage of the Wheeler-Howard Act, also known as the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1934), though it had been encouraged by the so-called "Meriam Report." Institute for Government Research, *The Problem of Indian Administration* (1928).

[3] *See* Francis Paul Prucha, *The Great Father: The United States Government and the American* Indians 609 (1984); Felix S. Cohen, *Handbook of Federal Indian Law* (1982), 17-24.

[4] Appropriations Act of Mar. 3, 1871, 25 U.S.C. § 71 (1871).

[5] General Allotment/Dawes Act of 1887, 25 U.S.C.A. § 331 *et seq.* (1887).

[6] *See* Robert N. Clinton, Carole E. Goldberg, and Rebecca Tsosie, American Indian Law: Nation Nations and the Federal System, Revised 4th Ed. (2005); Robert J. Miller, Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling, 25 Am. Indian L. Rev. 165 (2000-2001); David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr. Case and Materials on Federal Indian Law, 4th Ed. (1998); Felix S. Cohen, Handbook of Federal Indian Law (1982).

[7] Institute for Government Research, *The Problem of Indian Administration* (1928).

[8] Judith Royster, *The Legacy of Allotment*, 27 Ariz. St. L. J. 1, 15-18 (1995) (the "liberal policy of granting forced fee and other premature patents was officially abandoned" in 1921).

1934 when Congress enacted the Indian Reorganization Act as part of the Indian New Deal.[9]

To make this analysis relevant to the current era of federal Indian policy, fast forward to the 1960s. Scholars generally agree that the era of tribal self-determination began to form as early as the 1960s with President John F. Kennedy,[10] and was formalized, at least in the Executive Branch, with Richard Nixon's significant 1970 statement on federal Indian policy.[11] Shortly thereafter, Congress followed along.

The first major piece of legislation to implement the "self determination" policy was Public Law 93-638, the Indian Self Determination Act of 1975.[12] Under this law, Indian tribes could identify federal government services that they wished to provide to their own tribal members and contract for federal funding to provide those services themselves. Under such a contract, known as a "638 contract," a tribe would negotiate a contract for a specific service with the BIA, under which the tribe would perform the federal government's functions under specific performance standards and record-keeping requirements imposed by law and federal regulations.[13] Although neither BIA officials nor the tribes were particularly happy with the implementation of the 638 contracts program,[14] the contracting of federal functions on Indian reservations by Indian tribes was widely hailed as an improvement in federal Indian policy and a meaningful step toward self-determination.[15]

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[9] Indian Reorganization Act of 1934/Wheeler-Howard Act, 25 U.S.C. §§ 461-479 (1934).

[10] *See generally* Robert F. Clark, The War on Poverty: History, Selected Programs, and Ongoing Impact, 21-28 (2002); George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975* (1998); Francis P. Prucha, *The Great Father: The United States Government and the American Indians*, 1085, 87-88 (1984).

[11] President' Richard Nixon's Special Message on Indian Affairs (July 8, 1970), in Documents of U.S. Indian Policy 256-58 (Francis P. Prucha ed., 2d ed., 1990) is often described as having formally begun the tribal self-determination era.

[12] Indian Self-Determination and Education Assistance Act, Pub. L. 98-638, 88 Stat. 2206 (codified as amended in scattered sections of 25 U.S.C.)

[13] 25 U.S.C. § 450(l) and 25 C.F.R. Part 271. See also Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) (holding such contracts binding on the federal government).

[14] The regime was hampered by the byzantine bureaucracy of the BIA, which compartmentalized functions in a manner that frustrated flexibility among those providing services. Tadd Johnson, James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 Conn. L. Rev. 1251, 1264-1266 (1995).

[15] S. Bobo Dean, Joseph H. Webster, Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination, 36 Tulsa L. J. 349 (2000) (quoting Miccosukee tribal leader describing the self determination policy "as the most successful Indian policy [ever] adopted by the United States." (punctuation in original).

Having established that tribal administration of Indian programs was workable, the self-determination program was broadened dramatically in 1994 and recast as "self governance."[16] Instead of requiring tribes to negotiate for individual functions, the new law allowed tribes to negotiate broad compacts with the Department of the Interior that covered virtually all federal services on a reservation. Instead of discreet outlays for individual programs, tribes received large block grants to address a range of services and were given discretion as to how to allocate those grants, allowing far greater flexibility and allowing tribal governments to determine program priorities across a range of activities and services.[17] Under the federal policies of self-determination and self-governance, the tribal role in implementing federal responsibilities was broadened beyond the Department of the Interior and the Indian Health Service (IHS), [18] to the Environmental Protection Agency (EPA),[19] and even the Department of Housing and Urban Development (HUD).[20] Today, a significant portion of the annual federal appropriation for Indian tribal programs, including more than half of the BIA budget and nearly half of the IHS budget, is distributed to tribes under the self-determination or self-governance programs.[21]

Although the rhetoric of self-determination remains strong on Capitol Hill and in the Executive Branch, there has not been a specific self-determination based legisla-

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[16] Indian Self Determination Act Amendments of 1994, Pub. L. No. 103-413, tit. 2, 108 Stat. 4250 (1994) ("An Act . . . to provide for tribal Self-Governance"). See also Indian Self Determination Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2296 (1988). See also John Tahsuda, Economic Self-Determination: Federal Policies Promoting Development of Reservation Economies, 37 New England L. Rev. 559 (2002).

