The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror

Matthew L.M. Fletcher
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For three months Gus and the Indian female counselor met weekly. They would "smudge" before each session with sweet grass. Gus would explore his reality while carrying a stone in his hand. "We were learning, listening and talking, speaking freely, not judged." It was the nonjudgmental approach that attracted him—there is a stigma on a non-Indian treatment program, "having someone tell you something you already know."¹

News correspondents and anchors, rather than provide level-headed examinations of America’s drug problems and plausible remedies, rambled on about how schoolchildren “can get marijuana faster than a Popsicle,” and how “more and more teens are falling for heroin’s fatal allure.”²

The only urine sample you will get from me is for a taste test.³

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3. Popular bumper sticker.
In my first job as an on-reservation attorney, one of the first tribal government employees I met was a tribal member who had a tribal member wife and two very young kids, and worked in the tribe’s purchasing department as a buyer. His name was John.\(^4\) He showed this young attorney around the tribal government campus. As the newest attorney assigned to assist the purchasing department, i.e., reading contracts, I needed to have a good working relationship with him. John was a well-built, well-dressed, and charismatic man and I had a great first impression of him. I believed from the time we met that we would work very well together and we did. He was very efficient and accurate in his work. A month later I stopped by his office to drop off some paperwork and saw John packing his personal things. He looked devastated. “I failed my drug test,” he said. Over the weekend, he had a bad headache and took one of his wife’s migraine pills, a prescription medicine. As luck goes, he was then randomly selected for drug testing on the following Monday. The drug test picked up the prescription pill, the tribe’s zero-tolerance enforcement scheme kicked in, and John lost his job. A succession of buyers—none of them tribal members—followed him, but none ever lived up to his productivity and none ever attained his competence.

Had that tribe not enacted a random drug testing policy, John would have remained an employee with the tribe. He was a stellar employee, the kind of employee any employer would like to see cloned repeatedly. A roster of educated, intelligent, and diligent tribal members working for the tribe should be every tribal leader’s dream. Without the drug testing scheme, the tribe would not have had to deal with the difficulty of replacing John with a competent employee. In fact, they never really found an adequate replacement—one with institutional and cultural knowledge coupled with a sense of doing justice for his tribe, his people, and his family.

Like many tribes, that tribe had decided to subject its employees to random drug tests. In the time I worked there, the only employee who tested positive for drugs was John. That tribe’s problem with drug and alcohol abuse and addiction did not abate one iota because of its employee drug testing policy.

Part I of this Article describes the origins and commentary surrounding the modern war on drugs and briefly describes the history of drug and alcohol policy in Indian Country, including the use of random drug testing of tribal government employees. Part II discusses the possible causes of alcohol and drug addiction amongst Indians and argues that the practice of randomly drug testing all Indian tribal government employees is an inefficient and harmful

\(^{4}\) Not his real name.
method of reducing drug abuse. Part III argues that drug testing of tribal government employees is a palpable violation of the individual right to be free from unreasonable searches and seizures. Part IV argues that random drug testing of tribal government employees is a form of destructive assimilation.

I. THE DRUG WAR AS A NEW INDIAN WAR

A. Rise of the Modern American Drug War

In 1982, President Ronald Reagan declared the beginning of the Drug War during a major televised speech. Since even before the days of Reefer Madness—the 1936 propaganda film that intended to inform the public, specifically impressionable parents, that illegal drugs are dangerous and insidious—illegal drugs have been on the minds of the American public. The first so-called “Drug Czar,” William Bennett, ran a public education campaign


6. Reefer Madness (G & H Films 1936).


In recognition of the growing problem of drugs and drug-related crimes of violence in the United States, President [George H.W.] Bush, after his inauguration in January, 1989, with Congressional approval, created a new cabinet-level position and agency. The agency is entitled, “Office of National Drug Policy.” President Bush then appointed William H. Bennett as what the media immediately began to refer to as the “Drug Czar.” Insofar as this court has been able to ascertain, the Office of National Drug Policy has no precise statutory interconnection with, or official relationship with, the Department of Treasury or to either of its sub-agencies, ATF or the Customs Service, but it is obvious that the President intended to clothe Director Bennett with broad powers to address a widely perceived and serious societal problem.

Id. Though Bennett may have been the “Drug Czar,” he was not, apparently, the most vigilant drug warrior on the scene in the late 1980s and early 1990s:

Today, this Court is given the opportunity to participate in the most recent “War on Drugs,” by discussing whether the polar view, that marihuana is no more harmful than aspirin, is the correct view, or whether marihuana is truly a “killer drug,” that can lead not only to crime, but to insanity and moral deterioration as well, which I believe is the position that a majority of the voters, at least in the South, would vote
on drugs that helped instill a sense of fear about the impact of drug use, which contributed heavily to a fear of crime that continues to this day, even as crime rates decline. Writers such as Charles Bowden and William S. Burroughs have brilliantly described the lives of drug-addled persons, Indian and non-Indian alike. However, other media are used to further the war against drugs. Television programs such as *Miami Vice* focused almost exclusively on the lives of drug kingpins and couriers as well as the law enforcement officers dedicated to stopping the flow of drugs. Films such as *Scarface* and *Goodfellas* chronicled drug dealers' lives to much acclaim, but films about

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for if given the chance to vote on the issue, notwithstanding that it has been reported that marihuana is the most popular illegal drug today (it is reported that 30 million people use marihuana once a week), notwithstanding the crack epidemic, and notwithstanding former "Drug Czar" William Bennett's view that marihuana is no more harmful than alcohol.


8. Glassner describes how every American president since Nixon has actively solicited the media to join the anti-drug crusade:

   "In the newsrooms and production rooms of our media centers, you have a special opportunity with your enormous influence to send alarm signals across the nation," Ronald Reagan urged, and he has been proven right. After Reagan's successor, George Bush, declared in his first televised address as president that "the gravest domestic threat facing our nation today is drugs," the number of stories on network newscasts tripled over the coming few weeks, and public opinion changed significantly. In a nationwide survey conducted by the *New York Times* and CBS, two months into the media upsurge, 64 percent of those polled selected drugs as the country's greatest problem, up from 20 percent five months earlier.

Glassner, *supra* note 2, at 133 (citations omitted).

9. See *id.* at xi.


drug abuse, addiction, and violence have been accused of distorting the facts.\textsuperscript{15} The pop culture war on drugs is pervasive.

Outside of the cultural conflict, the political prong of the drug war requires courts to “balanc[e] fourth amendment rights against the nation’s war on drugs,”\textsuperscript{16} forcing courts into the political realm most appointed judges spend their entire careers attempting to avoid.\textsuperscript{17} And yet the fear of drugs creates a political atmosphere that cannot help but persuade some courts. The dominance of the drug war in modern American culture is no more obvious than in statements made by the highest court in the land. The Supreme Court candidly states that it is an important cog in the machine driving the drug war. The Court has “adverted . . . to ‘the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.’”\textsuperscript{18}

The federal government under President Reagan focused on several initiatives in an effort to reduce the use and abuse of controlled substances. The government spent heavily on interdiction and enforcement efforts, including beefing up law enforcement divisions dedicated to drug trafficking.\textsuperscript{19} The government spent somewhat less on education programs (“Say No To Drugs”),

\begin{itemize}
\item \textsuperscript{15} See Paul Iannicelli, Drugs in Cinema: Separating the Myths From Reality, 9 UCLA Ent. L. Rev. 139, 142 (2001) (“Drugs have been more or less taboo on television, but not in movie theaters, where they have been a primary or secondary theme in literally thousands of films. Most of these depictions, unfortunately, have distorted American's views of who uses drugs, why they do, and what the repercussions are.”).
\item \textsuperscript{16} Brent v. United States, 66 F. Supp. 2d 1287, 1292 (S.D. Fla. 1999).
\item \textsuperscript{17} In the words of the Honorable James Robertson:
\begin{quote}
Congress ought to focus on the central problem of the federal judiciary today: the virus of politicization. That virus was identified when the Senate rejected Robert Bork for the Supreme Court. (Or was it let loose by the retaliation for Bork's rejection? Who remembers now?) It has spread and mutated, and it now appears to be endemic. It has paralyzed the Senate's process of advising and consenting on judicial appointments. It threatens to disfigure the face of justice and to undermine the public's trust in an independent judiciary. Judges, who consider themselves just judges and not appointees of any particular president or party, are appalled and embarrassed.
\end{quote}

\item \textsuperscript{18} Nat'l Treasury Employees Union Ass'n v. Von Raab, 489 U.S. 656, 668 (1989) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).
\item \textsuperscript{19} See Eric Blumenson & Eva Nilson, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35, 40 (1998) (“This bureaucratic stake [in the war on drugs] is financial, deriving from the lucrative rewards available to police and prosecutorial agencies that make drug law enforcement their highest priority.”).
\end{itemize}
and spent considerably less on drug treatment and counseling programs. Part of the interdiction effort was the mass institution of the drug test for federal employees.

The war on drugs has not been successful under any standard measure. A West Virginia Supreme Court justice summed up many of the problems associated with the drug war:

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20. See id. at 80.


The war on drugs is not only waged on the streets and in vehicles; it has also opened a new front—the workplace. The Reagan and Bush administrations have consistently maintained that drug use in the workplace poses a serious threat to national security, public safety, and domestic productivity.


22. See Kevin B. Zeese, Engaging the Debate: Reform vs. More of the Same, 30 Fordham Urb. L.J. 465, 477–80 (2003) (arguing that, although the drug war has been reported to have reduced supply and demand for drugs, it has failed to create a safer and healthier environment). See also Eric Luna, who writes:

These statistics demonstrate that illegal drugs are being purchased and consumed in enormous quantities, that the war on drugs has resulted in a vast increase in drug defendants in the American criminal justice system, that these cases have placed an enormous strain on an already strapped judiciary, and that the courts have been forced to confront various legal issues that may never have surfaced in the absence of prohibition. In turn, the sheer volume of cases often compels judges to cut corners, to accept the constitutionality of an agent’s actions on his word, to deny suppression motions and to thereby streamline the process toward an eventual plea bargain, all in service of judicial economy.

Erik Luna, Drug Exceptionalism, 47 Vill. L. Rev. 753, 771 (2002). Eric Blumenson and Eva Nilson state further:

This massive outpouring of money and effort has produced record numbers of drug seizures, asset forfeitures, and prosecutions. By more meaningful measures, however, the Drug War has been an extraordinary failure. Drugs are more available—at higher purity and lower prices—than they were at the start of the decade. Drug dependence in the inner city and among teenagers has increased substantially. And the drug problem continues to produce massive amounts of crime, $20 billion in annual medical costs, one-third of all new HIV infections, prisons filled with
What happens when the police and the courts and the criminal justice system are commanded by politicians to treat a large amount of fairly harmless illegal drug use, and a smaller amount of more serious addiction, in the same fashion as robbery and murder? Some would say that we then see in the criminal justice system the growth of cynicism, lack of respect for proper procedures, blaming the victims, burn-out, loss of professionalism and civility, disregard of human rights, and other vices and abuses, including corruption. Moreover, many people argue that the zero-tolerance/lock-em-up approach of our current criminal-justice approach to drug policy itself creates other crimes. In fact, one could see the criminal-justice zero-tolerance approach to drugs as not just an ineffective medicine, but as a medicine that causes more of the very disease that the medicine is supposed to treat—social harm and damage. Seen this way, the side effects of our current drug policy include causing theft, mugging, and burglary—as desperate, hooked people seek money for costly illegal drugs. As illegal drug entrepreneurs protect their lucrative businesses, guns abound and people are killed. Communities live in fear. Police and community leaders and politicians are caught in a vicious cycle, trying to protect the community from the violence that is caused by the failed drug policy itself. In large part because of the current “War on Drugs,” the police and the criminal justice system are seen in many poor and minority communities—by many fully law-abiding and hard-working people—as more a part of the problem, than as a part of the solution.23

As the drug war continues, more and more respected commentators are arguing that most of the various efforts aimed at reducing the use and abuse of controlled substances have been a failure—in some cases a spectacular failure. There are many examples where elements of the drug war have caused far more harm than good. There are racial inequities;24 racial profiling;25 human rights

Blumenson & Nilson, supra note 19, at 37–38 (footnotes omitted).


25. See, for example, the representative facts of one such case:

Finally, defendants argue that they were stopped because of their race and subjected to increased suspicion because Valencia is from Puerto
violations in Colombia,26 Mexico,27 Peru,28 and Bolivia;29 gender inequities;30 forfeiture of personal property without even an arrest;31 and other problems too numerous to list.32 The war on drugs is, in reality, a racial conflict:

Almost every major drug has been, at various times in America’s history, treated as a threat to the survival of America by some minority segment of society. Panic based on media reports which

Rican [sic] and Minotta is of Colombian birth. Regrettably, it must noted that the training film prepared by the Louisiana State Police Department, which officer Washington admitted seeing, explicitly exhorts officers to make traffic stops for the purpose of narcotics searches based, in part, on the color of the driver’s skin. The film describes what to look for in attempting to pick out a drug courier: “males of foreign nationalities, mainly Cubans, Colombians, Puerto Ricans or other swarthy outlanders.” It is a statistical fact that the war on drugs has been waged disproportionately against persons of color. Yet, law enforcement intentionally predicated in any measure upon racial considerations is repugnant to this country’s values of individual treatment and equal justice. If it were proven that a stop were intentionally based on race, serious constitutional issues would entail.


32. See generally Hon. Jack B. Weinstein, Standing Down from the War on Drugs, 75 N.Y. St. B.J., Feb. 2003, at 55 (discussing the social and economic costs of the war on drugs).
incited racial fears has been used historically in this country as the catalyst for generating racially biased legislation.\textsuperscript{33}

Many judges, often in dissent or in opinions later reversed, have criticized the drug war generally or the law enforcement actions taken to enforce the drug war. One judge wrote:

As much as this nation wants to win the war on drugs, it would be counter-productive if the price that must be paid would be to turn this nation into a police state. As the police become more aggressive, the individual rights under the Bill of Rights must stand tall to deter over-reaching police authorities.\textsuperscript{34}

Another judge argued, "Although the 'war on drugs' has become fashionable, the 'war' has done little to stop drugs and the violence associated with them! Indeed, the main casualties of this 'war' have been justice and civil liberties."\textsuperscript{35} Still another maintained, "Unfortunately, this case serves to demonstrate how vigorous attacks on crime mutated to a war on drugs and corrupted into a war against our constitutional Bill of Rights. This result is epitomized by the inevitably valid ancient axiom: 'The road to hell is paved with good intentions.'"\textsuperscript{36} Another judge contended:

Were we not involved in a war on drugs (with the usual threat to civil liberties posed by any such serious national conflict) and had defendant been a citizen of the middle class (instead of a member of three minority classes by virtue of socioeconomic status, color and alienage), the good people who guard our borders would not have so encroached on his freedom, and this case would never have arisen. The lesson must be relearned in every generation—allow the rights of the least powerful to wither and the corrosion of injustice leaches out justice in the rest of society.\textsuperscript{37}

And, finally, a federal district court judge wrote:

If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of

\textsuperscript{33} United States v. Clary, 846 F. Supp. 768, 775–76 (E.D. Mo. 1994), rev’d, 34 F.3d 709 (8th Cir. 1994).

