

THE UNEXTINGUISHED MILITIA POWER OF INDIAN TRIBES

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INTRODUCTION

Sovereigns in the United States have military power: the federal government has the power to “[t]o raise and support Armies,”¹ while States, subject to some limitations, maintain militias.² But where do Indian tribal governments fit into this picture? Do tribes have some sort of equivalent power arising out of their retained inherent sovereignty? Or has tribal military power been impliedly or explicitly curtailed somewhere? Moreover, because almost every Indian reservation is encompassed by both state and federal borders, is there any *need* for the tribes to exercise a military power today?

This article suggests that, for some Indian tribal governments, a local militia of the people—raised, trained, and managed in accordance with the particular needs and military customs of that tribe—might be a valuable adjunct to tribal police and emergency services. A tribal militia might also be useful as an institution for shaping and transmitting certain cultural values. Raising a tribal militia—or even contemplating such a step—could be a powerful affirmation of tribal sovereignty within the American constitutional framework.

However, use of military power implicates the danger of abuse, and that danger is reflected in the history of militias and militia-like organizations in Indian country. Moreover, the use of the militia power in an internal, on-reservation capacity has sometimes occasioned paternalistic responses by the United States and Canadian governments.

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¹ U.S. CONST., art. I, § 8.

² The states train the militias and appoint their officers, while Congress arms them and prescribes the discipline by which they are to be organized. *Id.* Although governors normally command the militias, the President may use state militias “to execute the Laws of the Union, suppress Insurrections and repel Invasions.” *Id.*

Although this article arrives at the ultimate conclusion that tribes today retain a limited militia power, that conclusion is by no means automatic. Tribes would face real practical challenges in implementing a militia program. A highly-trained and well-equipped militia is an expensive proposition. On the other hand, there may be models of militia organization that can achieve some important tribal goals even without professional training and equipment. The organization of a militia could provide a vehicle through which tribes could obtain additional funding from the federal government.

Part I of this article examines definitions of “the militia” under Anglo-American theory and surveys the use of militia and militia-like organizations in 19th- and 20th-century Indian history. Such historical examples show both that militias are not alien to Indian country and that they are not without certain perils. Part II looks to treaties, federal statutes, and state law to determine what military powers tribal governments might still be able to exercise. Part III briefly sketches some reasons why a tribal government might be interested in exercising a militia power. Some of these reasons are immediate and practical, while others are tied to more general interests in cultural and political sovereignty. Part IV examines three possible models for a contemporary tribal militia: a select militia, a universal citizen militia, and a militia under the National Guard framework. Each model has certain advantages and disadvantages, and likely no one model is ideal for every tribal government. Nonetheless, this article concludes that a tribal militia could offer real advantages to tribal governments that are perpetually under-funded and face serious threats to the safety of their members.

I. WHAT IS A MILITIA?

What is a militia? This question turns out to be one without a clear answer—or at least, a question with several competing answers.³ The broadest definition would be “a fighting or security force drawn from the people, rather than a professional ‘standing’ army.” Yet this definition fails

³ See *infra* notes 4-19, 78-104, and accompanying text.

to capture two issues that, at least in the Anglo-American tradition, have always been contentious.

First, there is a tension between the idea of the militia as an institution representing “the people” as a whole and the practical need of the government to use the militia as an instrument. The more representative and all-encompassing the militia is, the less the militia can be adequately trained and made into a useful force. Conversely, a smaller militia is more easily trained and equipped, but because it is less representative it may be seen as a partisan tool of repression.

Second, the militia is often distinguished from an army in terms of its duties. In the American constitutional framework, “armies” and “navies” fight *foreign* wars, while the militia is often thought to have the duties of maintaining order in, and repelling invasions of, the homeland. This division, as we shall see, may be keenly important when discussing what remains of the tribes’ inherent military powers.

Furthermore, Anglo-American thought recognizes two possible types of official militia organization: a universal militia, made up of the people as a whole, and a “select” militia, which is smaller and (usually) composed of semi-professional soldiers. Lurking in the background is a third, more troublesome definition, which describes the militia as a spontaneous, unofficial organization of the people in response to tyranny.

This section will examine the various types of militias, discussing their strengths and weaknesses. Each type of militia has had some analogue in Indian country, either historically, in modern times, or both. Some of the described historical Indian militias should serve as models for thinking about the benefits and perils of the militia for tribal governments.

A. *Select Militias and Universal Militias*

In early American political thought select militias were viewed with some suspicion. In England, under the Stuarts, the formation of a select militia (distinct from the regular or universal militia) often went hand-in-

hand with laws affecting the disarmament of the people,⁴ and select militia members were required to swear never to take up arms against the king.⁵ Charles II used a combination of loyal regular militia units and a second “volunteer” militia to disarm the regular militia and, more disturbingly, to monitor and harass dissidents.⁶

Familiar with this history and the political fights it engendered,⁷ many Founding-era Americans were suspicious of a select militia and feared that a strong national government would impose one on the people. The “Federal Farmer,” an Anti-Federalist writer, thought that “the constitution ought to secure a *genuine* and guard against a *select* militia”⁸ “Congress,” said John Smilie during Pennsylvania’s ratification convention “may give us a select militia which will, in fact, be a standing army. . . .”⁹ Further, he worried, “[w]hen a select militia is formed; the people in general may be disarmed.”¹⁰ Others also felt that a select militia was just the “artful introduction” of a standing army, which would be used for political oppression.¹¹ Additionally, the Anti-Federalist minority at the

⁴ William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 21 (1992) (“[A]rms confiscations under the Militia Act were a widespread grievance. Sir Richard Temple, for example, criticized the militia bill as containing the power to disarm all England.”); *id.* at 12-13 (“[T]he 1662 Militia Act empowered lieutenants of the Militia to confiscate all arms owned by any person ‘judged dangerous to the peace of the kingdom’ . . . [and] parliament enacted amendments to the Hunting Act in 1671 that were designed to disarm the non-landowning population.”).

⁵ *Id.* at 12.

⁶ JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 35 (1994). (“Charles instructed his lieutenants to . . . monitor the ‘motions’ of ‘suspected’ persons and . . . [that their] weapons were to be seized at once and employed for the use of the trained bands.”).

⁷ *Id.* at 142 (“The American colonists followed the lively English debates over the retention of a standing army . . . [and] were also alert to the dangers of a ‘select militia’ . . .”).

⁸ *Letter from the Federal Farmer to the Republican No. XVIII* (Jan. 25, 1788), in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 362 (2009), available at <http://rotunda.upress.virginia.edu/founders/RNCN.html> (last visited Jan. 4, 2014) [hereinafter DOCUMENTARY HISTORY].

⁹ Speech by John Smilie to the Pennsylvania State Convention (Dec. 6, 1787), in DOCUMENTARY HISTORY, *supra* note 8, at 509. Standing armies were generally distrusted as instruments of autocracy and oppression; Elbridge Gerry called them “the bane of liberty.” 1 ANNALS OF CONGRESS 778 (1789).

¹⁰ Smilie, *supra* note 9.

¹¹ Hugh Hughes, “A Countryman” V, NEW YORK J. (Jan. 22, 1788).

Pennsylvania convention was worried that Congress would use a select militia to collect unpopular taxes.¹²

The Founders generally preferred a universal militia, comprised of the “body of the people”—a phrase used in early drafts of the Second Amendment,¹³ as well as some of its state-level predecessors.¹⁴ Soon after the adoption of the Constitution, the (Federalist) Congress actually created a militia. It turned out the Anti-Federalists’ fears of a select militia running wild through the countryside were overblown. The Militia Act called for “each and every free able-bodied white male citizen” to be enrolled in the militia.¹⁵

Despite its intuitive appeal, the universal militia was not without its drawbacks. Alexander Hamilton noted a key problem:

The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it.¹⁶

Indeed, for the most part the universal militia was not well trained. As Frederick Wiener pointed out on the eve of World War II, the universal militia had never been an effective tool of national defense or national policy at either the Founding or in the century-and-a-half since.¹⁷ Moreover, many militia members, noting that the Constitution

¹² *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PENNSYLVANIA PACKET (Dec. 18, 1787), in DOCUMENTARY HISTORY, *supra* note 8, at 636.

¹³ Compare 1 ANNALS OF CONGRESS 451 (1789) (introducing a draft without the phrase), with DOCUMENTARY HISTORY *supra* note 8, at 778 (including the phrase).

¹⁴ MALCOLM, *supra* note 6, at 148 (“[T]he famous Virginia Bill of Rights of June 1776 expressly stated that ‘a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State.’”). See Virginia Declaration of Rights, § 13 (1776).

¹⁵ Militia Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, (repealed 1903).

¹⁶ THE FEDERALIST, NO. 29 (Alexander Hamilton).

¹⁷ Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 188-90 (1940).

contemplated only domestic uses of the militia,¹⁸ believed that they could not be compelled to fight abroad.¹⁹

Eventually, in a series of acts from 1901 to 1916, Congress mostly abandoned the idea of a universal citizen militia and opted instead for a semi-professional, select militia in the form of the National Guard, which would now be under joint federal and state control.²⁰ The advantages were obvious—the Guard, equipped by the federal government and trained in accordance with a uniform plan, would now be a disciplined and capable fighting force. There was no longer any question of the scope of the militia’s duties because it was now a federal organ made up of volunteers, rather than the entire (male) body politic. It could now be called on to meet any and all public emergencies, including external warfare.

The English and American militias likely do not have exact analogues in the history of Indian North America. However, the issues that have arisen in the Anglo-American context may provide a useful lens through which to examine the historical use of military and paramilitary power by tribes and tribal governments.

1. *The Citizen-Soldier in the Tribal Tradition*

It is far beyond the scope of this paper to describe the practice of war in pre-contact or pre-reservation Indian societies, but a simple note will suffice: in many tribes, war seems to have been conducted by the whole body of the (fit) male citizenry as a part-time occupation. For example, 17th-century Jesuit missionaries in contact with the Haudenosaunee (Iroquois) reported that virtually the entire male population of a village would go out as a war party: “They go to war at a distance of two or three hundred leagues from their country . . . leaving in

¹⁸ The Militia Clauses of Article I, Section 8 only speak of using the militia to “execute the Laws of the Union, suppress Insurrections and repel Invasions.”

¹⁹ See, e.g., DAVID STEPHEN HEIDLER & JEANNE T. HEIDLER, *THE WAR OF 1812* 56 (2002) (noting the refusal of militia units to cross into Canada); Wiener, *supra* note 17, at 190 (describing the use of volunteer, rather than militia, forces in the Mexican-American War). See also Charles Hughes, *War Powers Under the Constitution*, S. DOC. NO. 105 (1917). (“[T]he organized militia, as such, cannot be employed for offensive warfare outside the limits of the United States.”).

²⁰ Wiener, *supra* note 17, at 197-201.

their Villages, for whole years at a time, only their women and little children.”²¹ Karl Llewellyn and E. Adamson Hoebel note, in discussing Cheyenne military societies, that they were “[o]pen to all men of all ages, [and] they were of an ungraded type.”²² These groups functioned as “social fraternities as well as military societies.”²³ Joe Sando similarly says, of the Jemez Pueblo, that “[e]very Jemez man belong[ed] to one of two societies, Eagle and Arrow, that ha[d] traditional functions dealing with defense and war.”²⁴ Mary Eastman, who lived among the Sioux near Fort Snelling in the 19th century, suggests that warfare was a part of the “education” of all young male children.²⁵ (She recounts, as an example, a “mimic war” in which young boys were ordered to attack a hornets’ nest; the hornets were considered their “enemies,” and the boys, after their battle, “entered [the village] as triumphantly as their fathers would have done.”²⁶)

This is not to suggest that Indian societies did not differentiate among soldiers. J.R. Walker, a physician who lived among the Sioux in the late 19th century, wrote of a special class of highly-revered warrior:

The only duties of the *Zuyawicasa*, or Dakota soldiers, are to march and fight, and when not engaged in either of these they are not together as an organized body so that they are not under obligation to perform the ordinary duties of camp life. They considered such affairs as beneath their dignity, leaving it to the women to perform the manual labor, or to the *Akicita* who were appointed to enforce compliance with regulations²⁷

Even Walker’s account suggests that this sort of warrior status was something most young men aspired to. He notes that the *Akicita*, or

²¹ THE JESUIT RELATIONS AND ALLIED DOCUMENTS 264-65 (1896-1901).

²² KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 99 (1941).

²³ *Id.* at 101.

²⁴ Joe S. Sando, *Jemez Pueblo*, in 9 HISTORY OF NORTH AMERICAN INDIANS: SOUTHWEST 425 (1979).

²⁵ MARY HENDERSON EASTMAN, DAHCOTAH; OR, LIFE AND LEGENDS OF THE SIOUX 49 (1849).

²⁶ *Id.* at 50-51.

²⁷ J.R. WALKER, LAKOTA SOCIETY 77 (1982).

“marshals,” were selected from the young men of the tribe who saw it as a “step towards becoming a leader of the people and a soldier.”²⁸ Historian Royal Hassrick asserts that the *Akicita* societies were “founded upon the desire to be successful in war,” and that “[t]hey acted as a body both in war and as camp police.”²⁹

Thus, although it would be a mistake to universalize “Indian” structures of military practice from a few examples, it is safe to say that pre-contact and pre-reservation Indian societies often regarded a great proportion of their male population as a soldier class. It is not clear that one can draw close analogies with the Anglo-American “militia” system—yet it is not a stretch to say that both types of society embraced the notion of citizen-soldiers.

Groups like the Sioux *Akicita* and the Cheyenne warrior societies, which were composed of a large portion of the male population and were the primary enforcers and police in tribal life, seem to mirror the Founding Generation’s militia ideal: civilian chiefs could make decrees, but they had to rely on “the people” (i.e., males in the military societies) perceiving those decrees as legitimate in order to get them enforced.³⁰ Among the Cheyenne, structural barriers prevented civilian chiefs from also being soldier chiefs³¹—a separation of powers that doubtless contributed further to the independence of the citizen-military.

2. *Select Militias in Indian Territory—the Light Horsemen, the Militia, and United States Interventionism*

In the 19th century, paramilitary companies often provided internal security on Indian lands among the so-called “Five Civilized Tribes” in the

²⁸ *Id.* at 78.

²⁹ ROYAL B. HASSRICK, *THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 91 (1964).

³⁰ See *THE FEDERALIST* NO. 29 (Alexander Hamilton) (“There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits and interests?”).

³¹ LLEWELLYN & HOEBEL, *supra* note 22, at 102 (“[A] soldier chief was never permitted to be a tribal chief at the same time.”).

Southeast.³² The very first written law of the Cherokee Nation³³ provided for the formation of “regulating parties” of light-horsemen. A mid-19th-century (non-Cherokee) source described them as “persons of courage and intelligence . . . whose duty it was to ride through the nation, to decide all controversies between individuals. In the unsettled state of the community . . . much was left to their discretion”³⁴ After the forcible removal of many southeastern tribes to the Indian Territory, the Cherokee National Council passed another bill establishing “a company of Light-Horse-men” to punish, among other things, murder, arson, and “endangering the peace and lives of the citizens of this Nation.”³⁵

Rennard Strickland has claimed that during the post-removal period—a period marked by angry political disputes within the Cherokee Nation—the light-horsemen “degenerated into private groups of vigilantes, such as those suspected of executing the political vendettas of Chief John Ross.”³⁶ Although allegations of murder and general brutality were lodged with Congress,³⁷ it is unclear how much of the violence is attributable to the light-horsemen per se, rather than individual partisans.³⁸ Nonetheless,

³² These were the Cherokee, Chickasaw, Choctaw, Creek, and Seminole nations, which had successfully adopted a variety of Anglo-American legal and social practices.

³³ CHEROKEE NATION, LAWS OF THE CHEROKEE NATION 3-4 (1995) (RESOLUTION OF “THE CHIEFS AND WARRIORS IN A NATIONAL COUNCIL ASSEMBLED,” SEPT. 11, 1808), AVAILABLE AT [HTTP://WWW.LOC.GOV/LAW/HELP/AMERICAN-INDIAN-CONSTS/PDF/28014184.PDF](http://www.loc.gov/law/help/american-indian-consts/pdf/28014184.pdf) (LAST VISITED JAN. 4, 2014).

³⁴ THOMAS L. MCKENNEY & JAMES HALL, HISTORY OF THE INDIAN TRIBES OF NORTH AMERICA WITH BIOGRAPHICAL SKETCHES AND ANECDOTES OF THE PRINCIPAL CHIEFS 89 (1849).

³⁵ CHEROKEE NATION, *supra* note 33, at 130-31 (enactment of the National Council, Nov. 8, 1845).

³⁶ RENNARD STRICKLAND, THE FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 148 (1975).

³⁷ See generally S. DOC. NO. 298 (Apr. 13, 1846).