[17] Tadd Johnson, at 1267-68. In 1991, seven tribes entered self-governance compacts that constituted a total of around $27 million of federal appropriations shifted to the tribes through funding agreements. It has since grown to involve more than 226 tribes in more than 85 funding agreements. Henry M. Buffalo, Jr., Implementing Self Determination and Self Governance, Materials of the 28th Annual Federal Bar Association Indian Law Conference entitled, Tribal Self-Determination and the Federal Trust Responsibility: Collaboration or Conflict 173 (April 10-11, 2003).

[18] See Rose. L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 Am. Indian L. Rev. 211, 223 (1997).

[19] See 42 U.S.C. § 7601(d)(2)(1) (Clean Air Act), 33 U.S.C. § 1377(e)(Clean Water Act), 42 U.S.C. § 200j-11(b)(1) (SDWA) and 42 U.S.C. § 9626(a) (CERCLA).

[20] Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq.* (1996). NAHASDA established a single federal flexible block grant for tribes or tribally-designated housing entities to design and administer housing assistance to tribal members.

[21] Bobo Dean, at 349-350.

tive initiative enacted in more than a decade. The last major legislative initiative aimed at self-determination was enacted in 1996.[22]

The lack of further legislative initiatives related to self-determination is surprising for a couple of reasons. First, the existing tribal self-determination initiatives are widely believed successful[23] and it is nearly impossible to find criticism of them in any literature. Second, tribal political power is perhaps stronger than ever. No major piece of substantive federal legislation has been enacted in the face of significant tribal opposition since the Indian Gaming Regulatory Act of 1988.[24]

Given the increasing financial power and political access enjoyed by some tribes, why have no successful legislative initiatives toward tribal self determination been enacted in recent years? Have all possible self-determination initiatives already been accomplished? Has the momentum for tribal self determination stopped? Is the era of tribal self-determination in its end phase? If not, what is the future of tribal self determination? How can it be restarted or resuscitated?

This Essay will not fully answer these important questions – indeed, some of them can be fully answered, if at all, only in future decades once the lens of hindsight can be brought to focus. This Essay will, however, offer some thoughts and, hopefully, some insights into these questions. This search for understanding will focus in two key directions. First, the current status of tribal self determination will be measured in a brief argument that concludes that self determination has far to go before it will be fully realized. Second, on the theory that the story of the birth of tribal self

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[22] Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq.* (1996).

[23] Elizabeth Lohah Homer, Implementing the Dself-Determination and Self-Governance Act, Course Materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, NM, April 10, 2003), at 177, 188 ("To date, there is every reason to believe that the Self-Governance process has been extremely successful."); S. Bobo Dean, Joseph H. Webster, Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination, 36 Tulsa L. J. 349, 349 (2000) (noting that "the policy has been remarkably successful" but quibbling with federal government provision o f "contract support" costs); Tadd Johnson, James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 Conn. L. Rev. 1251, 1279 (1995) (characterizing the Self-Governance Act as an "imperfect, incremental step," but "a strong beginning").

[24] Cf. Bethany Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 17-18 ("since 1970, Congress has not passed general legislation regarding Indian tribes over Indian opposition.").

determination programs may help explain the era's life span, lessons for the future of tribal self determination will be sought from its past.

I. REALIZING SELF DETERMINATION

One hypothesis for the lack of forward momentum in Congress toward tribal self determination is that full tribal self determination has already been achieved and no more federal legislative initiatives are needed. Among the possible explanations, however, this one is the least likely. Across the wide range of academic commentary on American Indian policy, it is difficult to find any scholars who are fully satisfied with the actual state of things in Indian country today.

Determining whether "tribal self determination" has been accomplished requires a more careful consideration of what this term means.[25] While the rhetoric of self determination is used widely in American Indian policy, it is rarely defined. At a fundamental (and theoretical) level, "tribal self determination" must denote the ability of an Indian tribe to "determine" its "self," or in other words, to adopt and affirm its own cultural values and pursue its own destiny.[26] At a more practical level, it might encompass the ability of a tribe to determine its own governmental structure and implement the policies that will effectuate those values. So, how would a tribe define and communicate its values and how would it effectuate those values in governmental structures and actions?

One way that sovereign political communities define and communicate their values and implement them in government is through criminal laws. Criminal law is where communities say what is right and what is wrong within their communities.[27] Indeed, it is where jurisdictions systematize, order and codify wrongs.

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[25] Andrew Huff, Indigenous Land Rights and the New Self-Determination, 16 Colo. J. Int'l Envntl. L. & Pol'y 295 (2005)(lamenting that no law or treaty defines the term).

[26] *See generally* S. James Anaya, *Indigenous People in International Law* 103-108 (2d Ed. 2004) (discussing the content of self determination). See also Saby Ghoshray, Revisiting the Challenging Landscape of Self-Determination with the Context of Nation's Right to Sovereignty, 11 ILSA J. Int'l & Comp. L. 443, 449-450 (2005) (citing an international treaty to the effect "self determination" as includes a people's right "to freely determine their political status and freely pursue their economic, social and cultural development.").

[27] *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 No. Carolina L. Rev. ___ (forthcoming 2006).