\textsuperscript{34} Holland v. O’Bryant, 964 F. Supp. 4, 6 (D.D.C. 1997).


\textsuperscript{37} United States v. Patrick, 899 F.2d 169, 172 (2d Cir. 1990) (Weinstein, J., dissenting) (citations omitted).
our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.\textsuperscript{38}

There is a substantial list of opinions in the Second Circuit alone warning us about the perils to constitutional liberties from the drug war.\textsuperscript{39} An Illinois court of appeals judge wrote a scathing dissertation covering about twenty-five pages in the Northeast Reporter (Second) in 1989.\textsuperscript{40} The judge voted to suppress evidence obtained by a police officer who “testified that he approaches about sixty persons a week with no reasonable suspicion at all, and on average hits the jackpot with at least a few of these brief encounters.”\textsuperscript{41}

However, most courts view themselves as an important cog in the drug war and take the war on drugs very seriously. One judge defended the “violent entry of the officers on a mistaken search”\textsuperscript{42} by noting:

It is an unfortunate but stark and inescapable truth of law enforcement today that the so-called war on drugs is a shooting war, and officers who execute search warrants on suspected drug distribution or production points must be prepared to use stealth, surprise, and advantage in numbers merely to reduce their risk of injury or death.\textsuperscript{43}

One Seventh Circuit judge wrote:

We are fighting a war on drugs at a time when the population is increasingly desensitized to violence, and assaults against police


\textsuperscript{39.} United States v. Glover, 957 F.2d 1004, 1020 (2d Cir. 1992) (Oakes, J., dissenting) (“One would hope that the war on drugs does not make for a police state.”); United States v. Hooper, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (“It appears that the police have sacrificed the fourth amendment by detaining 590 innocent people in order to arrest ten who are not all in the name of the ‘war on drugs’. When, pray tell, will it end? Where are we going?”); United States v. Monsanto, 924 F.2d 1186, 1204 (2d Cir. 1991) (Oakes, J., dissenting) (disagreeing with majority’s decision in light of “the squeeze already exerted on prosecutorial and judicial resources by the flood of narcotics cases inundating the federal courts”); United States v. Riley, 906 F.2d 841, 850 (2d Cir. 1990) (Weinstein, J., dissenting) (“Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.”) (citing Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting)).


\textsuperscript{43.} Id. at 655–56.
officers are frequently applauded or even encouraged by certain elements of pop culture. An officer, working alone at night without a partner, who has probable cause and encounters what he believes to be three suspects acting suspiciously and fleeing from the vicinity of a known drug house, is entitled to seize the suspects using greater force than is usually necessary during a routine traffic stop.\(^{44}\)

B. Indian Country Drug Wars—From 1492 to the Present

Indian Country\(^{45}\) has been involved in drug wars from the very first days of the European invasion.\(^{46}\) According to anthropologist Charles E. Cleland, liquor consumption by Indians in Michigan was a cause of the war led by the Ottawa leader Pontiac in 1763.\(^{47}\) Of these Indians, Cleland wrote:

Cheated by traders, ravaged by the violence brought about by the use of intoxicants, unfairly treated in the restriction of firearms in trade, and humiliated by the contempt of English soldiers and administrators, Great Lakes Indians seethed in growing anger.

\(\footnote{44}{McNair v. Coffey, 279 F.3d 463, 483 (7th Cir. 2002) (Coffey, J., concurring and dissenting).}
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\(\footnote{45}{The most useful definition of "Indian Country" for purposes of criminal and civil litigation is contained in 18 U.S.C. § 1151:}
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\([T]he term "Indian country"... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.}

\(\footnote{46}{18 U.S.C. § 1151 (2000); see also Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (applying "Indian Country" concepts to civil regulation); Cardinal v. United States, 954 F.2d 359 (6th Cir. 1992) (applying "Indian Country" concepts to criminal jurisdiction). However, perhaps the most accurate definition of "Indian country" comes from Tom Waits, who stated in a recent interview about the time he was courting his spouse: "We'd end up in Indian country," Waits remembers, "[o]ut where nobody could even believe we were there. Places where you could get shot just for wearing corduroy." Elizabeth Gilbert, \textit{Play It Like Your Hair's on Fire}, Gentlemen's Quarterly, June 2002, at 248, 254 (emphasis in original).}
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\(\footnote{47}{See generally Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest (1975) (popularizing the "invasion" metaphor as a descriptor of European conquest of the western hemisphere).}
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\(\footnote{47}{Charles E. Cleland, Rites of Conquest: The History and Culture of Michigan's Native Americans 133 (1992).}
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Finally, in the spring of 1763, the resentment resulted in open war, a war led by the southern Ottawa war chief, Pontiac. Cleland also wrote that French fur traders used liquor to “starve Indians into producing fur” during the winter months of the early 1800s. Finally, Michigan Indian tribes were exposed to liquor during treaty negotiations by the hypocritical Indian Agent Lewis Cass and his brother, Charles. Cleland wrote:

Despite long-standing official U.S. policy against the introduction of intoxicating beverages into Indian Country, one of the major proponents of the policy and the person responsible for curbing its use in Michigan was now prepared to supply it to the Saginaw Chippewa in order to induce them to sell their land.

The United States policy against introducing liquor into Indian Country quickly extended into a broad prohibition of liquor consumption by any Indians, resulting in the allocation of expansive social control authority to Indian agents. “Many chiefs recognized the evil of the liquor traffic and easily acquiesced in restrictive articles entered into the treaties.” Ironically, by the time the non-white population prohibited alcohol consumption for itself in the early decades of the twentieth century, local law enforcement officers often hesitated to enforce the prohibition in Indian Country.

48. Id.
49. Id. at 178.
50. The Michigan Indian Tribes that remain in Michigan and are now federally recognized include the Grand Traverse Band of Ottawa and Chippewa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Nottawaseppi Huron Band of Potawatomi Indians, the Hannahville Indian Community, the Keweenaw Bay Indian Community, the Saginaw Chippewa Indian Tribe of Michigan, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Match-E-Be-Nash-She-Wish Band of Potawatomi Indians of Michigan. These Tribes are the successors to the Anishinaabe (Ottawa, Potawatomi, and Chippewa) Bands, also known as the People of the Three Fires, that lived in Michigan since time immemorial. See Cleland, supra note 47, at 158.
52. Id. at 213.
53. See David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice 121 (1997) (citing Farrell v. United States, 110 F. 942, 947–50 (8th Cir. 1901)).
55. See U.S. Const. amend. XVIII.
56. Consider the comments of Vine Deloria, Jr. and David E. Wilkins:
Many Indian tribes have attempted to fight the modern war on drugs in Indian Country by initiating Drug Courts.\textsuperscript{57} These courts enable tribal Courts to divert young, first-time offenders out of the criminal justice system,\textsuperscript{58} through education of Indian children at home and at school, and through increased funding for counseling and drug treatment programs. Although many of these programs have had great success, they are not effective or affordable for every tribe.\textsuperscript{59} Drug abuse and addiction remains a serious problem for Indians.

One approach that Indian tribes have used to reduce drug abuse is random drug testing of tribal employees. Numerous Indian tribes have begun to

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\[T\]he violation of a liquor statute [on reservations during Prohibition] was a result of local politics–bootleggers bringing liquor into the reservation and being protected by local law enforcement officers. There was quite a hesitancy to indict local citizens, and so the practice was to indict the car that brought the forbidden drink into the federal enclave. Thus scholars are amused to find a series of cases such as \textit{United States v. One Chevrolet Coupe Automobile}, 58 F.2d 235 (9th Cir. 1932), and \textit{United States v. One Chevrolet Four-Door Sedan Automobile}, 41 F.2d 782 (N.D. Okla. 1930).


\textsuperscript{57} See Ronald Eagleye Johnny, \textit{The Duckwater Shoshone Drug Court, 1997-2000: Melding Traditional Dispute Resolution with Due Process}, 26 Am. Indian L. Rev. 261, 271 (2001-2002) ("Surprisingly, nearly all of the basic elements of a successful tribal drug court exist on nearly every Indian reservation; all that is required is that the services available to reservation residents be identified and used."). The federal government now encourage[s] the submission of and give[s] special consideration to applications under [the Drug Abuse Prevention, Treatment, and Rehabilitation Act] to programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women, handicapped individuals, and families of drug abusers.


\textsuperscript{59} “Culturally relevant treatment programs offer the most significant opportunity for change, but such programs are beyond the economic reach of most tribes and Indian substance abusers because state funding is available only to state-approved treatment facilities.” Kelly S. Croman, Note, \textit{One Size Does Not Fit All: The Failure of Washington's Licensing Standards for Alcohol and Drug Treatment Programs and Facilities to Meet the Needs of Indians}, 72 Wash. L. Rev. 129, 131 (1997) (footnote and citation omitted).
test their employees, particularly gaming employees, for drug use. Often citing the problem of drug abuse and addiction on reservations and with Indians generally, tribal councils impose drug testing on their employees not only to prevent the use of controlled substances, but also as a symbol of the tribe’s dedication to preventing drug abuse.

Unfortunately, non-Indian commentators view Indian Country as a very dangerous leak in the walls separating Americans from the horrors of drug smuggling and terrorism. Law enforcement officials view the Tohono O’odham Reservation, located on the Mexican border, as “a major area for drugs entering the U.S.” The New York Post recently published an article about the St. Regis Mohawk Reservation with the headline: “An Open Door to Drugs & Terror.” Completely misrepresenting the law on at least three different levels, the Post stated, “United States authorities have no jurisdiction within Indian reservations on or across our borders. They potentially are the weakest link in the new wall of security thrown up since Sept. 11, 2001.” First, contrary to the Post’s assertion, the United States does have criminal jurisdiction over Indian Country. Second, United States authorities do not, however, have jurisdiction over Indian reservations in Canada or Mexico, nor should they. Finally, despite


64.  Sam Smith, Open Door to Drugs & Terror, N.Y. Post, Jan. 12, 2003, at 20.

65.  Id.

the Post's implication to the contrary, many States also have criminal jurisdiction in Indian Country in accordance with Public Law 280.67 The Post article is emblematic of the hysterical commentary surrounding the war on drugs, which has recently been coupled with the war on terrorism.68

Tangentially, the Supreme Court has become involved in the war on drugs among Indian tribes and individual Indians. In Employment Division, Department of Human Resources of Oregon v. Smith,69 the Court upheld an Oregon law prohibiting the use of peyote against a First Amendment challenge by members of the Native American Church who were denied unemployment compensation benefits because they were discharged for work-related misconduct.70 According to one federal court: "It has been suggested that the Smith opinion was merely an overreaction to the nation's current political agenda—the war on drugs."71 As such, it appears that views held by non-Indians, such as the editors of the New York Post, may be influencing the Supreme Court's view of Indian Country. Battles over the right to ingest peyote continue in other arenas, such as in child custody disputes72 and in prisoners' rights cases.73

67. See 18 U.S.C. § 1162 which states:

Each of the States or Territories listed in the following table [Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.


68. The current difficulties that the Tohono O'odham people, for example, have with Border Patrol officials who harass them continually apparently will not abate any time soon, particularly given the militarization of the northern and southern U.S. borders. See Eileen M. Luna-Firebaugh, The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas, 17 Wicazō Sa Rev., Spring 2002, at 159.


70. See id. at 874, 890.


72. See, e.g., Family Court Judge Bans Boy From Taking Peyote, Deseret News (Salt Lake City), Apr. 23, 2003, at A9 (describing the petition in child custody dispute by a Grand Traverse Band Member to allow his son to ingest peyote).
The most recent battle in the war on drugs in Indian Country involves the Lakota in South Dakota who have begun to cultivate industrial hemp as a cash crop. 74 Though the tribal members provided a sample to the federal Drug Enforcement Agency (DEA) that proved there was no narcotic ingredient in the crop, the DEA raided and destroyed the crop in both 2000 and 2001. 75 And, though many South Dakota farmers support the legalization of industrial hemp, 76 a federal court ruled against the tribal members, preventing them from selling their crop in 2002. 77

II. DRUG TESTING OF TRIBAL GOVERNMENT EMPLOYEES IS AN INEFFICIENT AND HARMFUL METHOD OF REDUCING DRUG ABUSE IN INDIAN COUNTRY

Among the most difficult and challenging problems in Indian Country is the problem of drug and alcohol abuse. Virtually every Indian tribe—small or large, wealthy or destitute, landed or landless—must deal with this problem. A tribal election campaign for Tribal Council or other political position may turn on whether or not a candidate has demonstrated a sufficient commitment to stemming the drug and alcohol problem. Since the answers to drug and alcohol abuse are neither easily identifiable nor easily obtainable, tribal councils encounter great difficulty fulfilling campaign and political promises. Often, as in the non-Indian society generally, the perception of a drug and alcohol problem becomes larger than the reality and tribal leaders are forced to respond to community pressure to act.

Tribes are usually much more open to alternative means of reducing drug and alcohol abuse than states or the federal government. As noted above, tribes have attempted to operate Drug Courts and emphasize an array of non-punitive methods to treat drug and alcohol offenders. 78 However, because tribes often take a progressive approach to solve these problems, they are willing to

73. See, e.g., Indian Inmates of the Neb. Penitentiary v. Grammer, 649 F. Supp. 1374, 1377–78 (D. Neb. 1986) (rejecting claim that prison officials were required to allow Indian prisoners to ingest peyote), aff’d, 831 F.2d 301 (8th Cir. 1987).


75. See id. at 340–41.

76. See Lee Williams, Industrial Hemp Gets Backing, Sioux Falls (S.D.) Argus-Leader, Dec. 12, 2001, at 1B.

77. See United States v. White Plume, No. Civ. 02-5071, at 4 (D.S.D. Aug. 13, 2002) (order granting temporary restraining order); see also Lash, supra note 74, at 355–56 (describing the circumstances under which the court issued the temporary restraining order).