³⁸ Daniel Blake Smith presents the assassinations of several men associated with the “Treaty Party,” for example, as the work of organized partisans. Daniel Blake Smith, *An American Betrayal: Cherokee Patriots and the Trail of Tears* 1-2 (2011). And in *The Murder of Elias Boudinot*, 12 *Chron. of Okla.* 23 (1934), Ross’s son claimed that the assassination plan had to be kept from his father, who had stopped a previous attempt. Carolyn Thomas Foreman has gathered some of the conflicting accounts of partisan murders at the time. See *The Light-Horse in the Indian Territory*, 34 *Chron. of Okla.* 19-22 (1956), available at <http://digital.library.okstate.edu/Chronicles/contents/v034toc.html> (last visited Nov. 24, 2013).

some Cherokees complained of “a ‘police company’ . . . who arrested whom they pleased, without any responsibility whatever”³⁹

American political leaders of the time used the testimony of angry Cherokee partisans to portray the Cherokee Nation as hopelessly fractured—and probably in need of federal intervention. President Polk used the violence and chaos in Cherokee territory to justify a threat to dismember the Cherokee Nation in order to keep the peace.⁴⁰ That threat gave him leverage to force Chief John Ross to make key concessions, including acknowledging the validity of the Treaty of New Echota.⁴¹

The light-horsemen, however, may not have been a militia in the strictest sense; they were more a form of rough-and-ready law enforcement. (The difference between the two is not always apparent because a militia may also be called into service to perform law enforcement duties.⁴²) It may be that the light-horsemen were appointed under an internal police power rather than any military power; the Cherokee statutes are silent on the point. However, there is another example from the same period of a tribe using a military power quite explicitly.

Like the Cherokee, the Choctaw were removed from the Southeast to the Indian Territory in the 19th century. The post-removal Constitution of the Choctaw Nation, first ratified in 1838 and amended several times between 1838 and 1860, provided initially for the creation of a “military

³⁹ S. DOC. NO. 298 at 74 (Apr. 13, 1846). *But see* WILLIAM G. MCLOUGHLIN, *AFTER THE TRAIL OF TEARS: THE CHEROKEES’ STRUGGLE FOR SOVEREIGNTY 1839-1880* (1993) (“Ross’s opponents referred to these patrol companies as ‘vigilantes’ who . . . sought essentially to arrest or shoot down Ross’s opponents [But] these patrols were not essentially political in nature [L]ocated on the open prairie, the nation needed a mounted patrol to deal with outlaw bands.”).

⁴⁰ S. JOURNAL, 29th Cong., 1st Sess. 241-43 (1846) (statement by President James Polk to Congress asserting that “internal feuds still exist, which call for the prompt intervention of the government of the United States”).

⁴¹ See MCLOUGHLIN, *supra* note 39, at 55-57.

⁴² The U.S. Constitution, for example, allows Congress to authorize the use of the militia to “execute the Laws of the Union,” as well as to “suppress Insurrections.” U.S. CONST., art. I, § 8, cl. 15. See *also* THE FEDERALIST NO. 29 (Alexander Hamilton) (discussing the use of the militia “in those emergencies which call for the military arm in support of the civil magistrate”); MALCOLM, *supra* note 6, at 3.

department” which was explicitly envisioned as being empowered to fight in the event of “invasion or war.”⁴³ The military department was essentially a militia—“warriors” could be called into action by the “Militia Captains” “in case of war,”⁴⁴ and a “commander in chief” of the Nation’s forces was to be elected only “in case of war.”⁴⁵ Thus, immediately after removal, the Choctaw Nation understood itself as having both an internal and an external military power, to be exercised in time of need by the calling up of a citizen militia.

In 1842, the Nation revised its constitution to eliminate the military department and replace it with something called simply “the militia.”⁴⁶ With minor adjustments, the militia statutes remained intact until 1906, when the legal authority of the tribal government was effectively nullified by the Curtis Act.⁴⁷ Under the militia laws, the chief of each of the districts (and later, the principal chief of the Nation) could call forth the militia “to execute the laws of the Nation, to suppress insurrection and repel invasion.”⁴⁸

That language is drawn directly from the United States Constitution;⁴⁹ and as we saw above, the United States militia was

⁴³ CHOCTAW NATION CONST., art. VI, § 2 (1838) (emphasis added), available at http://s3.amazonaws.com/choctaw-msldigital/assets/325/1838constitution_original.pdf (last visited Nov. 24, 2013).

⁴⁴ *Id.*

⁴⁵ *Id.* at § 4. The form of organization may have been based on customary military organization existing prior to the constitution. See *A Brief History of the Choctaw Nation, FIVE CIVILIZED TRIBES*, <http://www.fivecivilizedtribes.org/FiveTribes/Choctaw/ChoctawHistory.aspx> (last visited Nov. 24, 2013) (“Each town had . . . a War Chief who acted as leader of the town's warriors. It was customary for the War Chief to appoint two assistants who became the town's military captains.”).

⁴⁶ CHOCTAW NATION CONST., art. VI, §§ 21-22 (1842), available at http://s3.amazonaws.com/choctaw-msldigital/assets/326/1842constitution_original.pdf (last visited Nov. 24, 2013).

⁴⁷ An Act For the Protection of the People of the Indian Territory, § 28, 30 Stat. 495 (1898).

⁴⁸ Compare CHOCTAW NATION CONST., art. VI, § 2 (1842), available at http://s3.amazonaws.com/choctaw-msldigital/assets/326/1842constitution_original.pdf (last visited Nov. 24, 2013), with CHOCTAW NATION CONST., art. VIII, § 3 (1860), available at http://s3.amazonaws.com/choctaw-msldigital/assets/331/1860constitution_original.pdf (last visited Nov. 24, 2013).

⁴⁹ U.S. CONST., art. I, § 8, cl. 15.

understood to be a *domestic* force that did not fight abroad.⁵⁰ This raises the question: was the Choctaw Nation, by changing the language of its constitution, consciously yielding the right to make war outside its own territory, yet explicitly attempting to retain the power to use military force *within* its territory?

In statutes providing for the organization of the militia, the Nation's General Council emphasized that the militia was being formed "[f]or the better securing to the citizens of this nation their rights of person and property . . . and for a speedy apprehension of murderers, robbers, thieves, and any other criminals"⁵¹ However, there are at least two good reasons to think the Choctaw Nation had not entirely surrendered its right to fight external wars. First, every constitution from 1838 to 1860 includes a section prescribing a "mode of declaring war."⁵² This is not mere defensive war, as there is a separate provision for dealing with "actual invasion by an enemy."⁵³ Second, the Nation joined with the Confederacy during the Civil War. Although the Choctaws "did little active fighting during the war," they did raise three regiments of troops, and the Choctaw military officially surrendered to the United States at the close of war.⁵⁴ It seems relatively clear that whatever motivated the change in the constitutional language, the Choctaw Nation did not, at least through the Civil War, see itself as lacking an external military power.

Although the Choctaw militia *could* theoretically be used to prosecute external wars, it seems to have been used *primarily* as a tool for quelling internal unrest and enforcing the law. Angie Debo points to several uses of the militia in this regard: reconstituting the civil order after the Civil War;⁵⁵ keeping the peace during whiskey riots;⁵⁶ and disrupting gangs of cattle rustlers.⁵⁷

⁵⁰ See HEIDLER & HEIDLER *supra* note 19 and accompanying text.

⁵¹ CHOCTAW NATION, CONSTITUTION AND LAWS OF THE CHOCTAW NATION 243 (1894).

⁵² See, e.g., CHOCTAW NATION CONST., art. VII, § 12 (1860) ("The mode of declaring war in this Nation shall be by at least two-thirds of the members of the General Council in full Council, with the approval of the Principal Chief . . .").

⁵³ *Id.*

⁵⁴ ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC, 85 (1961).

⁵⁵ *Id.* at 93.

However, the Choctaw militia, like the Cherokee light-horse company, was accused of being little more than a gang of thugs enforcing the political will of the Principal Chief. In what Debo calls “the most serious political disturbance in the history of the Choctaw people,” a close and bitter 1892 election was marred by murders, and there followed an intense partisan standoff over whether the light-horsemen could arrest a suspect in the murders.⁵⁸ For days, members of the suspect’s political party, the Nationals, guarded the suspect from both the light-horsemen and the militia, which had been called out to enforce the orders of the Principal Chief (the Chief belonged to the Progressive party). The militia shot up a small town and then the two sides engaged in a largely ineffectual shootout.⁵⁹

Although the violence resulted in no deaths, it deeply frightened Leo Bennett, the United States government’s Indian agent in Choctaw territory. He reported to the Secretary of the Interior that:

the calling out of the militia by Governor Jones to arrest Willis Jones was unnecessary and unlawful; that the acts of said so-called militia have been contrary to the laws and the constitution of the Choctaw Nation and that the conflict precipitated by them was the act of a drunken irresponsible and uncontrollable mob who were banded together as militia for the evident purpose of murdering women and children, thereby removing their political opponents, and so intimidating others that the powers of the present party in authority may be perpetuated.⁶⁰

Bennett declared that he could not think of any other way to defuse the situation than for the United States to declare martial law in the Nation.⁶¹

⁵⁶ *Id.* at 178.

⁵⁷ *Id.* at 193.

⁵⁸ *Id.* at 174.

⁵⁹ *Id.* at 169-172.

⁶⁰ *Report of the Secretary of the Interior, 1893*, H.R. Doc. No. 1, 53d Cong., 2d Sess. 88-89.

⁶¹ *Id.* at 89.

Troops were sent, and order restored.⁶² United States soldiers remained in the Nation for months afterward,⁶³ and the incident provided additional impetus to the movement, already afoot in Congress, to strip tribal governments of their ownership of and sovereignty over tribal land. Debo writes that the incident “strengthened sentiment in favor of the law recently passed . . . looking to the ultimate extinction of the tribal governments.”⁶⁴ Loren Brown similarly concludes that “[i]f the opponents of tribal government were looking for an excuse to bring their demands before Congress and the people in a lurid light, they had just what they wanted in the election troubles in the Choctaw Nation during the fall of 1892.”⁶⁵

These stories of political conflict in the Cherokee and Choctaw Nations point out two potential disadvantages of a select militia for tribal governments. First, a select militia’s legitimacy depends on the perceived legitimacy of the government. If it is *not* the body of the people, it can easily be seen as (and sometimes may, in fact, *be*) the partisan instrument of an overreaching political regime. Second, the purported or actual misuse of a militia may furnish the federal government with an excuse to interfere in tribal affairs in order to “protect” the Indians from their leaders. Such an excuse is far less credible where the militia represents the mass of the people. So choosing a select militia over a universal militia poses a special danger to Indian tribal governments.

3. A Modern Select Militia?—The GOON Squad at Pine Ridge

The select militia could also be said to have played a role in 20th-century political disputes in Indian country. On the Pine Ridge Reservation, home to the Oglala Sioux, a political clash between traditionalists and the tribal government, led by tribal chairman Dick Wilson, famously erupted into an occasionally violent standoff with the

⁶² *Id.*

⁶³ DEBO, *supra* note 54, at 172.

⁶⁴ *Id.* at 173.

⁶⁵ Loren N. Brown, *The Establishment of the Dawes Commission for Indian Territory*, 18 CHRONICLES OF OKLAHOMA 179 (1940) available at <http://digital.library.okstate.edu/chronicles/v018/v018p171.html> (last visited Jan. 4, 2014).

federal government at the town of Wounded Knee in 1973.⁶⁶ What is perhaps less well known is the role of Wilson's select group of enforcers called "the GOON squad."⁶⁷ Wilson claimed to be authorized to form such a force under a tribal council resolution granting him certain powers to deal with (as yet prospective) activities of the American Indian Movement (AIM) on Pine Ridge.⁶⁸ Although tribal police already patrolled the reservation, they were at least nominally employees of the Bureau of Indian Affairs (BIA).⁶⁹ The GOONs, on the other hand, reported directly to Wilson.⁷⁰ In the run-up to the Wounded Knee standoff, the GOONs intimidated and harassed Wilson's political enemies—including AIM members, traditionalist, "full-blood" Oglalas who were resistant to United States federal influence on the reservation, and even other tribal council members who challenged Wilson's authority.⁷¹ A failed attempt to impeach Wilson—in part because of these abuses—precipitated the Wounded Knee occupation.⁷²

During the occupation, the GOONs set up their own roadblocks, which they used to harass and detain the occupiers and their allies.⁷³ After the occupation ended and the United States Marshals left the area, Wilson

⁶⁶ See Andrew H. Malcolm, *Occupation of Wounded Knee Is Ended*, N.Y. TIMES (May 24, 1973), <http://www.nytimes.com/learning/general/onthisday/big/0508.html#article> (last visited Nov. 24, 2013); *History—Incident at Wounded Knee*, US MARSHALS, <http://www.usmarshals.gov/history/wounded-knee/index.html> (last visited Nov. 24, 2013) (calling Wounded Knee "the longest civil disorder in the history of the Marshals Service").

⁶⁷ Although the name was originally a derisive epithet used by Wilson's critics, the militia itself claimed the name, reverse engineering a proud acronym: Guardians of the Oglala Nation. AKIM D. REINHARDT, *RULING PINE RIDGE* 157 (2007).

⁶⁸ *Id.* at 153, 157.

⁶⁹ *Id.* at 153.

⁷⁰ *Id.* at 158 (describing Wilson's personal involvement in recruiting GOON Squad members). It is thought, however, that the money to pay the GOONs did come from the BIA. *Id.* at 157.

⁷¹ *We Shall Remain: Wounded Knee* at approx. 00:260:00 (PBS television broadcast 2009) (footage contemporary with the Wounded Knee incident in which Ellen Moves Camp states, "The people were scared, and they are scared, of Dick Wilson and all his men."); REINHARDT, *supra* note 67, at 159 (quoting a 1973 news interview in which Vice Chairman David Long noted, "I have bullet holes in my window and eight horses shot.").

⁷² REINHARDT, *supra* note 67, at 176-88; VOICES FROM WOUNDED KNEE, 1973: IN THE WORDS OF THE PARTICIPANTS 25-32 (1974) [hereinafter VOICES].

⁷³ *Id.*

consolidated power⁷⁴ and actually ramped up the intimidation. Wilson was not shy about his intentions, telling an interviewer “The Oglalas don’t like what happened. If the FBI don’t get ‘em, the Oglalas will. We have our own way of punishing people like that.”⁷⁵ When the interviewer asked if this included “shooting on the reservation,” Wilson smiled wryly: “You said it.”⁷⁶ During the years following Wounded Knee, Pine Ridge had the highest murder rate of any jurisdiction in the United States; political enemies of Dick Wilson died or disappeared on a regular basis.⁷⁷

One may ask the question: was Wilson’s force a militia, or something else—secret police, perhaps? To ask the question is merely to underline the problem the early Americans had with select militias to begin with. Once the use of force by the government is taken out of the hands of the general polity and placed in the hands of a select group of loyalists, the danger of secret-police-like tactics increases. King Charles had his “militia;” Wilson had his Orwellian “Guardians of the Oglala Nation.” Both used a loyal group of enforcers to crack down on political opposition—the core fear of John Smilie, the Federal Farmer, and others.

B. Non-Government Militias

We have seen two possible ways of organizing the people to create an internal fighting or security force that is separate from the army. There is the universal militia: the general class of able-bodied men, who may be trained formally or informally to use force on behalf of the people. And there is the select militia: a smaller group, less representative of the people, but perhaps more highly trained.

There was also a third sort of militia, one which bedeviled the American republic from the beginning and tended to upset the neat

⁷⁴ REINHARDT, *supra* note 67, at 204-05.

⁷⁵ *We Shall Remain*, *supra* note 71, at approx. 01:11:00 (interview with Dick Wilson).

⁷⁶ *Id.*

⁷⁷ See Timothy Williams, *Tribe Seeks Reopening of Inquiries in '70s Deaths*, N.Y. TIMES (June 15, 2012), http://www.nytimes.com/2012/06/15/us/sioux-group-asks-officials-to-reopen-70s-cases.html?_r=0 (last visited Nov 3, 2013) See also INCIDENT AT OGLALA at approx. 00:23:00-00:28:00 (Miramax 1992) (various Pine Ridge residents describing the post-Wounded Knee atmosphere as a “reign of terror” and the GOONS as “death squads”).

select/universal dichotomy. This was the spontaneously formed, *unofficial* citizens' militia. Such "militias" often attempted to found their legitimacy on the same popular right to resist tyranny that the universal militia ultimately represented. In practice they usually represented only a fraction of the populace.

Both Shays' Rebellion in 1786-87 (which took place just before the Constitutional Convention) and the Whiskey Rebellion in 1791-94 (under the newly-formed Constitution), for example, came clad in the garb of militia activity. In both cases, despite constituting only a small minority, the rebels posited themselves as true representatives of the people⁷⁸ and challenged the legitimacy of government institutions.⁷⁹ They mimicked the dress and customs of the revolutionary militia in order to show continuity with those now-celebrated bodies.⁸⁰ Shays' Rebellion in particular precipitated a crisis in public order, as many members of official state militias refused to fight—and in rare cases even *joined*—the Shaysites.⁸¹ Saul Cornell writes that "Shays' rebellion exposed a tension in American constitutional theory: was the militia an agent of government authority, or was it a popular institution that might serve as a check on government?"⁸² The Whiskey Rebellion showed that even after the adoption of the new

⁷⁸ SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 32 (2006) ("[T]he Shaysites cast themselves as champions of the 'good of the commonwealth' . . . invoking the metaphor of the 'Body of the People' The voice of the people spoke not through written constitutional texts, but directly through popular assemblies, including the militia."); *id.* at 80 ("[T]he rebels . . . used the language of civic obligations and republican liberty.").