Defining right and wrong is simply one of the most important things that governments do.[28] Indeed, with the possible exception of education, it is difficult to think of another formal institution that is as important in defining community values.[29] Criminal justice is the place where communities set out their most important values about how people should treat one another. And by formally institutionalizing those values in the criminal laws, they help to preserve and reinforce those values.[30]

The development of criminal laws is vital in helping communities define themselves. And these definitions change over time such that conversations within communities are usually ongoing. Consider that in Texas, homicide is privileged in certain circumstances to prevent someone from stealing property.[31] In most other states, homicide is absolutely unlawful absent grave danger to one's own life.[32] The value judgment that Texas made in adopting such a law makes a powerful statement about the relative value of property and human life within that jurisdiction. By codifying those values in the criminal laws, Texas thereby internally reinforces this important value judgment. The criminal laws thus not only help these communities say who they are, they help to preserve community values against change. Indeed, criminal law is where states codify the most fundamental aspects of their moral structures.

Not only is the definition of criminal law important at the outset, the everyday application of criminal law through the courts reinforces the existing value structure in a very formal and concrete manner. It also contributes to the broader informal conversation within the community about those values. In sum, the activities of defining right and wrong in a criminal code are bound up in a fundamental way with "self-determination."

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[28] *See* Erik Luna, *The Model Penal Code Revisited*, 4 Buff. Crim. L. Rev. 515, 537 (2000) ("law expresses the values and expectations of society; it makes a statement about what is good or bad, right or wrong."). *See also* Emil Durkheim, *Division of Labor in Society* 80-81 (1893, 1933 translation by George Simpson).

[29] See generally Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 No. Carolina L. Rev. ___ (forthcoming 2006). *54.

[30] *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 No. Carolina L. Rev. ___ (forthcoming 2006).

[31] *See* Tex. Penal Code Ann. §§ 9.41-9.42(2)(A) (1994) (generally allowing one to use force to protect one's property and even allowing the use of deadly force against a burglar, robber, or nighttime thief during flight if one reasonably believes that the property cannot be recovered any other way).

[32] *See People v. Ceballos*, 536 P.2d 241 (Cal. 1974); N.J. Stat. Ann. § 2C:3-6 (1987).

Now consider Indian tribes. Indian tribes have been largely pre-empted from discussing, defining and reinforcing their important values in this manner because felonies on Indian reservations are not defined by Indian tribes. Felonies on Indian reservations are defined by Congress and, to a lesser extent, state legislatures.[33] Moreover, Congress has prohibited Indian tribes from defining felony offenses.[34] Indian tribes are thus shut out of this key aspect of "self determination" in two key ways. First, a tribe is formally denied the power to determine right and wrong for itself. Second, the value judgments of another community are imposed upon the tribe, and indeed, imposed forcibly; these norms are violable only on pain of incarceration. While the first denies the tribe the ability to determine its own identity, the second forces a certain identity on the tribe.

To be sure, Indian tribes do have the power to define and prosecute misdemeanors.[35] But because of the very nature of limitation to misdemeanors, a tribe cannot address issues of great importance except in very limited and perhaps symbolic ways. Tribes also have a very limited power of self determination as to certain provisions in federal law. Consider, for example, the death penalty. The Federal Death Penalty Act of 1994,[36] provides that the federal death penalty will apply to crimes arising on Indian reservations under the federal Indian country criminal statutes only if the Indian tribe opts in to the death penalty and recognizes federal authority to pursue capital sentences.[37] In recent years, serious offenses on the Navajo Reservation have caused extensive debate within the tribe about whether the Navajo Nation should opt in to the federal death penalty.[38] In that debate, the Navajo Nation's Vice President asserted that the death penalty "goes against every-

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[33] Felonies between tribal members are largely defined by Congress under the Major Crimes Act, 18 U.S.C. § 1153. Felonies involving tribal members and others are sometimes defined under the Major Crimes Act, sometimes under the Indian Country Crimes Act, 18 U.S.C. § 1152, and sometimes by substantive state law by assimilation under the Assimilative Crimes Act, 18 U.S.C. § 13.

[34] The Indian Civil Rights Act, 25 U.S.C. § 1302, prohibits Indian tribes from levying sentences greater than one year in prison or fines in excess of $5000.

[35] *Id.*

[36] P.L. No. 103-322, Title VI, § 60002(a), 108 Stat. 1968, (1994)

[37] *Id.* (specific provision codified at 18 U.S.C. § 3598).

[38] *See* Ryan Hall, Navajo Nation Officials Split on Use of Death Penalty , THE DAILY TIMES (FARMINGTON, NM) (DEC. 4, 2005), AVAILABLE AT HTTP://WWW.DAILY-TIMES.COM/APPS/PBCS.DLL/ARTICLE?AID=/20051204/NEWS01/512040303/1001; Jim Maniaci, *Hearing Set for Navajo Stand on Death Penalty*, GALLUP INDEP. (web edition) (Sept. 10, 2003); Dennis Wagner, *Killer Gets Death in Navajo Carjack Case*, ARIZ. REPUBLIC, May 21, 2003, at 8B; Mark Shaffer, *Trial Nears End for Mom Accused of Killing Three Kids*, ARIZ. REPUBLIC, Jan. 16, 2003, at 5B.

thing Navajos stand for" while the Nation's President supports the death penalty for heinous offenses, such as the triple murder that ignited this most recent debate.[39] This debate implicitly shows that such issues are exceedingly important on Indian reservations. Because of the tribal option for the federal death penalty, these debates can occur, but the debate is necessarily limited by the fact that opting in to the federal death penalty requires a tribe to place the lives of its members in the hands of another sovereign. This places a substantial limitation on the debate.