78. See supra notes 57–59 and accompanying text.
try just about anything. When the Reagan Administration declared a War on Drugs, many tribes—desperate for relief—signed on. Thus, it is not unusual for an Indian tribe to adopt both a Drug Court to emphasize traditional healing and recovery methods and a zero-tolerance random drug testing policy for its government employees with the express purpose of alleviating (or creating the perception of alleviating) the drug and alcohol problem on its land.

Though it would be madness to generalize about what all tribes are doing—there are currently over 560 federally recognized Indian tribes— it is safe to say that many, if not a majority, utilize some form of drug testing policy with regard to their employees. Many tribes adopt limited drug testing policies that may include only reasonable suspicion testing or random drug testing of employees in safety-sensitive or political positions. Other tribes simply adopt the whole arrangement of drug testing available—random testing of all employees coupled with pre-employment testing and reasonable suspicion testing. Nearly all tribes operating Las Vegas-style gaming or high-stakes bingo establishments enforce a random drug testing policy for all of their employees. The primary focus of this Article is on tribes that have adopted random drug testing of all tribal government employees.

A. Causes of Alcohol and Drug Abuse in Indian Country

Due in large part to the poverty and oppression Indian people suffer wherever they live—be it on the reservation or elsewhere—abuse of controlled substances in Indian Country is a serious problem. The current problem is directly related to the abject poverty that marks the lives of many Indians today. Two commentators wrote:


80. Of the five tribes with which the author is most familiar, four have adopted a random drug testing policy for all tribal government employees.

81. See, e.g., FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1312 (9th Cir. 1990) ("As on many reservations, unemployment is rampant among the Shoshone-Bannock and contributes to the concomitant problems of poverty, alcoholism, drug abuse, and economic dependency."); see also Andy Dworkin, OHSU To Create National Center to Reduce Tribal Substance Abuse, The Oregonian, July 8, 2003, at A1 ("History plays a role: European explorers and traders were ‘pretty heavy-drinking folks,’ [Dr. R. Dale] Walker said, and introduced alcohol to many native tribes, creating problems hundreds of years ago. Higher rates of poverty, traumatic stress and other factors also probably contribute to high substance abuse, he said.").

82. See Claire E. Dineen, Fetal Alcohol Syndrome: The Legal and Social Responses to its Impact on Native Americans, 70 N.D. L. Rev. 1, 37 (1994) (quoting Cheyenne River Sioux Tribe ordinance that states, “alcohol abuse is an epidemic”); Antonia C. Novello, Crazy Horse
Instead of predisposition, most commentators and researchers point to the deplorable economic and social conditions on reservations and among urban Indians as the leading cause of Indian alcohol problems. The 1990 census discloses that thirty-one percent of all Indians live below the poverty level and that the per capita income for Native Americans is the lowest of all racial groups in the United States and is less than half the average of the overall population. The Indian unemployment rate is forty-five percent, which is thirty-seven percent higher than the average unemployment rate in the United States.\footnote{83}

Indians’ use and abuse of drugs and alcohol has many complex and related historical causes. The use of drugs and alcohol, according to anthropologist Charles Cleland, was a shortcut of sorts to the spirit world for Indians. Cleland wrote:

Prior to [the arrival of the Europeans], the Indians of eastern North America did not use either intoxicants or hallucinogens. They did, however, very highly value “out of body” experiences in trances, dreams, or visions. In fact, they went to great lengths to induce visions through privation and exposure. Liquor represented a powerful new short-cut to these same experiences, and it is perhaps for this reason that it was consumed in huge amounts by men and women, young and old.\footnote{84}

Additionally, there is a great deal of persuasive and logical evidence to suggest that Indians are not biologically or culturally predisposed to addiction.\footnote{85} In fact, the single most important cause was, and is, conquest. Comparing studies of North American Indians with indigenous peoples from New Zealand, Australia, and Hawaii, Robert Miller and Maril Hazlett wrote: “Indian alcohol problems arise from a common experience of indigenous people being crushed under


\footnote{84} Cleland, supra note 47, at 132.

conquest and the domination of other cultures, and not from a biologic predisposition to alcohol." With regard to North American Indians, they wrote:

In addition, conquest and domination by European nations and by the United States led to the theft of Indian lands, the outlawing of Indian religious and cultural practices, and the massive removal of Indian children from their families. All of these conditions have contributed to cultural loss and destruction of Indian family values, and have prevented Indian children from developing a healthy cultural identity. The federal policy concerning Indian boarding schools and the forced removal of Indian children from their homes also seriously weakened Indian cultures and family structures.

Since the causes of Indian drug and alcohol addiction are well documented, it bears noting that a random employee drug testing scheme, with the concurrent consequences (including summary discharge), does nothing to address these cultural and sociopolitical factors. If anything, a tribal government employee who tests positive for drugs and is terminated is unlikely to receive the help he needs and is more likely to seek relief from his employment difficulties by further pursuing his addiction.

B. Random Drug Testing Fails to Reduce Drug Use and Identify and Deter Drug Users

As a general matter, one problem with drug tests is that they often disclose facts that are irrelevant and fail to disclose facts that are relevant. Simply put, drug tests are scientifically unreliable. A leading treatise on the law of drug testing employees notes:

Over the past fifteen years, proficiency testing programs have resulted in several million individual results by participating laboratories. These proficiency tests show continued overall improvement in the accuracy, precision, sensitivity, and specificity of toxicological testing. "They also continue to demonstrate problems and pitfalls, and a consistent residue of false-positive and false-

86. Miller & Hazlett, supra note 83, at 230.
87. Id. at 231–32 (footnotes and citations omitted).
88. See James M. Shellow, The End of a Confidence Game: A Possible Defense to the Impossible Drug Prosecution, 24 Champion 22 (2000) (analyzing scientific literature relating to the various forms of drug tests and concluding that none are reliable indicators of drugs in the body). Of note, the author agreed that "gas chromatography/mass spectrometry (GC/MS) analysis is the most reliable and specific method to identify drugs," but often "an analyst is unable meaningfully to interpret the spectrum and identify a suspected drug." Id. at 25–26.
negative results, as well as sometimes unacceptably wide variation in
the reported drug concentrations in the quantitative surveys. No
single analysis technique or method has a monopoly on errors or
omissions or is excluded from them—all can yield incorrect or
unacceptable results in some hands, and all methods and techniques
have yielded incorrect results." 89

Contributing to the scientific unreliability of drug testing created by
 sloppy chain of custody practice and sloppy science are the many ways to
potentially defeat a drug test. First, and most common, is drinking large
quantities of liquid, such as a gallon of various forms of fluid, thereby diluting
the sample and creating a false negative. 90 Second, because an afternoon urine
sample contains fewer drug metabolites, 91 a drug test subject may avoid a
positive result by not giving the first urine of the day. 92 Third, the subject could
ingest liquid soap found in restrooms, table salt, or dishwashing detergent, all of
which decrease the likelihood of testing positive. 93 Fourth, adding minute
amounts of bleach to, or otherwise increasing the Ph levels of, a test sample will
dramatically reduce the effectiveness of the drug test without detection. 94 These
methods, in addition to substituting urine 95 or using one of the multiplicity of
products that clean dirty urine, 96 cast significant doubt on claims of reliability in
drug testing. Moreover, most drug testing facilities used by private
corporations—even those companies with the means to pay for expensive
testing—are inadequate. One commentator alleged: "[M]ost of the laboratories
in the United States currently testing urine for drugs do not meet federal
standards for accuracy." 97

It is unlikely that most Indian tribes—only a relative few of which
have significant financial resources to dedicate to drug testing—utilize the best

Rev. 415, 490 (1987)).
90. See id. § 3:7, at 3-4.1.
91. See id.
92. See id. at 3-5 ("The Syva Company has repeatedly reported that it would not be
unusual for an individual to test positive in the morning, negative in the afternoon, and then
positive the next morning without taking any drugs in between the tests.").
93. See id.
94. See id. at 3-5 to 3-6.
95. See id. at 3-6 to 3-7.
96. See id. at 3-7 to 3-8.
97. Charles H. Whitebread, Freeing Ourselves from the Prohibition Idea in the Twenty-
and most expensive drug testing centers. It appears logical that drug testing
centers would generate a host of false positives and false negatives, especially
considering the ease of altering a sample. It is also likely that a tribal
government employee would argue strenuously that their positive test at a non-
federally-approved center is invalid, perhaps leading to internal grievances and
then tribal court litigation. Given the fear of false positives that employees face
every time they take a drug test, it is certain that coerced, mandatory drug
testing cannot improve worker morale, worker safety, or operate as a symbol to
the community of tribal government employee cleanliness from drug abuse.

Further, drug tests do not detect poor workplace conduct, low
productivity, or dangerous conditions. Drug test results are inaccurate indicators
of productivity and hazardous impairment. One commentator described how a
positive drug test result rarely concludes a proper inquiry into an employee’s
conduct:

Positive results do not necessarily indicate impairment, or even drug
use, because other extraneous factors may produce a positive test
result. Some commentators also complain that while urinalysis
reveals traces of illegal drugs, it cannot determine if an employee is
specifically impaired while working because in some cases (e.g.,
cases of marijuana use) the test can identify drug use which predates
the test by two weeks or more. Additionally, urinalysis reveals much
more about an employee than is necessary to ascertain if he or she is
using illegal drugs. This highly confidential information must remain
private, at the employer’s peril.

Besides the extreme difficulty in efficiently managing the drug testing
of dozens or even hundreds of tribal government employees, drug testing
generally fails to reduce workplace injuries and property damage:

Fatigue, faulty technology, poor work organization, and excessive
overtime all contribute to accidents, yet management relies on drug
use to explain injuries and fatalities. But studies have not correlated
the concentration of drugs in the urine (whether cocaine, marijuana,
or barbiturates) with impairment, whereas blood-alcohol levels do
correlate with behavioral abnormalities. Controlled studies indicate

98. Karin Schmidt, Note, Suspicionless Drug Urinalysis of Public School Teachers:
The Concern for Student Safety Cannot Outweigh Teachers Legitimate Privacy Interests, 34
Colum. J.L. & Soc. Probs. 253, 270 n.112 (2001) (citing American Civil Liberties Union,
library/pbp5.html (last visited Nov. 2, 2003)).

Legalization on Employers Under Current Theories of Enterprise Liability, 7 Cornell J.L. &
that illicit drugs in general are a minor contributor to work-related accidents and fatalities compared with alcohol.\textsuperscript{100}

A positive test result simply does not provide a tribal government employer any relevant information about the impairment of an employee that mere visual observation could not detect.\textsuperscript{101} A positive test result requires a tribal government employee to explain the result by disclosing to their employers—who may be their neighbors, relatives, or acquaintances with whom they grew up—whether they take medication for depression, stress, illnesses, other medical conditions they wish to keep private, or some other fact about their lives that an employer otherwise has no need to know. In small, tightly knit communities, disclosure of this kind of information may be especially embarrassing, even humiliating. In other words, drug testing results are over and underinclusive.

Importantly, a very recent study of high schools that require student athletes to be tested for drug use indicates that drug tests may not reduce drug abuse.\textsuperscript{102} The researchers concluded:

\begin{quote}
Among the either 8th, 10th, and 12th-grade students surveyed in this study, school drug testing was not associated with either the prevalence or the frequency of student marijuana use, or of other illicit drug use. Nor was drug testing of athletes associated with lower-than-average marijuana and other illicit drug use by high school male athletes.\textsuperscript{103}
\end{quote}

Tribal governments can expect the same results.

Finally, drug testing policies create a large pool of hidden costs that most Indian tribes cannot sustain over a long period of time. These include: writing a drug policy; training supervisors; collecting urine forensically; money for express mail delivery; review of tests by a licensed physician; reporting to the company; and salaries for lawyers, consultants, trainers, supervisors, and

\begin{footnotes}

101. \textit{Cf.} Bartel v. State, 704 P.2d 1067, 1080 (Mont. 1985) (Sheehy, J., dissenting) ("Now courts give greater probity to blood test results than to witnesses' observations of drunken persons, when the reverse should be true. To paraphrase the remark about pornography, we cannot define drunkenness, but we know it when we see it.").


103. \textit{Id.}
\end{footnotes}
collectors. In addition, tribes that have drug testing policies can expect to incur costs for litigation, administrative dispute resolution, employee treatment costs, and to replace the lost employees. Moreover, the social costs of lowered employee morale and employee dissatisfaction must also be taken into account. These are costs that Indian tribes should not impose upon themselves. Finite tribal treasuries would carry a heavy burden in this form of warfare against drugs and alcohol.

Despite these concerns, tribes initiating random drug testing of their employees have created a dangerous “lemming effect” with other tribes. One commentator described the “lemming effect” in the context of private corporations:

[W]hen one company adopts drug testing other companies rush to follow it, even without strong evidence that the tests accurately detect drug abusers. Although companies rarely test employees randomly, except in power plants and other safety-sensitive positions, many employers announce that they are prepared to do random testing in an effort to keep drug users away from their company. This lemming effect in the spread of drug testing is similar to the “bandwagon” effect seen among research organizations that rush to develop medical technologies that are not necessarily the most promising scientifically. Thus, although some companies realize that drug testing is expensive and not the panacea they anticipated, they continue to test in part because other companies do.

At conferences with their peers, tribal councils and committees often ask each other about laws and policies enacted by other tribes. No one wants to re-invent the wheel and, when possible, tribes draw directly upon the ideas of neighboring and friendly tribes in similar circumstances. When one tribal leader learns that other leaders have initiated random drug testing, the tribal leader may feel freer to jump on the drug testing bandwagon, or even compelled to initiate drug testing to avoid being labeled a drug-user-friendly tribe.

104. See Zeese, supra note 89, § 1:2 at 1-11.
105. See id.
106. See id.
107. See Draper, supra note 100, at 299 (footnote and citation omitted).
108. Cf. Mark. A. Rothstein, Workplace Drug Testing: A Case Study in the Misapplication of Technology, 5 Harv. J.L. & Tech. 65, 84 (1991) (“There is an unmistakable political component to drug testing in both the public and private sectors. With a media-conscious war on drugs, much drug testing was initiated by government entities and private companies because the failure to do so might be perceived as condoning drug use.”).
The proliferation of drug testing tribal government employees offers a false panacea to drug abuse problems for tribal leaders. Some tribal leaders, trying to emulate the practices of successful private corporations, turn to drug testing because they are persuaded by the highly questionable findings of studies linking drug testing to productivity and competitiveness\(^9\)--and then turn other tribes on to their ideas. However, no Indian tribe has been able to assert persuasively that drug testing of tribal government employees has made a difference in the drug problems in the reservation community or in improving economic development conditions in Indian Country.