⁷⁹ *Id.* at 31 (stating that the Shaysites "challenge[d] their own state government's authority" and "shut down the local courts [to] prevent [farm] foreclosures"); *id.* at 77 (quoting one Whiskey Rebel: "It was time there should be a Revolution—that Congress ought either to Repeal the Law or allow these people to set up a government for themselves . . .").

⁸⁰ *Id.* at 32 ("The Regulators . . . went to extraordinary lengths to dispel the idea that they were a mob. Their actions and their rhetoric self-consciously drew on symbols associated with the Revolutionary militia."); *id.* at 79-80 ("As had been true of the Shaysites before them, the Whiskey Rebels appropriated the rituals and rhetoric of the militia muster to . . . give their actions legitimacy.").

⁸¹ *Id.* at 33.

⁸² *Id.*

Constitution, the possibility of spontaneous citizens' militias "remained a latent force to be reckoned with."⁸³

After the Civil War, that "latent force" reappeared in the Reconstruction South. Like the Stuart select militia in 17th-century England, post-War Southern state militias embarked on a campaign of disarming their fellow citizens: "[T]he head of the Freedmen's Bureau . . . reported that . . . militias were 'engaged in disarming the negroes.'"⁸⁴ When the federal government, in response, insisted on integrating the militias, white citizens abandoned the formal militia in favor of the Ku Klux Klan.⁸⁵ The conflict that followed was essentially a clash of two militias representing two different (and antagonistic) segments of Southern society—the official select militia, mostly black, and the shadow militia, entirely white.

The subject of spontaneous citizens' militias erupted into the public discourse in the mid-1990s, after Timothy McVeigh parked a truck full of explosives next to Oklahoma City's Alfred Murrah Federal Building.⁸⁶ McVeigh and his accomplice, Terry Nichols, were originally believed to be associated with the "Michigan Militia,"⁸⁷ a private militia group whose website today sports the slogan "Defending Against Disaster, Crime, Terrorism, and Tyranny."⁸⁸ The connection turned out to be weak—according to the Christian Science Monitor, "McVeigh considered groups like the Michigan Militia 'too moderate' and saw himself as 'a man of action' who wanted to do more than just vent."⁸⁹ The Michigan Militia

⁸³ *Id.* at 85.

⁸⁴ *Id.* at 175.

⁸⁵ *Id.* at 176-77.

⁸⁶ *History and Mission*, OKLA. CITY NAT'L MEM'L.

<http://www.oklahomacitynationalmemorial.org/secondary.php?section=1&catid=193> (last visited Nov. 24, 2013).

⁸⁷ Robert D. McFadden, *Links in Blast: Armed 'Militia' and a Key Date*, N.Y. TIMES at A1. (Apr. 22, 1995) available at <http://www.nytimes.com/1995/04/22/us/terror-in-oklahoma-the-far-right-links-in-blast-armed-militia-and-a-key-date.html> (last visited Jan. 4, 2014).

⁸⁸ MICHIGAN MILITIA, <http://www.michiganmilitia.com/> (last visited Nov. 24, 2013).

⁸⁹ Mark Guarino, *Could the Hutaree militia have spawned a Timothy McVeigh?*, CHRISTIAN SCIENCE MONITOR (Mar. 31, 2010), <http://www.csmonitor.com/USA/Justice/2010/0331/Could-the-Hutaree-militia-have-spawned-a-Timothy-McVeigh> (last visited Nov. 24, 2013).

strenuously denied that the group had been involved in the bombing.⁹⁰ The link called attention to a groundswell of private “militias” and raised questions about whether they truly represented a return to the grand American tradition of the engaged citizen as a buffer against tyranny.

Brannon Denning, a Second Amendment scholar writing not long after the bombing, took a skeptical but appreciative position on private militias. Denning emphasized the community-building nature of militia practice and saw the historical transition away from citizen militias and toward the professionalized National Guard system as highly problematic:

Many present day commentators seem unwilling to acknowledge the unique role that the militia filled, one that is not easily replaced[In the Founders’ view] [c]ivic virtue and a willingness to subordinate all private concerns to those of the community were conditions precedent to the establishment of a virtuous republic.⁹¹

But Denning also recognized that the anti-government philosophy animating the modern militia movement was so paranoid as to undermine claims to civic virtue:

[M]embers tend to share the same fears: federal gun control, erosion of national sovereignty, emergence of a United Nations led “one world government” and the invasion of the United States by shadowy socialist forces. The movement seems to have been further galvanized by both the Randy Weaver trial and the Branch Davidian standoff in Waco, Texas. Many . . . speak fatalistically about a coming showdown with the federal government

[T]hose participating in this new militia movement are not the successors to the heritage of the colonial militiasNor is

⁹⁰ See McFadden, *supra* note 87 (“We have denounced the entire incident as an act of barbarity It’s totally alien to everything we believe. We are totally defensive. We do not engage in terrorism.”).

⁹¹ Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191, 239 (1996).

Dennis Henigan completely wrong when he makes the point that “the Framers understood the militia to be an instrument of governmental authority.”⁹²

The private militias have certainly had a tendency to sound paranoid. Shortly after the Oklahoma bombing, two leaders of the Michigan Militia came forward with a theory that the attack had been organized by the Japanese government and that “Japan had paid CIA agents to bug President Clinton's offices.”⁹³ The Southern Poverty Law Center asserts that the militia movement, “which in the past was not primarily motivated by race hate,” has in more recent years become infected with racial animus.⁹⁴

Today's Michigan Militia aims to present a non-threatening, family-friendly face, inviting the public to “open carry” (that is, armed) picnics⁹⁵ and posting a letter from a mother of three on its website.⁹⁶ More directly to Denning's point about civic virtue the group in its FAQ heavily emphasizes active involvement and personal sacrifice.⁹⁷

There is some evidence that the government has been overzealous in raiding and prosecuting militias for what are lawful activities. The Federal Bureau of Investigation (FBI) raided another Michigan group, the “Hutaree,” in 2010, only to have a federal judge throw out sedition and

⁹² *Id.* at 229-30.

⁹³ *Two Leaders of Paramilitary Group Resign*, N.Y. TIMES (Apr. 30, 1995), <http://www.nytimes.com/1995/04/30/us/terror-in-oklahoma-michigan-militia-two-leaders-of-paramilitary-group-resign.html> (last visited Nov. 24, 2013).

⁹⁴ Southern Poverty Law Center, *The Second Wave: Return of the Militias*, SPLC (Aug. 2009), <http://www.splcenter.org/get-informed/publications/splc-report-return-of-the-militias#.UZRStoL3g08> (last visited Nov. 24, 2013).

⁹⁵ Fara Warner, *A Militia Reboots*, DAILY BEAST (Apr. 13, 2010), <http://www.thedailybeast.com/articles/2010/04/13/a-militia-reboots.html> (last visited Nov. 24, 2013).

⁹⁶ Kristin Stoner, *While it is True You Can Learn a Lot by Asking, You Can Learn More by DOING...*, MICHIGAN MILITIA, <http://www.michiganmilitia.com/SMVM/faq/faq.htm> (last visited Nov. 24, 2013).

⁹⁷ See *id.* (“You do not ‘belong’ to a militia; you ‘participate’ in one. . . . [W]hile many of our fellow citizens are nestled warmly around a mug of hot cocoa, or sitting on the couch watching the game, we were nestled not-so-warmly in sub-freezing snow; out in the field DOING stuff.”).

conspiracy charges against the group.⁹⁸ An expert interviewed by the *New York Times* noted that the Hutaree appeared to be “engaged in political speech,” and their defense attorneys similarly invoked the First Amendment.⁹⁹ The militia members are now suing the FBI over the incident.¹⁰⁰

For our purposes, what may be most interesting about the private militias is their size: the Michigan Militia claimed only 217 members in 2010,¹⁰¹ while the Hutaree may have just 20.¹⁰² Yet over nearly two decades private militias have been able to stir the interest of the public at large (which has never quite been able to decide whether they were risible¹⁰³ or alarming¹⁰⁴) and to convince their members of their own legitimacy as a genuine exercise of popular sovereignty. For the most part, private militias are harmless. However, their existence is unsettling because it suggests that small groups of individuals (like the Shaysites and the Southern post-Civil War white militias) may be attempting to take on the mantle of popular sovereignty—and perhaps even the popular right of revolution—without having bothered to consult the people. The right of

⁹⁸ Nick Bunkley, *U.S. Judge in Michigan Acquits Militia Members of Sedition*, N.Y. TIMES (Mar. 27, 2012), <http://www.nytimes.com/2012/03/28/us/hutaree-militia-members-acquitted-of-sedition.html> (last visited Nov. 24, 2013).

⁹⁹ *Id.*

¹⁰⁰ Niraj Warikoo, *Hutaree Militia Members Sue State Cop and FBI Agents*, DETROIT FREE PRESS (Apr. 9, 2013), <http://www.freep.com/article/20130409/NEWS05/304090086/1001/news> (last visited Nov. 24, 2013).

¹⁰¹ Warner, *supra* note 95.

¹⁰² *Hutaree Militia Fact Sheet*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/main_extremism/hutaree_militia_facts.html#.Usz8WfQ59XU (last visited Jan. 4, 2014).

¹⁰³ See, e.g., BOWLING FOR COLUMBINE (United Artists 2002); Moxy Früvous, *Michigan Militia*, on YOU WILL GO TO THE MOON (Warner Music Canada 1997).

¹⁰⁴ See, e.g., Chris Rovzar, *Are the Members of the Michigan Militia Terrorists?*, N.Y. MAG. (Mar. 30, 2010) http://nymag.com/daily/intelligencer/2010/03/are_the_members_of_the_michiga.html (last visited Nov. 24, 2013); Eileen Pollack, *The Extremists Next Door*, N.Y. TIMES (Apr. 18, 2010) http://www.nytimes.com/2010/04/19/opinion/19Pollack.html?_r=0 (last visited Nov. 24, 2013); Michelle Green, *Shadow Warriors*, PEOPLE, May 8, 1995, at 58.

revolution was one that the Founders assumed was the prerogative of the *whole* people, not a tiny, self-appointed team.¹⁰⁵

Again using the Anglo-American framework as background, we can now examine some examples of militias formed spontaneously by the people themselves in Indian country. Like their Anglo-American counterparts, these groups often put themselves out as representing the interests of the people, but are painted by their opponents as small bands of malcontents with little legitimacy.

1. *American Indian Movement (AIM)*

The Pine Ridge standoff, discussed above in Part I.A.3, involved armed groups on both sides. The AIM side, though partly made up of outsiders claimed to represent the people of Pine Ridge. Given Dick Wilson's dictatorial practices, they may well have been right.¹⁰⁶ Nonetheless, AIM was neither composed of a substantial majority of the Pine Ridge populace nor sponsored by any government, which made it easier for both Wilson and the United States government to suggest that they were malcontents and communist agitators, not a genuine popular movement.¹⁰⁷ Over the long run, even those who had supported the occupation ultimately moved away from full-throated support for the AIM

¹⁰⁵ Even the early Americans most invested in the popular right of revolution thought revolutions should occur, where possible, through deliberation and voting, not through mob violence. See THOMAS PAINE, COMMON SENSE (1776) (“[I]t is infinitely wiser and safer, to form a constitution of our own in a cool deliberate manner, while we have it in our power, than to trust such an interesting event to time and chance. If we omit it now, some Massanello may hereafter arise, who laying hold of popular disquietudes, may collect together the desperate and the discontented, and by assuming to themselves the powers of government, may sweep away the liberties of the continent like a deluge.”).

¹⁰⁶ See, e.g., VOICES, *supra* note 72, at 102 (noting that the Porcupine District of the reservation passed a resolution supporting the Wounded Knee occupiers); REINHARDT, *supra* note 67, at 208 (“Wilson was finally defeated in the more rigorously regulated 1976 election The rejection of Wilson in an honest election was not surprising.”).

¹⁰⁷ VOICES, *supra* note 72, at 125-26 (reprinting Dick Wilson's open letter claiming that Wounded Knee was a “long range plan of the Communist Party”); REINHARDT, *supra* note 67, at 176-77 (describing the FBI's mistaken belief that AIM was driving, rather than catching up to, events on Pine Ridge).

itself,¹⁰⁸ suggesting some discomfort with a self-appointed militia even when its motives were praiseworthy.

2. *The Mohawk Warrior Society*

Among the Mohawk living at Akwesasne, an area straddling the border between New York and Quebec, the “Mohawk Warrior Society” has often been at the center of political controversies on and off the reservation. The Warrior Society is an unusual organization: outside all channels of official government, it nonetheless occasionally claims that it acts under the aegis of the *traditional* tribal government. Mohawk journalist Kenneth Deer, on the other hand, has directly compared the Warriors to a spontaneous citizens’ militia and says that “[t]here’s no membership to the Warrior Society It’s just a name. It’s just a way to organize men when there’s something to be done.”¹⁰⁹

The Warriors have flitted in and out of alliance with various political factions since the early 1970s—unsurprising, perhaps, given the complex governmental arrangements in Mohawk territory. The tribe is officially represented by the Tribal Council of the St. Regis Mohawk Tribe¹¹⁰ on the New York side and the Mohawk Council of Akwesasne¹¹¹ on the Canadian side; both are democratically elected. However, there are also traditional governing bodies like the “Mohawk Nation Council of Chiefs” operating at Akwesasne.¹¹² The “Kahnawake branch of the Mohawk,” a sort of traditionalist shadow government in one of the territories on the Canadian side, states on its website that at least one Warrior Society was “authorized” by the “Mohawk Nation Council of Chiefs at Kahnawake” in 1972. It was charged “to carry out the resolutions of the Clans in Council and to serve as the defensive vanguard of the Longhouse.”¹¹³ For

¹⁰⁸ REINHARDT, *supra* note 67, at 208-209.

¹⁰⁹ *Mohawk Warriors to Get Military Apology*, CBC (Dec. 21, 2010), <http://www.cbc.ca/news/canada/montreal/story/2010/12/20/mohawk-military-apology.html> (last visited Nov. 24, 2013).

¹¹⁰ SAINT REGIS TRIBAL COUNCIL, <http://www.srmt-nsn.gov/> (last visited Nov. 24, 2013).

¹¹¹ AKWESASNE.CA, <http://www.akwesasne.ca/> (last visited Nov. 24, 2013).

¹¹² *See generally* MOHAWK NATION, <http://www.mohawknation.org> (last visited Nov. 24, 2013).

¹¹³ *National Defense and Public Security*, KAHNAWAKE LONGHOUSE, <http://www.kahnawakelonghouse.com/index.php?mid=1&p=3> (last visited Nov. 3, 2013).

decades the more traditional bodies have insisted that the federally recognized, elected governments were not legitimate Mohawk institutions, but the tools of colonial home-rule.¹¹⁴ The Warrior Society may have emerged, originally, as a weapon in that fight.¹¹⁵ Rick Hornung reports that “[f]or two years [1971-73], the Warriors wrangled with the elected chiefs in confrontations that verged on violence.”¹¹⁶

However, the Warriors have not been purely an agent of traditionalists agitating for recognition and clashing with the elected/federally-recognized governments. Certainly, the Warrior Society seems to have followed its own course and set its own agenda, especially during the heightened tensions around casino gambling at Akwesasne in 1989-90.¹¹⁷ The Warriors’ primary interest seems always to have been in excluding Canadian and United States authorities from Mohawk territory. During the gambling crisis they frequently forestalled attempts by both traditional and elected governments to bring in outside police or armed forces.¹¹⁸

At other times, the Warriors acted as an impromptu internal security force—for example, preventing a political demonstration from disrupting

¹¹⁴ See, e.g., *About the Mohawk Nation Council of Chiefs*, MOHAWKNATION.ORG, http://www.mohawknation.org/index.php?option=com_content&view=article&id=47&Itemid=56 (last visited Nov. 24, 2013) (“The Mohawk Nation Council, its Chiefs, Clan mothers and Faith keepers are not to be confused with the St. Regis (Mohawk) Tribal Council The St. Regis Tribal Council exists because the United States Government has chosen to recognize . . . ‘a government that it created’, instead of the one that was given to the Mohawk people by the Creator.”); *Akwesasne*, IROQUOISMUSEUM.ORG, <http://www.iroquoismuseum.org/akwesasne.htm> (last visited Nov. 24, 2013) (“The Mohawk Council of Akwesasne was forcibly imposed on Akwesasne by Canada. The St. Regis Band Council was forcibly imposed on Akwesasne by the United States.”).