In other areas, Congress has given the tribes the power to set normative standards. For example, Congress has delegated authority[40] to Indian tribes or recognized inherent tribal authority[41] to set certain substantive standards in the environmental context, such as air and water quality standards. And for some tribes, these issues can be especially important.[42] Setting such standards allows a tribe to obtain an environment that is better than the federal floor and thus allows a tribe to tighten environmental quality at the margins over state or federal standards. Environmental standards generally do not, however, go directly to the heart of community identity in the same fundamental way that criminal laws do.

Thus, while it is widely agreed that the last thirty-five years has constituted "the era of tribal self determination," real self-determination has not been – and cannot be – achieved until tribes can determine for themselves what is right and what is wrong on their own reservations and in human transactions involving their own members. If tribes are to have self determination, tribes must have this power. In the absence of this power, Indian people must conform their actions to rules and value judgments imposed on them by outsiders. Such a scheme is a tremendous obstacle to true self determination.

This perspective also offers a more plausible hypothesis for the lack of further progress toward tribal self determination on the Congressional front in the last decade. Most of the self-determination initiatives of the last thirty years primarily involved shifting appropriated federal monies from federal agencies to tribal governmental agencies. They saved effort at the federal level and allowed the federal government to contract in some ways. These efforts at self determination, while

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[39] Hall, *supra* note 38.

[40] *See* Clean Air Act, 42 U.S.C. § 7601(d)(2)(1)(1990).

[41] Clean Water Act, 33 U.S.C. §§ 1370, 1377 (1987).

[42] See City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding tribal water quality standards that preserve the Pueblo of Isleta's ability to use water in the Rio Grande for ceremonial purposes).

positive, were to some degree, low hanging fruit that was easily plucked from the tree.

That is not to say that they were not important. Given the poverty on many Indian reservations, decisions on where and how to use federal appropriations are exceedingly important. But while tribal governments now exercise greater day-to-day control in using these funds, the federal government retains the ability and indeed the responsibility to supervise tribal activities.[43] Ultimate control remains within the federal government. In that sense, the existing tribal self determination initiatives thus far have been relatively modest efforts that do not disrupt allocation of power between the federal government and the tribes.

To advance tribal self determination further may require tribal leaders and federal policy makers to reach much higher. And increasing tribal self determination, if that term is used meaningfully, almost necessarily requires restoring a greater measure of tribal autonomy and reducing federal control on Indian reservations. In sum, furthering self determination in this manner involves much higher stakes How could it be possible for Indian tribes to increase tribal autonomy in such a high stakes manner and in such exceedingly important matters such as substantive criminal law? One insight might be gleaned from the early days of the era of tribal self determination.

II. THE BIRTH OF THE CURRENT ERA OF TRIBAL SELF-DETERMINATION

The federal policy favoring "self-determination" is taken for granted by many people today because it is the only policy most tribal citizens have ever known.[44] Given the now-obvious normative force of the argument for tribal self-determination, some people today might assume that the current era in federal policy came about because enlightened federal policy-makers in Congress and the BIA finally gave in to the exhortations of tribal leaders and gradually loosened the reins of federal control over Indian reservations. The truth, however, is much more complicated. The self-

[43] Elizabeth Lohah Homer, Implementing the Dself-Determination and Self-Governance Act, Course Materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, NM, April 10, 2003), at 177, 187 (describing an "annual trust evaluation" of the tribe's implementation of trust programs and providing for "Secretarial reassumption of trust programs" from the tribe).

[44] More than one-third of American Indians were under the age of 18 years at the time of the 2000 Census. Cynthia Brewer and Trudy Suchan, Mapping Census 2000: The Geography of U.S. Diversity (ESRI Press 2001).

determination era in Indian policy really began not as an independent policy initiative related to American Indians, but as a component of a much broader national initiative. And this particular truth offers some exceedingly important insights into the development of federal Indian policy.

In some respects, tribal self-determination as an affirmative federal policy began in the 1930s during the New Deal era under the legal auspices of the Indian Reorganization Act ("IRA").[45] The IRA preserved, empowered and transformed modern tribal governments, but it did not make them particularly sophisticated governing institutions and it made only modest efforts at increasing tribal self-governance.[46] The real value of the IRA was that it recognized the continuing legal status of tribal governments and thus helped to hold back the forces that wished to sweep American Indians into the great American melting pot.[47] To the extent that tribal governments derive authority from the federal government,[48] the IRA is less significant to tribes today. The vitality and sophistication of tribal governments today stems to a much greater extent from the self determination policies that have developed in the last three decades. It is these policies that earned this period of Indian policy the title "era of tribal self determination." This era was originally not about *tribal* self determination, though. It had a different and much broader target.

Early in his presidency in 1964, Lyndon B. Johnson declared "unconditional war on poverty in America."[49] President Johnson proposed a broad social initiative that culminated in substantial new legislation[50] and the creation of a new federal office, the Office of Economic Opportunity (OEO), which was located directly within the Executive Office of the President.

