“We are only demanding our country”:
The Legal History of Lakota Survivance and the Long War for the West

By Helen Malley

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Abstract:

Scholars often confine the war between the Lakota and the United States to the nineteenth century, concluding histories of the conflict with the massacre of Wounded Knee in 1890. However, in examining the trials of *United States v. Plenty Horses* (1891) and *United States v. Banks* (1973), it becomes clear that the war did not end in 1890. Motivated by an unquenchable desire for land—and, by extent, the desire for perfect settler sovereignty—the United States waged an ongoing war of aggression for Lakota homelands throughout the nineteenth and twentieth centuries. U.S. military and police forces employed a variety of tactics in this war including containment and starvation. Conflicted over how to respond to the potential illegality of these tactics, the courts frequently issued limited verdicts that could not operate as precedent in the future. Consequently, the decisions in *United States v. Plenty Horses* and *United States v. Banks* did little to prevent future state violence. In the face of such judicial silence, the Lakota used the press coverage of the trials as a platform for exposing the ongoing war and asserting their continued presence in the Plains. In the process, Lakota activists crafted a public narrative of survivance that spanned the nineteenth and twentieth centuries.
Acknowledgements:

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“When Indians were herded onto reservations in the 1860s . . . it created the illusion that the ‘war was over’ . . . But the war is not over and will never be over until we have justice.”\textsuperscript{1}

Speaking out in the wake of the 1973 Occupation of Wounded Knee, American Indian Movement activist John Trudell identified a conflict that extended far beyond his own moment. Nearly a century earlier, U.S. General Nelson Miles shared a markedly similar sentiment regarding what he too saw as a war between the Lakota and the U.S.: “This is not the last of the Indian wars. There will be many more. The same causes which produced this one will produce others.”\textsuperscript{2} Both Trudell’s and Miles’s comments reveal a war that spanned centuries, challenging the dominant historical narrative that the war between the Lakota and the U.S. ended in 1890. However, their statements possess one subtle difference. While Miles conceived of the conflict between the Lakota and the U.S. as a series of distinct wars with similar origins, Trudell saw one prolonged war. This difference in temporalization reflects a broader difference in perceptions of the war by the U.S. and the Lakota. While former often frames the conflict as a series of “outbreaks” that largely concluded in the nineteenth century, the latter see a single war for territory and sovereignty that continues to be waged as a direct consequence of the United States’ settler colonial project.

Miles and Trudell each spoke in the midst of events that exposed this ongoing conflict to the broader public. Miles’s comments arose in the context of \textit{United States v. Plenty Horses}, the public trial of Tasunka Ota (“Plenty Horses”) for the death of U.S. Lieutenant Edward Casey.\textsuperscript{3} While he acknowledged that he shot Casey, Tasunka Ota and his legal team argued that his

\textsuperscript{1} Gordon Winters, “Indian Witnesses to Be Most Important—Throne,” \textit{The Lincoln Star}, December 16, 1974.
\textsuperscript{2} “Indian Troubles Not Ended,” \textit{New York Herald}, March 25, 1891.
\textsuperscript{3} While elsewhere referred to as Plenty Horses or Simka Wakan Ota, I use the name Tasunka Ota in this text, as that is the name both his father and uncle used to refer to him. “A Father’s Farewell,” \textit{The Madison Daily Leader}, April 20, 1891; “Plenty Horses Scowled,” \textit{The Pittsburg Dispatch}, April 27, 1891.
actions did not constitute murder because the Lakota and the U.S. were at war. Furthermore, they argued that if the U.S. failed to recognize the war, then the recent killing of hundreds of Lakota at Wounded Knee by Colonel James Forsyth and his men would constitute mass murder. Judge Oliver Shiras eventually directed the jury to acquit Tasunka Ota on the grounds that a state of war did exist between the Lakota and the U.S at the time of Casey’s death.

While many histories of this trial end with Tasunka Ota’s acquittal, the war it recognized continued into the twentieth century—the sources of its violence simply relocated. The tactics employed by the U.S. military in the nineteenth century were often adopted by more domestic agencies in the twentieth. Containment, for example, became the responsibility of local law enforcement. In relocating violence to seemingly civilian actors, the United States sought to reframe their conflict with the Lakota as a domestic affair, rather than a continuous war of elimination.

The Lakota, however, continued to frame this conflict as a war and to assert the existence of a sovereign Lakota nation. In 1973, one such assertion gained national attention: the American Indian Movement (AIM) and the Oglala Sioux Civil Rights Organization’s (OSCRO) Occupation of Wounded Knee. This collective action built upon decades of activism within the Oglala Lakota community and proclaimed the existence of an Independent Oglala Nation. In response to the occupation, local and federal law enforcement agencies laid siege to the town of Wounded Knee, with the support of the U.S. military. In the trials that followed, particularly

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4 While the term “containment” has taken on a particular connotation within the laws of war tradition in the wake of the Cold War, its usage here is in reference to its more literal meaning—“holding something [or someone] within bounds.” For a further discussion of the meaning of containment both colloquially and in a Cold War context, see Anna M. Wittmann, *Talking Conflict: The Loaded Language of Genocide, Political Violence, Terrorism, and Warfare* (Santa Barbara, California: ABC-CLIO, 2017), 78–79.
United States v. Banks, Lakota activists used the courtroom as a platform to publicize the continued presence of the Independent Oglala Nation and the violence that nation faced at the hands of the United States. While presiding judge Frank Nichol ultimately failed to hold the U.S. accountable for the violence it inflicted at Wounded Knee, AIM and OSCRO activists used the trial to bring broader public attention to the ongoing war for sovereignty in the Plains.

This thesis argues that the trials of United States v. Plenty Horses (1891) and United States v. Banks (1974) constitute two events within a single war. Since its initial violation of the 1868 Fort Laramie Treaty, the United States has waged an ongoing war of aggression against the Lakota in an attempt to exert greater control over the Plains region. While the actors involved in the war have changed—as the U.S. exchanged military personnel for local law enforcement at the turn of the twentieth century—many of the tactics remain the same: namely, containment and starvation. To the Lakota of the nineteenth century, as well as the twentieth, the underlying strategy behind these tactics was clear. The U.S. intended to wholly eliminate the Lakota from the political and geographic landscape of the Plains, in order to assert its own sovereignty claim.

The United States’ tactics in this war, however, rested on unstable legal footing. When the Lakota exposed them in a court of law, they were often met with conflicted verdicts that neither condemned nor condoned U.S. action. While the courts would be remiss to ignore the illegality of the United States’ conduct in its war against the Lakota, they also had a vested interest in preserving the ends of that war: settler sovereignty. After all, the validity of the

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6 Settler sovereignty claims rely upon the state’s ability to establish and maintain sole legal jurisdiction over a given territory. The process to produce such jurisdiction is twofold. First, the state attempts to eradicate any counter claims to the land, through the elimination of Native claims and, in many cases, Native lives. The state then exerts legal jurisdiction over the Native polities in the region, by criminalizing Native resistance to settler rule. In this later stage, the courts play a critical role in the production of settler sovereignty, serving as the venue for such exertions of U.S. legal jurisdiction on a local level. Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (Harvard University Press, 2010), 2, 25, 182.
courts’ own jurisdiction over the matters before them depended upon the greater validity of U.S. sovereignty over the Plains and the people that occupied it. These opposing interests within the courts ultimately resulted in limited decisions with little precedential value. The courts lifted the criminal charges against the Lakota defendants before them, but refrained from producing accountability for the United States’ own criminal behavior. In the case of United States v. Plenty Horses, Judge Shiras went so far as to produce justification for that behavior. Furthermore, both Shiras and Nichol went to considerable lengths to ensure that their opinions could not operate as precedent in the future. In this way, the U.S. court system has played a crucial role in implicitly legitimizing the war and, at the same time, masking the state violence it has entailed.

Unable to receive redress through the courts, Lakota activists turned to alternative venues for accountability, including the press. Lakota resisters used the publicity gained from trials to reveal the ongoing conflict to the broader public. When speaking with media outlets, Lakota activists connected past and present acts of war by the United States to reveal a single war of aggression for the Lakota homelands. In the process, these activists also produced their own narrative of the war and, by extent, Lakota survivance. More than passive survival or endurance, survivance denotes an active Native presence. This presence can be a narrative one, as the term originally intended, or it can also refer to a physical presence on the land itself. In the midst of the United States v. Plenty Horses and United States v. Banks trials, Lakota activists used the press coverage of the trials to practice survivance in both forms. By actively creating a Lakota presence within the broader public narrative of the press, Lakota activists produced narrative survivance. Furthermore, within those narratives, activists asserted their continued physical presence.

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presence on the land and, by extent, their physical survivance. Through these interventions in the press, Lakota activists thus drew attention to not only the ongoing war between themselves and the United States, but also their continued survival—and vitality—despite that war.

My decision to maintain the Lakota periodization of this conflict as a singular ongoing war is in direct response to a historiographic trend known as “lasting.” First conceptualized by Jean O’Brien (Ojibwe), “lasting” refers to the phenomenon in which historians identify particular people or events as “the last of the ______.” O’Brien describes this move as a narrative form of “purifying” the land, as historians attempt to erase evidence of Native land claims in order to justify non-native occupation. While originally conceived in the context of local New England histories, narratives of lasting are quite common in histories of the Lakota, particularly regarding the massacre at Wounded Knee. One clear example of this genre of narrative is Robert Utley’s renowned work *The Last Days of the Sioux Nation*. Not only does the title of the text explicitly perpetuate the notion of lasting, but Utley’s argument also locates that “last” moment at Wounded Knee in 1890. In doing so, Utley argues that the war between the Lakota and the U.S. ended with an act of genocide in 1890, because that act “shattered all illusions” of future liberation and, by extension, Lakota sovereignty. This decision to conclude Lakota history at Wounded Knee thus implicitly argues that the United States’ genocidal war for Lakota homelands was successful.

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10 While later historians have worked to challenge the narrative of lasting in recent tellings of Lakota history, the timelines they use often implicitly reinforce this narrative. Histories of the Lakota—particularly those written by non-Lakota historians—frequently still end at Wounded Knee in 1890. Finnish historian Pekka Hämäläinen, for example, framed his most recent monograph as a recovery of “the untold story of the Lakotas from the sixteenth into the twenty-first century.” Yet, apart from a conclusion that gestures toward a more contemporary history of the Lakota, the main content of Hämäläinen’s book concludes at Wounded Knee in 1890. Pekka Hämäläinen, *Lakota America* (New Haven: Yale University Press, 2019), 5.
Lasting narratives like Utley’s operate as argumentative tools to legitimize Native dispossessio

n through two forms of erasure. Lasting confines Native nations to the past, consequently erasing their present-day existence and rightful claim to their land. By extension, it confines U.S. violence against those nations to the past as well, thereby erasing the violence the U.S. has inflicted in more recent years. By narratively ending the war between the U.S. and Lakota in 1890, historians simultaneously absolve the U.S. of any guilt for the violence it inflicted in the following decades and erase Lakota experiences of and responses to that violence.