¹¹⁵ RICK HORNUNG, ONE NATION UNDER THE GUN 28 (1991) (“[T]he Warriors see the elected tribal councils as mere adjuncts to the U.S. and Canadian governments.”).

¹¹⁶ *Id.* at 21.

¹¹⁷ See generally *id.* at 16, 28-29, 32-64 (detailing the role of the Warrior Society in factional disputes in the Mohawk Nation).

¹¹⁸ See *id.* at 21 (“[T]he Canadian chiefs called in the Quebec provincial police, the Sûreté du Québec, but the Warriors drove them out.”); *id.* at 33-34 (recounting a situation in which the Warriors repelled, temporarily, an FBI/state police joint patrol attempting to enter Mohawk territory); *id.* at 63-64 (“[T]he [police] major said . . . officers would contact the [Warriors] if police were called He also offered a guarantee that troopers would not stray from Route 37 during routine traffic patrols . . .”).

traffic on the reservation.¹¹⁹ Unlike Wilson's GOONs, the Warriors frequently avoided violence and claimed to prefer political means.¹²⁰ The female Warriors seem to have encouraged the men to think about long-term political gains instead of the immediate satisfaction of violent skirmishes. Minnie Garrow says of the Warriors at the time:

The men were focused on the police and protecting our community from outsiders. These are very real problems that require enormous concentration, but we also have to see beyond this role How do we go from a group that is always fighting the police to a group that is willing to stand on our own?¹²¹

Diane Lazore adds: "The people trusted us for protection. Now we had to win their trust for leadership" ¹²²

Predictably, given the heated nature of the fight over casinos in Akwesasne at the time, the Warriors have their detractors. The Warriors themselves always maintained that their focus was Mohawk territorial sovereignty¹²³ and they claim to have attempted to avoid direct commercial entanglements with controversial enterprises like gambling and smuggling.¹²⁴ Anti-gaming activist and publisher Doug George has said that the Warriors' talk of sovereignty was code for "their right to make

¹¹⁹ *Id.* at 83.

¹²⁰ *Id.* at 35 ("Despite the tough talk and the previous sighting of guns by undercover cops, the Mohawks did not display any firearms."); *id.* at 42 ("With Maracle pushing for a confrontation, Kakwirakeron had to project militancy but stop short of any display of force or armament."); *id.* at 78 ("[T]he Warriors met with the casino owners to get assurances that their security guards would not be provoked into a fight that would give police an opportunity to come again."); *id.* at 54 ("I support the march as all Warriors support anything peaceful," said Warrior John Boots. "If this march can help the so-called elected leadership understand that they have neglected us and our needs as Mohawks, then it will be a real success.").

¹²¹ *Id.* at 61-62 (internal quotation marks omitted).

¹²² *Id.* at 62 (internal quotation marks omitted).

¹²³ *Id.* at 42 ("Kakwirakeron, Boots, and Maracle knew the warriors needed to . . . present sovereignty, not gambling, as the key issue.").

¹²⁴ *Id.* at 79-81 (recounting discussions within the group about whether or not to embrace gambling and cigarette smuggling as sources of revenue). On the other hand, see *id.* at 1 for a description of Warriors smuggling weapons across the Canadian border; whether this is primarily for profit or to help the ideological struggle is not made clear.

a buck by crap games or tobacco smuggling,” and criticizes them for not having put forth a coherent political plan for uniting Akwesasne.¹²⁵ Traditional Chief Jake Swamp attacks Kakwirakeron, a prominent Warrior, as a self-promoting outsider:

He will tell you about Moss Lake¹²⁶ and how he fought for the Mohawk Nation. Well, what happened . . . ? Within a few years he left for California. . . .He did not come onto Mohawk land and join the community and participate in our life. But as soon as there is talk of the state police, he shows up with his long braids and big shoulders. A good picture for the newspaper and the television, but this is not his land¹²⁷

The newspaper *Akwesasne Notes* occasionally published scathing editorials calling the Warrior Society everything from an illegitimate “militant group” playing on public sympathies¹²⁸ to a “military dictatorship,”¹²⁹ “like a bunch of Nazi thugs.”¹³⁰

Canada’s military establishment is also not enthusiastic about the Warrior Society, which it included in a 2006 draft list of “potentially violent insurgent group[s].”¹³¹ Although the government later offered an apology for the inclusion,¹³² the Canadian military’s view of the Warrior Society was undoubtedly shaped by the “Oka crisis.”¹³³ During the crisis, Warriors, after months of wrangling with anti-gambling forces and American authorities on the New York side,¹³⁴ crossed the border to aid Mohawks demonstrating against the development of a golf course on traditional Mohawk land. Hornung describes the Canadian reaction:

¹²⁵ *Id.* at 47.

¹²⁶ Site of a longstanding Warrior occupation that ended with a state set-aside of 5,000 acres for the Mohawk to hunt and fish in. *Id.* at 21.

¹²⁷ *Id.* at 49.

¹²⁸ “*Warrior Society*,” AKWESASNE NOTES, June 30, 1990.

¹²⁹ Charlotte Debbane, *The Rule of the “Warriors”*, AKWESASNE NOTES, May 31, 1990.

¹³⁰ *The Crisis at Akwesasne*, AKWESASNE NOTES, Jan. 31, 1990.

¹³¹ *Mohawk Warriors to Get Military Apology*, CBC (Dec. 21, 2010), <http://www.cbc.ca/news/canada/montreal/story/2010/12/20/mohawk-military-apology.html> (last visited Nov. 24, 2013).

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See, e.g.*, HORNUNG, *supra* note 115, at 111-132.

On the American side of the border . . . [t]he authorities handled the Warriors as yet another fringe group exercising their distinctly American rights to dissent and bear arms. . . . In Canada, citizens do not have a constitutional right to bear arms, particularly against the government When the Warriors crossed the border, provincial and federal officials saw the presence of heavily armed Mohawks as an insurrection. . . .¹³⁵

Invited in by some Canadian Mohawks to help sustain a blockade preventing access to the disputed site,¹³⁶ the Warriors and other protesters initially did not carry weapons.¹³⁷ By the time court orders had been issued against the occupying Mohawks and the Sûreté du Québec (provincial police) were ordered in to clear the barricade, guns were on site. Sûreté officers fired tear gas, shooting started, and after a few minutes of chaos, a Sûreté corporal had been fatally shot.¹³⁸ The Canadian government then brought in the military. Internal disagreements between the Warriors and other protesters weakened the effectiveness of their campaign,¹³⁹ and eventually, after 78 days, the Mohawks came out of the woods. Although many fled, twenty-three Warriors were arrested in a confused, but largely bloodless, series of melees with police and the army.¹⁴⁰

The Warriors still exist, at least as an idea,¹⁴¹ but since the Oka crisis they have been far less visible. The Mohawk Warrior Society

¹³⁵ *Id.* at 3-4.

¹³⁶ *Id.* at 186,188.

¹³⁷ *Id.* at 188-89; *CBC Television News* (CBC television broadcast April 27, 1990) (interview with unidentified Mohawk who says he is not armed, but adds, "But the Creator will provide"), available at <http://www.cbc.ca/archives/categories/politics/civil-unrest/the-oka-crisis-1/bubbling-frustration-and-anger.html> (last visited Nov. 24, 2013).

¹³⁸ *The National* (CBC television broadcast July 11, 1990), available at <http://www.cbc.ca/archives/categories/politics/civil-unrest/the-oka-crisis-1/the-stand-off-begins.html> (last visited Nov. 24, 2013).

¹³⁹ See generally HORNUNG, *supra* note 115, at 226-77.

¹⁴⁰ *The National* (CBC television broadcast, Sept. 26 1990), available at <http://www.cbc.ca/archives/categories/politics/civil-unrest/the-oka-crisis-1/the-stand-off-begins.html> (last visited Nov. 24, 2012).

¹⁴¹ See Kahnawake Branch of the Mohawk Nation, *supra* note 113. See also "Mohawk Warrior Society" profile, FACEBOOK, <https://www.facebook.com/pages/Mohawk-Warrior->

provides an interesting model through which to understand the benefits and drawbacks of spontaneous citizens' militias. In many ways the Warriors mirror the most radical conceptions of the American militia to arise during the Founding era: those embodied in Shays' Rebellion and the Whiskey Rebellion. Like the Warriors, the Shaysites and the Whiskey Rebels disputed the legitimacy of democratic institutions and their officers; consciously adopted popular imagery of the past; insisted that they were carrying on in the true spirit of their culture's most important principles; and occasionally rallied support from the people.¹⁴² Like the Warriors, they were defeated militarily but helped focus public attention on the questions raised by their very existence.¹⁴³

Since the Washington administration, the United States government has viewed spontaneous, non-state-sponsored militias with deep suspicion, seeing them as a gateway to mob rule. As outlined above, there is good reason for such skepticism; spontaneous citizen militias are almost never of sufficient numbers to claim the inherent legitimacy of the universal militia, and by definition they cannot derive legitimacy from the government's democratic institutions. It should always make us nervous when armed private citizens claim the mantle of "the people."

The same principles probably apply to reservation politics. Organizations like AIM and the Warrior Society set themselves up in opposition to what they see as unlawful governmental intrusion on the people's liberty. But precisely because a legitimate government does not back them, they carry a certain burden of proving that they accurately represent the people's interests. Additionally, since they form only a *part* of "the people," their opponents (both tribal *and* federal) can easily paint them as an extremist fringe.

Society/35272274775 (last visited Nov. 3, 2013)) (Facebook page for fans of the Warriors); *The Warriors Within*, N. Y. PRESS, (Feb. 8, 2006) <http://nypress.com/the-warriors-within/>

(last visited Jan. 13, 2014) (profile of Paul Delaronde, a Warrior from the Moss Lake era).

¹⁴² See *supra* notes 77-80, and accompanying text.

¹⁴³ CORNELL, *supra* note 78, at 85 ("While the defeat of the Whiskey Rebels was certainly a setback for the opponents of the Federalist agenda . . . the notion that the militia might actively or passively protest unjust federal policies remained a latent force to be reckoned with in American constitutionalism.").

All this may seem to be somewhat irrelevant to the question of whether tribal governments may (or should) form *official* tribal militias. But I think these stories of unofficial militias can shed some light on that issue in two ways. First, the unofficial militias stand as a counterpoint to the official use of citizen militias. To the degree that “armed Indians” may strike some atavistic chord of unease among federal officials, it may be useful for tribal governments to *distinguish* their clearly lawful activities from the somewhat more dubious activities of the unofficial militias. On the other hand, AIM and the Mohawk Warrior Society were arguably modern Indian expressions of the same communitarian (if also slightly anarchic) militia spirit that animated so much of early American civic thought and played a countermelody to the dominant tune of Federalism. Presumably, if they could create legitimate democratic structures through which to channel it, at least some contemporary Indian societies might find it advantageous to tap into that spirit.

II. MAY TRIBES STILL EXERCISE THE MILITIA POWER?

While the dominant theme of Part I was the authority and composition of the militia itself, the theme of Part II is the nature of the militia power, which I hope to show is a power of inherent sovereignty that tribal governments retain to this day. Prior to being absorbed into the United States, Indian tribes had all the sovereign powers that any nation claims—including the power to use military force. The question now is, how much of that power is left? Having examined a number of treaties, as well as federal statutory law and a few other sources of law, I conclude that tribes likely retain *at least* the “militia” power, which is the power to organize the people for the purposes of (1) defense from invasion and (2) internal security.¹⁴⁴

Here the Anglo-American model, oddly enough, may prove useful to the cause of tribal sovereignty. The United States Constitution already provides a neat framework for dividing the military power between that used for external warfare (the power to “raise Armies,” in the Constitution’s

¹⁴⁴ Recall U.S. CONST. art. I, § 8, cl. 15 (authorizing the use of the militia “to execute the Laws of the Union, suppress Insurrections and repel Invasions”), as well as the militia’s role as the defense and security force of the *state* government, see *infra* Part II.C.

terms) and that used for defensive and internal purposes (i.e., the militia power). Because the history of treaty relations with the United States suggests that the federal government was primarily worried about the exercise of the former power, and not the latter, there is a very good argument that the latter power remains viable today.

A. General Indian Law Principles

As a general rule, tribes retain all the aboriginal powers of sovereignty that have not been “extinguished” by agreement in the treaty process or by Congress through its so-called “plenary power” over Indian affairs.¹⁴⁵ The military power is one of the fundamental rights of sovereignty—so much so that the unique system of co-sovereignty created in the United States Constitution splits the military power between the States and the federal government.¹⁴⁶ Equally foundational to the notion of sovereignty is the power to exclude others from one’s territory.¹⁴⁷ It follows that the power to effectuate that exclusion is also a part of sovereignty.

Thus, absent restrictions accomplished through treaty, or clear statutory limitations created by Congress, Indian tribes retain their inherent military powers—especially the portion of the military power necessary to exclude unwanted parties and maintain order within their own territory.

In the following sections, I introduce treaties as the most likely and most authoritative source of any limitations on the tribal military power. The Supreme Court has been inconsistent in its treatment of treaty

¹⁴⁵ See, e.g., *United States v. Lara*, 541 U.S. 193, 197 (2004) (holding that criminal jurisdiction over tribal offenders was one of the inherent powers of tribal sovereignty which had not been extinguished); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.04 [2] [a] at 1164; and § 18.04 [2] [e] at 1169 (2012) (“Perhaps the most basic principle of all Indian law ... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”).

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 16.

¹⁴⁷ See *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., dissenting) (emphasis added) (“[M]ost would consider the defining characteristic of sovereignty . . . [to be] the power to exclude from the sovereign’s territory people who have no right to be there.”).

rights,¹⁴⁸ but it is fair to say that today treaties are honored, at least in principle, as part of the foundational corpus of Indian law. Indeed, the strong form of the argument is that treaties are the *only* legal framework for dealing with Indian tribes that is constitutional in scope. They are the only records of any sort of *consent to be governed* equivalent to the consent of the States to enter into the constitutional arrangement.¹⁴⁹ Like the Constitution, treaties are presumptively binding on tribes and the federal government alike, even in the absence of any enabling statute.

Of course, treaties are not uniform in their legitimacy (i.e., in documenting the consent of the governed); nor are they nationwide in scope (because they necessarily apply only to the signatory tribes). Nonetheless, although each treaty applies only to certain tribes, *all* treaties bind the United States government. Treaties are thus our window into the federal government's view of which powers the tribes had to surrender to become part of the Union. One could argue, therefore, that treaties collectively throw a sort of shadow, outlining the shape of what the *United States* understood to be the lost—or retained—sovereign powers of the tribes.¹⁵⁰

To complete the picture I also examine federal statutes for possible limitations on the tribal military power and raise the question of whether state governments should have any say in regulating tribal militias.

¹⁴⁸ Compare *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress may unilaterally alter Indian treaties), with *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (affirming an Indian Claims Commission finding an uncompensated taking of the Black Hills, which had been guaranteed to the Sioux by treaty).

¹⁴⁹ See, e.g., FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 40 (1995) (explaining that treaties form “the primary doctrinal grounding for the recognition of tribal sovereignty,” “the foundation for the recognition of a government-to-government relationship,” and “the closest thing to a (federal) constitutional benchmark” in Indian affairs).

¹⁵⁰ A similar method was used, controversially, in Justice Rehnquist's majority opinion in *Oliphant v. Suquamish Indian Tribe*, where he drew on the terms of an 1830 treaty with the Choctaw and an 1855 treaty with the Suquamish (as well as other sources) to find a broad lack of tribal criminal jurisdiction over non-Indians. 435 U.S. 191, 197-99, 206-207 (1978). It seems to me that turnabout is fair play, and that this method ought be available to argue in *favor* of retained tribal sovereignty as well as against.

B. *Treaties*

As Stuart Banner has noted, there is a standard narrative lurking in the background of our popular culture that “[t]he Indians were . . . conquered by force,”¹⁵¹ an idea that has informed legal doctrine since at least 1823.¹⁵² What then are we to make of the extensive body of treaties between the United States and Indian tribes? Is it the case, as Banner admits he originally assumed, that “Americans and their British colonial predecessors papered over their conquest with these documents to make the process look proper and legal”?¹⁵³ One might expect, were this the case that treaties would tend to look like instruments of surrender, with terms dictated by the winning party to the losing party. Given the violence of the wars between the United States (or, originally, colonists) and Indians, we might expect that some of these treaties would require the Indians to foreswear their inherent military powers as nations, either as a condition of entry into the Union (if one adopts the view that Indian treaties constituted an agreement to enter the federal system¹⁵⁴), or as a means of ensuring that the tribes were too weak to be a further threat.

But the text and context of Indian treaties argue (as does Banner) that it was rarely so simple, and that Indians were often full participants in the treaty-making process—albeit participants under tremendous pressure.¹⁵⁵ And, as I will attempt to show below, Indian treaties may have

¹⁵¹ STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 1 (2005).

¹⁵² *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).