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[45] Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461-79 (2000)). See also Kenneth R. Philp, John Collier's Crusade for Indian Reform, 1920-1954, 26-54 (1977); George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975*, 111-118 (1998); Francis P. Prucha, *The Great Father: The United States Government and the American Indians*, 1115-1120 (1984).

[46] *See* George Pierre Castile. *To Show Heart: Native American Self-Determination and Federal Indian Policy* (1998), at xviii-xix (surveying the varying views of historians as to the effectiveness of the IRA).

[47] *Id.* (Castile) at xxi ("without the IRA there would have been no federally acknowledged Indian governments in place to resist the resurgence of assimilation that followed shortly.")

[48] To be clear, the primary force behind the persistence of tribal governments is the resilience of Indian people themselves, not the varied, inconsistent and flawed federal policies that have existed these past two centuries.

[49] Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964).

[50] *See* Economic Opportunity Act of 1964, 42 U.S.C. § 2941 (1964).

The War on Poverty was a bold initiative and a signature policy for President Johnson. It embodied far more than simple appropriations; the policymakers who worked under the auspices of the OEO in the White House attempted an innovative approach to the problem of poverty that avoided elitism and embraced grassroots community organizations.[51] Indeed, the program that developed came to reflect a cynical view past public efforts to address the problem of poverty and skeptical view of local governments. Important federal policymakers believed that local governments were part of the problem of povety, not part of the solution. The same policymakers were hopeful about the promise of grassroots community organizers. At its core, the OEO's philosophy reflected a progressive mindset that the poor should be centrally involved in addressing the problem of poverty.[52]

The centerpiece of the antipoverty initiative was the Community Action Program, which Congress charged with insuring that action programs be developed at the local level with public or nonprofit "community action" agencies that were to be operated "with the maximum feasible participation of residents of the areas and members of the groups served[.]"[53] The federal legislation containing these requirements left tremendous discretion with the OEO to define the substantive meanings of these instructions.[54] Given their prejudices against local governments, the OEO officials who implemented the law generally sought to bypass state and local governments and work directly with community groups.[55]

Though the War on Poverty seemed primarily directed at the urban poor, Indian tribes and their representatives actively lobbied Congress when the Economic Opportunity Act was first enacted, seeking to be included in the antipoverty provisions.[56] While the bills were pending in Congress, Senators and House members

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[51] Allen J. Matusow, The Unraveling of America 116-24 (1984).

[52] See generally James A. Morone, The Democratic Wish 213-17 (rev. ed. 1998); *Sanford Kravitz, The Community Action Program–Past Present and its Future? in* ON FIGHTING POVERTY 52, 54-59 (James L. Sunquist ed 1969); Allen J. Matusow, The Unraveling of America 108-119 (1984).

[53] Economic Opportunity Act of 1964 § 202(b), Pub. L. No. 88-452, 78 Stat. 508 (1964). For a critical history, see DANIEL PATRICK MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969).

[54] James L. Sundquist, *Origins of the War on Poverty, in* ON FIGHTING POVERTY 6, 29 (James L. Sundquist ed. 1969). For a critical history, see DANIEL PATRICK MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969).

[55] Matusow at 244. See also FRANCES FOX PIVEN AND RICHARD A. CLOWARD, REGULATING THE POOR 28 (1971).

[56] Among the best historical summaries of these developments as they relate to Indian tribes is Daniel M. Cobb, *Philosophy of an Indian War: Indian Community Action in the Johnson Administration's War on Indian Poverty, 1964-1968*, AM. INDIAN CULTURE & RES. J. No. 22-2, at 71 (1998).

exacted promises from the Administration that tribes would be allowed to participate.[57]

Though the OEO's decision to fund tribal governments was certainly beneficial in financial terms, it was far more powerful in another respect. In the words of Sam Deloria, the OEO's "decision to fund tribes directly, bypassing the Bureau, implicitly recognized the Bureau's role as the de facto municipal government of Indian reservations."[58] Tribal governments were treated more like community action organizations that were better suited than the local government to assist these impoverished constituents.[59]

Though tribal governments had difficulty in the earliest days of the programs, they eventually became successful in obtaining OEO grants.[60] From 1965 to 1967, Community Action Program grants to Indian tribes increased from $3.6 million to $20.1 million.[61]

Meanwhile, however, the OEO's general stance in favor of community groups and antipathy toward municipal governments began to anger state and local officials, causing them to lobby for greater control over community action programs. By 1968, Congress acted on the concerns of state and local officials by amending the Economic Opportunity Act to require community action agencies to operate under the aegis of state or local governments and gave state and local officials greater management control.[62] By this time, however, Indian tribes were part of the fabric of the OEO programs. To preserve the key role of tribal governments, tribes suc-

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[57] See Statement of Secretary of the Interior Stewart Udall, Economic Opportunity Act of 1964: Hearings on H.R. 10440 Before the Subcomm. On the War on Poverty Program of the House Comm. on Educ. & Labor, Pt. 1, 88th Cong. (1964), at 366 (affirming that Indians would be eligible for all OEO programs and that President Johnson "want[ed] the Indians to be in the forefront"); see also Sargent Shriver, Economic Opportunity Act of 1964: Hearings on S. 2642 Before the Senate Select Comm on Poverty of the Comm. on Labor & Public Welfare, 88th Cong. 1964 at 137-40 (promising that the OEO could send community action funds directly to tribal governments, bypassing municipal and state governments).