C. Random Drug Testing is Demoralizing and Degrading For Employees Generally and Indians Specifically

Many tribal government employees are members of an Indian tribe. Depending on the demographics of the local reservation or the local Indian Country, the vast majority of a tribal government’s employees may be Indians. The larger the tribe’s membership, the larger the likelihood that tribal member Indians will staff most of the positions within the tribal government. As such, when a tribal council or committee adopts a random drug testing policy for its employees, that council or committee is choosing to force its own relatives, friends, and co-tribal members to undergo drug testing. For some tribal leaders, the attendant political problems preclude the imposition of a random drug testing policy. However, in other tribal political arenas, the concern about alcohol and drug abuse by tribal members compels tribal leaders to impose random drug testing policies. Additionally, many tribal leaders and tribal management employees believe that, since they are dependent on federal grants and must follow federal rules in administering those grants, federal drug-free workplace rules require them to impose random drug testing on their employees.\(^1\) This is not always the case. For example, most “drug-free

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\(^9\) See American Civil Liberties Union, Drug Testing: A Bad Investment 5–7 (1999) [hereinafter American Civil Liberties Union]. “In the midst of this maelstrom of misinformation, private-sector employers were asked to decide whether instituting a drug testing program made good business sense. Not surprisingly, many employers decided that it did.” Id. at 7.

workplace” provisions or conditions in federal contracting do not mandate drug testing.111

Politics is another reason why tribal councils adopt random drug testing policies. Often, the dynamics of tribal politics work against tribal government employees. The most recent generations of young Indians are graduating from high school and earning college degrees at a greater rate than ever before.112 They often wish to return to the reservation and work for their tribes using the knowledge they have acquired and also to participate in tribal government as citizens. This generation of new tribal government employees—educated members—is almost never a large segment of the larger population of the reservation but often constitutes a significant portion of the employees and management staff of a tribal government. Despite the fact that tribal leaders typically base at least part of their political campaigns on education—attempting to realize a goal of sending as many young tribal members off to school as possible—when those young members come home, they often return under a cloud of suspicion or even jealousy. Those young members may return to take positions such as health clinic doctor or administrator, or a natural resources biologist, or a water quality program director, or an accountant, or a lawyer, or a housing director.

While employing as many educated tribal member employees as possible is almost always a political goal for tribal governments, often the majority of a tribal leader’s constituents are not qualified to hold a management position within the tribal government. This constituency often pressures tribal leaders to intensely and sometimes unfairly scrutinize tribal members holding management positions. This pressure may persuade a tribal council to adopt harsh employment policies, such as salary cuts or freezes, employment at-will handbooks and policies,113 and random drug testing policies. In fact, many tribal


113. And yet, whatever the perception of tribal councils, tribal courts generally agree that, once a tribal employee’s employment vests, it is a property right that cannot be taken away absent due process and, usually, just cause. See Bethel v. Mohegan Tribal Gaming Auth., No. GDTC-T-98-105, ¶ 66 (Mohegan Gaming Disputes Trial Court of Appeals, Dec. 14, 1998) (citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985)),
council members and tribal members (and many tribal government employees) view continuing employment with the tribe as a privilege that can be revoked at any time rather than an entitlement that can only be taken with due process of law. This atmosphere may encourage tribal members to seek employment elsewhere rather than return home.

The imposition of random drug testing policies for tribal government employees—particularly those in non-safety-sensitive positions—has very serious real and potential consequences for tribal governments. Because random drug testing is very expensive, many tribes, particularly those with negligible revenues from gaming or natural resources, do not have the funds to administer drug testing policies. A congressional study of the costs of identifying drug users indicated that, in 1990, "the federal government spent $11.7 million to test selected workers in 38 federal agencies. Out of nearly 29,000 tests given, only 153 were positive (.5%). The cost of finding a single drug user was therefore estimated to be $77,000." 114

The testing itself significantly diminishes employee morale,115 particularly in Indian cultures. The imposition of a random drug testing policy

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114. American Civil Liberties Union, supra note 109, at 14 (citation omitted).

115. The American Civil Liberties Union explains:

Employers need . . . to consider the impact of drug testing on job satisfaction and morale. Many workers find the urine collection process itself to be degrading and demeaning, particularly when it involves direct observation. People from some cultures more than others, and women more than men, report being embarrassed and offended by having to urinate in the presence of others.

See id. at 17. See also Scott S. Cairns & Carolyn V. Grady, Drug Testing in the Workplace: A Reasoned Approach for Private Employers, 12 Geo. Mason L. Rev. 491, 499 (1990) (employees can view random testing as an invasion of privacy and a presumption of guilt); Sharona Hoffman, Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace, 49 U. Kan. L. Rev. 517, 520 (2001) (restrictions on pre-placement medical testing would benefit both employers and employees); Stephen Plass, A Comprehensive Assessment of Employment Drug Testing: Legal Battles Over Delicate Interests, 27 San Diego L. Rev. 29, 79 (1990) (testing appears to affect worker
on tribal government employees, as with any type of employee, is a form of implicit accusation. A tribal council or committee initiating such a policy implies that some or many tribal government employees use drugs. Like government leaders in the national drug war, tribal leaders have been known to accuse anyone objecting to drug tests of being drug users. The refrain, "[i]f you don’t use drugs, then you don’t have anything to worry about," is invoked frequently to silence dissent and chill speech. The impact of this form of indirect accusation on the morale of tribal government employees is disheartening. Employees subjected to random drug testing are subjected to a constant state of indirect accusation. As in the non-Indian employment context, drug testing causes productivity to decline and tensions to increase. Employees who would normally participate in tribal government activities, such


116. See American Civil Liberties Union, supra note 109, at 20 ("Drug testing, particularly without probable cause, seems to imply a lack of trust, and presumably could backfire if it leads to negative perceptions about the company.") (citation and quotation omitted). As Mark Rothstein suggests:

Where employees must submit to testing (or face dismissal) without any suspicion of drug use, the employer sends a message of distrust to employees. Irreparable harm may result to the employer-employee relationship. Because the overwhelming majority of employees do not use drugs and consequently test negative, one questions whether the benefits of detecting the relatively few drug users who may be identifiable by other means is sufficient to outweigh the morale problems implicit in testing.

Rothstein, supra note 108, at 79–80 (footnotes omitted).

117. See American Civil Liberties Union, supra note 109, at 19 ("Since drug testing itself is built upon employers’ suspicions regarding employees, it should not be surprising that drug testing fuels workers’ suspicions regarding their employers.").
as open meetings, may refrain from speaking openly about tribal policies if they feel indirectly accused of drug abuse. Fears about false positives abound:

Workers are also concerned that, on the basis of an inaccurate drug test, they will be falsely accused of being a drug user. In drug testing's early days, false-positives were more of a problem than they are today. Improvements in testing technology . . . have helped reduce the incidence of false-positives. The problem of "human error," however, has not been eliminated completely.

More importantly, whatever the reality, the fear of false-positives adds to the "termination anxiety" that already pervades the American workplace.

Even in the absence of drug testing, it is a fact that many tribal government employees, rationally or not, sincerely fear for their jobs every day at work. This is no different than with private employers, especially in difficult economic times. Drug testing policies add concreteness to those fears, directly and significantly increasing worker morale problems in tribal government employees.

Drug tests also reinforce stereotypical views of Indians generally. There is already a terrible stereotype about the "drunken Indian" that, along with anecdotal evidence of prejudice against Indians, abounds in American culture.

One collection of oral histories included this story:

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118. See id. ("[W]orkers worry that managers will generate false-positive tests to get rid of certain workers—those who complain too much, for example, or who engage in union activities.").

119. Id.

120. See generally United States v. Norquay, 987 F.2d 475, 480 (8th Cir. 1993) (discussing case where defense counsel objected to instruction that allegedly invoked the "drunken Indian" stereotype); United States v. Lavallie, 666 F.2d 1217, 1219 (8th Cir. 1981) ("Lavallie argues the instruction was unfairly prejudicial, raising the stereotype of a 'drunken Indian' in the minds of the jurors. Lavallie is of Indian descent . . . given the great influence that a trial judge has on the jury, this instruction denied him his right to a fair trial."); Quigg v. Crist, 616 F.2d 1107, 1112 (9th Cir. 1980) ("A motel clerk with whom Robbins had spoken before going to the airport said that Robbins had been concerned because he had almost been run into by a car driven by 'two drunken Indians,' and they might 'come after him.'"); United States v. Lopez, 575 F.2d 681, 688 (9th Cir. 1978) (Hufstedler, J., dissenting) ("The fact that fratricide occurred between drunken Indians did not detract from the emotional atmosphere of this case."); James v. Atchinson, T. & S.F. Ry. Co., 464 F.2d 173, 174 (10th Cir. 1972) ("Other evidence in the record suggests that there had been previous problems arising from the presence of Indians and the City Police were shown to have regularly removed drunken Indians from this area."); O'Neill v. Gourmet Sys. of Minn., Inc., 213 F. Supp. 2d 1012, 1018 (W.D. Wis. 2002) (discussing claim by Indian restaurant patron who was denied service due to alleged "drunken Indian" stereotype); Engels Copper Mining Co. v. Indus. Accident
A [non-Indian] deputy sheriff married to an Indian woman in an area with a large Indian population reported reprimanding officers there for saying, "Oh, boy. We got a couple of drunken Indians." He said, "The next time you come in with a couple of white guys who are drunk, I want you to say the same. I got a couple of drunken whites . . ."121

Indian employees believe that they can be fired for a positive test result they know is false. Even if they somehow explain away the false positive or otherwise do not lose their jobs by consenting to lesser punishment than discharge, the test result will taint them wherever they may go. A positive test result is a self-fulfilling prophesy for the tribal member. A positive test result is exactly what the non-Indians expect out of Indians. Unfortunately, a positive

Comm'n, 185 P. 182, 183 (Cal. 1919) (quoting deceased, who stated, "I have got to go down and see about a drunken Indian or buck."); People v. Pilgrim, 166 P.2d 636, 638 (Cal. Dist. Ct. App. 1946) ("There is substantial evidence that the defendant made an unprovoked assault upon an apparently harmless, good-natured, fat, old, drunken Indian."); People v. Soules, 106 P.2d 639, 646 (Cal. Dist. Ct. App. 1940) ("In his opening statement to the jury the defendant's attorney, in commenting on the evidence he expected to adduce, said that the deceased threatened the defendant and started toward him acting 'as if he had something to drink just like any drunken Indian.'"); People v. Evans, 220 P. 309, 310 (Cal. Dist. Ct. App. 1923) ("There is no doubt in my mind that the drunken Indians, unarmed however, [were] so drunk that they were easily handled as demonstrated by the first trouble. . ."); State v. Jamieson, 300 N.W. 809, 810 (Minn. 1941) ("He searched one of the booths and found an empty whiskey bottle on the floor. In another booth 'there was a drunken Indian woman . . . also five other people sitting in the first booth.'") (ellipses in original); Alwin v. Leisch, 90 N.W. 404, 404 (Minn. 1902) ("He imagined he was soaring on the wings of eloquence, when as a matter of fact the 'wheels' only revolved a little more rapidly, the speaker increased the distortion of his face, he shouted at the top of his voice, and he gestured like a drunken Indian."); Gibbons v. State, 629 P.2d 1196, 1197 (Nev. 1981) (quoting brief which stated, "[T]he only reason she was following through with her complaint was to avoid possible humiliation to her reputation for losing her car to a drunken Indian."); Gordon v. State, 253 P. 1036, 1036–37 (Okla. Crim. App. 1927) ("Tom Kilmer, city marshal of Atoka, testified that he found a drunken Indian, Adams Lawrence, in the south part of town and asked him where he got his drink. . ."); Ward v. State, 188 P. 894, 895 (Okla. Crim. App. 1920) ("Mrs. Will Ward testified that she was at home when these drunken Indians stopped at the gate . . . they returned that evening and stopped again; that her husband did not let these Indians or any one of them have any Chocaw beer."); State v. Honie, 57 P.3d 977, 988 (Utah 2002) (discussing closing statement in which prosecutor said that the murder of the victim was worse than the murder of a "drunken Indian"); Lawrence R. Baca, Diversity and the Federal Bar Association, Fed. Law., Feb. 2003, at 23, 29 ("You can hear the palpable specter of the stereotype of the 'drunken Indian' as the unspoken underpinning for the Court's finding that control over liquor sales has not been a part of the historical sovereignty of Indian tribes.") (citing Rice v. Rehner, 463 U.S. 713, 731 n.15 (1983)).

test result is often what tribal leaders expect to see out of their own constituents.\textsuperscript{122}

Indian tribal government employees, particularly women, are subjected to greater humiliation than non-Indians generally in drug testing situations. Subjecting an Indian woman to random drug testing inevitably results in a situation where she is forced to provide a urine or blood sample during her period. In many Indian tribal cultures, as in many indigenous cultures, monthly menstruation is a critical time for a woman and her family, a time of great power and spirituality. Imposing a blood or urine test on an Indian woman during her monthly cycle thus constitutes an extraordinary form of humiliation. Tribal leaders have attempted to avoid this situation by offering Indian women the option of an alternative testing method, such as the testing of a hair sample. However, the taking of Indian hair is also a problem in many Indian cultures. Moreover, the darker hairs of Indians are more likely to test positive for drugs than lighter hairs, raising the specter of the fulfillment of improper stereotypes.\textsuperscript{123} Finally, the testing of hair raises additional, practical problems because it fails to detect recent drug use and, instead, detects drug use from the distant past.\textsuperscript{124}

In sum, the problems associated with random drug testing of employees—reduced worker morale, increased direct and hidden costs, and inefficient and inaccurate test results—are all exacerbated in tribal government settings. But there are other reasons to discard the use of drug testing policies.

\textsuperscript{122} See Robert A. Williams, Jr., \textit{Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context}, 24 Ga. L. Rev. 1019, 1032–33 (1990) ("[S]ome Indian people hold very negative views about aspects of their own cultures. Despite the self-critical nature of such views, this possible interpretation may itself be subject to the hegemonical functioning of white patriarchy's value structures in contemporary Indian life.").


\textsuperscript{124} See Draper, \textit{supra} note 100, at 300. Specifically, Draper states:

Drug testing by hair sample raises special problems. A hair is similar to a growth ring in a tree trunk, because its growth marks can show that someone used drugs several months ago but not necessarily very recently. However, more specificity about the time of use is important in identifying problems affecting work. For example, if employees took a drug during their vacation, the drug might show up in tests yet may not affect performance on the job.

\textit{Id.}
III. DRUG TESTING OF TRIBAL GOVERNMENT EMPLOYEES VIOLATES THEIR RIGHTS

Indian tribes have been trying to get out from under the yoke of the federal and state governments since the time of First Contact. Thus it is ironic that these same tribes are so willing to fall in line with the government by drug testing their employees.