¹⁵³ BANNER, *supra* note 151, at 1.

¹⁵⁴ Some treaties do, if only ambiguously, anticipate that Indians will ultimately have some sort of formal representation in Congress. See, e.g., Treaty with the Delaware Nation, U.S.-Delaware Nation, art 6, Sept. 17, 1778, 7 Stat. 13 (“[I]t is further agreed . . . [that other tribes may] join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress.”); Treaty of Hopewell with the Cherokee Nation, U.S.-Cherokee Nation, art 12, Nov. 28, 1785, 7 Stat. 18 (“That the Indians . . . shall have the right to send a deputy of their choice, whenever they think fit, to Congress.”). See *also* BRUCE ELLIOTT JOHANSEN, *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 297-300 (1998) (describing doomed efforts to have the Indian state of Sequoyah admitted to the Union).

¹⁵⁵ Perhaps the quintessential treaty illustrating this point is the 1868 Treaty with the Navajo Nation, in which the Navajo, who were at the time effectively prisoners of the U.S.

acted to limit certain *uses* of the inherent military power, but never actually extinguished that power.

Treaty making between the United States and Indian tribes has tended to reflect the contemporary power dynamic between the respective parties. Between the first English contact with Indians in Virginia and Massachusetts to the end of the treaty period in 1871, the United States grew from a ragtag set of outposts dependent on good relations with Indians for their very survival, to a small set of embattled former colonies in need of allies, to an aggressively expansionist continental power. In the 19th century particularly, America grew more colonialist;¹⁵⁶ United States courts officially declared that Indians no longer had absolute sovereignty over their own territory;¹⁵⁷ white supremacy reached its zenith,¹⁵⁸ and new

Army, nonetheless managed to reclaim a substantial portion of their traditional land after having been removed several years prior. See Part II.B.5, *infra*, for discussion of this treaty and the military power.

¹⁵⁶ See, e.g., John O'Sullivan, *The True Title*, N. Y. MORNING NEWS (Dec. 27, 1845) ("[The American claim to the Oregon territory] is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable to the full expansion of its principle and destiny of growth . . .").

¹⁵⁷ *Johnson v. McIntosh*, 21 U.S. 543, 587 (1823) ("The United States . . . maintain . . . that discovery gave [European powers] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.").

¹⁵⁸ Whether the supremacy of whites was due to their biological superiority or merely the grace of circumstances was a subject of debate—but the fact of that supremacy was, generally, considered axiomatic. Compare, e.g., George Combe & B.H. Coates, *Crania Americana*, 38 AMER. J. OF SCIENCE AND ARTS 342, 352 (1840), available at <http://archive.org/download/mobot31753002152160/mobot31753002152160.pdf> (last visited Nov. 24, 2013) (book review) (emphasis added) ("One of the most singular features in the history of this continent is, that the aboriginal races, with few exceptions, have perished or constantly receded, before the Anglo-Saxon race, and have in no instance either mingled with them as equals, or adopted their manners and civilization. These phenomena must have a cause; and can any enquiry be at once more interesting and philosophical than that which endeavors to ascertain whether that cause be connected with a *difference in the brain between the native American race, and their conquering invaders?*"), with GEORGE CUSTER, MY LIFE ON THE PLAINS, OR, PERSONAL EXPERIENCES WITH INDIANS 12 (2009) (1874) (third emphasis added) ("Stripped of the beautiful romance with which we have been so long willing to envelop him . . . in his native village, on the war path, and when raiding upon our frontier settlements and lines of travel, the Indian forfeits his claim to the appellation of the '*noble red man*.' We see him as he is . . . a *savage* in every sense of the word; *not worse, perhaps, than his white*

commercial powers like the railroads put additional pressure on the government to dispossess the Indians of their lands.¹⁵⁹ Indians became more embattled by the year, winning both legal and military victories, but ultimately fighting a rear guard action. Treaties between the United States and various tribes reflect the changing political balance, and later treaties reflect much harsher terms—terms of conquest. Despite this, however, at no point were Indian nations' internal military powers ever entirely extinguished.

1. Colonial Period

Treaties from the colonial period are quite clear that Indian tribes are separate, equal nations. Around 1643, the Haudenosaunee entered into an unwritten, but physically memorialized, treaty known as the “Two Row Wampum” treaty with Dutch colonists.¹⁶⁰ The wampum belt, memorializing the agreement, consisted of two parallel rows of colored beads, indicating the parallel (i.e., non-interfering) and equal relationship of the two parties.¹⁶¹ The relationship was later transferred to the English (who largely displaced the Dutch) and a three-link silver “chain of friendship” was forged in 1677 to memorialize this agreement.¹⁶²

Even in the earliest years, there were attempts to frame these agreements as creating a vassalage relationship.¹⁶³ The Haudenosaunee,

brother would be similarly born and bred, but one whose cruel and ferocious nature far exceeds that of any wild beast of the desert.”).

¹⁵⁹ See, e.g., General William T. Sherman, Speech to Lakota and Cheyenne Chiefs at North Platte, Nebraska Territory (Sept. 19, 1867), in *The Indian Commission: Grand Council with the Hostile Chiefs at North Platte*, N.Y. TIMES (Sept. 27, 1867), <http://query.nytimes.com/mem/archive-free/pdf?res=9902E3DF103AEF34BC4F51DFBF66838C679FDE> (last visited Nov. 24, 2013) (“This railroad up the Platte and the Smoky Hill Railroad will be built . . . and if your young men interfere, the Great Father [i.e., the president] . . . will let loose his young men, and you will be swept away The slow ox-wagons do not answer white men; we build iron roads, and you cannot stop the locomotives any more than you can stop the sun and the moon . . .”).

¹⁶⁰ ROBERT S. ALLEN, HIS MAJESTY’S INDIAN ALLIES: BRITISH INDIAN POLICY IN THE DEFENCE OF CANADA, 1774-1815 15 (1993).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *id.* at 16 (quoting instructions to colonial officials to impress on the Indians that they “are and have always been, the subjects of the King of England”); JAMES WILSON,

however, politely rebuffed any such suggestion. A Haudenosaunee tradition records the following response to a Dutch proposal of vassalage:

You say that you are our Father and I am your son. We say We will not be like Father and Son, but like Brothers. This wampum belt confirms our words. These two rows will symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian People, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our boat. *Neither of us will make compulsory laws or interfere in the internal affairs of the other.* Neither of us will try to steer the other's vessel.¹⁶⁴

In 1753, responding to a failure of the British to assist the Haudenosaunee in fending off encroachments from western tribes, a party of Mohawks threatened to declare the chain of friendship broken and to “send up a belt of Wampum to our Brothers the 5 Nations to acquaint them the Covenant Chain is broken”¹⁶⁵ This kind of threat is a diplomatic maneuver by a completely independent sovereign, not an entity that has surrendered any of its powers of self-government—especially not the military power.

2. *Revolutionary Period*

Revolution-era treaties also envisioned tribes as independent nations likely to engage in war from time to time, including in alliance with the newly formed United States. A 1778 treaty with the Delaware tribe reflects the young country's weak position and need for allies against the British. It provides that the United States will supply the Delaware with

THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA 115 (1998) (arguing that the English viewed the treaties as feudal arrangements).

¹⁶⁴ WILSON, *supra* note 163 at 115–116 (1998); *See also What is Wampum?*

GANONDAGAN, <http://www.ganondagan.org/wampum.html> (last visited Nov. 24, 2013).

¹⁶⁵ ALLEN, *supra* note 160, at 20.

“implements of war,”¹⁶⁶ while for their part, the Delaware promised to “join the troops of the United States . . . with such a number of their best and most expert warriors as they can spare, consistent with their own safety, and act in concert with them”¹⁶⁷ Furthermore, as Chief Justice Marshall would later explain, at the time of the Founding Indian tribes even had the right of warfare *against* the United States. “Their appeal [in cases of conflict with the United States or the States] was to the tomahawk, or to the government.”¹⁶⁸ That is, Indian tribes were separate nations and resolved their disputes with the United States via warfare and diplomacy.

3. *Early 19th Century/Removal Period*

Soon after the Revolution, treaties began to call on Indian nations to acknowledge the patronage and protection of the United States. A 1785 treaty with the Cherokee, who had sided with the British in the Revolutionary War, required the tribe to admit that it was “under the protection of the United States of America and of no other sovereign whosoever.”¹⁶⁹ The idea that Indian tribes were in some way dependent on the United States would later become the foundation of the legal doctrines diminishing tribal sovereignty.¹⁷⁰ Yet even assuming the validity of such doctrine, there is nothing in the mere fact of dependence, in and of itself, that would diminish any specific power of a pre-existing sovereign. As Chief Justice Marshall wrote in *Worcester v. Georgia*, “A weak state, in order to provide for its safety, may place itself under the protection of one

¹⁶⁶ Treaty with the Delaware Nation, U.S.-Delaware Nation, art 5, Sept. 17, 1778, 7 Stat. 13, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/del0003.htm> (last visited Jan. 5, 2014).

¹⁶⁷ *Id.* at art. 3.

¹⁶⁸ *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 18 (1831).

¹⁶⁹ Treaty of Hopewell with the Cherokee Nation, U.S.-Cherokee Nation, art 3, Nov. 28, 1785, 7 Stat. 18, *available at* <http://www.cherokee.org/AboutTheNation/History/Facts/TreatyofHopewell,1785.aspx> (last visited Jan. 5, 2014).

¹⁷⁰ *See supra* note 168 (“It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.”).

more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe.”¹⁷¹

Marshall’s view of the Cherokee as a “weak state . . . under the protection of one more powerful” is the most natural reading of the early treaties. But even a *federalist* reading of “under the protection of the United States”—one that views the tribes as agreeing to be encompassed in the Union—does not, by itself, tell us that any given power of sovereignty is extinguished. Similarly, in order to show that the tribes were divested of some or all of their military powers as sovereign nations when entering the Union, we would still need to rely on specific treaty language.

The 1830 Treaty of Dancing Rabbit Creek with the Choctaw Nation, providing terms of forced removal, seems to envision a hybrid system of patronage. The Choctaw would desist from aggressive warfare against the United States or neighboring tribes, and in exchange the United States would “protect the Choctaws from domestic strife and from foreign enemies *on the same principles* that the citizens of United States are protected.”¹⁷² Thus, the Choctaw are not made citizens of the United States, and are still clearly envisioned as a separate nation, but the United States take on obligations to protect the Choctaw, *as if* they were citizens.

At the same time, the treaty contemplates the possibility that the United States might call on the Choctaw to fight a common enemy, “provided, no war shall be undertaken or prosecuted *by said Choctaw Nation* but by declaration made in full Council, and to be approved by the United States, *unless* it be in self-defense against an open rebellion or against an enemy marching into their country.”¹⁷³ The key point is that the Choctaw Nation as a whole is still recognized as having a military power, albeit now primarily defensive and of circumscribed independence.¹⁷⁴ (As

¹⁷¹ *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

¹⁷² Treaty of Dancing Rabbit Creek with the Choctaw Nation, U.S.- Choctaw Nation, art 5, Sept. 27, 1830, 7 Stat. 333 (emphasis added), *available at* <http://www.choctawnation.com/history/pre-removal-government-treaties/1830-treaty-of-dancing-rabbit-creek/> (last visited Jan. 5, 2014).

¹⁷³ *Id.*

¹⁷⁴ *See also id.* at art. 6 (committing the Nation to deliver up for punishment anyone who engages in acts of war “except to oppose an actual or threatened invasion or rebellion”).

discussed in Part I.A.2, *supra*, the Choctaw might not have agreed that they were so circumscribed.) Furthermore, far from envisioning the Choctaw as in any way disarmed, the treaty provides that the United States will furnish “to each warrior who emigrates a rifle, moulds, wipers and ammunition.”¹⁷⁵

This kind of treaty provision—stipulating that Indian tribes would desist from military activities outside their reservations, relying on United States military protection from exterior threats, but retaining the right to repel invasions and maintain order—appears to have been quite common in the early and mid-19th century.¹⁷⁶ For example, the Treaty of Yakima explicitly reserves to the tribe a right to make war with other tribes “in self-defence.”¹⁷⁷

4. *Late 19th Century/Western Expansion*

One might expect that the later treaties with Plains and Southwest Indians, who were often subdued and driven onto reservations only through the operation of considerable military force, would be written almost entirely on the conquering nation’s terms. This view is complicated by the fact that by the 1860s the United States was using nearly identical boilerplate language in treaties with both tribes over whom it had exerted total military control, like the Navajo,¹⁷⁸ and those that had actually defeated the United States in battle, like the Sioux.¹⁷⁹ Yet this only

¹⁷⁵ *Id.* at art. 20.

¹⁷⁶ See also Treaty of Medicine Creek., U.S.-Nisqually, Puyallup, Etc., art 8, Dec. 26, 1854, 10 Stat. 1132, available at <http://digital.library.okstate.edu/kappler/vol2/treaties/nis0661.htm> (last visited Jan. 5, 2014); Treaty of Yakima, U.S.- Yakima Nation, art. 8, June 9, 1855, 12 Stat. 951, available at <http://www.ccrh.org/comm/moses/primary/yaktreaty.html> (last visited Jan. 5, 2014).

¹⁷⁷ Treaty of Yakima, U.S.- Yakima Nation, art. 8, June 9, 1855, 12 Stat. 951.

¹⁷⁸ See John Burnett, *The Navajo Nation's Own 'Trail Of Tears'*, NPR (June 15, 2005) <http://www.npr.org/2005/06/15/4703136/the-navajo-nation-s-own-trail-of-tears> (last visited Nov. 24, 2013).

¹⁷⁹ See JEFFERY OSTLER, *THE PLAINS SIOUX AND U.S. COLONIALISM FROM LEWIS AND CLARK TO WOUNDED KNEE* 49 (2004) (“For the Sioux, then, the 1868 Treaty entailed the making of a permanent peace between two equal parties.”); *id.* at 40-46 (describing the U.S.’s unsuccessful attempts to subdue the Sioux through military force in the 1860s). The Sioux would not be finally subdued until 1876, five years after Congress had, for its own

underscores the point—*regardless* of whether the tribes were militarily subdued, their treaties did not deprive them of the internal military powers that had been more explicitly retained by tribes like the Choctaw.¹⁸⁰ Neither treaty calls for the tribe to disarm, or to refrain from defensive warfare or internal peacekeeping.

Both treaties, moreover, appear to have recognized the tribes' retained right of exclusion. The treaty with the Navajo, for example, provides that "no persons" shall "pass over, settle upon, or reside in" the tribe's land, except duly authorized agents "of the Government, *or of the Indians.*"¹⁸¹ The treaty also contemplates that the tribe might allow "other friendly tribes or individual Indians" to settle among them.¹⁸² The land is "set apart" for the "use and occupation" of the tribe. All these taken together would seem to imply a retained right of exclusion. An even more explicit example is the treaty with the Utes, guaranteeing to the tribe "the absolute and undisturbed use" of the land.¹⁸³

Whether the right of exclusion should by itself suggest a retained and unextinguished right to use force to eject intruders, or to engage in self-defense, can be a somewhat more difficult question.¹⁸⁴ The Apache,

internal political reasons, ended the treaty-making process with Indian tribes. Indian Appropriation Act, 25 U.S.C. § 71 (2006).

¹⁸⁰ They do circumscribe the *external* activities of the tribe with a high degree of specificity, however. Treaties with the Sioux and the Navajo required, for example, that the tribes "withdraw all opposition to the construction of the railroads," permit railroad construction "not passing over their reservation," cease all attacks on the homes, wagon trains, coaches, and livestock of U.S. citizens, and refrain from harming or killing white men. Treaty of Fort Laramie, U.S.-Sioux Nation, art 11, Apr. 29, 1868, 15 Stat. 635; Treaty of Fort Sumner, U.S.-Navaho Nation, art. 9, June 1, 1868, 15 Stat. 667, *available at* <http://reta.nmsu.edu/modules/longwalk/lesson/document/treaty.htm> (last visited Jan. 5, 2014).

¹⁸¹ Treaty of Fort Sumner, U.S.-Navaho Nation, art. 2, June 1, 1868, 15 Stat. 667 (emphasis added).

¹⁸² *Id.*

¹⁸³ Treaty with the Utes, U.S.-Ute Nation, art 2. Mar. 2, 1868, 15 Stat.619.

¹⁸⁴ Confusing matters further, the Supreme Court has been unclear about the exact degree of exclusive control tribes have over their reservations. *Compare* *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that tribal governments, unlike cities, counties, or federal territories, constitute a "separate sovereign" within the federal system), *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations."), *and* *Morris v. Hitchcock*, 194 U.S. 384, 387-89 (1904) ("[I]t is also undoubted that in treaties entered into with the

for example, agreed to “refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment.”¹⁸⁵ Is this merely a grant of jurisdiction in cases of *private* tort against individuals? Or does the phrase “cases of aggression” include acts of war, either by other tribes or by organized factions of Americans? Does it matter that the Apache agreed to allow American citizens “free and safe passage through the territory,”¹⁸⁶ thereby limiting its right to exclude?¹⁸⁷ On the other hand, the Apache also agreed, in the same treaty, and again in a separate treaty involving other tribes, to cease military incursions into “Mexican provinces.”¹⁸⁸ Does the specificity of this particular promise suggest that a blanket ban on military activities is *not* intended, on the principle of *expression unius est exclusion alterius*? None of this is easily resolved.

Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned”), *with Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that a tribal court did not have jurisdiction to hear civil rights claims against state officials executing a warrant against Indians on the reservation), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribal courts did not have civil jurisdiction over a traffic accident between nonmembers on a state highway running through the reservation), *and Montana v. United States*, 450 U.S. 544 (1981) (holding that the tribal government could not regulate hunting and fishing on non-Indian fee land within the reservation).

¹⁸⁵ Treaty with the Apache, U.S.-Apache, art 4, July 1, 1852, 10 Stat. 979, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/apa0598.htm> (last visited Jan. 5, 2014).

¹⁸⁶ *Id.* at art. 7.

¹⁸⁷ *See, e.g., Strate v. A-1 Contractors*, 520 U.S. at 455-56 (“Forming part of the State’s highway, the right-of-way is open to the public, and traffic on it is subject to the State’s control. The Tribes . . . have retained no gatekeeping right. So long as the stretch is maintained as part of the State’s highway, the Tribes cannot assert a landowner’s right to occupy and exclude.”).

¹⁸⁸ *See* Treaty with the Apache, U.S.-Apache, art 5, July 1, 1852, 10 Stat. 979 (“Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any ‘incursions within the Territory of Mexico’ of a hostile or predatory character”); Treaty with the Camanche, Kiowa, and Apache, U.S.-Camanche, Kiowa, and Apache Nations, art 5, July 27, 1853, 10 Stat. 1013 (“The Camanche, and Kiowa, and Apache tribes of Indians, parties to this treaty, do hereby solemnly covenant and agree to refrain in future from warlike incursions into the Mexican provinces, and from all depredations upon the inhabitants thereof”) *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/apa0598.htm> (last visited Jan. 5, 2014).

Perhaps the clearest example to be found of a tribe explicitly surrendering the right to use some portion of their military power is in the Treaty with the Cheyenne and Arapaho. There the tribes agreed that:

*For the purpose of enforcing the provisions of this article it is agreed that in case hostile acts or depredations are committed by the people of the United States, or by Indians on friendly terms with the United States, against the tribe or tribes, or the individual members of the tribe or tribes, who are parties to this treaty, such hostile acts or depredations shall not be redressed by a resort to arms, but the party or parties aggrieved shall submit their complaints through their agent to the President of the United States, and thereupon an impartial arbitration shall be had*¹⁸⁹

This appears to be a great limitation on any retained military power. By barring “resort to arms,” even in retaliation for “hostile acts or depredations,” it does seem that the treaty is going beyond the scope of mere tit-for-tat revenge in cases of private tort; the language seems to be a ban on *military* retaliation even for *acts of war* against the tribe as a whole.

However, the provision is limited by at least two clauses. One clause specifies that the prescribed method of redress is applicable only when the “hostile acts” are committed by “people of the United States” or the United States’ Indian allies. Presumably tribes hostile to the United States are on their own if they aggrieve the Cheyenne or the Arapaho.

More importantly, there is the initial clause, which limits the ban on military retaliation to the purposes of the first article of the treaty. The treaty must be read in its peculiar context. It was intended to bring an end to a war that had begun with a massacre of Cheyenne and Arapaho villagers by United States soldiers at Sand Creek in 1864.¹⁹⁰ Article 6 of

¹⁸⁹ Treaty with of the Little Arkansas, U.S.-Cheyenne and Arapaho, art 1, Oct. 14, 1865, 14 Stat. 703, (emphasis added), *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/che0887.htm> (last visited Jan. 5, 2014).

¹⁹⁰ See S. Doc. No. 26, at 11-14 (1867) (testimony describing the attack).

the treaty acknowledges the wrong done and provides for reparations.¹⁹¹ In light of these circumstances and the language limiting it to “the purposes of enforcing” the first article (i.e., the end of the war), the most natural reading of the non-retaliation provision is that it is intended to bring a halt to what might otherwise have become a cyclical blood feud. It was not intended to deprive the tribes of a military power *generally*.

Even in the 1866 treaty with the Cherokee—who had sided with the Confederacy in the Civil War, and who were therefore an explicitly defeated enemy—the United States does not abolish the Nation’s military power *per se*.¹⁹² Instead, the treaty merely requires the tribe to turn over all weapons “and quartermaster’s stores” belonging to either the United States or the Confederacy.¹⁹³ This provision seems like little more than an attempt to secure loose munitions in Confederate-friendly country¹⁹⁴—especially because it immediately follows an amnesty provision for all “wrongs committed in aid or in the suppression of the rebellion.”¹⁹⁵ It certainly lacks the absolute sweep of other provisions in the treaty that clearly *were* intended to limit the Cherokee government’s powers. An example of this is found in the provision bringing Cherokee abolition of slavery into conformity with the Thirteenth Amendment,¹⁹⁶ or the one

¹⁹¹ Treaty with of the Little Arkansas, U.S.-Cheyenne and Arapaho, art 6, Oct. 14, 1865, 14 Stat. 703, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/che0887.htm> (last visited Jan. 5, 2014).

¹⁹² See *generally* Treaty with the Cherokee Nation, U.S.-Cherokee Nation, July 19, 1866, 14 Stat. 799, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/che0942.htm> (last visited Jan. 5, 2014). The treaty is also highly tribe- and circumstance-specific, unlike the more boilerplate language of the Navajo and Sioux treaties.

¹⁹³ *Id.* at art. 2.

¹⁹⁴ The post-Civil War treaty with the Choctaw and Chickasaw similarly demands the surrender of “ordnance, ordnance stores, and arms of all kinds” belonging to the “so-called Confederate States of America.” Treaty with the Choctaw and Chickasaw, U.S.-Choctaw and Chicksaw Nation, art 5, Apr. 28, 1866, 14 Stat. 769, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/cho0918.htm> (last visited Jan. 5, 2014).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at art. 9.

giving the United States President discretion to “correct” certain Cherokee laws.¹⁹⁷

5. *Extrinsic Sources*

We might also ask whether extrinsic sources could shed light on whether the parties (but especially the United States) intended the treaties to extinguish the military power. Records of Indian treaty negotiations are sometimes used by courts to resolve ambiguities or otherwise shed light on the application of treaty provisions.¹⁹⁸ Although an exhaustive survey is not possible within the scope of this article, perusal of some of the better-known records of Indian treaty negotiations does not suggest a general understanding, on the part of either tribal or United States representatives, that treaties with the United States included an extinguishment of tribal military power.

For example, the proceedings of the Council at the Walla Walla Valley, where Governor Isaac Stevens of the Washington Territory met with the Umatilla, the Cayuse, and the Walla Walla to convince them to move onto reservations, contain no hint of any attempt to negotiate away their military power.¹⁹⁹ The United States negotiators do admonish against internecine war on *moral* grounds,²⁰⁰ but there is simply no hint that the treaty would involve a surrender of the military power, even despite the hostile circumstances under which negotiations took place.²⁰¹ The final

¹⁹⁷ *Id.* at art. 6.

¹⁹⁸ See, e.g., *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d 904, 916 (8th Cir. 1997) *aff'd sub nom.* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (“Defendants do not point to a single document indicating that the 1837 treaty negotiations included discussion of removal.”); *United States v. Webb*, 219 F.3d 1127, 1137 (9th Cir. 2000) (citation omitted) (“[T]he record of negotiations with the Yankton Sioux disclosed a desire to ‘dissolve . . . tribal governance,’ motivation utterly absent from the Nez Perce negotiations.”).

¹⁹⁹ See PROCEEDINGS AT THE COUNCIL IN THE WALLA WALLA VALLEY (1855), *reprinted in* ROBERT H. RUBY & JOHN ARTHUR BROWN, *THE CAYUSE INDIANS: IMPERIAL TRIBESMEN OF OLD OREGON* 315-370 (1972).

²⁰⁰ *Id.* at 379 (“We not only want you to be at peace with all whites but we want you to be at peace with yourself. We didn’t come here to divide you or to induce one to be against another. Why should you be at war with each other? You may live at separate places, but your hearts would be as one and help each other.”).

²⁰¹ In his diary of the negotiations, Lawrence Kip describes the discovery, after the negotiations, of a narrowly defeated proposal by the Cayuse to massacre the American

treaty stipulated that the tribes would refrain from “depredations” against United States citizens and would not make war with other tribes “except in self-defence.”²⁰² This treaty put the tribes on roughly the same footing, it would appear, as the Choctaw, the Yakama, and others discussed above.²⁰³

To add to the notion that treaties were not intended to terminate tribal military power, the treaty provisions provided the Choctaw with rifles and ammunition, and the Walla Walla negotiators promised the tribes a gunsmith to ensure their weapons worked.²⁰⁴ Similarly, General Sherman promised the Sioux “powder and ball” as an incentive during negotiations a year before the Fort Laramie treaty.²⁰⁵ In fairness, the weapons are discussed primarily as tools for hunting, but the general point remains that American negotiators did not anticipate that the tribes would be disarmed.

Indeed, as late as 1868, General Sherman made very clear, during negotiations with Navajo leader Barboncito, that the tribe still had the same rights of defensive warfare we have already seen were explicitly retained by the Choctaw and others:

[Y]ou must live at peace and must not fight with other Indians The Army will do the fighting, you must live at peace, if you go to your own country the Utes will be the nearest Indians to you, you must not trouble the Utes and the Utes must not trouble you. If however the Utes or Apaches come into your country with bows and arrows and

negotiating party. LAWRENCE KIP, INDIAN COUNCIL IN THE VALLEY OF THE WALLA WALLA (1855).

²⁰² Treaty with the Walla Walla, Cayuse and Umatilla, U.S.-Walla Walla, Cayuse, and Umatilla, art 8, June 9, 1855, 12 Stat. 945, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/wal0694.htm> (last visited Jan. 6, 2014).

²⁰³ See *supra* notes 175-76, and accompanying text.

²⁰⁴ RUBY & BROWN, *supra* note 199, at 352.

²⁰⁵ Sherman, *supra* note 159.

guns *you of course can drive them out* but must not follow beyond the boundary line.²⁰⁶

In short, even as late as 1868, it seems clear that negotiators were still envisioning Indian nations as holding a military power, albeit one limited to defensive and internal purposes, not to be directed in aggression against the United States itself or its neighbors. This is arguably *no less than what the States themselves retain* under our federal system,²⁰⁷ especially after the Civil War.²⁰⁸

The overwhelming conclusion is that 19th-century negotiators for both the tribes and the United States overwhelmingly understood themselves to be negotiating certain *conditions* to be placed on the tribes' use of the military power. It was understood that the power would be used defensively, and, more specifically, that tribes would refrain from attacking the United States and its allies—rather than extinguishing that power entirely.

As noted above, treaties are generally binding only on the signatory tribes. But because the United States has been a party to each one of those treaties, their collective outline may yield the closest thing we have to universal principles regarding United States-tribal relations—including, in this case, the principle that tribes have not relinquished a defensive/internal military power.

²⁰⁶ Council Proceedings (May 28, 1868) (emphasis added) *available at* <http://reta.nmsu.edu/modules/longwalk/lesson/document/may28.htm> (last visited Nov. 24, 2013).

²⁰⁷ See U.S. CONST. art. I, § 8, cl. 15 (limiting even the *federal* use of state Militias to “execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions”); see also Wiener, *supra* note 17, at 189, 192-93 (detailing situations in which state militias refused to go abroad for war, on the theory that their role was domestic and defensive).

²⁰⁸ See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 212 (1983) (calling the theory of the Second Amendment as supporting States' right to armed revolt *against the U.S.* “little more than a holdover from an era of constitutional philosophy that received its death knell in the decision rendered at Appomattox Courthouse”).

C. Federal Statutes

Though treaties form a significant basis for understanding which powers of sovereignty tribes retain, they do not tell the whole story because Congress is generally assumed to have “plenary power” over Indian tribes.²⁰⁹ Is there, then, any federal *statute* that prohibits formation of militias by Indian tribes?

Nothing in Title 25 of the United States Code—dealing with Indians—forbids a tribe from maintaining a militia. On the other hand, Title 32 of the United States Code, regulating the National Guard, does forbid “a State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, or the Virgin Islands” from maintaining troops in peacetime except for its National Guard troops.²¹⁰ Does this limitation prevent tribes from raising a militia outside the National Guard system?

Arguably not, for two reasons. First, Title 32 does not even prevent the *States* from raising a militia that would act purely as a defensive or internal force²¹¹—exactly the kind of military power which, as I have argued above, remains in the tribes’ hands. Second, the text of the provision is quite inclusive, naming territories (Guam and the Virgin Islands), a commonwealth (Puerto Rico), and a federal capital district (D.C.). Yet it excludes Indian tribes. Furthermore, 32 U.S.C. § 101 provides that “[f]or purposes of other laws relating to the militia . . . the term ‘Territory’ includes Guam and the Virgin Islands.” In 10 U.S.C. §335, a chapter governing the use of state militias to control insurrections, “State” is defined to include those same territories. Again, neither mentions Indian tribes. Note, however, that numerous other parts of the

²⁰⁹ The strongest statement of the principle is probably found in *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (asserting that the power over tribes *must* exist in Congress, because “it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes”). Later courts have backed off *Kagama’s* position somewhat. See, for a summary of the changes, *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997).

²¹⁰ 32 U.S.C. § 109(a), (c) (2006).

²¹¹ *Id.* at § 109(c). Although the term “defense force” is used, such militias do more than just respond to invasions. See *infra* Part IV.B discussing State Defense Forces.

United States Code include the phrase “Indian tribe” in similar lists,²¹² suggesting that Congress will name tribes explicitly when it intends to include them.

Federal regulation might inevitably follow the formation of tribal militias. If a tribe were to adopt a militia program as a means of dealing with crime along international borders,²¹³ for example, the federal executive’s broad power over international relations would likely be implicated. Moreover, male tribal members between 17 and 45 are already a part of the federal unorganized militia.²¹⁴ To avoid conflicts with federal policy, perhaps tribes *should* be brought within the scope of 32 U.S.C. § 109. However, they are not; federal statutes simply do not regulate tribal militias.

D. The Role of the States

It is uncertain whether state law would have any effect on tribal militias. Some states prohibit or heavily regulate non-state-sponsored militias within their geographical boundaries.²¹⁵ Florida, for example, requires paramilitary organizations to be specially licensed²¹⁶ and bans paramilitary training or drilling for purposes of engaging in civil disorder.²¹⁷

These statutes likely apply only to individuals, not to independent sovereigns. Although some states do exercise criminal jurisdiction over Indian individuals on tribal reservations,²¹⁸ and recent Supreme Court cases have tended to move away from an absolute prohibition on state regulation,²¹⁹ states generally may not interfere with the functioning of

²¹² See, e.g., 18 U.S.C. § 2265 (2006); 28 U.S.C. § 1738C (2006); 42 USC § 12523 (2006). Others include “Indian country,” as well as territories, in a broad definition of “State.” See, e.g., 28 U.S.C. § 1738B(b) (2006).

²¹³ See *infra* Part III.A.

²¹⁴ 10 U.S.C. § 311 (2006). This “unorganized militia” is the last remnant of the national universal militia and the source of draftees when there is a draft.

²¹⁵ For an excellent primer, see Joelle E. Polesky, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1606 (1996).

²¹⁶ FLA. STAT. ANN. § 870.06 (West 2012).

²¹⁷ FLA. STAT. ANN. § 790.29 (West 2012).

²¹⁸ 18 U.S.C. § 1162 (2006), 28 U.S.C. § 1360 (2006), 25 U.S.C. §§ 1321 (2006).

²¹⁹ See *Rice v. Rehner*, 463 U.S. 713, 718 (1983).

tribal *governments*. States may not directly tax tribal enterprises,²²⁰ for example, or regulate tribally-managed game herds.²²¹

In *Nevada v. Hicks*, the Supreme Court distinguished between “on-reservation conduct involving only Indians,” where “state law is generally inapplicable,” and a situation where “state interests outside the reservation are implicated” and states might have authority to intervene.²²² Whether a state could ban or limit a tribal militia is untested legal territory, but the answer might turn on the degree to which the militia is understood as being limited in reach and scope—that is, not implicating the security of the state itself.

There is no reason a tribal militia should *necessarily* threaten a surrounding state—given the population disparities between tribes and states. However, there would certainly be government-to-government issues to work out: the tribal militia’s ability to detain non-Indian state citizens during times of public emergency, for example, or its ability to patrol and enforce the borders of the reservation. In jurisdictions where tribes lack clearly defined reservations or in areas under state regulatory jurisdiction that lie cheek-by-jowl with those under tribal jurisdiction (Oklahoma, for example), the use of a tribal militia is obviously much more likely to implicate the state’s sovereign functions.