[58] See *Philip S. (Sam) Deloria, The Era of Self-Determination: An Overview*, *in* INDIAN SELF-RULE 191, 197 (Kenneth R. Philp Ed. 1986).

[59] *Id.*

[60] Clarkin at 122.

[61] *Id.*

[62] An amendment to the Economic Opportunity Act, sponsored by Rep. Edith Green (D. Ore.) in 1967 and thereafter known as the Green Amendment required the community action agencies to operate under the control of state or local governments. Conf. Rep. 90-1012 (1967), reprinted in 1967 USCCAN, 2578-80.

cessfully lobbied to insure that the amendments made tribal governments equivalent to state or local governments for purposes of obtaining -- and participating in -- community action grants.[63]

In that sense, Indian tribes accomplished a very successful act of shape shifting during this period. When the War on Poverty was launched, local governments were thought to be obstacles to the solution of poverty.[64] Because OEO policymakers seemed to view Indian tribes as *de facto* local community groups that were "governments" in formal terms only, they were willing to work with tribes. Three years later, when tribes needed to be considered legitimate governments to retain direct access to OEO grants, Congress was willing to treat them as such. This legislation foreshadowed important action in the future in treating tribes like state and local governments for a wide range of substantive legislation, most notably in the environmental arena.[65]

Thus one important insight from the birth of the tribal self determination movement is this: tribes were successful in achieving public policy objectives in the 1960s by downplaying their governmental status and emphasizing the BIA's dominant role on Indian reservations, successfully tapping into official cynicism about the effectiveness of governments as instruments of change. At the time, tribal governments were rhetorically flexible enough to be able to distance themselves from state and local governments to win OEO funding. The strategy was to de-emphasize the fact that tribes were governments and to present them more like community organizations living under the thumb of a local BIA superintendent who was not successfully addressing the problem of poverty. Tribes pursued the more formal status of "governments" only when they needed it to remain eligible for the OEO programs.

If tribes had been unwilling to compromise their status – if they had, for example, aggressively asserted their sovereign status – then they might not have achieved

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[63] See, e.g., Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, § 211, 90 Stat. (1967); H.R. Rep. 90-866 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2428, 2449-50 (recognizing, for example, that a "requirement that one-third of each community action board by public officials is satisfied . . . by membership of officials of the tribe.").

[64] *See* note *supra* and accompanying text.

[65] Two examples are the environmental statutes and the historic preservation statutes. See,e.g., Clean Air Act, 42 U.S.C. § 7601(d)(2)(1) (authorize the treatment of Indian tribes as states for the purposes of environmental programs), Clean Water Act, 33 U.S.C. § 1377(e) (same), and National Historic Preservation Act, 16 U.S.C. § 470a(d)(2) (allowing tribes to assume the functions of state historic preservation officials in certain circumstances).

successes with the OEO. Militant and inflexible assertions of tribal sovereignty may be emotionally satisfying. And they may, frankly, be more consistent with fundamental notions of truth and justice. But strong expressions of "sovereignty" seem to come up hollow in so many Supreme Court cases[66] at a time when even non-aggressive legal assertions of sovereignty seem to encourage judicial divestiture.[67] Indeed, a flexible and more practical approach may sometimes be useful as long as Congress yields "plenary power" and the Court wields the "doctrine of implicit divestiture."

An even more important insight from the birth of tribal self determination lies in the fact that, as Indian policy, this policy developed accidentally and in spite of official federal Indian policy. The War on Poverty was not an "Indian program" and neither the Department of the Interior nor the Bureau of Indian Affairs participated in drafting the legislation.[68] Despite the fact that it was not an Indian program, it had enormous positive ramifications for American Indian policy. The OEO's community action grants enabled Indian tribes to become governments in a much more meaningful sense than before – they now had an alternative financial source that would work to help them accomplish governmental purposes by themselves and independent of the BIA. This alternative funding stream to tribes ultimately broke the BIA's chokehold on tribal governments.[69] In a significant sense, the OEO made the BIA less relevant on Indian reservations and empowered tribal governments to work toward goals that the BIA had never accomplished.[70]

The irony is that the War on Poverty failed to end poverty, but it dramatically affected future federal Indian policy. It may have had more positive effects for Indian tribes than any federal "Indian policy initiative" has ever had. Indeed, to a significant extent, modern tribal governments were born from the War on Poverty

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[66] See David Getches, Beyond Indian Law: The Rehnquist's Court's Pursuit of State' Rights, Color-Blind Justice and Mainstream Values, 86 MINN L. REV. 267 (2001) (noting that Indian tribes have had little success in recent Supreme Court cases).

[67] City of Sherrill v. Oneida Nation, 125 S.Ct. 1478 (2005) (holding that tribe, even by purchasing land that had been illegally alienated from it, could not successfully restore its aboriginal title to the land).

[68] THOMAS CLARKIN, FEDERAL INDIAN PLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961-1969, 111 (2001).

[69] Cobb, at 75.