In the case of *United States v. Plenty Horses*, lasting narratives also erase the trial’s potential continuities with later cases and events that followed. Utley relied heavily on lasting narratives in his examination of the *United States v. Plenty Horses* trial. He argued that because the trial occurred “as the last important Indian conflict drew to an unhappy close,” it merely served to recognize a war that was already over. However, this explanation of why the case never became precedent fails to account for the role played by Shiras in ensuring his decision could not become precedent (e.g., limiting its scope, leaving it unreported, etc.). This question of judicial discretion arose in again *United States v. Banks* nearly a century later, a continuity that is conveniently obscured by Utley’s lasting framing of the trial. Utley’s framing also erases a continuity in the war itself, separating the war recognized in 1891 from the war identified by the American Indian Movement nearly a century later. AIM activists, and much of the secondary historical literature on the movement, adopted the language of war to describe the relationship between the activists and the United States. While these two conflicts occurred nearly a full

12 Paul Matthiessen’s monograph on the American Indian Movement describes the relationship between AIM and the United States as “the new Indian wars.” Similarly, Ward Churchill and Jim Vander Wall’s monograph focuses on what it terms “FBI’s war on AIM.” Both of these texts describe another instance of war in the 1970s; however, by framing it as a “new war” or the “FBI’s war,” they too ultimately separate this more recent conflict from the one seen in *United States v. Plenty Horses*. Peter Matthiessen, *In the Spirit of Crazy Horse* (New York: Viking Press,
century apart, both shared the same tactics and underlying cause. Seeing the conflict between the Lakota and the U.S. as a single war spanning the nineteenth and twentieth centuries thus recognizes a continuity in the violence that lasting narratives otherwise erase.

Understanding the underlying cause of this violence—the desire for Lakota homelands—requires an understanding of settler colonialism and settler sovereignty. A term first introduced by Patrick Wolfe, “settler colonialism” refers the continuous process by which settler populations work to eliminate Native populations for the sake of asserting their own territorial claims. Territory serves as the primary motivation for the “elimination of the native” in settler colonial systems, in large part due to its centrality in the production of settler sovereignty. Lisa Ford defines settler sovereignty as an inherently “territorial measure of authority,” whose realization is contingent upon the settler state’s ability to establish sole legal jurisdiction over a defined territory or space. The war between the United States and the Lakota was thus a constituent part of United States’ project to eliminate the Lakota from the political and geographic landscape in order to produce their own claim to that territory and, by extent, their own sovereignty. Recognizing this duality in settler colonialism—as an attempt to not only eliminate, but also replace—reveals the underlying design of both United States v. Plenty Horses and United States v. Banks: the subversion Lakota land and sovereignty claims for the sake of justifying U.S. claims in their place.

The act of subverting one set of claims in exchange for another produces precarity within settler sovereignty. In spite of its attempts to eliminate Lakota claims, the U.S. cannot expunge

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13 Ford, Settler Sovereignty, 2, 25, 182.

them from the legal record or collective memory. A counter and prior claim to the land will always exist.\textsuperscript{15} The continued physical and narrative presence of the Lakota in the Plains region embodies that claim, which will always hold the potential to upend settler sovereignty completely. The legitimacy of settler sovereignty rests on the state’s ability to maintain sole territorial jurisdiction, jurisdiction that is inherently challenged by a prior unceded claim to that space.\textsuperscript{16} In this way, the active presence of the Lakota both physically and narratively—their survivance—levies a greater challenge to the legitimacy of settler sovereignty than either United States \emph{v. Plenty Horses} or United States \emph{v. Banks} ever managed.

While these two trials serve as grounding events within this history, court documents feature minimally in it relative to other primary source bases. This decision was partially made out of necessity; however, it allows for the introduction of perspectives that are historically excluded from court records. Few of the court documents concerning United States \emph{v. Plenty Horses} remain in existence, because Shiras left his decision unreported. Consequently, newspaper archives contain the majority of the evidence on the events of the trial itself.\textsuperscript{17} However, beyond the details of the trial, these newspapers offer glimpses into how the Lakota understood the ongoing war through interviews with Lakota defendants and leaders.\textsuperscript{18} Similarly, while the courts have maintained a record of Nichol’s final decision in United States \emph{v. Banks}, few of the trial’s intermediate hearings are readily available through the court. Instead, I

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\textsuperscript{16} Ford, \textit{Settler Sovereignty}, 187.
\textsuperscript{17} I will primarily be examining coverage of the trial in \textit{The Sioux Falls Argus Leader}, \textit{The New York World}, and \textit{The Madison Daily Leader}.
\textsuperscript{18} The military records from this period have been consolidated into the “Reports and correspondence relating to the Army investigations of the Battle at Wounded Knee and to the Sioux campaign of 1890-1891,” which is located on Microfilm 983 at the National Archives. This microfilm has also been digitized and is available at https://dds-crl.edu.proxy.uchicago.edu/crldelivery/20654.
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similarly relied on accounts of those hearings published in *Akwesasne Notes* and the memoir of Dennis Banks, one of the defendants in the *United States v. Banks.* I have also referred to testimonies from a third trial, *United States v. Consolidated Wounded Knee Cases* (1975) as additional context. These testimonies not only provide first-hand accounts of the Occupation of Wounded Knee, but also contain transcribed oral histories of nineteenth century Lakota history and the Fort Laramie Treaty of 1868. Together, these sources reconstruct individual experiences of the ongoing war for the Lakota homelands.

Across the nineteenth and twentieth centuries, this war’s underlying cause and tactics remained the same. My examination of the conflict begins in the late nineteenth century with an analysis of how the desire for Lakota homelands motivated a relentless war between the U.S. and the Lakota, ultimately producing the circumstances for that war’s partial recognition in *United States v. Plenty Horses.* I then track the war’s continuation into the twentieth century, as the U.S. continued to employ the tactics of starvation and containment in an attempt to eliminate the Lakota from the Plains region entirely. This iteration of the war ultimately culminated in the occupation and concurrent siege of Wounded Knee in 1973. To understand the implications of this event, I draw our attention back to the courts with the case of *United States v. Banks.* In analyzing *United States v. Plenty Horses* and *United States v. Banks* together, two conclusions become clear. First, the war between the Lakota and the United States did not end in 1890; its violence simply relocated to other, seemingly more domestic, sources. Second, despite the

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19 A compilation of articles from *Akwesasne Notes* has been published in the volume *Voices from Wounded Knee: In the Words of Participants.* The full *Akwesasne Notes* archive is also available through the American Indian Digital History Project at [http://www.aidhp.com/](http://www.aidhp.com/). The Dennis Banks memoir I am using is *Ojibwa Warrior: Dennis Banks and the Rise of the American Indian Movement.*

United States’ unlawful conduct during this war, the court consistently refrained from producing institutionalized accountability, for fear of jeopardizing the war’s end goal: U.S. sovereignty.

My argument is inherently colored by my positionality as a non-Lakota historian. While I have sought to center and amplify Lakota voices within both my primary and secondary source material, I cannot bring a contemporary Lakota perspective to this history. However, there is work that I can do to “unsettle the settler” within my own writing and challenge the dominant, U.S.-centered historical narrative that erases the present-day violence of settler colonialism. In doing so, I aim to reveal the extent to which settler colonialism remains an ongoing violent process and recognize the ever-evolving forms of Lakota survivance that continue to thwart it.

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To understand the historical context of United States v. Plenty Horses and its implications, it is necessary to first understand the terminology it employed. In the trial, and in many of the documents produced by the U.S. in this era, the term “Sioux” was frequently used to refer to the political confederacy of the Lakota, Nakota, and Dakota peoples. However, this term is an exonym, derived from the French word “Nadouessioux,” which was itself an adaptation of a term used by the Ojibwe for their enemies to the West. The Lakota, Nakota, and Dakota together self-identified as the Oceti Šakowin. Within the Lakota Oyate (or the Lakota People), there are seven divisions, including the Sicangu Lakota and the Oglala Lakota, both of whom

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21 Several other historians do bring this perspective and I have sought to incorporate their work throughout my own. Among these historians are Nick Estes, Philip Deloria, Susan Bordeaux Bettelyoun and Josephine Waggoner. Oak Lake Writers Society has also put together an extensive bibliography of works written by Lakota, Dakota, and Nakota scholars, which is available at https://olws.squarespace.com/oceti-sakowin-oyate-bibliography-project.
feature heavily within this history. While I preserve quoted material in its original form, the body of this thesis will use the terminology and spelling conventions outlined in the chart below.

**Oceti Šakowin**

Seven Council Fires

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<thead>
<tr>
<th>Lakota</th>
<th>Nakota</th>
<th>Dakota</th>
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<tr>
<td>Tetons</td>
<td>Yankton</td>
<td>Santee</td>
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<tr>
<td>Ticópanywan (Plains Dwellers)</td>
<td>Ihanštóywan (End Dwellers)</td>
<td>Wahpetonwan (Leaf Dwellers)</td>
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<tr>
<td>Títonywan (Little End Dwellers)</td>
<td>Yanktonais</td>
<td>Wahpeton (Leaf Shooters)</td>
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<tr>
<td>Yankton</td>
<td>Sisseton</td>
<td>Wahpekute</td>
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<tr>
<td>Oglala</td>
<td>Wahpeton (Mystery Lake Dwellers)</td>
<td>Wahpekute</td>
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<tr>
<td>Hunkpapa (End of Horn)</td>
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![Diagram](image)

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Fig. 1 - Oceti Sakowin Organization.

Land occupied a central position in the relationship between the Lakota and the United States by the mid-nineteenth century. The Fort Laramie Treaty of 1868 delineated each party’s land rights and, theoretically, the means to safeguard those rights. It not only outlined the boundaries of Lakota and U.S. land, but also contained a provision requiring the consent of three-quarters of the male Lakota population in order for any cession of land to occur.

However, when the United States realized that such consent would never be given, they began to...