Often, Indian tribal leaders are unfamiliar with the vagaries of constitutional law as it relates to employees. Though many tribal leaders do not have law or even college degrees, there is hardly to be found a tribal council member who is unfamiliar with the Indian Gaming Regulatory Act, the Indian Child Welfare Act, or the Native American Housing Assistance and Self-Determination Act; Supreme Court cases dealing with regulatory and adjudicatory civil or criminal jurisdiction over Indians, non-member Indians, and non-Indians; or treaty rights relating to off- or on-reservation hunting, fishing, and other natural resources. However, while there are a multitude of books, articles, and other commentaries discussing these

130. See, e.g., Duro v. Reina, 495 U.S. 676 (1990) (adjudicating whether tribal courts have criminal jurisdiction over non-tribal member Indians).
134. See, e.g., Randolph D. Moss, Tribal Restrictions on Sharing of Indigenous
issues, there is very little to assist a tribal leader or attorney with the constitutional and practical issues related to drug testing tribal government employees.

Part III is intended to be a nutshell for tribal leaders and attorneys on the law of random drug testing of government employees. Although most tribal attorneys have heard of *Chandler v. Miller*\textsuperscript{135} and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,*\textsuperscript{136} and know what the Supreme Court held in those cases, Indian lawyers may not have delved into a line of cases that is seemingly unrelated to Federal Indian Law. Students of the Supreme Court's complex and inconsistent Federal Indian Law jurisprudence\textsuperscript{137} will not be surprised by the Court's apparently contradictory and disingenuous analysis in its drug testing jurisprudence. A proper understanding of the Supreme Court's five decisions relating to government employee drug testing will go a long way toward avoiding potentially expensive, complex, and politically devastating tribal court litigation aimed at defending a mostly indefensible position. And, although federal court cases on internal tribal government matters are not binding on any tribal court,\textsuperscript{138} they provide persuasive authority that is likely to sway tribal court judges. Also, the analysis of the underlying justifications (or lack thereof) for the drug war and

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Knowledge on Uses of Biological Resources, Memorandum for the Assistant Attorney General, Environment and Natural Resources Division, 1999 WL 33229993 (Oct. 12, 1999) (discussing the ability of Indian tribes to limit the sharing of indigenous knowledge with the outside world under the Indian Civil Rights Act).


External rules and interpretations do not apply to the internal matters of the tribe. Application of such is recognized as inappropriate by the law. It would destroy the unique traditional, cultural and community attributes of tribal communities. In addition, uniform application of external measurements would destroy the diversity that exists among the many tribal communities themselves.

*Id.* at 2–3; see also Hoopa Valley Indian Housing Auth. v. Gerstner, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Ct. App. Sept. 27, 1993) ("Even though the decisions of federal, state, or other tribal courts are not controlling in this court, such decisions can be used as guidance in helping us address these issues.") (citation omitted).
drug testing by non-Indian employers should convince tribal leaders to rethink their positions on the matter.


The Fourth and Fourteenth Amendments to the U.S. Constitution prohibit the federal government and state governments from randomly drug testing most government employees. As a general matter, if a federal or state employee is not working in a "safety-sensitive" position, the government cannot constitutionally subject that employee to a random drug testing scheme. The portion of this Article that follows includes a detailed discussion of five Supreme Court cases and two lower court cases that frame the law of random drug testing for government employees.

1. *Skinner v. Railway Labor Executives' Ass'n*

The U.S. Supreme Court opined in 1989 for the first time on federal employee drug testing policies in the companion cases *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees Union v. Von Raab*. In *Skinner*, the Court reviewed regulations promulgated by the Secretary of Transportation in compliance with the Federal Railroad Safety Act of 1970 that mandated blood and urine tests of employees involved in certain train accidents, such as where a fatality occurred. Writing for the majority, Justice Kennedy prefaced his discussion with the assertion: "The problem of alcohol abuse on American railroads is as old as the industry itself." Justice Kennedy further cited a Federal Railroad Administration (FRA) finding that railroads caused fatalities and millions of dollars in property damage each year from 1972 to 1983, which railroad industry sources more or less confirmed. Justice Kennedy stated: "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are

141. 489 U.S. at 606 (citing 45 U.S.C. § 431(a)).
142. Id.
143. Id.
under the influence of alcohol or drugs.”

Justice Kennedy then began the analysis that the Supreme Court follows in drug testing cases, treating the case as a Fourth Amendment search issue. The Court noted that “a ‘compelled intrusive[n] into the body for blood to be analyzed for alcohol content’ must be deemed a Fourth Amendment search,” as well as breath testing and the taking of urine samples. Importantly, the same would likely be true for all tribal governments—they are bound by the Indian Civil Rights Act, which prohibits tribes from “violat[ing] the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . .”

Justice Kennedy next moved directly to the “special needs” exception of the Fourth Amendment. This exception allows for warrantless searches without probable cause “when ‘special needs, beyond the normal need for law enforcement’” arise. Justice Kennedy quoted the balancing test the Court employs when confronted with such a search: “When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”


146. Id. at 616 (quoting Schmerber v. California, 384 U.S. 757, 768 (1966)) (brackets in original).

147. Id. Justice Kennedy also noted that breath testing “requires the production of alveolar or ‘deep lung’ breath for chemical analysis [and] . . . implicates similar concerns about bodily integrity.” Id. at 617–18 (citations omitted). As for urine testing, Justice Kennedy listed a host of factors that made it clear to the Court that the testing of urine amounted to a search, including the disclosure of “private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic,” and “visual or aural monitoring of the act of urination.” Id. at 617.


149. Skinner, 489 U.S. at 619.


Justice Kennedy likened the blood testing of a railway employee who may or may not be visibly impaired after a fatal accident to an obviously drunk motorist.\textsuperscript{152} He acknowledged that urine tests implicate significant privacy concerns, but explained that the urine tests were conducted in a "medical environment"\textsuperscript{153}—though not necessarily by medical personnel—and that the railway industry was already so heavily regulated that no employee could have legitimate privacy concerns.\textsuperscript{154} Thus, after taking the time to acknowledge that breath, blood, and urine testing are searches, Justice Kennedy rejected the assertion of a reasonable privacy interest by asserting: "[T]he privacy interests implicated by the search are minimal . . . ."\textsuperscript{155} The entire legal justification for drug testing of any person was created through this assertion, unsupported by any citation.\textsuperscript{156}

Justice Kennedy also interjected the notion that not only are the FRA, the Secretary of Transportation, and the federal government protecting the lives of the public, they are protecting the employees as well by forcing them to undergo a drug test.\textsuperscript{157} This paternalistic theme runs throughout the lexicon of justification for drug testing policies, including those used to test tribal government employees.

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 625 (citing Schmerber v. California, 384 U.S. 757, 771 (1966)).
\item \textsuperscript{153} \textit{Id.} at 626.
\item \textsuperscript{154} \textit{Id.} at 627 (citing 45 U.S.C. § 437(a), which authorized the Secretary to "test . . . persons, as he deems necessary" (emphasis in opinion)).
\item \textsuperscript{155} \textit{Id.} at 624.
\item \textsuperscript{156} In fact, Justice Marshall argued in dissent:
\begin{quote}
[\textit{T}hat the privacy interests offended by compulsory and supervised urine collection are profound[,] is the overwhelming judgment of the lower courts and commentators. As Professor–later Solicitor General–Charles Fried has written:
\end{quote}
\begin{quote}
"[\textit{I}n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one’s dignity and self-esteem."
\end{quote}
\textit{Id.} at 646 (Marshall, J., dissenting) (quoting Charles Fried, \textit{Privacy}, 77 Yale L.J. 475, 487 (1968)). Interestingly, Mr. Fried argued the Government’s case before the Court in \textit{Von Raab} and was listed on the Government’s brief in \textit{Skinner}.
\item \textsuperscript{157} See \textit{id.} at 621 ("The governmental interest in ensuring the safety of the traveling public \textit{and of the employees themselves} plainly justifies prohibiting covered employees from using alcohol or drugs on duty . . . .") (emphasis added).
\end{itemize}
2. **National Treasury Employees Union v. Von Raab**

Decided on the same day as *Skinner, National Treasury Employees Union v. Von Raab*[^158] involved the Court's review of a pre-employment drug screen instituted by the Commissioner of Customs.[^159] Again writing for the majority, Justice Kennedy began the opinion by describing the responsibility of the Customs agents. He indicated: "[M]any Customs employees have direct contact with those who traffic in drugs for profit."[^160] Because hunting down drugs and drug dealers is a dangerous business, "many Customs operatives carry and use firearms in connection with their official duties."[^161] The Court’s public safety concern is the linchpin of justification for drug testing employees in safety-sensitive positions.[^162]

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[^158]: 489 U.S. 656 (1989). It is important to note that, although the Court decided *Von Raab* and *Skinner* on the same day, Justice Kennedy treated the *Von Raab* facts as though the principles articulated in *Skinner* controlled his analysis. *See id.* at 665 (citing *Skinner*, 489 U.S. at 616–18). *Von Raab* was likely a tougher sell on the facts to all the Justices, many of whom could be classified as steadfast promoters of law and order, police reasonability, and prosecutorial discretion. Unlike railway workers, Customs operatives "seized drugs with a retail value of nearly $9 billion [in 1987 alone]." *Id.* at 660. Perhaps that is why the majority could only garner a five-to-four vote in *Von Raab* after losing Justices Scalia, who dissented, *see id.* at 681 (Scalia, J., dissenting) ("In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."); and Stevens, who joined Scalia’s opinion. *Skinner* established a Fourth Amendment balancing test on drug testing of government employees that the Court itself extended dramatically on the very day it announced the test.

[^159]: *See id.* at 660–61 (citations omitted).

[^160]: *Id.* at 660.

[^161]: *Id.*

[^162]: "Public safety has been the primary justification for each case in which suspicionless drug testing has been upheld." Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1140 (E.D. Mich. 2000), aff’d, 2003 WL 1870916 (6th Cir. Apr. 7, 2003) (en banc) (unpublished opinion). The Marchwinski court went much further, counseling that:

If the State is allowed to drug test [Family Independence Program (FIP)] recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents. Indeed, the query posed by Justice Marshall in his dissent in *Wyman v. James* . . . is a pertinent inquiry to make here:
Acknowledging a "national crisis in law enforcement" caused by drugs, Justice Kennedy stated that Customs operatives are "our Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population." Noting that Customs operatives "may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service,” Justice Kennedy accepted the Government’s claim that it has a "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." Thus, Justice Kennedy built up a significant and tangible danger that Customs operatives on drugs may pose to the public.

Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.

Upholding this FIP suspicionless drug testing would set a dangerous precedent.

_id. at 1142 (quoting Wyman v. James, 400 U.S. 309, 342 (1971) (Marshall, J., dissenting)).

163. _Von Raab_, 489 U.S. at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

164. _Id._

165. _Id._ at 669.

166. _Id._ at 670.

167. Justice Kennedy wrote:

This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user’s indifference to the Service’s basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a
Justice Kennedy then sought to weigh “the interference with individual liberty that results from requiring these classes of employees to undergo a urine test.” Kennedy concluded:

Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service’s policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

This language should be given careful scrutiny by tribal leaders and attorneys. The Court strongly implies that there is no need to drug test traditional office workers because supervisors may more easily scrutinize them. Moreover, the Court emphasized the “extraordinary” dangers associated with drug use by employees in safety-sensitive positions. In this respect, it is unlikely that a tribal council could defend a drug testing scheme on the basis that tribal government employees could constitute an extraordinary danger to the public.

We agree with the Government that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances.


168. _Id._ at 671.

169. _Id._ at 674.

170. Justice Kennedy listed a number of Customs Service positions that were included in the testing scheme—accountant, animal caretaker, baggage clerk, attorney, mail clerk, and messenger, to name a few—and opines that perhaps “the Service ha[d] defined this category of employees more broadly than is necessary to meet the purposes of the Commissioner’s directive.” _Id._ at 678.
As to the employee, this system of analysis works against Indian tribal
government employees in a very destructive manner. The Supreme Court’s
analytical structure becomes its own *modus operandi* in subsequent drug testing
cases, as well as in lower state and federal court review of drug testing cases.
Since “special needs” requires a showing of a “compelling interest” on the part
of the government to justify a drug testing scheme, the government must prove
how dangerous employees can be. The entire analytical scheme places
employees on the defensive to prove that they are not a danger to the public.

3. *Vernonia School District 47J v. Acton*

The Court next upheld the random drug testing of high school athletes
in *Vernonia School District 47J v. Acton*.\(^1\) Following the analytical structure
established by the Court’s prior decisions, Justice Scalia demonized the school
district’s students while simultaneously arguing that random drug testing was
for their benefit.\(^2\) Writing for the majority, Justice Scalia asserted:

> That the nature of the concern is important—indeed, perhaps
> compelling—can hardly be doubted. Deterring drug use by our
> Nation’s schoolchildren is at least as important as enhancing
> efficient enforcement of the Nation’s laws against the importation of
> drugs, which was the governmental concern in [*Von Raab*], or
deterring drug use by engineers and trainmen, which was the
governmental concern in [*Skinner*].\(^3\)

Completing his justification for drug testing, Justice Scalia dramatically reduced
privacy expectations for high school athletes.\(^4\)


\(^2\) Justice Scalia noted:

> We are not inclined to question—indeed, we could not possibly find
> clearly erroneous—the District Court’s conclusion that “a large segment
> of the student body, particularly those involved in interscholastic
> athletics, was in a state of rebellion,” that “[d]isciplinary actions had
> reached ‘epidemic proportions,’” and that “the rebellion was being
> fueled by alcohol and drug abuse as well as by the student’s
> misperceptions about the drug culture.”

1992)).

\(^3\) *Id.* at 661 (citing *Von Raab*, 489 U.S. at 668; *Skinner v. Ry. Labor Executives’
Ass’n*, 489 U.S. 602, 628 (1989)).

\(^4\) Justice Scalia wrote:
Justice Scalia equated the Vernonia students who are "entrusted" to the
care of their "guardian and tutor"—the school district—to government
employees who are subjected to searches that the "government conducts . . . in
its capacity as employer (a warrantless search of an absent employee’s desk to
obtain an urgently needed file, for example). . . ." 175

Tribal councils and leaders are often in a position to act in a very
paternalistic fashion, especially since many of their constituents are younger
relatives. Because of Justice Scalia’s paternalistic language, tribal leaders and
attorneys may read Vernonia as strongly supporting drug testing of tribal
employees. However, tribal government employees are not schoolchildren.
Moreover, Vernonia reaffirmed that the presence of a tangible danger is
important to justify a drug testing policy.