Perhaps the best that can be said on this subject is that tribes would likely have to take state interests into account in deciding how to employ a tribal militia; that the degree of state interest is likely to be highly situation-dependent; and that it could be the subject of litigation.

III. WHY A MILITIA?

Assuming they have the right to do so, we may ask why Indian tribes might need or want to organize a citizen militia. The very short answer is, for the same reasons any other sovereign might. But a slightly more nuanced answer should address reasons specific to tribal

²²⁰ Okla. Tax Comm’n. v. Chickasaw Nation, 515 U.S. 450 (1995) (holding that where the incidence of a fuel tax falls on the tribe as vendor, the tax is invalid).

²²¹ New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

²²² Nevada v. Hicks, 533 U.S. 353, 361-62 (2001).

governments. With the caveat that of course no single governance tool (including citizen militias) will be appropriate to every one of the 565 federally-recognized Indian communities,²²³ I examine some of these reasons below.

A. Maintaining Territorial Control and Reducing Crime

Tribes, like other sovereigns, have the right to secure their territories and exclude unwanted intruders.²²⁴ Among sub-federal sovereigns in the United States, this ability may be subject to federal limitations. For example, states may not exclude citizens from other states.²²⁵ Indian tribes, by contrast, have some powers that states do not have²²⁶—including the power to exclude nonmembers, at least from trust-held, tribally-owned, or member-owned lands within the reservation,²²⁷ and in certain cases from the reservation entirely.²²⁸

Tribal police, however, are often understaffed and asked to patrol vast territories.²²⁹ They simply may not have the manpower to exclude, for

²²³ BUREAU OF INDIAN AFFAIRS, TRIBAL LEADERS DIRECTORY (2012), *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc002652.pdf> (last visited Nov. 24, 2013).

²²⁴ See *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., dissenting) (emphasis added) (“[M]ost would consider the defining characteristic of sovereignty . . . [to be] the power to exclude from the sovereign’s territory people who have no right to be there.”).

²²⁵ See U.S. CONST. art IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted) (“[T]he constitutional right to travel from one State to another is firmly embedded in our jurisprudence.”).

²²⁶ *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (“Indian tribes are not states. They have a status higher than that of states.”).

²²⁷ See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 160 (1982) (Stevens, J., dissenting) (“[A] tribe may exclude nonmembers entirely from tribal territory”); *Monestersky v. Hopi Tribe*, No. 01AP000015, 2002.NAHT.0000003 (Hopi Tribal App. Ct., June 27, 2002) (holding that the tribe has an inherent right to exclude nonmembers); *Alire v. Jackson*, 65 F. Supp. 2d 1124 (D. Or. 1999) (holding that civil exclusion of nonmember Indian was not grounds for habeas relief).

²²⁸ *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) (holding that tribe could exclude non-Indian even from fee land, where he had initially entered the reservation under color of a lease that specifically reserved right of exclusion).

²²⁹ *Examination of Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th CONG. 1 (2008) (statement of Sen. Byron Dorgan, Chairman, S. Comm. on Indian Affairs) (“Less than 3,000 Bureau of Indian

example, non-Indian criminals taking shelter within the reservation, or to prevent them from engaging in criminal conspiracies with tribal members.²³⁰ A citizen militia could give professional law enforcement a substantial manpower boost without the cost of adding full-time employees to already tight tribal budgets.

This may be especially useful on-reservations that are essentially “border states.” Both the St. Regis Mohawk territory in New York and the Tohono O’odham territory in Arizona stretch across national borders—reaching into Canada and Mexico, respectively. Each has become a gateway for smugglers who take advantage of the lack of law enforcement as well as “[t]he deep loyalty that exists within tribes, where [cross-border] neighbors are often related, and the intense mistrust of the American justice system” among reservation residents.²³¹ Some members may even flout the tribal government’s own laws to take part in or support cross-border activities.²³² This dynamic leads to both weakening of the tribal government’s legitimacy and the intrusion of federal authorities. At Tohono

Affairs and tribal police patrol more than 56 million acres in Indian lands.”); BUREAU OF JUSTICE STATISTICS, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY iii, 5 (2002) (noting that only 165 of the 314 tribes responding employed at least one full-time sworn officer), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=543> (last visited Jan. 6, 2014); John Christopher Fine, *Profile: Cheyenne River Sioux Tribal Police*, 9-1-1 Magazine, Feb. 27, 2012, (“We were down to six officers to patrol the whole reservation, now we have thirteen We had five thousand more calls [per year] than the Rapid City, South Dakota Police Department We average 13,500 calls per year.”), available at <http://www.9-1-1magazine.com/Fine-Cheyenne-River-Sioux-Tribal-PD> (last visited Jan. 6, 2014).

²³⁰ See Sarah Kershaw, *Drug Traffickers Find Haven in Shadows of Indian Country*, N.Y. TIMES (February 19, 2006), <http://www.nytimes.com/2006/02/19/national/19smuggle.html> (last visited Nov. 24, 2013) (describing the invasion of some reservations by organized crime).

²³¹ *Id.*

²³² See *id.* (noting that the Mohawk government spends half its budget on border patrol and law enforcement, but that many tribal members are nonetheless “recruited” to assist in drug smuggling); Todd Miller, *Ground Zero: The Tohono O’odham Nation*, NACLA, Nov. 2, 2012, <http://nacla.org/blog/2012/11/2/ground-zero-tohono-oodham-nation> (last visited Nov. 24, 2013) (“Mike Wilson, a Tohono O’odham man . . . puts out water in stations on the reservation [for those attempting illegal border crossings] in defiance of the Nation’s legislative council . . .”).

O’odham, for example, the Border Patrol presence has been described as an “occupying army”²³³ and a “militarized zone”²³⁴ on the reservation.

The creation of a tribal citizen militia could address these sorts of problems in several ways. First, a militia could provide a mechanism by which the federal government could provide support and training for better law enforcement and border control without invading the reservation and taking over. In Part IV(C) I suggest that it might be possible to incorporate tribal militias into the National Guard system. Even absent such a drastic step, it seems that a reservation population with arms and some militia training might be effectively mobilized to provide much of the manpower needed, even when federal authorities do feel the need to take action on the reservation.

Second, the adoption of militia laws on the reservation could go hand-in-hand with an overall gun control scheme: the tribal government could use the militia as a conduit for registration of household weapons, and weapons not registered through the militia could be outlawed or tightly regulated.²³⁵ This would give law enforcement an additional tool in detaining, arresting, and prosecuting criminals on the reservation even when they are not presently engaged in smuggling or trafficking.

Third, there is at least a plausible argument that a citizen militia, especially if universal, could forge a tighter bond between the people and their government. This might generate positive effects in both directions—detering crime by citizens on the one hand, but also deterring corruption and the capture of government institutions by crime syndicates on the other.²³⁶ From the perspective of the political theory that informed the framing of the Constitution, this is a primary purpose of a citizen militia: to act as a safeguard against overreach by a government. To put it in a more

²³³ *Id.*

²³⁴ Erik Eckholm, *In Drug War, Tribe Feels Invaded by Both Sides*, N.Y. TIMES (Jan. 24, 2010) <http://www.nytimes.com/2010/01/25/us/25border.html> (last visited Nov. 24, 2013).

²³⁵ See generally Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012) (explaining that tribal governments probably have much more latitude than state and federal lawmakers in enacting gun control following *District of Columbia v. Heller*).

²³⁶ See Kershaw, *supra* note 230 (reporting allegations of tribal officials colluding with criminals at the Wind River and Red Lake reservations).

positive light, the more tightly a government's use of force is bound to the people's consent, the more legitimacy it will have. Therefore, where a tribal government has struggled to enforce the law against its own citizenry's wishes, the militia becomes a way for the citizenry to "buy into" government and for the government to acquire a measure of trust.

In short, endowing tribal governments with the ability to organize the people to disrupt criminal enterprises, drive out intruders, and patrol their own territory could greatly augment existing police forces and increase public safety. It might also increase the legitimacy of tribal governments, both by forestalling federal intervention on the reservation and by giving tribal citizens a direct role in the use of force by the government.

B. Disaster Readiness

Apart from strengthening tribes' ability to exercise territorial control, a citizen militia could be useful in other ways. Like everyone else, tribes face increased threats of natural disasters in the coming years. In 2011, for example, the massive Las Conchas fire devastated the Santa Clara Pueblo,²³⁷ and the Crow Reservation experienced catastrophic flooding.²³⁸ The Spirit Lake Reservation has been dealing with continuous flooding for nearly two decades,²³⁹ and in 2011 it and two other reservations in North Dakota were declared part of a disaster area.²⁴⁰ In such situations, it may be useful to have the people organized as a rapid-response force to mitigate damage, rescue the injured, and control opportunistic crime.

²³⁷ See, e.g., *Facing Floods and Fires: Emergency Preparedness for Natural Disasters in Native Communities: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 59 (2011) (statement of Walter Dasheno, Governor, Santa Clara Pueblo).

²³⁸ Lorna Thackeray, *Reservation Flooding: Flood Emergency Declared on Crow Reservation*, BILLINGS GAZETTE (May 23, 2011), http://billingsgazette.com/news/state-and-regional/montana/flood-emergency-declared-on-crow-reservation/article_0bee3562-93dd-527d-8810-cc491fe271fc.html (last visited Nov. 24, 2013).

²³⁹ Lisa M. Hamilton, *Spirit Lake Rising: Living with a Neverending Flood*, ATLANTIC (May 31, 2011), <http://www.theatlantic.com/national/archive/2011/05/spirit-lake-rising-living-with-a-neverending-flood/239644/> (last visited Nov. 24, 2013).

²⁴⁰ Office of the Governor, *Disaster Declaration Approved for North Dakota Flooding*, ND (May 10, 2011), <http://governor.nd.gov/media-center/news/disaster-declaration-approved-north-dakota-flooding> (last visited Nov. 24, 2013).

In addition, the Federal Emergency Management Agency urges individual tribal members to have an emergency plan ready in case a natural disaster strikes.²⁴¹ However, as with the American population at large, that idea is not always translated into practice, as a 2009 survey on the Chehalis Reservation illustrates. According to the survey, only 13 percent of Chehalis citizens had a household emergency plan, and only 17 percent had spare supplies set aside for an emergency.²⁴² Yet, the same remoteness from federal and state hubs that makes reservations subject to inadequate law enforcement can likewise make them subject to delays in emergency services as well as greater difficulty evacuating.²⁴³ A militia—especially a universal militia, with members in every household—could be a useful hub for distributing supplies, ensuring that citizens are familiar with emergency plans and evacuation routes, and training household members in first aid and other useful self-help skills.

C. *Esprit de Corps/Tribal Identity*

Finally, tribes may wish to create tribal militias for purely cultural reasons. For about a century, various assimilationist policies of the federal government encouraged or demanded that Indians relinquish traditional ways and become “civilized” in accord with Euro-American norms.²⁴⁴ In recent years, many tribes have attempted to reverse the damage wrought by assimilation by training young people in inherited ceremonial and practical skills.²⁴⁵ A tribal militia might similarly be a venue for young tribal

²⁴¹ Federal Emergency Management Agency, *Make a Plan: Indian Country*, READY, <http://www.ready.gov/make-a-plan/indian-country> (last visited Nov. 24, 2013) (under the tab “Readiness Planning”) [hereinafter FEMA].

²⁴² CHEHALIS TRIBE, CHEHALIS RESERVATION NATURAL HAZARDS MITIGATION PLAN 18 (2009). Nationally, about 46 percent of Americans have a household plan and about 43 percent have emergency supplies. FEDERAL SIGNAL, UNCOVERING THE SAFETY CONCERNS OF AMERICANS 5-7 (2010).

²⁴³ FEMA, *supra* note 241 at *Special Considerations*.

²⁴⁴ The story is almost too well known to rehearse, but see, for example, Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008), <http://www.npr.org/templates/story/story.php?storyId=16516865> (last visited Nov. 24, 2013).

²⁴⁵ See, e.g., Laurel Morales, *Forget the Heels: What it Takes to Be Miss Navajo*, NPR (Sept. 8, 2012), <http://www.npr.org/2012/09/08/160789972/forget-the-heels-what-it-takes-to-be-miss-navajo> (last visited Nov. 24, 2013) (describing the positive psychological benefits for young Navajo women of connecting with traditional tribal activities); The

members to engage in tribal traditions of self-sacrifice, public service, and physical bravery.²⁴⁶ Such a venue may be especially useful for young men who feel trapped by both poverty and the history of cultural destruction.²⁴⁷ An interview with Anderson Thomas, director of the Ramah Navajo behavioral health program, confirms this point:

[I]t's typically young men who are dying by suicide, not young women. "I'd say more than 90 percent of girls here go through their traditional coming-of-age ceremony," he said. In contrast, little is done for young males. In large part, he said, that's because traditional male activities like hunting have diminished, so rituals related to them have dropped off as well. Though Ramah Navajo men and boys can obtain conventional therapy, they also need ceremonies, Thomas said.²⁴⁸

Always keeping in mind that tribal militias need not be male-only enclaves, military service to the community surely counts as a "traditional male

Kitchen Sisters, *Four Days, Nights: A Girls' Coming-of-Age Ceremony*, NPR (Sept. 6, 2010), <http://www.npr.org/templates/story/story.php?storyId=129611281> (last visited Nov. 24, 2013) (describing a Yankton Sioux coming-of-age ritual for girls); Pauline Arrillaga, *Indian Tribe Fights to Preserve Tradition with Coming-of-Age Ceremony*, ELLENSBURG DAILY RECORD B2 (Oct. 1, 2001) (describing an Apache community's challenges in transmitting ceremonial and religious traditions to the younger generations).

²⁴⁶ More so even than their American and European counterparts, American Indian military traditions often included a significant non-military public service component. See, e.g., LINDA PERTUSATI, IN DEFENSE OF MOHAWK LAND: ETHNOPOLITICAL CONFLICT IN NATIVE NORTH AMERICA 42 (1997) ("Although the Mohawk language contains no word that literally translates as 'warrior,' the Mohawk word 'rotiskenrakhete' symbolically means 'warrior.' Rotiskenrakhete means those who 'carry the responsibility of protecting the origins,' or 'carry the burden of peace.'"); KARL LLEWELLYN, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 99-131 (1941) (giving examples of "military societies" involved in dispute resolution and social discipline in traditional Cheyenne society).

²⁴⁷ Stephanie Woodard, *Suicide Is Epidemic for American Indian Youth: What More Can Be Done?*, NBC, (Oct. 10, 2012), http://openchannel.nbcnews.com/_news/2012/10/10/14340090-suicide-is-epidemic-for-american-indian-youth-what-more-can-be-done (last visited Nov. 24, 2013) ("Native youngsters are particularly affected by community-wide grief stemming from the loss of land, language and more. . .").

²⁴⁸ *Id.*

activity,” and a citizen militia could be used to connect young men with culturally specific military traditions.

In short, a citizen militia may serve a tribe’s immediate practical needs, and it may also serve longer-term, less concrete needs such as maintaining sovereignty, and transmitting tribal values and traditions to the next generation. But what form of militia would be most useful in achieving those goals? The next Part attempts to answer that question.

IV. MODELS OF A TRIBAL CITIZEN MILITIA

If a tribal militia might be useful to tribal governments, and its formation appears to be lawful, the remaining question is how a militia could be organized. In the following sections, I consider three forms of organization. First, there are “select” militias, which have some precedent in 19th-and 20th-century Indian country. Second, there are “universal” militias, which would arguably ameliorate some of the select militia’s shortcomings and provide additional benefits, but which also present certain functional and definitional challenges. Finally, there is the modern National Guard system, which could provide funding and a broader mission for tribal militias, but would almost certainly impinge on both the flexibility and the distinctive cultural flavor of a tribal militia.

A. *Select Militias*

The Cherokee, Choctaw, Pine Ridge, and Mohawk experiences all show, in different ways, that militias comprised of something less than the whole body of the people may struggle for legitimacy. The legitimacy of a select militia will always be closely tied to the legitimacy of the government it serves. A select militia is thus most likely to be both functional and accepted as legitimate where the tribal government is well established, generally free from allegations of corruption, and bolstered by strong democratic safeguards.²⁴⁹ This is, of course, somewhat like saying

²⁴⁹ Such democratic safeguards will not necessarily mirror Anglo-American institutions. In traditional Haudenosaunee governance, for example, the check on the Chiefs is not direct election, but careful selection by Clan Mothers accompanied by the possibility of removal for cause. See *People of the Hills*, ONONDAGA NATION, <http://www.onondaganation.org/gov/chiefs.html> (last visited Nov. 24, 2013).

warrantless wiretapping works best when the people have a high level of confidence in the integrity of the intelligence services; once the possibility is admitted at all, it is difficult to prevent its abuse, or in any event the *perception* of abuse.