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26 This treaty concerned the relationship between the United States and several Lakota, Nakota, and Dakota polities within the Oceti Sakowin. For the scope of this paper, I will examine its provisions specifically in relation to the Lakota polities included in the treaty: the Sicangu (Brulé), Oglala (Ogallalah), Minnkowju (Miniconjou), Hunkpapa (Ungcpapa), Sihaspa (Blackfeet), Oohenunpa (Two Kettle), and Itazipco (Sans Arch). Because these polities together account for all seven within the Lakota Oyate, I refer to them collectively as the Lakota. A reprinting of the treaty can be found at: “Treaty with the Sioux-Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee - and Arapaho, 1868 Treaty,” *Indian Affairs Laws and Treaties* 2 (1904): 998–1007.
illegally encroach onto the Lakota’s homelands. These encroachments quickly became militarized.\textsuperscript{27} In 1876, the U.S. government claimed the Black Hills in violation of the 1868 Treaty, classifying any Lakota person found off the new reservation as “hostile” and tasking the U.S. military with forcing such individuals back onto reservation land. When South Dakota gained statehood in 1889, Congress split the reservation further into five smaller tracts, claiming much of the Lakota’s homelands for their newfound state.\textsuperscript{28} The United States thus expanded its territorial jurisdiction over the Plains region in the late nineteenth century, in violation of the Fort Laramie Treaty and without Lakota consent.

\begin{figure}[h]
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\caption{Fig. 2 – Map Depicting Change in Land Boundaries circa 1868, 1876, and 1889.\textsuperscript{29}}
\end{figure}

\textsuperscript{27} Ortiz, \textit{The Great Sioux Nation}, 25–26, 102.
\textsuperscript{28} For a full account of the history of this cession see Jeffrey Ostler, \textit{The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee} (Cambridge: Cambridge University Press, 2004), 229–39. To see the scale of the land cessions, see Fig. 2.
\textsuperscript{29} \textit{Voices from Wounded Knee, 1973, in the Words of the Participants} (Rooseveltown, N.Y.: Akwesasne Notes, 1974), 7.
To enforce these territorial claims, the United States enlisted the military’s assistance. On November 13, President Benjamin Harrison authorized the Secretary of War “to assume military responsibility for any threatened outbreak and to take such steps as might be necessary to that end.” This term “outbreak” was frequently employed by U.S. state officials during this period to refer to the conflict with the Lakota. Among its many connotations, “outbreak” implied that the Lakota had transgressed the geographic bounds imposed upon them by the United States, framing those bounds as lawful and any Lakota transgression as criminal. Such a framework legitimated the United States’ policy of Lakota containment, under which the U.S. used its military to force the Lakota onto smaller and smaller portions of land, rendering the surrounding area “empty” and therefore suitable for settler occupation. To enforce containment, the U.S. criminalized any transgression of those spatial bounds. Not only could this criminalization then warrant further containment of the Lakota in the form of incarceration, but it also conveniently evaded the question of war. Under the pretense of preventing an outbreak, U.S. General Nelson Miles could summon soldiers from as far as California to the Pine Ridge and Rosebud reservations and amass the largest concentration of U.S. troops since the Civil War—both of which he did—without ever declaring war.

The United States also adopted a second tactic that did not depend upon a declaration of war: starvation. This tactic could be easily executed in a colonial context in which one actor

30 Quoted in John Noble to John Ingalls, “In Response to a Senate Resolution of 2d Instant, a Communication from the Commissioner of Indian Affairs Relative to the Alleged Armament of Indians in Certain States,” December 11, 1890, Microfilm 983, National Archives at Atlanta.
33 This tactic is also known as victual warfare, or the “stealing, withholding, or destroying grain or animals (or threatening to do so) . . . to create hunger, instability, and chaos.” Rachel B. Herrmann, No Useless Mouth: Waging War and Fighting Hunger in the American Revolution (Ithaca: Cornell University Press, 2020), 11.
was providing rations to another through a reduction in—or the complete denial of—those rations. By 1890, the United States government had already been engaging in such behavior for nearly five years, in direct violation of the Fort Laramie Treaty. From 1886 to 1889, the Lakota’s rations had been more than halved—going from 8,125,000 in 1886 to 4,000,000 in 1889—with no corresponding decrease in the size of the Lakota population. Beyond the curtailment of rations, it was later reported that those who attempted engage in farming faced retribution, with their houses burned and farming implements destroyed. While military reports did not attribute this violence to any state or civilian actor, one report did paraphrase Tutu, a Sicangu Lakota herder, as saying, “there was no use in spreading out and farming as the white people had decided to make war.” From the Lakota perspective, the source of this violence against their homes and their livelihoods was not a lone state or civilian actor, but rather the ongoing war with the United States. In that war, starvation was achieved by not only withholding food, but also destroying the means to obtain it.

Where the United States saw a series of distinct outbreaks, the Lakota saw a continuous war for their homelands and survival. Among its many ends, the framework of continual battle highlighted the U.S. encroachment on Lakota land, as opposed to the Lakota transgression of U.S. land boundaries alleged by the term “outbreak.” In this way, the Lakota framing of the war as an ongoing one established the Lakota’s land claim as the rightful one. During the deliberations at the Fort Laramie in 1868, One Horn (Oglala Lakota) explained:

This Indian country we all (the Sioux Nation) claim as ours. I have never lost the place from my view. It is our home to come back to. I like to be able to trade here, although I

34 John Brooke to Assistant Adjutant General, November 30, 1890, Microfilm 983, National Archives at Atlanta.
36 Two Lakota historians who lived through the period themselves explained that since coming into “possession of the western country . . . there had been a constant battle—sometimes three or four time a year—to keep possession.” Bettelyoun and Waggoner, With My Own Eyes, 86.
will not give away my land. I don’t ever remember ceding any of my land to anyone . . . I see that the whites blamed the Indians, but it is you that acted wrong in the beginning. The Indians never went to your country and did wrong. This is our land, and yet you blame us for fighting for it.\textsuperscript{37}

Clear within One Horn’s conceptualization of the conflict was the adamant belief that the Lakota maintained a just claim to the land—the conflict was not an outbreak because they had not transgressed any boundary. To the Lakota, the limits of their land were not the boundaries drawn by the reservations, but rather those drawn by the Fort Laramie Treaty. It was the United States who had transgressed beyond their territorial limits, not the Lakota. Historian Philip Deloria (Lakota) synthesized this belief clearest, explaining that the Lakota “refused to see themselves as conquered . . . refused, in other words, to think that what whites called outbreak might not really mean a war between nations.”\textsuperscript{38}

This difference in Lakota and U.S. temporalizations of the conflict was not without consequence. According to the international laws and customs of war, length constitutes one of the distinguishing characteristics between an incident of conflict and a war. Quite simply, “the longer an incident continues, the more difficult it is to describe it as merely an incident.”\textsuperscript{39} Thus, by framing the conflict as a series of distinct, unrelated, and brief “outbreaks,” the United States could maintain their stance that the conflict did not constitute a war. Conversely, by identifying continuities in the cause of those incidents the Lakota identified a single event with multiple manifestations. The Lakota identified the conflict with the U.S. as a singular ongoing war.

In the face of this war, the Lakota continued to assert their presence and, by extent, their survivance. Such survivance took on a number of different forms among the Lakota. For some, it


\textsuperscript{38} Deloria, “Violence,” 22.

involved serving as law enforcement officials or scouts for the U.S. military, experiences which taught them new methods of resisting U.S. encroachment and offered a means of escaping the spatial confines of the reservation.\textsuperscript{40} For others, it came out of the prophesies of Wovoka, a Paiute holy man posthumously called the “Messiah of Survivance.”\textsuperscript{41} Wovoka prophesized of an event that would remake the world, vanquishing the United States and bringing back all that had been lost to colonization. Nearly a third of all Lakota participated in the Ghost Dance movement, as well as over 20,000 Natives from across the western Native nations.\textsuperscript{42} Beyond participation in the dance itself, Ghost Dancers engaged in a variety of other affiliated survivance tactics, including withdrawal from reservation life, refusal to speak English, and the refusal to live on allotted land.\textsuperscript{43} Such tactics maintained the Lakota’s presence in the Plains on their own terms, rather than those of the United States. It was from this movement that numerous Lakota derived their strength, and it was this movement—or, more specifically, the survivance and sovereignty claims it produced—that General Miles enlisted thousands of men to suppress.\textsuperscript{44}

In his “suppression” of the Ghost Dance, Miles began to target those he identified as leaders among the Lakota.\textsuperscript{45} On December 15, 1890, reservation police killed Tatanka Ivotanka (Sitting Bull), a Huŋkpapa Lakota leader and Ghost Dancer. Viewed by Miles as one of the “principal incendiaries” of the Ghost Dance, Miles originally ordered his arrest; however, when

\begin{itemize}
\item Vizenor, “Resistance and Survivance,” 228.
\item Estes, “Our History Is the Future,” 114, 118.
\item Vizenor, “Resistance and Survivance,” 229.
\item Estes, “Our History Is the Future,” 118–19.
\item Ostler, \textit{The Plains Sioux}, 300.
\item Wittmann, \textit{Talking Conflict}, 92–93.
\end{itemize}
the arrest escalated, the reservation police killed Tatanka Ivotanka.\textsuperscript{46} In the wake of his death, the U.S. issued military arrest warrants for a number of other Ghost Dancers, including Hehaka Gleska (Spotted Elk).\textsuperscript{47} A stark defender of the rights of his people to Ghost Dance, Hehaka Gleska’s peers viewed him as a strong yet diplomatic leader. Joined by a number of Tatanka Ivotanka’s followers, Hehaka Gleska began to make his way to Pine Ridge to turn himself in. However, on December 29, 1890, what began as the disarmament of Hehaka Gleska and his band at Wounded Knee ended in a massacre. While the Lakota at Wounded Knee fought back to the best of their ability, by the end of the day Colonel James Forsyth and the Seventh Calvary had killed over 300 Lakota people, more than two-thirds of whom were women and children.\textsuperscript{48} In a matter of weeks, what outwardly began as a government policy of targeted strikes against Lakota leaders devolved into one of mass murder.

Those living at Pine Ridge witnessed the aftermath of Wounded Knee and its impact on their people. To many, the massacre was a constituent part of the United States’ ongoing war for Lakota homelands. One journalist, Bright Eyes (Omaha), sought to capture this perspective in her work, writing:

> The conviction is slowly forcing itself into my mind that this war has been deliberately brought about. The hostile Sioux firmly believe that it has been brought about because their land was wanted. If the white people want their land and must have it, they can go about getting it from them in some other way than starving them or provoking them to war and sacrificing the lives of innocent women and children.\textsuperscript{49}

\textsuperscript{46} For a more in-depth discussion of Tatanka Ivotank’s assassination, see Ostler, \textit{The Plains Sioux}, 320–26.
\textsuperscript{47} Though elsewhere referred to as Si Tanka (Big Foot), I use the name Hehaka Gleska (Spotted Elk) here because the record indicates that Si Tanka was not his given name, but rather a taunt used by U.S. soldiers in reference to the government-issued shoes being too small for his feet. Estes, “Our History Is the Future,” 120.
\textsuperscript{48} Estes, 111–21; Ostler, \textit{The Plains Sioux}, 320–34.
\textsuperscript{49} Bright Eyes, “Horrors of War,” \textit{Omaha World-Herald}, January 2, 1891. For more on Bright Eyes and her positionality relative to Wounded Knee, see Hugh J. Reilly, \textit{The Frontier Newspapers and the Coverage of the Plains Indian Wars} (Santa Barbara: Praeger, 2010), 111–17.
Far from viewing Wounded Knee as an aberration, Bright Eyes framed the massacre as sharing the same motivations as the other manifestations of this conflict: land. When the tactics of containment and starvation failed to achieve the United States’ desired end, the U.S. military resorted to murder.