4. Chandler v. Miller

The Supreme Court’s decision in Chandler v. Miller 176 stands as a
strong indication that random drug testing of office workers is unconstitutional.
Accordingly, tribal leaders and attorneys should read this case very carefully
before opting for any drug testing policy.

Legitimate privacy expectations are even less with regard to student
athletes. School sports are not for the bashful. They require “suiting up”
before each practice or event, and showering and changing afterwards.
Public school locker rooms, the usual sites for these activities, are not
notable for the privacy they afford. The locker rooms in Vernonia are
typical: No individual dressing rooms are provided; shower heads are
lined up along a wall, unseparated by any sort of partition or curtain; not
even all the toilet stalls have doors. As the United States Court of
Appeals for the Seventh Circuit has noted, there is “an element of
‘communal undress’ inherent in athletic participation.”

There is an additional respect in which school athletes have a
reduced expectation of privacy. By choosing to “go out for the team,”
they voluntarily subject themselves to a degree of regulation even higher
than that imposed on students generally. In Vernonia’s public schools,
they must submit to a preseason physical exam (James testified that his
included the giving of a urine sample), they must acquire adequate
insurance coverage or sign an insurance waiver, maintain a minimum
grade point average, and comply with any “rules of conduct, dress,
training hours and related matters as may be established for each sport by
the head coach and athletic director with the principal’s approval.”

Id. at 657 (citations omitted).
175. Id. at 665.
The *Chandler* Court reviewed a Georgia policy that required potential candidates for state office to pass a drug test before they could be eligible to run.\(^{177}\) Justice Ginsburg’s majority opinion was not structured in the same manner as the three previously discussed Supreme Court dissertations on drug testing. She began with a recitation of the Fourth Amendment, followed by a description of the Georgia statute at issue.\(^{178}\) She noted that the Georgia legislature did not find any evidence of drug abuse by the state’s elected officials.\(^{179}\) As Justice Ginsburg put it: “Notably lacking in [Georgia’s] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.”\(^{180}\) Since Georgia did not establish a tangible danger analogous to the threats documented by the Customs Service, the Vernonia School District, and the Federal Railroad Administration, its drug testing scheme was doomed.

*Chandler* gave the Court an opportunity to articulate important limits on government drug testing schemes.\(^{181}\) Justice Ginsburg mentioned some specific factors that the Court would consider as possible justifications for a drug testing scheme under its balancing test. First, Justice Ginsburg stated, “A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program.”\(^{182}\) In this case, Georgia offered no “[p]roof of unlawful drug use...”\(^{183}\) Next, Justice Ginsburg indicated that a valid drug testing scheme should be “a credible means to deter illicit drug users...”\(^{184}\) Since Georgia’s test date “was no secret,”\(^{185}\) potential candidates for office “could abstain for a pretest period sufficient to avoid detection.”\(^{186}\) Justice Ginsburg also stated that the government should offer a “reason why ordinary law enforcement methods would not suffice” to detect the drug testing

\(^{177}\) See *id.* at 308 (reviewing Ga. Code Ann. § 21-2-140 (1993) (repealed 1999)).

\(^{178}\) *Id.* at 308–09 (citations omitted).

\(^{179}\) *Id.* at 311 (citing *Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996), rev’d, 520 U.S. 305 (1997)).

\(^{180}\) *Id.* at 318–19.

\(^{181}\) Justice Ginsburg stated: “Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context.” *Id.* at 321.

\(^{182}\) *Id.* at 319 (citing Nat’l Treasury Employees Union v. *Von Raab*, 489 U.S. 656, 673–75 (1989)).

\(^{183}\) *Id.*

\(^{184}\) *Id.*

\(^{185}\) *Id.* at 320.

\(^{186}\) *Id.* (citation to record omitted).
subjects. Moreover, Justice Ginsburg affirmed that regular office workers, for example, are subject to “‘day-to-day scrutiny that is the norm in more traditional office environments,’” allowing for easier detection of drug use.

Importantly, Justice Ginsburg held that a mere symbol of a government’s desire to end illegal drug abuse and addiction is not a sufficient “special need” to justify drug testing. She wrote:

What is left, after close review of Georgia’s scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State’s elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not “special,” as that term draws meaning from our case law.

Indeed, if a need of the “set a good example” genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and Vernonia ranked as “special” wasted many words in entirely unnecessary, perhaps even misleading, elaborations.

Justice Ginsburg concluded her analysis by reminding the government that a drug testing scheme may not “diminish[] personal privacy for a symbol’s sake.”

187. Id.
188. Id. at 321 (quoting Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989)).
189. See generally Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001) (“In Chandler, however, we did not simply accept the State’s invocation of a ‘special need.’ Instead we carried out a ‘close review’ of the scheme at issue before concluding that the need in question was not ‘special,’ as that term has been defined in our cases.”) (quoting Chandler, 520 U.S. at 322)). Discussion of the Ferguson case, in which the Court struck down a drug testing scheme that applied to female state hospital patients, is unnecessary in this context. Ferguson, unlike tribal government employee drug testing, involved the “[s]ate’s general interest in law enforcement” because the test results were often turned over to the police. Ferguson, 532 U.S. at 79.
191. Id. at 322.
Because the debates that lead to the drug testing of tribal government employees often start with the symbolic need to assure all tribal members that their civil servants are not using drugs, Chandler explicitly undermines the motivation and justification for most tribal government employee drug testing schemes.

5. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In the Supreme Court’s most recent drug testing case, Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, the Court returned to the arena of the high school, as in Vernonia. Here, the Court, through Justice Thomas, reviewed a drug testing scheme that covered all school children participating in “extracurricular activities.” The child challenging the drug testing scheme participated in the school “show choir, the marching band, the Academic Team, and the National Honor Society.” Having already established in Vernonia that drug abuse is a serious problem for the nation, Justice Thomas had no trouble construing the problem broadly, effectively expanding the nation’s drug problem to every American school.

In stating that “students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on the privacy as other athletes,” Earls suggests that a symbolic act may constitute a “special need” justifying drug testing. Although the decision is limited to the custodial wards of the school districts, the absence of a showing of special need to drug test marching bands, show choirs, and National Honor Society members strongly implies that the Court may consider some symbolic acts to be valid in future cases. It may also suggest to tribal government employers that their largely symbolic act of drug testing all employees may be constitutional. In that regard, Earls is particularly dangerous to tribal government employee rights.
6. D.C. Circuit’s “Nexus” Test

Though the Supreme Court has not decided the matter, federal courts hold that it is unconstitutional for a government to subject its employees who are not employed in safety-sensitive positions to drug tests. In particular, the D.C. Circuit has articulated a “nexus” rule in which the government must prove a “direct nexus between the duties of each position and the nature of the feared violation.” State courts also subject such testing to strict review and have invalidated testing policies for violating statutory protections of personal privacy or other state constitutional provisions. The issue of testing workers holding non-safety-sensitive positions rarely, if ever, arises in state or federal courts because those governments do not generally test that class of worker. In fact, many of those governments have procedures wherein a worker in a safety-sensitive position testing positive may be transferred to a non-safety-sensitive position. For example, “[p]olice officers are subject to a broader testing rule


199. Am. Fed’n of Gov’t Employees, Local 1616, 798 F. Supp. at 598–99 (citing Harmon v. Thornburgh, 878 F.2d 484, 490 (D.C. Cir. 1989)).


201. See, e.g., Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 66 (2000) (citing 49 C.F.R. § 382.605(c)(2)(i) (1999)) (discussing regulation where employees in safety-sensitive-positions that test positive for drugs may be assigned to a non-safety-sensitive position until completion of a drug counseling program); Kwok v. New
than employees in non-safety-sensitive positions because (as already observed) an intoxicated police officer performing police duties would endanger public safety.\textsuperscript{202}

In Harmon v. Thornburgh,\textsuperscript{203} the D.C. Circuit reviewed a drug testing scheme wherein the Department of Justice (DOJ) randomly tested its prosecutors, employees with access to grand jury proceedings, and personnel holding top secret security clearances.\textsuperscript{204} The government argued first, that “its interest in ensuring the integrity of its workforce would justify the random drug testing of every federal employee.”\textsuperscript{205} The court rejected that concept, noting that “federal employment alone is not a sufficient predicate for mandatory urinalysis.”\textsuperscript{206} The court then held that even general law enforcement responsibility is insufficient to justify mandatory urinalysis, stating: “Von Raab, however, suggests that the government may search its employees only when a clear, direct nexus exists between the nature of the employee’s duty and the nature of the feared violation.”\textsuperscript{207} The court reviewed the other proffered justifications for mandatory urinalysis—public safety and access to sensitive information—utilizing the “nexus” test. The court reviewed the job descriptions for each position and compared them to the proffered justifications. In the case of office workers, the court rejected the public safety justification, stating: “Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train.”\textsuperscript{208} The court noted that the “immediacy of the threat” is the critical element, not present in circumstances “where the chain of causation between misconduct and injury is considerably more attenuated.”\textsuperscript{209} Accordingly, the court held that the government can test workers who have

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\textsuperscript{202} Grow v. City of Milwaukee, 84 F. Supp. 2d 990, 1000 (E.D. Wis. 2000).
\textsuperscript{203} 878 F.2d 484 (D.C. Cir. 1989).
\textsuperscript{204} Id. at 485.
\textsuperscript{205} Id. at 490.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id. at 491.
\textsuperscript{209} Id.
access to "top secret national security information." Other courts have adopted the "nexus" model of analysis and struck down drug testing of employees in non-safety-sensitive positions.

Tribal leaders and attorneys should read the Harmon case carefully. The federal courts would look for a direct threat to public safety from employees using drugs. That may include tribal public safety personnel, especially those carrying weapons, possibly employees charged with providing direct services to Indian children, and possibly maintenance or construction employees involved in operating heavy equipment. However, this test would exclude the remainder of tribal government employees—in fact, likely all management and administrative personnel.

210. Id. The court further stated that: "If submission to drug testing can legitimately be made a requirement for access to top secret materials—and Von Raab indicates as much—then the government may properly make testing a requirement for holding a top secret security clearance." Id. at 492. See also Hartness v. Bush, 919 F.2d 170, 173–74 (D.C. Cir. 1990) (holding that drug testing of federal employees holding top secret security clearances was permissible).

In a case decided the same year, National Federation of Federal Employees v. Cheney, the D.C. Circuit reviewed a U.S. Army drug testing policy that tested civilian employees at the Alcohol and Drug Abuse Prevention and Control Program who handled drug test samples from other divisions. See Nat'l Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 613–14 (D.C. Cir. 1989). The court again applied the "nexus" test and struck down the regulation, stating:

The Army's compelling interest in preventing drug use among the other categories of critical personnel carries a collateral interest in ensuring effective detection. To this extent, serious governmental interests may be furthered by testing those in the laboratory and in the biochemical chain of custody, upon whom the legitimacy of the entire program depends. However, a drug-related lapse by such an employee does not portend either direct or irreparable harm, as would, for example, a lapse by an air traffic controller, pilot, or guard. Absent either a "clear, direct nexus" between the duties of a lab technician or other employee in the chain of custody and the nature of the feared harm . . . , and absent any compelling reason to expect that drug use will result in misplaced sympathies for their responsibilities, testing these employees lacks the necessary causal connection between the employees' duties and the feared harm.

Id. at 614 (citing Harmon, 884 F.2d at 489–90).

211. See, e.g., Webster v. Motorola, Inc., 637 N.E.2d 203, 208 (Mass. 1994) (applying the "nexus" test and holding that company could not randomly drug test the editor of technical textbooks).
7. Bangert v. Hodel

In 1989, the federal district court for the District of Columbia decided Bangert v. Hodel, a relatively insignificant drug testing case as compared to the large number of drug testing cases the D.C. Circuit heard in the late 1980s and early 1990s. This case, however, is likely the closest a federal court will ever come to reviewing drug testing of tribal government employees because federal courts do not have jurisdiction to hear disputes arising out of internal tribal affairs.

In Bangert, the district court reviewed the federal Department of Interior’s (DOI) drug testing scheme as it applied to its employees, many of whom are Bureau of Indian Affairs (BIA) employees—including “some 3,753 Bureau of Indian Affairs teachers.” The Department designated twenty-five percent of its employees as “occupying positions of such sensitivity as to warrant the invasion of their privacy notwithstanding the absence of the slightest suspicion of wrongdoing.” The court wrote that the Department’s insistence in designating so many of its employees as such was imprudent, stating: “It hardly constitutes hyperbole to say that the designation of thousands of employees of this type as being all in sensitive positions is bureaucracy run amok.” The court noted that the Department’s plan apparently originated with the publication of the recommendation of the President’s Commission on Organized Crime that all federal employees should be drug tested. The court concluded that the program’s symbolic elements were insufficient to override the employees’ constitutional rights, stating:


215. Id. at 649.

216. Id. at 648.

217. Id. at 649.

218. See id. at 651 n.24 (citing President’s Commission on Organized Crime, America’s Habit: Drug Abuse, Drug Trafficking, and Organized Crime, U.S. Gov’t Printing Office, at 456, 483 (1986)).
The drug trade, with its associated criminal activity, even murder, represents an extremely grave menace to this nation, and few know this better than those in law enforcement—be they police officers, drug enforcement agents, prosecutors, or judges—who are frequently face to face with those responsible for this scourge and those who are its victims.

... But the government-wide program of which the Interior Department plan under consideration here is a part has very little to do with fighting the drug menace or the drug sellers, nor does it even have much to do with curbing the use of drugs. The program does not in substance address any of these: stripped of the verbiage that surrounds it, that program is essentially but a show, perhaps an educational show, in which the civil servants employed at the Interior Department are the involuntary players.219

BIA teachers as well as many DOI park rangers and park police, which the court also concluded were protected from drug testing,220 engage in many of the same work activities as tribal government teachers and conservation officers.221 In short, the random drug testing of workers in non-safety-sensitive positions by the government is not permissible.222 Drug testing for the purpose of sending a symbolic message does not justify the infringement on employee privacy.223

219. Id. at 651.
220. See id. at 648–49.
221. The court listed many of the positions for which it held government employee drug testing impermissible. They included:
- clerical assistants; mail and file clerks; secretaries; administrative clerks;
- computer operators and specialists; petroleum engineering technicians;
- personnel officers; various scientists and engineers; surface mining reclamation specialists; auditors; power plant control room operators;
- cartographers; printing press operators; and some 3,753 Bureau of Indian Affairs teachers, education specialists, counselors, dormitory attendants and social workers.

Id. at 649. This list of employee positions is representative for tribal governments as well.