[70] Cf. Sam Deloria at 197.

programs.[71] With OEO support, tribes became more politically organized, more sophisticated, and better able to demand that the BIA find ways to adopt self-determination policies. And they had advocates in the White House who agreed with such approaches. As a result of these early actions, tribes eventually obtained 638 contracts and self-governance compacts.[72] Indian reservations are very different places today than they were in the 1960s. Today, tribal governments are the primary providers of all government services on many Indian reservations.[73]

While the War on Poverty was indeed animated by a notion of "self determination," it was not a notion of "tribal self determination" or "self determination for indigenous peoples." It reflected a much broader principle of "human" or "citizen" self determination. It simply reflected that the poor are likely to have significant insight into the problems of poverty and may be best motivated to find the solutions.[74] It recognized that paternalism to the poor was anachronistic and that the poor should be empowered to address the problems which they felt most keenly. In that respect, self determination reflected a very generalized principle of good government, that is, that the constituents ought to be involved in devising solutions to the problems that affect them.

Thus, the notion of self determination was not indigenous to American Indians. And it was not invented as an Indian policy. American Indians did not invent the concept and it was not adopted in Indian country because of the power of American Indian rhetoric or even the moral force of the addressing the injustice committed against American Indians. Self determination first came to Indian country as a by-product of a general public policy.

One important lesson here is that Indian tribes do not drive federal Indian policy. Much larger and wider considerations drive federal policy. In the 1960s, the War on Poverty was a freight train. It was a swiftly moving federal initiative and ultimately one of the most important federal policies of that decade; many of its

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[71] See Cobb, Philosophy of an Indian War, *supra*, at 85, 91-92 (noting that the community action program "breathed life into tribal governments" and helped develop a generation of tribal leaders with political skills and federal bureaucratic savvy).

[72] See *supra* notes 11 through 17 and accompanying text.

[73] Indian Self-Determination and Education Act of 1975, 25 U.S.C. §450(l) (1975) (allowing tribes to contract with the Bureau of Indian Affairs to administer BIA programs using federal funding).

[74] *See Legal Services and the War on Poverty*, 13 Cath. Law. 272, 277 (1967).

successful programs are still alive today.[75] Tribal leaders hopped aboard the War on Poverty and rode the initiative successfully to a better political place for Indian tribes. But tribal leaders were not the engineers; they were merely along for the ride. The question for tribal advocates is how can Indian tribes identify and climb aboard larger public policy initiatives and ride those initiatives to achieve real self determination?

III. HOPPING ABOARD A MOVING TRAIN

If self determination came to Indian tribes only because the larger body politic was interested in self determination for the poor, then the goal for current tribal advocates ought to be find other broad policy initiatives in American government that can also benefit Indian tribes. When President Johnson declared war on poverty, tribal governments essentially volunteered as foot soldiers in that war, even downplaying their governmental authority and presenting themselves as community organizations so that they could meet the enlistment qualifications.

Such an approach is not unique to Indian policy. Joining broader initiatives is a good way for a small group to change national policy in its favor.[76] Tribal advocates

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[75] Examples are the Head Start program, legal services, and Upward Bound. SAR A. LEVITAN, THE GREAT SOCIETY'S POOR LAW, 122-126, 133-89 (1969).

[76] As Professor William Eskridge, Jr., has explained, African Americans, women, gays, and other social movements achieved progressive change in American policy using such strategies. *See generally* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2001); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. Rev. 1183 (2000). In beriefing in *Lawrence v. Texas*, 539 U.S. 558, 562-4 (2003), Eskridge forwarded the gay rights movement by tying the case to a libertarian agenda. And Eskridge's theory was successful, ultimately co-opting a conservative Court in an argument that convinced the swing vote, Justice Kennedy, to write an opinion striking down a Texas law as unconstitutional. In a new work, Eskridge is attempting to take the gay rights movement further. William N. Eskridge, Jr., *Three Lessons After Thirty-Five Years of the Same-Sex Marriage Debate*, 91 Minn. L. Rev. ____ * 50 (forthcoming 2006) (presented as the annual Lockhart Lecture at the University of Minnesota). In this new work, Eskridge explains that it is not gays, but straight couples who present the real threat to traditional marriage, by legalizing cohabitation, sex outside of marriage and promoting legal reforms such as no-fault divorce laws that have undermined the norm of marriage as a mandatory lifetime commitment. Eskridge argues that advocates of traditional marriage ought to be decrying these "reforms," not crusading against gays who are alarmed at the devaluation of the institution of marriage. Because many in the gay marriage movement are committed to many of the traditional elements of marriage, Eskridge implies that traditional family values conservatives should embrace gay marriage. Eskridge's reasoning is clever and suggests that he is not content at co-opting the conservative libertarians, but is now setting his sights on the

must be innovative. Tribes joined a broader national initiative in the 1960s and it was largely responsible for bringing us the modern notion of tribal self-determination.[77] This is an important lesson about Indian policy. Indian tribes are very small and not terribly powerful in the political realm. Tribes do not set national agendas. Tribes rarely get to create the freight trains that move federal policy. Tribes are, at best, riders on those trains. And more often, of course, Indian tribes have been hit by those trains.