In the wake of Wounded Knee, Tasunka Ota (Plenty Horses) hoped to safeguard his people from further violence, often going to the outskirts of the No Water camp to watch for U.S. troops on the horizon. On January 7, 1891, Tasunka Ota and several other Lakota scouts came across U.S. Lieutenant Edward Casey, who was out on a reconnoitering mission as well. Tasunka Ota would later recall that Casey grew angry when asked to leave and responded that he would return again with enough U.S. troops to capture and kill the chief. Eventually the lieutenant turned to go and, fearing for the life of his leader, Tasunka Ota raised his gun and shot Casey from behind.

When later asked about his actions, Tasunka Ota’s stance was clear: it was war. He contextualized Casey’s death within the events of Wounded Knee specifically, stating in one interview with the New York World:

> We were at war with the whites. If we had sent a spy to their camp with the expressed intention of getting points to use against them for an attack, they would not have hesitated to kill him if captured. If they are going to punish every man, who shot another when engaged in actual fighting, then why not arrest the soldiers who killed poor old Big Foot? He was lying before his tepee dying of fever, unable to raise his hand, and yet a dozen bullets were fired into his body. And look at the six Indians found after the battle—one man and the rest women and children, all shot down within eight miles of Pine Ridge by scouts or soldiers! Why not investigate that? I suppose they say it can’t be done, but it can. There are many cases similar to mine. We were at war.\(^51\)

\(^{50}\) “Plenty Horses: He Testifies in His Own Behalf in the United States Court,” Madison Daily Leader, April 24, 1891.

In this response, Tasunka Ota makes the connection between Wounded Knee and his own actions clear, framing both events as part of a larger war. However, Tasunka Ota also notably distinguishes between their circumstances. Casey was a spy sent to their camp for the explicit purpose of gathering intel for future campaigns, whereas Hehaka Gleska posed no risk to the soldiers that killed him. In this way, Tasunka Ota used the platform afforded to him by the trial to bring the public’s attention to the brutal reality of the United States’ actions and expose the asymmetry of the United States’ response to the two events. The killing of one combatant by another merited a murder trial, yet the United States rewarded the killing of over 300 Lakota civilians with medals of honor for the soldiers involved.52

By the time court was called into session in the matter of United States v. Plenty Horses, the war question was top of mind for all involved—was Casey’s death an act of murder or an act of war? Tasunka Ota’s defense attorneys D.E. Powers and George P. Nock adopted their client’s stance that it was a war. Throughout the first few days, Powers and Nock introduced evidence intended to prove the existence of the war, including testimonies from those present at Wounded Knee. However, such introductions were not easy. Prosecutor William Sterling consistently objected to the “introduction of any testimony for the purpose of showing that a state of war existed between the Sioux and the government of the United States . . . [because] the Government did not concede that there was a war at the time Casey was killed.”53 Despite the centrality of the war question to the trial, the mere introduction of evidence that could demonstrate the existence of a war required a concession that the United States was not willing to make.

For the United States, recognizing the existence of a war posed the risk of recognizing
Lakota nationhood. At the time of United States v. Plenty Horses, U.S. law defined “war” to
mean “a state of armed hostility between sovereign nations or governments.” In claiming that a
war existed, Tasunka Ota’s defense team inherently implied the existence of a sovereign Lakota
nation as well. In the opening days of the Trial, Powers initially employed an argument to that
effect, stating that “the act of [the] defendant in killing Casey was the act of a belligerent in the
prosecution of a war, and inasmuch as his act in killing Casey has been endorsed by the Sioux
Nation, the civil authorities of this government have no jurisdiction to try him for murder.”
This was precisely the argument the United States had been hoping to avoid. The recognition of
a state of war exposed the unsettling reality of continued Lakota nationhood. The legitimacy of
settler sovereignty depended upon the state’s ability to maintain sole jurisdiction over a given
territory or space. Consequently, the recognition of Lakota nationhood—and its potential
jurisdictional claims in the Plains—could wholly upend the United States’ claims to sovereignty
over the region.

In order to avoid this challenge to settler sovereignty, Tasunka Ota’s defense attorneys
soon made use of past legal precedent and recently adopted laws of war known as the Lieber
Code. Nock and Powers argued that “the United States Supreme Court, in several cases, has
distinctly held that . . . dependent nations possess certain political powers and functions, and
among these powers and functions is the right to declare war.” As defined in Cherokee Nation
v. United States, “domestic dependent nations . . . [are] completely under the sovereignty and

https://avalon.law.yale.edu/19th_century/lieber.asp.
55 “Plenty Horses: New Interest for the Young Brave in His Trial.”
56 “Plenty Horses: New Interest for the Young Brave in His Trial.”
dominion of the United States.”\textsuperscript{57} The classification of the Lakota as a “dependent nation” thus allowed the defense team to preserve the Lakota’s right to war without levying a challenge to U.S. settler sovereignty claims, since dependent nations remained subject to the sovereignty of the United States. Furthermore, when discussing the conflict itself Nock and Powers often referred to it as a “rebellion” rather than a “war.”\textsuperscript{58} The Lieber Code defined “rebellion” as “a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.”\textsuperscript{59} During such a conflict, the invocation of the laws of war “neither proves nor establishes an acknowledgment of the rebellious people . . . as a public or sovereign power.”\textsuperscript{60} Not only did this language allow the United States to recognize a war with the Confederacy without recognizing Confederate sovereignty, but it also allowed the United States to do the same with the Lakota nearly three decades later.\textsuperscript{61} In this way, Nock and Powers used pre-existing case law and legal codes to render the ongoing war legible to the court, yet simultaneously unthreatening to U.S. settler sovereignty.

Presiding Judge Oliver Shiras adopted a similarly limited conception of the war, which he ultimately used to acquit Tasunka Ota. First, in his initial recognition of the war, Shiras reportedly held that “in deciding that the Indians were recognized as belligerents the court . . . did not go so far as to say that they were looked upon as a foreign nation would be and they

\textsuperscript{57} The Cherokee Nation v. the State of Georgia, 30 U.S. 1 (1831).
\textsuperscript{58} “Plenty Horses: An Attorney Visits Pine Ridge and Returns After a Successful Trip,” \textit{The Madison Daily Leader}, May 22, 1891.
\textsuperscript{59} \textit{General Orders No. 100: The Lieber Code} (1863).
\textsuperscript{60} \textit{General Orders No. 100: The Lieber Code} (1863).
\textsuperscript{61} This exact parallel was drawn by the \textit{Daily Argus Leader} in the wake of the final verdict. The paper printed that “The Sioux tribe is not of course an independent nation, and cannot formally declare war. But it can rebel, as did the Southern states in 1861, and war can result.” For the full article, see “The Plenty Horses Verdict,” \textit{Sioux Falls Argus-Leader}, May 29, 1891, 6.
were, therefore, in the jurisdiction of the court.” In short, Shiras recognized the existence of a state of war, without recognizing the existence of Lakota sovereignty, in order to maintain his own jurisdiction over the matter. Then, in his final decision, Shiras limited his recognition of this war even further:

It clearly appears that on the day when Lieut. Casey met his death there existed in and about Pine Ridge Agency a condition of actual warfare between the army of the United States there assembled under the command of Major Gen Miles and the Indian troops occupying the camp on No Water and in its vicinity . . . It is apparent that the actions and conduct of the troops of the United States at and about Pine Ridge cannot be justified in all respects excepting under the admission of the fact they were engaged in actual hostilities and warfare and were therefore justified in resorting to all the legitimate acts of war. The main facts involved in the case are not to dispute and, in the judgement of the court, any other conclusion cannot be maintained under the evidence than there was a condition of actual warfare existing between the Indians and the United States Army.

In this opinion, Shiras first limited his decision temporally (“on the day that Lieut. Casey met his death”) and geographically (“in and about Pine Ridge”). He then further narrowed his decision to only involve specific combatants: “the army of the United States there assembled under the command of Major Gen Miles and the Indian troops occupying the camp on No Water and in its vicinity.” Finally, Shiras limited his decision in regard to the kind of conflict it recognized, never explicitly recognizing a “war,” but rather a “condition of actual warfare.” This final limit allowed for the application of the laws of war to the trial, without conferring legitimacy or sovereignty to the Lakota people. By narrowing his decision in this way, Shiras ensured that it would pertain

63 While Shiras’s decision was summarized by a number of other newspapers, the New York World appears to be the only paper to quote the decision in full and therefore is the account reprinted above.
64 From the available sources, it appears that governmental contemporaries understood this phrase to allow for the application of the laws of war without necessarily conferring sovereignty or independence to the parties at war. For example, U.S. Senator John Sherman (OH) used this phrasing to a similar effect in a discussion of the conflict between Spain and Cuba in 1870, stating “I do not go so far as to recognize the state of independence [of Cuba], but simply to require the United States to recognize a condition of actual warfare, so that fair play shall be given to the insurgents.” U.S. Congress, The Congressional Globe: Containing the Debates and Proceedings of the Second Session Forty-First Congress; Together with an Appendix, Embracing the Laws Passed at That Session (Washington: Blair & Rives, 1870), 1206.
exclusively to the facts before him, with little impact on future discussions of ongoing war or Lakota sovereignty.

Furthermore, Shiras used these limits to ensure that his decision that could never serve as doctrine in the future. In order to operate as precedent, the decided case must involve “similar facts or issues” to the case at hand.\(^6^5\) In *Plenty Horses v. United States*, Shiras produced a decision that was so contingent upon its particular set of facts that it could not be reasonably applied to a future case. Shiras also left his decision unreported and without instructions for interpretation. Unreported or unpublished decisions are often attributed far less precedential value than decisions that have been reported by the court.\(^6^6\) Left unreported, it became far more difficult for *United States v. Plenty Horses* to serve as legal precedent in the future.\(^6^7\) Executing his decision in this way thus allowed Shiras to recognize a specific instance of war, without potentially creating legal doctrine capable of recognizing another manifestation of that war in a future place or time.

However, Shiras’s opinion could validate, at least within the public consciousness, what his peers viewed as a contemporary manifestation of that war: Wounded Knee. Validating the United States’ violence against the Lakota became the primary focus of popular interpretations of *United States v. Plenty Horses*. For example, in the immediate aftermath of the trial, *The Sioux Falls Argus-Leader* explained the trial’s outcome by saying that “If the Sioux trouble at

\(^6^7\) This lack of precedential afterlife was not caused by a lack of interest in the case. In 1898, an attorney in Minnesota tried to inquire about *United States v. Plenty Horses* to see whether its verdict would impact his own case. However, because the case was unreported, the South Dakota’s States Attorney could not provide him with any information on the trial beyond a general summary of Shiras’s decision. William Porter to Evans Robert, October 15, 1898, Record Group 118, National Archives at Chicago, https://catalog.archives.gov/id/40431521.
Wounded Knee was not a war, the Indians killed at Wounded Knee were simply murdered by our soldiers.⁶⁸ Even though Shiras refrained from explicitly referencing Wounded Knee in his decision, his statement about justifying the United States’ past conduct was popularly interpreted to mean Wounded Knee. In this way, while Shiras ensured his decision could not be used to prevent or legitimate future acts of war, he left the enough ambiguity within his decision to sufficiently validate the massacre at Wounded Knee in the public consciousness.