Consider our historical precedents. In the case of John Ross's Light-horsemen, complaints about its legitimacy may have been largely the work of a disgruntled political minority; in the case of Dick Wilson's GOONs, the complaints appear to have been objectively valid. But as we saw in the Cherokee case, even where the complaints are not well-founded, they may be used to justify federal intrusion into Indian affairs. Wilson's abuses also pushed citizens to take up arms themselves, which, again, invited federal intrusion. The overall point, of course, is that perceived or real misuse of a select militia can end up threatening tribal sovereignty, above and beyond whatever civil rights abuses occur.

Some select militias are likely to be better than others. The more representative it is of the people (in terms of both absolute numbers and demographics), the more likely the militia will be seen as legitimate. One way to ensure that the militia's membership is representative of the people rather than obedient to a particular leader is to create regular, published standards for recruiting and training members. Recruitment, in particular, should be highly regularized to ensure that favoritism does not creep in, and in general command should be separated from oversight.

Such separation may be particularly challenging in communities operating under, for example, unmodified Indian Reorganization Act (IRA) constitutions, which "typically established a system of centralized government"²⁵⁰ and "did not provide for any separation of powers."²⁵¹ (Felix Cohen, who oversaw the organization of tribes under the IRA, envisioned tribal government essentially like a town council,²⁵² rather than a sovereign with enough power and authority to need careful separation.) Some tribal constitutions may not have organs of government sufficiently

²⁵⁰ OFFICE OF INDIAN ENERGY AND ECONOMIC DEVELOPMENT, TRIBAL BUSINESS STRUCTURE HANDBOOK II-1 (2008).

²⁵¹ POMMERSHEIM, *supra* note 149, at 65.

²⁵² David E. Wilkins, *Introduction*, in FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xxii (2006).

separated to provide adequate independent oversight of a militia's functioning, which increases the likelihood that a select militia could be misused.

However, the *advantages* of a select militia should also not be overlooked. A select militia is easier to manage, train, and equip than a universal militia. Membership can be made contingent on competence and fitness, and morale is generally higher among volunteers than among those *required* to serve. In some cases, a select militia may also be politically easier to achieve, because it does not require the participation of the entire community. For tribal communities that have thought deeply about separation of powers and attempted to strengthen tribal courts or other organs of independent review, a select militia may well be workable.²⁵³

B. A Universal Tribal Militia

The appeal of a “universal” militia—that is, a militia whose composition is large enough to include a member from every, or nearly every, household—is that by its very nature it represents the people. Unlike a select militia, which will often (justly or not) be seen as the tool of a governing elite, the universal militia inherently acts as a *counterweight* to overreaching tribal government, putting the brakes on civil rights abuses and other questionable policies.

A universal militia is also the kind best suited to enhancing emergency preparedness. Where the militia has members in every household, ensuring that each household has an emergency plan and the necessary supplies becomes a simple task. And the militia could provide both an effective network for disseminating information during an emergency and a large pool of trained emergency workers when the situation requires it.

²⁵³ I use the term “separation of powers” here, which has an undeniably Anglo-American ring to it. But recall that the Cheyenne, for example, arrived at the same practice independently, forbidding civilian chiefs from also being soldier chiefs. See *supra* Part I.A.1.

Finally, because it would touch the majority of households in the community, a universal militia could be an effective focal point for a wide array of meaning-building activities: it could become an institution for training young people in traditional values; it could act as an informal network for transmitting important political ideas; its drills could be augmented with community get-togethers; and (if desired) its ceremonial functions could be meshed with the community's ceremonial/religious life.²⁵⁴

How might a universal tribal militia be structured? Traditional American militias depended on two sorts of laws; laws requiring militia members to own weapons and other accoutrements of military service, and laws requiring regular drill. For example, the Massachusetts colony required that "all inhabitants" have "armes in their howses fitt for service, with powder, bullets, [and] match,"²⁵⁵ and that "every captains shall traine his companie on Saterdag in everieweeke" (later reduced to once-monthly).²⁵⁶

Whether this would work in the modern tribal context is probably highly contingent on circumstances. Although gun ownership is thought to be widespread on reservations,²⁵⁷ exact numbers are elusive. One can imagine a tribal community in which requiring gun ownership would not be terribly burdensome, and the tribal government might be able to assist members who don't already own guns with purchasing them. But one can also imagine communities where such a requirement might impose a serious hardship. Moreover, relying on individuals to provide their own weapons would necessarily mean that weapons would not be

²⁵⁴ Tribal governments have somewhat wider latitude than other American sovereigns in integrating religion into governance; see *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that tribes are not governed by the Bill of Rights); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (2006) (creating certain statutory analogues to the Bill of Rights, but omitting an Establishment Clause analog).

²⁵⁵ NICHOLAS J. JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 102 (2012).

²⁵⁶ ROBERT K. WRIGHT, *MASSACHUSETTS MILITIA ROOTS: A BIBLIOGRAPHIC STUDY* 3 (1986).

²⁵⁷ EDITH G. C. WOLFF, *GUN VIOLENCE ON INDIAN RESERVATIONS: AN ADVOCACY CAMPAIGN TO COLLECT DATA AND RAISE COMMUNITY AWARENESS* 5 (1998) ("Gun ownership is widespread on many reservations, especially rural ones . . .").

standardized, making firearms training, and maintenance more of a challenge.

Similarly, requiring some large percentage of the populace to attend drill once a month may or may not be feasible in a given tribal community. On the one hand, any community that elects to adopt a universal militia program presumably has a great deal of buy-in from the public, such that people would be willing to abide by such a requirement. On the other hand, reservations are often geographically quite large, which might make regular drills logistically challenging. Decentralized training would probably be key, and the tribal government might also have to arrange transportation.

Still, a universal tribal militia need not look like the Massachusetts Militia of 1628. The degree to which militia members need to be armed, be armed uniformly, or develop a high degree of weapons proficiency will vary enormously from situation to situation. At one extreme might be the “border state” problem discussed above, in which a citizen militia might face armed and hostile foreign drug gangs. In that circumstance, to have a militia at all would be to take on the responsibility of sufficiently arming and training militia members for actual combat.

By contrast, where the militia is intended more for emergency management, it might resemble State Defense Forces—quasi-military volunteer groups organized by many states. Such groups are often given training in emergency medical services²⁵⁸ and plugged into the emergency plans of the National Guard.²⁵⁹ Their duties may also include logistical support and, for example, assisting firefighters in “monitoring real-time fire behavior.”²⁶⁰ Members of State Defense Forces do not need to meet the combat-ready marksmanship and fitness standards of the regular forces. However, they may still take on certain obligations, including purchasing uniforms, training for a certain number of hours each year, and agreeing to

²⁵⁸ See, e.g., *Military Emergency Medical Specialist Academy (MEMS)*, STATE GUARD ASS'N OF THE U.S., <http://www.sgaus.org/training/mems.asp> (last visited Nov. 24, 2013).

²⁵⁹ CAL. NAT'L GUARD, 2008 CALIFORNIA NATIONAL GUARD YEAR IN REVIEW 31 (2008) (describing the activation of 155 state defense force members to assist the California National Guard in fighting wildfires).

²⁶⁰ *Id.*

be bound by a military code.²⁶¹ A universal tribal militia where armed defense is not necessary or desirable might follow a similar model.

Of course, there are many possible in-between models—a militia that requires some basic arms training, but not high levels of proficiency or constant ownership, for example. One could also imagine a hybrid of the select and universal models in which the universal militia is augmented by a somewhat smaller, better-trained select corps. Such a model could offer some of the manpower advantages and anti-abuse deterrence of a universal militia while still allowing for a well-equipped and well-trained subset to aid the police and federal forces in more dangerous missions, like providing border security and rousting drug gangs.

Finally, any tribe that decides to institute an armed universal militia should consider allowing for conscientious objection. The United States Code exempts from armed military service those who, by “religious training and belief,” oppose “war in any form,”²⁶² while local ordinances requiring firearms ownership often exempt those who are morally opposed to owning or using weapons.²⁶³ A tribal militia ordinance might have a similar provision.

C. The Tribal National Guard

The idea of tribes raising their own militias poses the question whether those militias should be integrated with, or adjoined to, the federal National Guard system. Although, as I have pointed out in Part II(C) federal statutes do not currently require this of tribes the way they do of states, there might be advantages to engaging with the federal system.

²⁶¹ Cal. Nat'l Guard, *California State Military Reserve Frequently Asked Questions*, CAL. NAT'L GUARD, http://www.calguard.ca.gov/casmr/Documents/New_Application_Files_/9.CA%2520SMR%2520Frequently%2520Asked%2520Questions.doc (last visited Nov. 24, 2013).

²⁶² 50 U.S.C. App. § 456(j) (2006).

²⁶³ See Kennesaw, Ga., Code of Ordinances § 34-21(b) (2011); Melissa Gray, *Georgia Town Mulls Mandatory Gun Ownership*, CNN (Mar. 8, 2013), http://us.cnn.com/2013/03/07/us/georgia-gun-requirement/index.html?sr=sharebar_facebook (last visited Nov. 24, 2013); See also Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

The largest advantage would be access to federal money and training opportunities. Many tribes might struggle even to adequately equip a militia and conduct minimal training, but the federal government devotes enormous financial resources to the state militias. The Utah National Guard, for example, receives 74 percent of its funds from the federal government,²⁶⁴ while the Georgia National Guard “is funded with \$552 million in federal money and 9 million dollars from the state.”²⁶⁵ Even adjusted down to a level appropriate to tribal populations, that kind of money could provide tribal governments with vast new resources in addressing public safety issues, both routine and emergency.

Additionally, integration with the National Guard system could be a useful public relations maneuver, elevating the tribes to co-equal status with the states in the public eye. By making tribal membership an alternative basis on which to join the National Guard, the federal government could acknowledge the “third sovereign” in a highly visible way. It could convey a clear message to the public (and the states) that the sovereign status of tribes entitles them to participation in one of the most fundamental projects of the federal system: joint control of the military.

Finally, integration with the national military could check abusive uses of a tribal militia, because the federal government would provide for regularized disciplinary procedures and meaningful oversight. Thus, a federally integrated militia could provide a tribe with all the benefit of a select militia while mitigating the risk that it could be used for oppressive purposes.

Of course, that possibility points to the very reason why tribes might *not* want to integrate with the federal system: any such integration would almost certainly involve some loss—perhaps a very *great* loss—of local control. In exchange for federal money, state militias agree to a number of

²⁶⁴ STATE OF UTAH, NATIONAL GUARD, VETERANS’ AFFAIRS, AND CAPITOL PRESERVATION BOARD AGENCY BUDGET OVERVIEW 1 (2012).

²⁶⁵ Terry Dickson, *Defense Budget Cuts Would Affect Georgia National Guard, Adjutant General Says*, FLORIDA TIMES-UNION (Feb. 10, 2013), <http://jacksonville.com/news/georgia/2013-02-10/story/defense-budget-cuts-would-affect-georgia-national-guard-adjutant> (last visited Nov. 24, 2013).

conditions: their National Guard soldiers are trained and disciplined according to federal standards; they wear the Army's uniform; their units are structured according to the Army's command-and-control regime; and the President may federalize National Guard units in times of war or public emergency, or for training, even beyond the nation's borders.²⁶⁶

Integration with the federal system thus presents profound challenges to both tribal sovereignty and tribal cultural distinctiveness. If the tribal militia, to receive federal funds, must embrace United States military culture in full, the idea of the tribal militia as a vehicle for the transmission of cultural traditions is radically undermined. A relationship in which the federal government could commandeer organs of the tribal government would upend the principles of self-determination which are supposed to be the hallmark of tribal-federal relations. That this would put the tribes in no worse position than the states is no answer, because states have powerful representation in the national government (especially the Senate), while tribes have no federal representation at all.

In theory, each tribe could decide for itself which trade-offs in sovereignty and cultural distinctiveness would be worthwhile. In practice, however, this would raise another potential issue with federal integration: namely, many tribes are not large enough to create whole National Guard units larger than, say, a company. By way of example, California has an overall population of approximately 38 million²⁶⁷ and total National Guard enrollment of 21,000.²⁶⁸ The Navajo Nation, one of the nation's largest tribes, has an on-reservation population of approximately 173,000²⁶⁹ and an overall enrollment of about 287,000.²⁷⁰ Thus, we might expect National Guard enlistment of, at most, a few hundred soldiers—enough, perhaps,

²⁶⁶ See *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990).

²⁶⁷ U.S. Census Bureau, *State and County Quick Facts*, CENSUS.GOV,(2010), <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Nov. 24, 2013).

²⁶⁸ Gretel C. Kovach, *S.D. National Guard Unit Preps for a Final Afghan Deployment*, U-T SAN DIEGO (Jan. 18, 2013), <http://www.utsandiego.com/news/2013/jan/18/tp-sd-national-guard-unit-preps-for-a-final/> (last visited Nov. 24, 2013).

²⁶⁹ U.S. CENSUS BUREAU, *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION 14* (2010).

²⁷⁰ *Id.* at 17. The Nation itself puts the number at slightly over 300,000. Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJO TIMES (Jul. 7, 2011), <http://navajotimes.com/news/2011/0711/070711census.php> (last visited Nov. 24, 2013).

to man a single battalion.²⁷¹ By contrast, many tribes in California number in the hundreds,²⁷² and statistically might be expected to have only a handful of citizens who would be interested in the substantial time commitment of a National Guard-type militia membership, let alone be able to meet enlistment requirements. Of course, small tribes would face challenges raising a tribal militia no matter what, but attempting to integrate the militia into the federal system would presumably reduce the tribe's flexibility in finding creative ways to man its militia.

There are workarounds to the size issue. Perhaps a small tribal Guard unit could be folded into a larger state unit. But this is likely a solution no tribe would adopt. Integrating into the federal system, though admittedly risky, is not a fundamental threat to the current status of tribal sovereignty, because the federal government claims plenary power over tribes anyway. States, however, are traditionally *much* more circumscribed in their ability to regulate tribal affairs,²⁷³ and to give a state governor command authority over a tribal organ seems like an unprecedented step.

A more interesting possibility is that tribes could enter into regional compacts, creating intertribal militia frameworks in order to have sufficient numbers. There is no theoretical reason why tribes could not create such a compact without sacrificing sovereignty—tribes already enter into intertribal agreements, for example, to manage federal appropriations for natural resource husbandry, or to provide court services to multiple small tribes.²⁷⁴ States have also entered into regional compacts to deal with

²⁷¹ See U.S. Army, *Operational Unit Diagrams*, ARMY.MIL., <http://www.army.mil/info/organization/unitsandcommands/oud/> (last visited Nov. 24, 2013).

²⁷² See U.S. CENSUS BUREAU, AMERICAN INDIAN AND ALASKA NATIVE TRIBES IN CALIFORNIA (2000), <http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf> (last visited Nov. 24, 2013).

²⁷³ See *supra* Part II.D.

²⁷⁴ *Who We Are*, INTERTRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/node/3> (last visited Nov. 24, 2013) (describing the history of the ITBC, including its early formation as a 501 (c) 3 non-profit and its 2010 reorganization as a corporation under Section 17 of the IRA); *Protecting Tribal Sovereignty*, INTERTRIBAL COURT OF SOUTHERN CALIFORNIA, <http://icsc.us/> (last visited Nov. 24, 2013).

large-scale problems, like nuclear waste disposal.²⁷⁵ This might be an effective mechanism for tribes to generate sufficient numbers to integrate smoothly with the National Guard. However, it might end up stripping the tribal militia of many of its proposed advantages, because it would now be neither a vehicle for cultural transmission nor an immediately available local emergency force.

Of course, tribal engagement with the federal system need not look exactly like that of the state militias. For example, tribes might elect to create something that looks much less like the actual National Guard and much more like the State Defense Forces—that is, an emergency response force that is *not* subject to federal activation. State Defense Forces are normally funded entirely by the state. An accommodation might be reached with Congress whereby tribal militias are given federal National Guard funding at a much lower level than state National Guard units, but in exchange remain entirely under local control. Such an arrangement might represent a happy medium for tribes reluctant to enter into the federal National Guard wholesale, and it would moot the size issue.

CONCLUSION

Tribal governments have a retained, but largely unused, internal military power. That power could provide a tool for tribes to secure the territorial integrity of their reservations, police their borders, disrupt criminal organizations, manage natural disasters and other public emergencies, train young people, and provide a focal point for community organization. Tribal members and their governments should consider whether such a tool can help them meet their governance goals.

The use of military power is, of course, not without its dangers. An armed select militia, particularly, has an unfortunate historical precedent in Dick Wilson's GOONs, which was an instrument of flagrant civil rights violations on the reservation. Moreover, complaints about the use of internal military power have sometimes led to federal intervention in tribal

²⁷⁵ See 42 U.S.C. § 2021(d) (2006) (authorizing and incentivizing the creation of regional compacts).

affairs or to armed clashes with the federal government. With that history as a warning and a guide, there is no reason why a tribe could not provide adequate safeguards against abuse, adopt a tribal militia under one of the models discussed above, and thus exercise its powers as a sovereign and provide for public safety.