222. At least one court held that random drug testing of workers, even in safety-sensitive positions—in this case, police and fire department employees—is an unconstitutional intrusion on privacy. See Anchorage Police Dep’t Employees’ Ass’n v. Mun. of Anchorage, 24 P.3d 547, 558 (Alaska 2001) (“Unlike suspicionless testing occasioned by application, promotion, demotion, transfer, or vehicular accident, the policy’s random test provision has no logical nexus to any job-related occurrence.”).

223. See Int’l Bd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm’n, 966 F.2d 521, 525 n.9 (9th Cir. 1992); Taylor v. O’Grady, 888 F.2d 1189, 1196 (7th
The Supreme Court's loud pronouncements against the evils of drugs in *Von Raab, Skinner, Veronia*, and *Earls* belie the limitations of those decisions. Drug testing is constitutionally valid only for government employees in safety-sensitive positions. Nonetheless, many Indian tribes have implemented and are continuing to implement random drug testing policies over workers in non-safety-sensitive positions for the express purpose of sending a message.

B. Indian Civil Rights Act and Tribal Law Counsels Against Imposing Random Drug Testing of Tribal Government Employees

1. Indian Tribes and the Right Against Unreasonable Searches and Seizures

The Fourth Amendment does not apply to Indian tribes because Indian tribes are not arms of the federal government.224 However, in 1968, Congress passed the Indian Civil Rights Act (ICRA), which compelled Indian tribes to follow many civil rights articulated in the Bill of Rights, including the prohibition against "violat[ing] the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."225

Some federal courts226 and tribal courts227 treat the ICRA as a mirror of the Fourth Amendment. One federal district court wrote: "The analogy of the Indian Civil Rights Act to the Amendments is appropriate and the law governing actions against individuals for damages under the Fourth . . .

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226. *See*, e.g., United States v. Hunter, 2001 WL 128297, at *4 (6th Cir. Feb. 9, 2001) (unpublished opinion) ("[A]lthough caselaw interpreting the Fourth Amendment is not automatically available to Hunter when seeking to invalidate the warrant of a tribal judicial officer, . . . Doherty holds that we are guided by parallel construction in determining Congressional intent, consistent with a Congressional desire not to interfere unduly with tribal tradition.") (citing United States v. Doherty, 126 F.3d 769, 779 (6th Cir. 1997)).

227. *See*, e.g., Duckwater Shoshone Tribe v. Thompson, 25 Indian L. Rptr. 6131, 6132 (Duckwater Shoshone Tribal Ct., 1998) ("Federal Indian Law experts agree that 25 U.S.C. § 1302(2), which nearly mirrors the Fourth Amendment, is derived from the U.S. Constitution . . . ").
Amendment[] should be applied to the Act.”228 However, as Justice Souter recently observed in *Nevada v. Hicks*,229 tribal courts are not required to treat the Fourth Amendment as an absolute parallel.230 Specifically, he wrote:

Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, . . . "the guarantees are not identical," . . . and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot.'"231

Notwithstanding Justice Souter's outlook, tribal courts generally do consider the federal courts' Fourth Amendment jurisprudence as very persuasive. For example, the Mashantucket Pequot Tribal Court wrote that where no tribal "custom or tradition has been argued to be implicated . . ., [tribal courts] will look to general U.S. constitutional principles, as articulated by federal . . . courts, for guidance. . . ."232

The Supreme Court in *Santa Clara Pueblo v. Martinez*233 confirmed that only tribal courts have jurisdiction over civil cases arising under the

231. *Id.* The Mashantucket Pequot Tribal Court has indicated that:

The guarantees afforded to individuals under the ICRA, such as the right to due process, are similar but not identical to those provided under the United States Constitution. Both federal and tribal courts have acknowledged that Congress did not intend the due process principles of the Constitution to disrupt settled tribal customs and traditions.

Louchart v. Mashantucket Pequot Gaming Enter., 27 Indian L. Rptr. 6176, 6179 (Mash. Pequot Tribal Ct., 1999) (citation omitted).
232. *Louchart*, 27 Indian L. Rptr. at 6179.
234. *Id.* (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”) (citing Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959); Ex parte Crow Dog, 109 U.S. 556 (1883)).
ICRA. As such, tribal government employees must turn to tribal courts to vindicate their rights against unreasonable searches and seizures by tribal governments.

2. Tribal Court Decisions Discussing Drug Testing of Government Employees

Whether a tribal drug testing scheme will survive challenge on an Indian Civil Rights Act or tribal constitutional claim depends entirely on tribal courts. At least two tribal courts have discussed the U.S. Supreme Court's decisions regarding drug testing of government employees, but neither definitively answered the question for their respective jurisdictions of whether a tribal government may impose suspicionless drug testing on employees.

In Gourd v. Robertson, the Spirit Lake Tribal Court reviewed the positive drug test of a tribal gaming management employee. The tribe had declared that all gaming manager positions were "sensitive positions at the Casino" and, for that reason, could be subjected to random drug tests. The tribal court concluded:

Casino managers are in sensitive positions where they frequently have access to casino revenues and are charged with supervising other staff. Failing to properly monitor these employees may endanger the tribe's gaming enterprise and violate the tribe's Class III Gaming Compact with the State of North Dakota. These concerns undoubtedly explain why the Casino had made them "subject to greater sampling" under the random testing policy.

The tribal court nevertheless overturned the Plaintiff's discharge on the basis that he had not been subject to a "truly random" drug testing process as mandated by the personnel policy.


236. Gourd v. Robertson, 28 Indian L. Rptr. 6047, 6047 (Spirit Lake Tribal Ct. 2001).

237. Id.

238. Id. (quoting Spirit Lake Policy and Procedures Manual, ch. XIII(3)(B)(c)).

239. Id. at 6048.

240. Id.
The tribal court discussed the validity of random drug testing of government employees in safety-sensitive positions in dicta. Emulating the federal courts’ “safety-sensitive”-type analysis, the tribal court wrote:

Courts have recognized that employment-related drug testing by a governmental entity is a search as defined under the Fourth Amendment and incorporated into the Indian Civil Rights Act. . . . In general, the Indian Civil Rights Act prevents searches without warrants unless they meet the reasonableness requirement of the Fourth Amendment. Warrantless drug urinalysis testing of employees in safety-sensitive jobs may be consonant with the Fourth Amendment where part of a systematic, uniformly applied testing program (such as random testing), . . . or where based on the employer’s individualized “reasonable suspicion” of drug use by the employee.\textsuperscript{241}

The tribal court went on to note that it “need not reach the question of whether mandatory testing of the plaintiff would violate the Indian Civil Rights Act . . . because the Tribe and Casino have not opted to make employees such as the plaintiff here subject to mandatory testing.”\textsuperscript{242} Despite using federal “safety-sensitive” reasoning, the tribal court did not specify whether a casino table games manager is a “safety-sensitive” position. It stands to reason that a table games manager is not on the front lines of drug enforcement and interdiction or any other form of public safety. Additionally, the tribe in the case had not proven or even alleged that there was a drug or alcohol abuse problem among gaming management employees. The tribe had merely classified, without justification, gaming management positions as “sensitive” positions.\textsuperscript{243} And yet the tribal court seemed to be saying that employees in “sensitive” positions could be drug tested as though they were in “safety-sensitive” positions, thus blurring the line between what the Supreme Court has articulated as a valid justification for drug testing—fighting the drug war—and the tribe’s desire to preserve its financial security.\textsuperscript{244} Even if this blurred distinction is legitimate,


\textsuperscript{242} Id. (citing Nat’l Treasury Employees Union v. Yuetter, 918 F.2d 986 (D.C. Cir. 1990); Louchart v. Mashantucket Pequot Gaming Enter., 27 Indian L. Rptr. 6176 (Mash. Pequot Tribal Ct. 1999)).

\textsuperscript{243} See id.

\textsuperscript{244} Compare id. (“Casino managers are in sensitive positions where they frequently have access to casino revenues and are charged with supervising other staff.”), with Harmon v. Thornburgh, 878 F.2d 484, 490 (D.C. Cir. 1989) (“[T]he government may search its
however, random drug testing of tribal government (as opposed to gaming) employees would likely fail to survive a legal challenge.

In *Louchart v. Mashantucket Pequot Gaming Enterprise*, the tribal court reviewed the discharge of a gaming employee that had failed a "reasonable suspicion" drug test. The employee had been videotaped receiving a package at the gaming facility from an individual known to be a drug dealer. Based on this information, the tribe required the employee to take a drug test, but not until more than five months had elapsed. The tribal court considered the drug testing issue "against the backdrop of the Indian Civil Rights Act’s prohibitions against unreasonable searches and the deprivation of property without due process." Applying the Fourth Amendment jurisprudence of the federal courts, the tribal court concluded that the test violated the employee’s right to be free from unreasonable searches. The tribal court stated:

> [I]n the drug testing situation there must be some freshness to the information giving rise to the suspicion that the employee is under the influence of drugs or alcohol. In this case, the delay of over five months renders the information regarding the plaintiff's suspicious behavior too stale to constitute reasonable suspicion to require a drug test.

The tribal court did not discuss whether the Indian Civil Rights Act would preclude the suspicionless drug testing of tribal government employees in non-safety-sensitive positions. However, this court applied federal and

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246. *Id.*

247. *See id.*

248. *See id.*

249. *Id.* at 6179.

250. *Id.*

251. The same court also reviewed the discharge of an employee that had failed to complete the requirements of the Employee Assistance Program (EAP) after a drug test. *See Reamer v. Mashantucket Pequot Gaming Enter.,* 2 Mash. 197 (1997), available at http://www.tribalresourcecenter.org/opinions (last visited June 4, 2003). The employee had also tested positive on a second drug test but argued that the results of that drug test were never properly verified. *See id.* ¶ 22. The court never reached this issue, holding that the failure of the employee to "complete the EAP program as a condition of employment constituted an independent ground for discipline." *Id.* ¶ 27.
state court search and seizure jurisprudence.\textsuperscript{252} Other tribal courts can be expected to do the same.

3. Tribal Drug Testing Policies

Drug testing policies and statutes adopted by Indian tribes run the gamut from being very detailed to being very short. The following portion of the Article examines three random drug testing policies—one of which was never implemented due to tribal constitutional infirmity.

a. Suquamish Tribe’s Random Drug Testing Ordinance

In 2001, the Suquamish Tribe’s General Council, the entire membership of the Tribe, enacted a Drug Testing Ordinance requiring all elected Tribal Council Members to take a drug test.\textsuperscript{253} A sparse document, the Ordinance noted that the General Council “has made clear it’s [sic] desire to see a drug and alcohol free Tribal Council. . . .”\textsuperscript{254} The Ordinance stated that “the Tribal Council shall obtain a Level I drug test within 24 hours and randomly thereafter.”\textsuperscript{255} “Level I drug test” was not defined, nor was “randomly thereafter.” The Ordinance provided, “[A]ll testing shall be performed by an accredited agency outside of the tribal Organization.”\textsuperscript{256} The Ordinance did not indicate who should select the “accredited agency,” who should “accredit” the agency, or who should employ and pay for the agency’s services. The Ordinance provided that “all test results shall be reviewed by the Suquamish Tribal Chairperson and held in the strictest confidence [and that] [a]ll positive test results shall result in an immediate vacancy pursuant [to the Suquamish Tribal Constitution].”\textsuperscript{257}

The Ordinance’s obvious loopholes—allowing the Council to choose its own drug testing facility and allowing the Chairperson to review his or her own drug tests—rendered it completely invalid long before a single urine sample was taken. A member of the General Council and a major sponsor of the Ordinance brought suit to compel the Tribal Council to comply, but withdrew

\textsuperscript{252} Id.
\textsuperscript{254} Id. ¶ 3.
\textsuperscript{255} Id. ¶ 4.
\textsuperscript{256} Id. ¶ 6.
\textsuperscript{257} Id. ¶ 7.
her complaint when the defendants moved to dismiss on the basis that it amounted to an unreasonable search and seizure.\textsuperscript{258}

The General Council had intended to invoke the "special needs" exception by mentioning the symbolic aspect of drug testing tribal leaders.\textsuperscript{259} Many tribal councils and committees utilize the same lexicon of symbolism when they enact drug testing for tribal government employees. The Tribal Council never implemented the Ordinance on advice of its General Counsel and the suit to enforce the Ordinance was dropped after a motion to dismiss was filed. Since the Suquamish Tribe's drug testing ordinance, with all its loopholes and palpable constitutional infirmities, is no more than a straw man, discussion of more detailed and carefully crafted drug testing policies is in order.

b. Ho-Chunk Nation's Random Drug Testing Policy

The Ho-Chunk Nation enacted its random drug testing policy in 1995.\textsuperscript{260} The policy subjects all tribal government employees to "random unannounced drug testing."\textsuperscript{261} The Ho-Chunk Nation Legislature stated that the Ho-Chunk Nation has a "vital interest in maintaining a safe, healthy, and efficient working environment..."\textsuperscript{262} According to the legislature, the use of drugs poses a "serious health and safety risk to the user, as well as other employees..." and poses an "unacceptable risk to a safe, healthy, and efficient work environment."\textsuperscript{263} The legislature only implicitly raised the health and welfare of tribal members:

The Ho-Chunk Nation recognizes that its own well-being and future success as a Nation and as an employer are dependent on the physical, mental, and emotional health of its employees. Accordingly, it is the right, obligation and intent of the Nation to maintain a safe and healthy work environment to protect its

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\begin{itemize}
\item \textsuperscript{258} See Notice of Motion and Motion to Dismiss at 12–14, Pratt v. Suquamish Tribal Council, No. 01-0207-C (Suquamish Tribal Court 2001).
\item \textsuperscript{259} See Suquamish Tribe General Council, Drug Testing Ordinance ¶ 3 ("[The General Council] has made clear it's [sic] desire to see a drug and alcohol free tribal Council...").
\item \textsuperscript{261} 6 HCC § 5.VI(7)(a).
\item \textsuperscript{262} 6 HCC § 5.VI(1)(a).
\item \textsuperscript{263} Id.
\end{itemize}
employees, property, equipment, operations, goodwill, and customers.\textsuperscript{264}

The Ho-Chunk Nation did not identify an employee drug problem justifying the imposition of random drug testing. In fact, the Ho-Chunk Nation's legislature failed to identify any drug problem at all. Furthermore, the legislature did not make an express finding that, absent drug testing, health, safety, and workplace, efficiency would decline. It appears the legislature assumed that random drug testing justifies itself. Suspicion is unnecessary. Such an assumption would not be uncommon among tribal leaders and employees as many drug testing policies are enacted without serious examination of the benefits or disadvantages. Tribal council members perceive that random drug testing has become a norm in American workplaces and so believe it should become a norm in American Indian workplaces. Accordingly, many tribes attempt to incorporate the practices of non-Indian corporate employers in pursuit of increased productivity and efficiency.