While Shiras sought to limit the trial’s futurity, the Lakota used the publicity of the trial to produce their own survivance. First, the Lakota at the trial used the newspaper coverage in order to generate their own narrative presence within the archive produced on the trial. By the time of its conclusion, United States v. Plenty Horses had become a thing of celebrity, with coverage of the trial appearing in leading newspapers from over 20 states and territories.⁶⁹ Tasunka Ota gave interviews to a number of these news outlets, offering accounts of the war and life on the Plains from a Lakota perspective. In doing so, he actively produced a Lakota presence within the broader public discourse on the trial. While this presence was mediated by the journalists conducting the interviews, it nonetheless contained a distinctly Lakota perspective. In this way, Tasunka Ota used the platform of Plenty Horses v. United States as a means of

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⁶⁸ This excerpt from The Sioux Falls Argus-Leader further demonstrates the generative legal power of the term “genocide,” a term that did not exist until the mid-twentieth century. Before the introduction of the word “genocide,” the defense of war served as a legal avenue for absolving the United States of its guilt at Wounded Knee. From a nineteenth century popular and legal perspective, Wounded Knee would constitute murder in a state of peace, but a legitimate act of war in a time of conflict. Consequently, recognizing a war could legitimate Colonel Forsyth and the Seventh Calvary’s killing of nearly 300 Lakota people. Raphael Lemkin’s introduction of the term “genocide” led to the creation of a new class of crime during wartime. Consequently, by today’s legal standards, recognition of a war cannot absolve the U.S. of its guilt of genocide at Wounded Knee. In times of peace and war, the systematic targeted killing of an entire class of people constitutes a crime under international law.


generating an active Lakota presence in the public narrative of the trial and, by extent, Lakota narrative survivance.

Within these public narratives, Tasunka Ota and other Lakota present at the trial drew attention to a second survivance practice: their physical survivance. Oglala Lakota leader Wasicu Tasunka (American Horse), for example, used the press coverage of the trial to demonstrate his people’s continued presence in the Plains and expose the ongoing violence they faced from the United States. In the wake of the trial, Wasicu Tasunka told *The Evening World*:

> The whites have driven us where we are today . . . Our treaties have been broken. The whites come on our land, get rich, and build big houses. They push us back and do not want us to live with them . . . The whites starved us . . . Today I have no horses or cattle. The whites took them all in the war last Winter – that’s the way they treat us. What must the Indian do? Die, fight, or starve?  

Throughout this interview, Wasicu Tasunka drew the broader U.S. public’s attention to the eliminatory design underlying the military’s actions. The military had adopted tactics of not only battleground violence, but also spatial containment—forcing the Lakota off of their homelands and onto reservations—and starvation. The intended design behind such tactics was the eventual elimination of the Lakota from the Plains entirely; in short, genocide. Through his reference to “our land,” Wasicu Tasunka further reminded his audience of the enduring Lakota claim and presence on the land despite this violence. By the mid-1890s, *The Evening World* had an audience of roughly 340,000 people.  

Wasicu Tasunka used his interview to remind those readers of the Lakota’s continued presence in the Plains. In doing so, he used the platform of the trial to both highlight contemporary Lakota physical survivance and generate a narrative survivance that would endure into the years that followed.

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Most histories of United States v. Plenty Horses end with the trial’s decision; however, the violence and survivance highlighted by Wasicu Tasunka continued into the early to mid-twentieth century. Relative to discussions of United States v. Plenty Horses, and later the Occupation of Wounded Knee in 1973, this era is frequently ignored within the historical literature on the Lakota. Estes attributes this silence to “settler society’s . . . obsession with war.”  This period lacks a striking moment of violent conflict, without which settler society remains uninterested. However, there is a possible alternative explanation for this silence: settler society’s definition of war. Throughout the Plenty Horses era, the United States conceived of the war the Lakota as a series of distinct “outbreaks.” Consequently, a period without a violent altercation could be understood as a period of peace. This understanding of the war conveniently absolves the U.S. of any guilt for non-military acts of state violence undertaken during the interim between Plenty Horses and the Occupation of Wounded Knee. In doing so, it also erases potential continuities between the tactics used in the nineteenth century and those used in the twentieth. By reconceptualizing the conflict of the nineteenth century as a singular war motivated by the United States’ unquenchable desire for Lakota land, the state violence of the early twentieth century is revealed to be a constitutive part of that same war, motivated by those same ends and employing same tactics.

The United States’ tactic of starvation, for example, continued into the twentieth century, albeit in slightly more passive ways. For example, in the winter of 1913-1914, the Lakota and Dakota peoples living at Standing Rock endured a period known as the “Starving Time.” The previous summer the potato and corn crops both failed, then 35,000 cattle disappeared the following fall, leaving those at Standing Rock with little to eat. While he could not substantiate

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the claim, local lawyer Aaron McGoffey Beede believed the cattle had been stolen. Given the sheer quantity of cattle lost, Beede’s theory of an orchestrated famine has its merits. However, regardless of whether this famine was by design—and regardless of the role played by the U.S. government in that design—it remains clear that the United States did little to prevent the famine’s fatality. North Dakota Congressman P.D. Norton argued that those at Standing Rock were “supplied with plenty of food,” as they still had their “mice-feed” stores. In regard to their cattle, Norton relayed that the Commissioner of Indian Affairs, Cato Sells, promised to give special attention to livestock farming education in the future years. Through its refusal to take direct action to prevent loss of Lakota and Dakota lives during the Starving Time, the United States adopted a tactic of passive starvation in the early twentieth century.

The United States also continued to actively employ its policy of containment. However, rather than being enforced by the United States military, containment became the responsibility of local law enforcement. The shift from a military presence to a police one was not without consequence. It reframed containment as a domestic policy rather than a military tactic, consequently obscuring the reality of containment as a constituent part of an ongoing war for the Lakota homelands. Furthermore, the shift to the police caused the United States to begin relying more heavily on one particular method of containment: incarceration. Consisting of the complete spatial removal of a person from public space, incarceration is the quintessential form

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74 Quote in Aaron McGoffey Beede, “Beede Replies to the Published Letters,” The Fargo Forum and Daily Republican., April 9, 1914.
76 Incarceration as a tool of containment was not unique to the twentieth century. During the Plenty Horses era, military arrest and detainment was incredibly common within the Plains, particularly the arrest of those believed to be “the leaders of non-progressive Indians.” L.A. Grant to Secretary of the Interior, “Indian Affairs at Rosebud, Cheyenne, and Standing Rock Agencies,” March 31, 1891, Microfilm 983, National Archives at Atlanta; J. Geo. Wright to Commissioner of Indian Affairs, March 10, 1891, Microfilm 983, National Archives at Atlanta.
of containment as colonial violence. Incarceration offered the United States the means of spatially removing the Lakota from even their allotted reservation territory and, in the process, creating the possibility for the U.S. to acquire the Lakota homelands more fully for themselves.

The arrests of Native people for public intoxication were particularly indicative of these spatial dynamics. In South Dakota in 1955, Native people accounted for 26% of all reported arrests overall. In areas bordering Oceti Šakowin reservations, Native people accounted for as high as 80% of arrests. Out of all Native arrests statewide, 92% were for “crimes connected with the consumption of alcoholic beverages.” However, arrest for such an offense was not the stated norm of the police at this time. In interviews from the period, police officers consistently stated a preference of escorting the intoxicated person home. When confronted by the above statistics, the common explanation was that “most Indians had no town residences and could not be easily returned to their homes.” The act of incarcerating a Native person rather than allowing them to return home reveals the dynamics of settler colonial containment in microcosm: the process of repeatedly denying one access to their homelands and instead confining them to an increasingly small space, in the hopes of one day removing them from the landscape entirely.

As in 1890, Lakota survival in the face of these eliminatory tactics took on a number of different forms. For some, like Richard (“Dick”) Wilson, personal survival came from alignment with—and eventually the perpetuation of—the settler police state. In April of 1972, Wilson

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79 Farber, Odeen, and Tschetter, 64.
80 The use of “survival” here as opposed to “survivance” is intentional. As conceptualized by Vizenor, survivance “is more than survival, more than endurance or mere response . . . survivance is an active repudiation of dominance.” While Wilson’s strategy of aligning himself with the police state—and later with the settler police state, during the Occupation—ensured his own survival and protection throughout this period, his actions did not
took office as the Tribal Chairman of Pine Ridge Reservation, a position created by the U.S. under the Indian Reorganization Act of 1934.\textsuperscript{81} During his first year in office, Wilson embraced the notion of a police state, establishing an auxiliary force of “special citizen deputies” known as the Guardians of the Oglala Nation, or “GOONs.”\textsuperscript{82} However, for many others survival entailed collective resistance of the settler state nationally, and of Wilson’s police state locally. In early February of 1973, a group of Wilson’s opponents formed the Oglala Sioux Civil Rights Organization (OSCRO).\textsuperscript{83} OSCRO advocated for the end of Wilson’s government and a return to treaty councils and customary Lakota leadership.\textsuperscript{84} Inherent within this advocacy was a claim of enduring Lakota sovereignty. To OSCRO, survival was not an individual matter, but rather a collective one. OSCRO advocated for the endurance and continued presence of an independent Oglala Lakota nation in the Plains.

Wilson and OSCRO’s methods of survival soon came to a head, as inherent within either party’s means of survival was a competing claim to governance at Pine Ridge. Perceiving OSCRO’s call for a return to traditional leadership as a threat to his power as Tribal Chairman, Wilson used his GOON squad to target members from OSCRO and other activist organizations like the American Indian Movement (AIM). Wilson openly acknowledged this abuse of power, later stating that he had “organized this force to handle people like Russell Means [an Oglala Lakota activist] and other radicals.”\textsuperscript{85} The leadership of OSCRO and AIM were aware of the

\begin{footnotesize}
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\item For more on the position of tribal chairman, see Voices from Wounded Knee, 10–11, 17.
\item Paul Chaat Smith and Robert Allen Warrior, Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee (The New Press, 1996), 176, 196.
\item Estes, “Our History Is the Future,” 203.
\item Churchill and Vander Wall, Agents of Repression, 136.
\end{itemize}
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GOONs intentions; however, this threat of violence did not discourage them from dissenting. It merely shaped the form of their dissent. At Pine Ridge, OSCRO’s primary leadership was all men; however, because of concerns about police violence, their initial protests were led by entirely women. Despite Wilson and the GOONs’ violent methods of intimidation and repression, OSCRO would not be silenced.