If tribal self determination has stalled out and the question is how to resume forward momentum, the answer is to find a useful federal initiative and work to insure that Indian tribes get aboard. Today is a different timer than the 1960s. In many respects, it is a darker and less idealistic time. The United States no longer wages the War on Poverty.[78] While a few successful poverty programs live on, many of them were cut dramatically.[79] But the last fifteen to twenty years have brought several other "wars" including, a "War on Crime" and a "War on Terrorism." [80]

Though the new wars are characterized far more by cynicism than idealism, the playbook for Indian tribes could be very similar. Just as Indian tribes were effective soldiers in the war on poverty and it paid great dividends (other than poverty reduction) for tribes,[81] Indian tribes can present themselves as foot soldiers in the War on Crime and the War on Terrorism.

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religious right. In short, Eskridge successfully secured gays a seat on the privacy/libertarian bandwagon, and is now trying to sneak them aboard the "family values" freight train that has rumbled along with tremendous inertia during the last decade. Eskridge's example is an important lesson about how marginal political movements like the gay rights movement can leverage their power.

[77] *See* George Pierre Castile. *To Show Heart: Native American Self-Determination and Federal Indian Policy* (1998).

78 The War on Poverty slowly died from political stalemate and budget problems. *See generally* James T. Patterson, America's Struggle Against Poverty in the Twentieth Century (2000); Robert F. Clark, The War on Poverty: History, Selected Programs, and Ongoing Impact, 265-270 (2002).

[79] For example, President Clinton's welfare reform legislation changed many of the social goals of the War on Poverty. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, 110 Stat. 2105 (1996); Welfare Reform Extension Act of 2004, Pub.L. 108-210, 118 Stat. 564 (2004).

[80] *See generally* Michael Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare* (1989).

[81] *See* George Pierre Castile. *To Show Heart: Native American Self-Determination and Federal Indian Policy* (1998).

One way for tribes to be a part of the war on crime is to promote more respect for existing tribal institutions of criminal justice. A potential reform at the federal level is federal recognition of tribal court convictions in federal sentencing.[82] On the civil side, tribal courts have been taking a beating in recent years at the federal level. The Supreme Court's decisions in *Iowa Mutual*[83] and *National Farmers Union*,[84] decided at the height of tribal self-determination initiatives, were wonderful cases for tribal judicial systems, but the promise their promise has been limited in more recent cases.[85] If federal judges are instructed to respect criminal convictions from tribal courts, federal courts may develop a deeper appreciation of tribal courts and of tribes as governments. The habitual acceptance by federal court of tribal convictions might help federal courts to see tribal courts as sisters and might gradually facilitate federal acceptance of tribal civil judgments.

The strategy suggested here is not novel. In 1986 tribes joined the War on Drugs and succeeded in increasing their criminal jurisdictional limitations from six months of imprisonment to one year of imprisonment, or effectively from petty to gross misdemeanor authority.[86] That reform came in 1986 in omnibus anti-drug legislation and was expressed by Congress as an effort to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations[.]"[87] Likewise, the success in creating the block-grant style approach in the "tribal self governance" initiatives in 1994 was no doubt assisted by the focus on "devolution" of federal social welfare programs to states in the 1980s and early

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[82] Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L. J. 403, 450 (2004).

[83] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (requiring exhaustion of tribal court review to federal diversity cases before they an be heard in federal court).

[84] *National Farmers Union Ins. Cos. Of Indians v. Crow Tribe*, 471 U.S. 845 (1985) (requiring exhaustion of tribal court review of the federal question of tribal jurisdiction before allowing cases to be heard in federal courts).

[85] *See Strate v. A-1 Contractors*, 250 U.S. 438, 442-453 (1997) (holding that tribal courts may not hear tort claims against nonmembers "arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question" and stating that "a tribe's adjudicative jurisdiction does not exceed it legislative jurisdiction"); *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001) (holding that tribes do not have the authority to tax non-member activity that occurs on non-Indian land within a reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribal courts lack jurisdiction to hear tort claims arising from a state police officer's execution of a state search warrant on reservation land relating to an off-reservation crime).

[86] *See* Pub. Law 99-570, § 4217, 100 Stat. 3207 (Octo. 26, 1986) (this provision is now codified at 25 U.S.C. § 1302(7)).

[87] *Id.*

90s.[88] And, finally, similar instincts have been apparent in recent years in the War on Terror, animating a clear focus on a role for Indian tribes in the new homeland security efforts.[89]

CONCLUSION

In a long history of federal Indian policy that has swung like a pendulum toward and then against Indians, tribal governments may be at the crossroads of a new policy era. If tribes want self determination to expand rather than contract, tribes must find ways to breathe new life into this important policy. Because the absence of self determination in the area of criminal justice may fundamentally represent the absence of any real self determination, criminal justice is an obvious place to begin.

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[88] See Indian Self Determination Act of 1994, Pub. L. No. 103-413, tit. 2, 108 Stat. 4250 (1994). See also Harry N. Scheiber, Redesigning the Architecture of Federalism – An American Tradition: Modern Devolution Policies in Perspective, 14 Yale J. on Reg. 227 (1996) (describing the Reagan and Gingrich policies of devolution).

[89] President George W. Bush, *Executive Order Establishing the Office of Homeland Security* (October 8, 2001) (according tribes the same status as states for Homeland Security purposes). See generally National Native American Law Enforcement Association, Tribal Homelands Security Report (Feb. 12, 2003).