As resistance to Wilson’s leadership grew, so too did the settler police presence at Pine Ridge. On February 11, 1973, over 65 U.S. Marshals arrived at Pine Ridge. In the days that followed, the Marshals began to train local BIA police in riot control, and additional reinforcements from the FBI and state police departments began to arrive. This increase in the settler police presence at Pine Ridge could be attributed to the potential threat to settler sovereignty embodied within OSCRO’s call for an Independent Oglala Nation. An Independent Oglala Nation would derive its power from a Lakota sovereignty claim that outdated that of the United States—a counter and prior claim with the ability to unsettle settler sovereignty in the Plains. Conversely, Wilson’s government derived at least a portion of its legitimacy from the Bureau of Indian Affairs and the Indian Reorganization Act of 1934. As such, Wilson was subject to U.S. rule in certain respects and thus viewed as the less threatening option to the maintenance of settler sovereignty. In short, fearing the unsettling potential of an enduring and independent Lakota claim to sovereignty in the Plains—a claim embodied by OSCRO call to return to remove Wilson and return to traditional, customary leadership—the U.S. settler police state stepped in to protect Wilson’s claim to local authority and by extent, their own claim to settler sovereignty.

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86 Voices from Wounded Knee, 22.
OSCRO began to host daily meetings in the neighboring town of Calico to discuss what should be done to confront this heightened police presence in their homelands. OSCRO member Gladys Bissonette later recalled these meetings, explaining that “We wanted to find a way to get some straight answers about the marshals and the goon squad of [Dick] Wilson's . . . No one would tell us anything.” Nearly two weeks later, and still without answers, OSCRO invited leaders from the American Indian Movement (AIM) to their townhall. AIM was a grassroots advocacy organization that had recently reached national attention for its collective actions, the Occupation of Alcatraz and the Trail of Broken Treaties Caravan. Together, they all gathered to answer one question: “What is to be done?” Resident after resident spoke about their frustration with Wilson’s administration and their experience with the GOONs. After the testimonies had been shared, Oglala leaders and activists, as well as the two AIM leaders present—Dennis Banks (Ojibwa) and Russell Means (Oglala Lakota)—conferred among themselves. Together, they decided that they would reclaim the town of Wounded Knee and, in the process, assert the survivance of Lakota life and sovereignty in the Plains.

On February 27, 1973, the Occupation of Wounded Knee began. The activists in Wounded Knee issued a list of demands to the Justice Department, with the following statement:

Communicate this to whoever is in charge. We are operating under the Provisions of the 1868 Sioux Treaty. This is an act of war initiated by the United States. We are only demanding our country.

The occupation—and subsequent siege—of Wounded Knee lasted 71 days. As evidenced in the statement above, those inside Wounded Knee understood its stakes clearly: Lakota treaty rights

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87 “St Paul Trial Ends with a Dismissal of All Federal Charges,” *Akwesasne Notes*, Early Autumn 1974.
89 In an act of linguistic survivance, many of the testimonies shared were given in Lakota, then translated for the AIM leaders present. Smith and Warrior, *Like a Hurricane*, 197–98.
90 *Voices from Wounded Knee*, 31; Smith and Warrior, *Like a Hurricane*, 198–201.
91 Smith and Warrior, *Like a Hurricane*, 203.
and, by extent, Lakota sovereignty. Russell Means later explained that “Wounded Knee was not against anything. It was for the 1868 Fort Laramie Treaty. It was for our people.”92 Faced with the United States’ refusal to recognize their treaty rights in the past, the Occupation of Wounded Knee became an embodiment of those rights. The occupants of Wounded Knee declared themselves the Independent Oglala Nation and Wounded Knee their sovereign territory.93 In doing so, they enacted a public practice of Lakota survivance, asserting the presence of a sovereign Lakota nation in the Plains.

Such assertions posed a direct threat to U.S. settler sovereignty in the region. Consequently, the United States sought to suppress Lakota sovereignty and exert its own jurisdiction over the territory of Wounded Knee. To accomplish this, U.S. Marshals and FBI agents first surrounded the town and established roadblocks along all major roads connecting Wounded Knee to neighboring areas. The following day, armored personnel carriers (APCs) began to arrive, fortifying the roadblocks. The United States then laid siege to the town of Wounded Knee in early April, using those roadblocks to prevent the flow of people and food in and out of the town. In short, the United States once again employed the tactics of containment and starvation in order to wage a war against Lakota sovereignty. It was not long until battlefield violence—namely, firefights—became a nightly occurrence as well.94

A significant asymmetry in armaments pervaded these exchanges. The activists inside Wounded Knee had fewer than 50 rifles. The bullets from these weapons could barely reach the U.S. bunkers surrounding Wounded Knee, much less damage an APC.95 They made Molotov

93 Voices from Wounded Knee, 54–57.
94 Akard, “Wocante Tinza,” 194; Voices from Wounded Knee, 41, 184.
cocktails as well; however, a journalist inside Wounded Knee noted that the activists had made them entirely wrong—the soda bottles used were too thick to break properly.\textsuperscript{96} Meanwhile, by the end of the standoff, the U.S. agents at Wounded Knee had accumulated over 400,000 rounds of ammunition, 120 sniper rifles, 20 grenade launchers, and several gas grenades, among other munitions provided by the government. The 15 APCs used by the government to fortify the roadblocks around Wounded Knee resembled medium-sized tanks, while AIM’s spin on their own APCs—or AIM Personnel Carriers—amounted to spray-painted vans.\textsuperscript{97}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Fig3.png}
\caption{The APCs of Wounded Knee.\textsuperscript{98}}
\end{figure}

\textsuperscript{96} Smith and Warrior, \textit{Like a Hurricane}, 211.
\textsuperscript{97} Garbus, “General Haig of Wounded Knee,” 454.
\textsuperscript{98} \textit{Voices from Wounded Knee}, 40, 134.
This level of asymmetry in armaments was far from new in the war between the United States and the Lakota; however, it became increasingly stark in the standoff at Wounded Knee in 1973. The militarization of the police at Pine Ridge soon became a full mobilization of the military in all but name only.

The U.S. military provided tangible and tactical support to local law enforcement at every stage of the Wounded Knee affair. The Directorate of Military Support (the Pentagon unit that directed assistance between the army and local law enforcement agencies) ensured that those present at Wounded Knee were outfitted with all the munitions of war. Specifically, the DOMS provided APCs, M-16s, infantry weapons, chemical weapons, steel helmets, gas masks, body armor, flares, and rations to the U.S. law enforcement officials at Wounded Knee. Furthermore, many of the law enforcement personnel present at Wounded Knee had military training themselves. The initial cohort of U.S. Marshals originally called to Pine Ridge in February 1973 were known as the Special Operations Group (SOG). The SOG was a recently established rapid-response strike force that consisted of solely individuals with military careers or training. It was later described as “a domestic version of the Green Berets.” Lastly, military personnel were sent to Wounded Knee to offer strategic and tactical advice less than a week after the Occupation began. General Volney Warner, for example, arrived at Wounded Knee on March 3 and played a crucial role in U.S. decision making for the duration of the conflict. He later recalled that army representatives had an “equal vote in the decision-making process at

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101 Voices from Wounded Knee, 24.
Wounded Knee.” ¹⁰² In this way, the United States enlisted military support at every level of their response to the Occupation of Wounded Knee.

However, the United States publicly maintained the stance that there was no war between themselves and the Lakota, framing Wounded Knee as a criminal domestic dispute under the jurisdiction of local law enforcement. In March of 1973, Secretary of the Interior Rogers Morton issued a statement to the press, stating:

> These are criminal operations and should be dealt with accordingly . . . There is no way that I or any other Secretary can undo the events of the past. If it was wrong for the European to move on to this continent and settle it by pioneerism and combat, it was wrong. But it happened and here we are. ¹⁰³

In this statement, Morton explicitly frames the Occupation of Wounded Knee as a “criminal operation,” rather than legitimate sovereign action by the Oglala Lakota. He also implicitly confines any possible war between the Lakota and the United States to the past. Rather than conceptualizing of “pioneerism and combat”—in short, the violence of colonialism—as component parts of an ongoing war, Morton defines them as “events of the past.” From this perspective, any attempt to counter that violence today was not a sovereign act of war, but rather part of a domestic criminal operation. The entity intended to handle such operations was law enforcement. Publicly, the U.S. succeeded in maintaining the image that law enforcement was precisely who was managing the U.S. response to Wounded Knee. The journalists present never reported seeing a single military uniform on the premise. ¹⁰⁴ Shipments of military equipment were stopped miles outside of Wounded Knee, transferred from marked military vehicles into

¹⁰² Matthiessen, *In the Spirit of Crazy Horse*, 73.
¹⁰³ *Voices from Wounded Knee*, 113–14.
¹⁰⁴ General Alexander Haig explicitly ordered the military personnel present at Wounded Knee to wear civilian clothing while on site. Such an order was extremely uncommon; two military officials present at Wounded Knee later admitted that “never before in their years of service had they not worn uniforms during ‘work.’” Smith and Warrior, *Like a Hurricane*, 212; Garbus, “General Haig of Wounded Knee,” 454.
unmarked civilian ones, and then driven to roadblocks by military officials in civilian clothing.\textsuperscript{105} To the outside observer, it appeared as though that domestic law enforcement agencies alone were responding to the Occupation of Wounded Knee.

By concealing the broader existence of the war between themselves and the Lakota, the United States allowed itself to be less beholden to the laws governing such a war. As in 1890, the tactics the United States had adopted during the conflict rested on unstable legal footing. In the final months of the occupation the U.S. laid siege to Wounded Knee, making use of the combined tactics of containment and starvation. Lawyers observing the siege described it in the following terms:

\begin{quote}
The United States Government has established a military siege of the village. It proposes to starve the people into submission by depriving them of food and necessities of life. It proposes to reduce them to a state of disease and ill health . . . In effect, it has arrested, punished, and imprisoned the entire population without due process.\textsuperscript{106}
\end{quote}

The tactics of the United States’ siege—containment and starvation—thus stood as not only ethically but also legally unsound. Even those untrained in the law recognized the reprehensibility of the United States’ tactics. In mid-April a team of medical workers issued a statement to the press, stating that “If it [Wounded Knee] is a war, then we must demand that the U.S. Government conduct itself appropriately — siege warfare has long been regarded as inhumane and illegal.”\textsuperscript{107} Had the United States recognized the existence of a war, they would have been obligated to obey the laws of war and reform their siege. However, by not only withholding recognition of the war, but also actively erasing signs of its existence, the U.S. attempted to evade the jurisdiction of such laws.

\textsuperscript{105} Garbus, “General Haig of Wounded Knee,” 454.
\textsuperscript{106} Voices from Wounded Knee, 184.
\textsuperscript{107} Voices from Wounded Knee, 184.
Lakota and AIM activists combatted these attempts at erasure by explicitly and publicly identifying Wounded Knee as part of an ongoing war for Lakota land and sovereignty. This framing frequently adopted the epithet of “The Longest War.” To a U.S. audience, such a title would have been particularly striking. The Vietnam War dominated public consciousness during this period and was publicly understood to be the longest war in U.S. history. By reassigning that title to Wounded Knee, the activists in Wounded Knee redirected contemporary indignation at Vietnam toward the violences inflicted by the United States onto the Lakota, and Native nations more broadly.

This epithet—“the Longest War”—also framed the war of 1973 as part of a broader war against the Native nations that spanned centuries. AIM activist Dennis Banks (Ojibwa) explained this connection, saying “This Indian war has been going on since Columbus landed. It’s the longest racial war in history. The longest war, the longest undeclared war, has not been Vietnam but one against Indian citizens.” By explicitly contrasting the length of the war in Vietnam with the war in Wounded Knee, Banks demonstrated the scale of the war the United States was waging against the Lakota and other Native nations. Furthermore, Banks located the beginnings of this war with the arrival of Columbus in 1492. This temporalization of the war not only established an even longer historical continuity, but also identified the war as endemic to settler colonialism. Rather than the root cause of this war being unique to the relationship between the Lakota and the United States, Banks framed it as a war between settler and Native nations. Furthermore, with the addition of “undeclared,” Banks identified a level of invisibility within that conflict. The settlers involved—Columbus or the United States—could have declared a war,

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but consistently chose not to for the sake of concealing the state violence it entailed and ensuring that they would not be beholden to the rules governing conduct during wartime.\(^{110}\)

Another AIM activist, Russell Means (Oglala Lakota), further used this temporalization of the conflict in order to reveal the long history of Lakota survivance. Rather than centering the ongoing settler violence against Native peoples, Means’s discussion of the Wounded Knee Occupation centered Native nations’ survivance: “after almost 500 years . . . we are still alive and still resisting.”\(^{111}\) In adopting this framing, Means actively combatted myths of lasting and in their place asserted an enduring Native presence and vitality. To those inside Wounded Knee, the occupation and concurrent siege revealed a continuity in not only the United States’ aggressive war for their land, but also their own continued survivance and resistance to that war.

On May 1, 1973, OSCRO representatives and the U.S. officials present at Wounded Knee entered into the negotiations that would eventually conclude the occupation and concurrent siege.\(^{112}\) The terms of the stand-down were highly debated over the course of several days, producing a dialogue that embodied a number of the fundamental differences between U.S. and Lakota understandings of the conflict at hand.

\textit{U.S. Asst. Attorney General Kent Frizzell:} I can’t be responsible for what the government did a hundred years ago. We’re willing to have a treaty commission after the laying down of arms —

\textit{Frank Kills Enemy, traditional Oglala elder:} In ’68, a treaty. And in ’71, a war. And in ’72, another one. The government is guilty right there — violating these treaties. War plan, 1874. Peace plan, 1874 and ’75. Then war in 1875 and ’76 . . . This is a concentration camp. Hundred years confinement. And we’re bounded by the military of

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\(^{110}\) Estes explains that “Undeclared war, however, never made endless war making against Indigenous peoples any less real. Waging ‘savage war’ simply suspended the rules of ‘civilized war.’” Estes, “Our History Is the Future,” 70.

\(^{111}\) Akard, “Wocante Tinza,” 197.

\(^{112}\) The AIM leaders present did not sign the negotiation agreement, as they believed such an agreement needed to between the Oglala Lakota and the United States. Dennis Banks later said, “I will submit to the arms laying down because the chiefs and headmen have agreed . . . AIM’s job here is done.” Smith and Warrior, Like a Hurricane, 263.
this nation. And I want to face these who are coming from Washington. I like them to face what laws they have violated.\textsuperscript{113}

To Frizzell, the events of Wounded Knee in 1973 were distinct from the violence of past centuries; however, to Kills Enemy the violence of the past centuries never ended. The Lakota had endured a “hundred years of confinement” at the hands of the military and, in some cases, a militarized police force. These contrasting temporalizations of the conflict revealed a second difference in U.S. and Lakota understandings of the conflict, specifically in relation to accountability. Because Frizzell distinguished his present moment from the United States’ violent past, to him the Lakota appeared to be holding the current U.S. government accountable for the violence committed by its forefathers. Conversely, Kills Enemy sought to hold the United States accountable for both the violence it had committed against the Lakota in the past and the violence in continued to commit in 1973. While OSCRO and the U.S. ultimately came to an agreement resulting in the standdown on May 8, 1973, this question of the form and nature of U.S. accountability would continue to reverberate into the trials that followed.\textsuperscript{114}

The activists from Wounded Knee found their first opportunity to potentially produce U.S. accountability in the trial of AIM leaders Dennis Banks and Russell Means. \textit{United States v. Banks}, as the trial became known, was one of several leadership trials held in the wake of the occupation.\textsuperscript{115} Banks and Means faced a total of eight charges for their actions at Wounded Knee, including burglary, larceny, and conspiracy.\textsuperscript{116} However, while the trial began with the prosecution of Banks and Means for their alleged actions at Wounded Knee, it quickly became

\begin{footnotes}
\item[113] Voices from Wounded Knee, 230.
\item[114] For a more in-depth account of the stand-down, see Smith and Warrior, \textit{Like a Hurricane}, 263–68.
\item[115] The “leadership trials” were a group of the cases that arose in the wake of Wounded Knee, in which several of the identified leaders of the Occupation were tried in federal court for conspiracy, among other charges. While the group originally petitioned to be tried as a group, their cases were later broken up into multiple separate trials. Banks and Erdoes, \textit{Ojibwa Warrior}, 213.
\end{footnotes}
far more concerned with the actions of the FBI and Pentagon leadership. Over the course of the trial, the court uncovered overwhelming evidence of governmental misconduct during the occupation and siege of Wounded Knee, including wiretapping and the illegal mobilization of the military.\textsuperscript{117} Then, during the trial itself, the U.S. government continued to engage in misconduct. The head of the FBI Joseph Trimbach perjured himself on the stand, repeatedly stating that he never signed the affidavit authorizing wiretapping until the defense confronted him with such a document bearing his signature.\textsuperscript{118} The prosecution actively suppressed crucial evidence to the point that the court ordered a complete search of the government’s records. This search produced 131 pieces of evidence that had been withheld from the defense.\textsuperscript{119} While Judge Nichol’s was initially hesitant to dismiss the case based on what he saw as governmental negligence, he eventually determined that “when a pattern of negligent conduct becomes apparent, it becomes a permissible, and possible compelling, inference to say that bad faith is present.”\textsuperscript{120} On the grounds of such “bad faith” on the part of the government, Judge Nichol ultimately dismissed all of the State’s remaining charges against Banks and Means.

Nichol’s memorandum opinion dismissing the case offered a scathing account of the government’s conduct during the trial. In it, Nichol stated that:

I am forced to the conclusion that the prosecution in this trial had something other than attaining justice foremost in its mind. In deciding this motion I have taken into consideration the prosecution's conduct throughout the entire trial. The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case.\textsuperscript{121}

\textsuperscript{120} United States v. Banks, 383 F.Supp. 389.
\textsuperscript{121} United States v. Banks, 383 F.Supp. 389.
In this opinion, Nichol recognized the governmental misconduct that AIM and their attorneys had been working to expose for years. However, Nichol limited his condemnation of the government’s conduct to the events of the trial itself. Even when identifying a pattern of misconduct, Nichol limited his dismissal to the misconduct that occurred over “the course of the trial” rather than over the course of the entire Wounded Knee affair. Furthermore, Nichol’s only held the government verbally accountable. Beyond being reprimanded in court, the attorneys and other government officials involved in the misconduct faced few consequences for their actions; far from it, many went on to have immense success in the legal field.122 Nichol thus limited his seemingly radical opinion to focus exclusively on the incidents of misconduct that occurred within his chambers and offered few opportunities for institutional governmental accountability.

Furthermore, in narrowing the concerns of his dismissal, Nichol inherently limited his decision’s ability to serve as precedent beyond his chambers. While Nichol dismissed the remaining Wounded Knee cases under his jurisdiction, his ruling in United States v. Banks could not serve as precedent for the dismissal of the other remaining Wounded Knee cases under other judges’ jurisdiction.123 This inability to serve as precedent can be attributed to the grounds Nichol cited for dismissal. Similar to Shiras’s decision in United States v. Plenty Horses, Nichol’s acquittal of Banks and Means was deeply rooted in the particularities of the facts before him. While he noted the existence of governmental misconduct at Wounded Knee elsewhere, the “pollution” he cited in his dismissal was not endemic to the relationship between the Lakota and the United States. Rather, it was the result of the prosecution’s actions. Consequently, in the eyes

122 For example, Assistant States Attorney R.D. Hurd—who Nichol criticized as being “more interested in convictions than justice”—was appointed to be a judge on the Second Circuit Court of South Dakota less than ten years later. For more information, see “In Dedication to Judge R.D. Hurd Dedication,” South Dakota Law Review 41, no. 1 (1996): v; Matthiessen, In the Spirit of Crazy Horse, 98.
of the court, the defendants in the remaining Wounded Knee cases were not necessarily similarly positioned to those in *United States v. Banks*. The prosecution in their cases had not yet engaged in similar levels of misconduct, meaning their cases could not be dismissed on the basis of Nichol’s decision in *United States v. Banks*. Had Nichol cited the misconduct at Wounded Knee in his final decision, perhaps there would have been stronger cause for dismissal of the remaining cases. However, by limiting his final opinion to exclusively the misconduct of the prosecution, Nichol concurrently limited its ability to serve as precedent in other trials.

Limiting his decision’s scope also allowed Nichol to avoid condemning the actions of the United States as a whole. While he ultimately condemned the actions of the prosecution, Nichol refused to classify the United States’ actions at Wounded Knee as “criminal” for the duration of the trial. In one statement the United States’ earlier misconduct, Nichol explicitly stated “This Court did not intent to suggest, and does not in this opinion mean to suggest, that this court is of the view that any federal officials, law enforcement personnel or military personnel, were engaged in criminal conduct in connection with the events at Wounded Knee.”124 While Nichol denounced the actions of several high-level U.S. officials who impeded the realization of justice in his courtroom, he never went as far as to classify their past or present actions as “criminal.” In doing so, he largely shielded the actions of those involved in misconduct during the Occupation of Wounded Knee from reproach.

Far from it, Nichol used this case as a means of validating those actions in order to support and reproduce the U.S. government’s continued claims to legitimacy. Throughout the trial, Nichol maintained the United States’ stance that their sovereignty was legitimate, and assertions of Lakota sovereignty were illegitimate if not illegal. Specifically, Nichol refrained

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from entertaining the war question at all and instead consistently classified the entire matter before him as “civil.” In the wake of the trial, Nichol voiced his concern about the military’s involvement in the siege—“We don’t want the military running the civil affairs in this country.” While this statement criticized the military’s involvement to an extent, it was a critique grounded in the fact that what occurred at Wounded Knee was a domestic or civil affair. Implicit within this statement was thus an understanding of the Lakota as domestic subjects, rather than foreign or sovereign ones. Nichol further reproduced U.S. jurisdictional claims when he denied Banks and Means’ motion for judgement of acquittal on the grounds that the court lacked jurisdiction under the Treaty of 1868. Unlike some of his peers, Nichol did allow the Treaty to be introduced as evidence and instructed the jury to treat it as such; however, he never went so far as to enforce or uphold the limits that the Treaty placed on U.S. settler sovereignty, particularly when it came to his own jurisdiction over the trial. In this way, despite his eventual condemnation of individual instances of misconduct in his courtroom, Nichol upheld the broader actions of the United States and, by extent, their settler sovereignty claims.

The ultimate result of United States v. Banks was thus quite similar to that of United States v. Plenty Horses nearly a century earlier: while the court questioned—and, in Nichol’s case, went so far as to condemn—the United States’ recent actions, they refrained from creating an institutional structure to prevent or punish similar actions in the future. Instead, the court continued to maintain the systems that allowed for those actions to occur. In Nichol’s case, he intentionally limited the scope of his decision so as to refrain from issuing a broader critique of the United States’ actions during the siege of Wounded Knee. In so doing, Nichol shielded those

125 “St Paul Trial.”
guilty of misconduct from facing accountability for their actions and consequently facilitated the potential repetition of such misconduct in the future.

AIM and the Lakota knew it was unlikely that the courts would produce full accountability for the United States’ past or present violence. Such accountability would require the United States to first acknowledge that it had waged and continued to wage a war against the Lakota for over a century. As demonstrated by *United States v. Plenty Horses*, the recognition of such a war threatened the very structure that kept those courts in power—U.S. sovereignty—and was consequently never undertaken lightly. Knowing this fact, full accountability for U.S. action through the courts was never AIM or OSCRO’s primary goal. Rather, they hoped to use the publicity of the trial to once again reveal this war to the broader U.S. public through the press.

In this regard, the AIM and OSCRO activists were largely successful. Unlike in 1890, Native activists now had access to Native-led news publications, such as *Akwesasne Notes*. Such publications allowed activists to share their experiences of the war publicly and produce their own narratives, unmediated by an interviewer’s voice or perspective. In writing for publications like *Akwesasne Notes*, Lakota activists thus crafted their own narrative survivance once more. Furthermore, even the non-Native outlets that disagreed with the Occupation or the trial’s outcome often still acknowledged the legitimacy of the Oglala Lakota’s claims. For instance, one *Chicago Tribune* article referred to Banks and Means as leaders of a “very small and . . . misguided constituency,” but went on to state that “If one reaches back to 1890 . . . and even earlier, the weight of Indian grievances is staggering.” Even though the author of this

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127 In the wake of *United States v. Banks*, the publication *Akwesasne Notes* provided such an opportunity, dedicating the first third of its Early Autumn magazine to coverage of the trial and Wounded Knee more broadly. This coverage included excerpts of testimony shared during the trial, interviews with those living at Pine Ridge, interviews with jurors, and editorial pieces concerning the outcome of the trial. *Akwesasne Notes* 6, no 4 (Early Autumn 1974): 4-19.
article disagreed with Banks and Means politically, they could not deny the legitimacy and severity of their grievances. Additionally, they employed the Lakota temporalization of the conflict their coverage, acknowledging that the events of Wounded Knee in 1973 were inextricably connected to those of 1890. The press coverage of the United States v. Banks trial thus became a means of exposing the broader public to the past and present injustices committed by the United States against the Lakota, from a Lakota perspective.

In some instances, exposure to this history mobilized the public to acknowledge those injustices and attempt to produce greater accountability for them. In the wake of Untied States v. Banks, the former jurors came together to write a letter of U.S. Attorney General William Saxbe. In it, they detailed their own vision for a path forward:

In our view a government that cannot, in an eight month trial, present enough evidence against the two leaders of the Wounded Knee siege to secure a conviction on any count should for moral and ethical reasons, drop the criminal charges against all the other Indain [sic] people and their supporters. Since the two leaders were guilty of no crime we believe the others should not be prosecuted for following them . . . We urge you to respect this suggestion and to join with U.S. and other Americans in an effort to bind up the wounds that have been caused by this, our longest, and perhaps our least honorable, war.129

While Nichol did not take the steps necessary to ensure that his decision could operate as precedent, the jury took it upon themselves to reveal what they viewed to be the absurdity of denying the precedential value of United States v. Banks. The former jurors pointed out that to dismiss the leaders of a movement, but then convict those who followed them was inconsistent at best and unjust at worst. Though the court failed to go so far as to create institutional change that would prevent further injustices, the people of the jury took it upon themselves to call for that change. Additionally, the jurors fully adopted the Lakota conceptualization of the conflict,

identifying it as “our longest, and perhaps our least honorable, war.” While Nichol and the court may have shied away from holding the United States fully accountable for the illegality and cruelty of its actions, through this letter a group of U.S. civilians sought to produce that accountability themselves.

* * *

This push for accountability did not end in 1973. Decades later, Lakota activists have continued to use the platform of the courts and the press to speak out against the ongoing war between themselves and the United States. Most recently, this advocacy has centered around the Dakota Access Pipeline and the corresponding #NoDAPL movement, as those living at Standing Rock and their supporters seek to prevent the construction of a pipeline through Oceti Šakowin land.\(^{130}\) In the midst of this recent movement, Tamakawastewin (LaDonna Brave Bull Allard, Lakota) spoke to the press about her experience in the movement. On the verge of tears, she explained to her interviewer: “We’re in a war . . . How did this happen? I did nothing wrong. I have a right to say ‘no.’ I have a right to live in my own country, on my own land.”\(^{131}\) In these few sentences, Tamakawastewin identified a historical continuity—a war—that spans from United States v. Plenty Horses, to United States v. Banks, to our present moment.

When the United States first violated the Treaty of 1868, it did not simply violate specific provisions of the Treaty. The U.S. violated its fundamental purpose. The Fort Laramie Treaty was, first and foremost, a peace treaty. After the Lakota defeated the United States on the field of battle, the United States sued for peace at Fort Laramie in 1868. However, after finding


themselves unable to buy land, the United States decided to illegally take that land by force, starvation, and containment. It refused to hear the Lakota people’s “no.” In the first article of the Fort Laramie Treaty, the United States and the Lakota shared a mutual promise of peace. To break such a promise is to make war.

To quote Leonard Crow Dog, a Lakota elder and one of the activists who led the Occupation of Wounded Knee: “The word, ‘war,’ it means broken treaties today.” The Fort Laramie Treaty was not merely broken in 1891 or 1973, but also every year between. The continuous occupation of unceded Lakota land by the United States violates the Treaty. Furthermore, to maintain such an occupation the United States has mobilized its military and law enforcement to physically patrol their land claims, criminalizing any competing land or sovereignty claims in the process, including the Lakota’s. However, it is not the Lakota whose claim is criminal, but rather that of United States. The United States sought to criminalize Lakota actions and sovereignty claims as a means of disguising its own criminality.

In order to further erase—and, at times, justify—its criminal actions, the United States frequently turned to the courts. In both United States v. Plenty Horses and United States v. Banks, the courts were conflicted over how to respond to the United States’ request. The courts had no apprehension toward criminalizing Lakota land and/or sovereignty claims. Such criminalization not only legitimated the U.S. claim to the territory, but also the courts’ claim to jurisdiction. However, the courts also undoubtedly saw the illegality undergirding this claim and the means by which the United States sought to maintain it. The U.S. had violated treaty law,

134 Stark, “Criminal Empire.”
engaged in genocidal warfare, and, in the case of United States v. Banks, actively engaged in misconduct within the courtroom itself. This internal conflict within the courts ultimately resulted in limited court decisions that could not operate as precedent for either side in the future. Both trials thus produced a precedential silence regarding the atrocities committed by the United States. In the context of potentially developing legal doctrine that could prevent future violence, such a silence is a violent act in and of itself.

The courts were not the sole source of validation for the United States and its violence. History, too, has become a means of absolving the United States of its conduct during this war. Historians, state officials, and civilians alike often conceive of the conflict between the United States and the Lakota as a series of distinct conflicts, confined to the nineteenth century. This “lasting” narrative first manifested as the logic of “outbreaks” during the era of Plenty Horses v. United States and, more recently, as the logic articulated by Kent Frizzell: “I can’t be responsible for what the government did a hundred years ago.”135 In both cases, this temporalization of the conflict allows the individual articulating it to absolve themselves of any responsibility from the war. In the late nineteenth century, this absolution stemmed from the fact that the event at hand was committed by a different group or in a different circumstance. Most recently, absolution stems from the belief that the violence and cruelty of the war is confined to the past. By historicizing the war in this way, the United States is able to tell a comfortable settler history where the unlawful or unjustifiable components of settler colonialism—the war it entails—are wholly of the past. The courts, and settlers more broadly, thus feel no obligation to prevent the violences or injustices of this settler colonial war because to them the war is over.

135 *Voices from Wounded Knee*, 230.
From the time of Tasunka Ota to that of Tamakawastewin, the Lakota have employed another temporalization of the conflict. They have seen a single, ongoing war for their homelands. This temporalization offers no absolution of contemporary actors or justification for the courts’ failure to create institutional change. Instead, it emphasizes the present-day realities of state violence against the Lakota, as well as the present-day stakes of that violence: Lakota sovereignty and Lakota land. Aware of the courts’ hesitancy to fully hold the United States accountable for its behavior, the Lakota sought accountability within the court of public opinion instead. Using the press as a means of speaking to the broader public, the Lakota drew the U.S. public’s attention to the realities of the ongoing war in the Plains. Furthermore, they used the press as a means of disseminating their own understanding—and eventually their own voices—to the public. In the process, Lakota activists produced a narrative survivance that spanned the nineteenth, twentieth, and—with Tamakawastewin—twenty-first centuries.

In this narrative, the Lakota revealed a distinctly un-settling truth: settler colonialism is a perpetual state of war. It is a method of empire-building predicated upon the illegal occupation of the homelands of others. Because settler colonialism is an ongoing process, this war is ongoing. The war recognized in United States v. Plenty Horses and once more at Wounded Knee in 1973 continues to be waged as a direct result of the United States’ desire for Lakota land, and more broadly its own settler colonial project. However, the existence of this war neither negates nor erases the validity of the Lakota’s claim to their land. As Tamakawastewin explained, the Lakota have a right to live in their own country, on their own land. Rather than respecting that right, the United States resorted to war. Far from ending in 1890, the United States’ war of aggression for the Lakota homelands has continued—and likely will continue—until the United States respects the Treaty of 1868 and the Lakota’s inalienable right to their country.
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