Like the random drug testing policies in \textit{Bangert v. Hodel},\textsuperscript{265} the Ho-Chunk Nation’s policy fails to establish a compelling, public safety-related justification. The legislature did not identify a drug problem with its employees, as demanded by the Supreme Court in \textit{Skinner}\textsuperscript{266} and \textit{Von Raab},\textsuperscript{267} nor did the Nation identify a harm caused by its employees, particularly those in non-safety-sensitive positions, as demanded by the Court in \textit{Vernonia}\textsuperscript{268} and \textit{Earls}.\textsuperscript{269} Thus, the policy most closely resembles the one that the Supreme Court struck down in \textit{Chandler}.\textsuperscript{270}

Although the Ho-Chunk Nation’s drug testing policy is a much more detailed piece of legislation than the Suquamish Tribe’s Ordinance, it still contains a few internal inconsistencies that render the policy constitutionally infirm. Employees who fail a drug test will be placed on probation and required to enter the Employee Assistance Program (EAP).\textsuperscript{271} The policy also requires

\begin{thebibliography}{99}
\bibitem{264} 6 HCC § 5.VI(1)(b).
\bibitem{270} Chandler v. Miller, 520 U.S. 305 (1997).
\bibitem{271} 6 HCC § 5.VI(13)(c).
\end{thebibliography}
that new employees pass a drug screening when they begin employment. And, if an employee has never had an initial drug screening and tests positive on a random, unannounced drug test, that employee will be terminated. The last provision appears intended to cover employees who had been hired prior to the enactment of the drug testing policy and who would not have been subjected to an initial drug screening as a result. However, those employees would appear to have an equal protection claim under the Indian Civil Rights Act because the legislature treats them differently than employees hired after 1995, when the drug testing policy was initiated. Moreover, employees hired before 1995 may have a contractual right to employment without random drug testing because they agreed to a previous version of the employee manual or handbook.

Additionally, the Ho-Chunk Nation’s policy further violates its tribal government employees’ freedom from unreasonable searches and seizures. Public employees have a reasonable expectation of privacy in their workspaces. Nonetheless, the policy allows the employer to “conduct unannounced searches for illegal drugs or illegal controlled substances on the Nation premises.” Despite the existence of the policy, however, tribal government employees still have a civil rights cause of action against their employer in the event the employer attempts to exercise the “authority” to conduct an unauthorized search of an employee’s belongings to look for drugs. The employees are, after all, office workers who often decorate their

272. See 6 HCC § 5.VI(6)(c).
273. 6 HCC § 5.VI(7)(f).
274. See generally Brodie v. Gen. Chem. Corp., 112 F.3d 440, 443 (10th Cir. 1997) (reasoning that implied-in-fact exception to at-will doctrine would be meaningless if employers were allowed to modify implied-in-fact employment contract unilaterally). See also Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999). The Demasse court states:

ITT argues that it had the legal power to unilaterally modify the contract by simply publishing a new handbook. But as with other contracts, an implied-in-fact contract term cannot be modified unilaterally. Once an employment contract is formed—whether the method of formation was unilateral, bilateral, express, or implied—a party may no longer unilaterally modify the terms of that relationship.

Id. at 1144 (citations omitted).

275. See O’Connor v. Ortega, 480 U.S. 709, 715 (1987) (“Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.”); see generally James Baird et al., Public Employee Privacy: A Legal and Practical Guide to Issues Affecting the Workplace 50–54 (1995) (discussing employer’s limited justifications to search in the workplace).
276. 6 HCC § 5.VI(12)(a).
277. See Rossi v. Town of Pelham, 35 F. Supp. 2d 58, 64 (D.N.H. 1997) (holding that
offices as they would a bedroom or a living room in their own homes. The privacy interest in the office space is substantial and would be considered seriously by a federal court. The Ho-Chunk policy allows for the “Department of Justice Compliance Division” officers to conduct unannounced searches “at any time,” and without a search warrant. Although outside the scope of this Article, these warrantless searches of tribal government employees, their offices, and their personal belongings—all justified by the need for a “safe, healthy, and efficient working environment”—appears to violate the rights of tribal government employees.

c. Little River Band of Ottawa Indians’ Random Drug Testing Policy

In 2002, the Little River Band of Ottawa Indians adopted a random drug testing policy. The policy states: “Any person employed by the Little River Band of Ottawa Indians may be tested at random for utilization of [drugs] . . . .” Employees who test positive are required to enter “counseling or rehabilitation and thereafter refrain[] from using illegal drugs.”

278. 6 HCC § 5.VI(12)(d).
279. 6 HCC § 5.VI(12)(c).
280. 6 HCC § 5.VI(12)(d).
281. Interestingly, the policy excludes peyote use and will not discipline an employee for using peyote. The policy states:

The use, possession, and/or transportation of peyote by Native American Church members in connection with the practice of the Native American Church (NAC) ceremony will not be considered to violate this Policy. The employee, contract service provider, or elected or appointed Official will not be subject to disciplinary action on the basis of such use, possession, or transportation in connection with the practice of the NAC.

6 HCC § 5.VI(3)(b). It is likely that few non-Indian workplaces would include such a provision, but this provision does not rectify the constitutional infirmity of the policy.
283. Id. (Random Testing section).
284. Id. (Finding of Drug Use and Disciplinary Consequences section).
The Little River Band of Ottawa Indians provided absolutely no justification for the imposition of the drug testing policy. The policy merely states the tribe's desire "to better carry out its responsibilities to its members through identification of and assistance to those employees, if any, whose use of illegal drugs on or off duty impairs and impedes their performance of their job responsibilities." Thus, the tribe candidly admits that there might not be a single employee with a drug problem. As such, there is no legally recognizable justification for the policy. Upon challenge by an employee, the policy is likely to be vacated, much like the Ho-Chunk Nation's policy above.

d. Symbolism Over Public Safety

Most tribal random drug testing policies appear to be vulnerable to challenge. Under federal case law, mere symbolic acts may not justify the type of search and seizure that is typical of drug testing. When adopting a random drug testing policy for all tribal government employees, tribal councils focus on the policy as a symbolic act. The actual purpose of many random drug testing policies is not only to have tribal government employees maintain a drug free existence, but also to set a responsible example for all tribal members.

In order for a governmental employer to show a "special" or "compelling need" that justifies the intrusion of random drug testing on individual privacy, it must show some plausible and direct threat to public safety. However, tribal councils rarely make an express finding that tribal government employees have a drug problem. Similarly, there is usually no finding that tribal government employees generally are in positions where they may be on the front-line of drug interdiction or would be tempted by bribes or threatened with violence. Also, there often is no finding that the symbolic act of testing tribal government employees would help to reduce drug abuse on the reservation. Finally and most critically, public safety often is not implicated in

285. Id. (Purpose section) (emphasis added).


289. Even in such a circumstance, random drug testing is likely unconstitutional. In Knox County Educ. Ass'n v. Knox County Bd. of Educ., the Sixth Circuit struck down a random drug testing scheme of public school teachers who acted, in some ways, as front-line drug warriors at local schools. 158 F.3d 361, 383–84 (6th Cir. 1998).
tribal drug testing policies. The drug abuse of tribal government employees working in administrative office environments, for example, does not raise direct public safety questions.

Tribal government employees are the least likely candidates on the reservation to abuse drugs. Most are office workers, which, according to the Supreme Court, are the types of workers whose drug abuse will be detected by their employers. Most tribal government employees do not carry weapons or operate heavy machinery, so danger is not at issue. Contrary to popular belief, tribal government employees generally are not drug users. Because of the constant vigilance of their co-workers, their supervisors, and, most importantly, their Indian clients, it would be well-nigh impossible for a tribal government employee to carry on a sustained and damaging drug addiction.

The selection of all or most tribal government employees for random drug testing is analogous to the Department of Interior's selection of twenty-five percent of its workforce that was declared unconstitutional in Bangert v. Hodel. If one further takes into consideration Louchart v. Mashantucket Pequot Gaming Enterprise, the constitutional weaknesses of all-inclusive random drug testing schemes are highlighted. In Louchart, the court articulated a rule that is useful for analyzing tribal constitutions, especially those with many of the same prohibitions as articulated in the Bill of Rights: "where no tribal 'custom or tradition has been argued to be implicated . . ., [tribal courts] will look to general U.S. constitutional principles, as articulated by federal . . . courts, for guidance. . ." Indians—especially those who continue to follow the traditional ways—consider their personal privacy to be at least as sacred as other Americans. As such, it seems likely that tribal courts would take the

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290. One federal district court recently stated: "Public safety has been the primary justification for each case in which suspicionless drug testing has been upheld." Marchwinski, 113 F. Supp. 2d at 1140.
291. See supra note 221 and accompanying text.
293. See Rothstein, supra note 108, at 91–92 ("[B]etter supervision and performance review in general may be more effective than drug testing in improving productivity, and it may cost less."). The Tenth Circuit recently agreed that "the general day-to-day scrutiny that [workers] experience in the workplace serves more of a deterrent effect than [a drug] testing scheme." 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068, 1074 (10th Cir. 1998).
295. 27 Indian L. Rptr. 6176 (Mash. Pequot Tribal Ct. 1999).
296. Id. at 6179.
traditional protections of personal privacy into consideration when analyzing a random drug testing policy and give greater scrutiny to the greater intrusion.

The attempt by tribes to reduce drug and alcohol abuse in Indian Country through drug testing of its employees is laudable but ultimately misguided. In sum, a policy of randomly drug testing tribal government employees (1) does not reduce employee drug or alcohol abuse or deter drug abusers from using; (2) does not reduce employee accidents or increase employee productivity; (3) does not reduce drug or alcohol abuse on the reservation; (4) violates employees’ rights under the Indian Civil Rights Act; (5) costs more in direct and indirect costs than it saves; (6) is not mandated by federal law; and (7) reduces morale amongst tribal government employees. Moreover, using random drug testing to fight a war on drugs creates additional, more insidious problems, such as assimilation into non-Indian culture.

IV. TRIBAL GOVERNMENTS SHOULD NOT ADOPT THE WAYS OF THE CONQUEROR

Not so long ago, the Bureau of Indian Affairs (BIA) engaged itself in an ill-informed display of paternalism by involving its employees in the everyday activities of Indians. Felix S. Cohen described how BIA superintendents told BIA police on the Blackfeet Reservation to force the Indians to stop playing stick games after six o’clock and go to bed early.\textsuperscript{297} Modern tribal councils are populated with many Indians who have the personal experience of dealing with the federal government’s brand of paternalism—they should not do the same to their own constituents.

The war on drugs, declared by every president since Ronald Reagan, is a fight that Indians and Indian tribes should work very hard to keep away from the reservation. Although no tribe will be able to keep the Border Patrol, the Drug Enforcement Agency, and the Federal Bureau of Investigation off the reservation, and many tribes in Public Law \textsuperscript{280} states will not be able to keep the state officers away, a tribe’s internal affairs,\textsuperscript{299} especially employment in tribal government, can and must be controlled by the tribe. Since tribes have the power to implement their own customs and traditions to prevent drug and


\textsuperscript{298} 18 U.S.C. § 1162 (2000); see supra note 66 and accompanying text.

\textsuperscript{299} See generally Williams v. Lee, 358 U.S. 217 (1958) (holding that the states may not interfere with the right of reservation Indians to make their own laws and be governed by them).
alcohol abuse and addiction, it makes no sense to adopt the ways of the conqueror.

It must be understood that random drug testing has been successful in some arenas, most notably the U.S. Armed Forces. In 1971, the Army finally admitted that the vast majority of soldiers had used illegal drugs during the Vietnam War. With the election of President Reagan, the declaration of the war on drugs, and the rise of the “zero-tolerance” attitude toward drug use, the military adopted mandatory drug testing. The drug testing scheme was a success in large part because of the advent of the all-volunteer force and the end of the draft:

Where the military brass had been wary of cracking down during the early years of the all-volunteer force, [Secretary of Defense Caspar] Weinberger recognized that the all-volunteer force actually allowed the military to take a strong stance. During the draft, drug use was an easy way for soldiers to rebel against an unpopular war and an unpopular military. But the all-volunteer force changed the nature of soldiers. Now, soldiers joined the military because they wanted the job, the career, and the skills. In the new world of the all-volunteer force, the risk of losing a desirable career surpassed the transitory lure of recreational drug use.

The experience of the U.S. military is not readily translatable to tribal governments because of acute differences between the institutions. First, there is no evidence that tribal government employees have problems with drugs and alcohol that are similar to those plaguing the military of the early 1970s. Second, tribal government employees are not required to handle arms or military-style equipment. Third, the military is the military, where a positive drug test can mean “[d]raconian” punishments, such as dishonorable discharge and prison time. Fourth, there are serious constitutional concerns that are likely to preclude the random drug testing of employees without probable cause. Finally, and most importantly, Indian tribes are not paramilitary organizations. A great many tribal government employees choose to work for


301. See id. at 34 (“But in 1971, according to the Army’s own surveys, nearly 15 percent of enlistees had taken hallucinogenic drugs while on tour in Vietnam, nearly 23 percent had used heroin, 20 percent had used opium, and 60 percent had used marijuana.”).

302. See id. at 35.

303. Id. at 36.

304. Id.

305. See supra Part III.
the tribe over other public and private sectors and could more easily leave the folds of tribal government than serious, career-minded military personnel. Imposing difficult working conditions for no appreciable practical benefit drives away talented and educated people who really want to work for their tribes.306

Aside from the military and its very specialized context, drug testing is certain to fail. Initially, "few, if any, scientific, peer-reviewed studies demonstrate the effectiveness of workplace drug testing in reducing employee drug abuse and improving safety and productivity."307 Drug testing does not work in most non-Indian employment circumstances and surely would not work for a tribe with a majority-Indian employee roster. As one commentator put it, "[w]orkplace drug testing was, for the most part, a doomed attempt to impose a technological solution on a non-technological problem."308 Indians do not rely on technology to solve their problems, nor should they try to use technology to address a problem that the tribe is uniquely unqualified to assist.

Drug testing represents a form of judgment and stigma that is far removed from Indian cultures. Though it is folly to generalize about the hundreds of Indian tribes in the United States, many tribes have utilized a system of governmental decision-making that emphasizes the building of a consensus over the majority-rule concept.309 Indians traditionally have not utilized the form of investigation, interrogation, trial, and retribution exemplified by the failure of due process during, for example, the Spanish Inquisition,310 the executions of Leopold and Loeb,311 and the interrogation of Ernesto Miranda.312

306. See supra notes 112–13 and accompanying text.
308. Id. at 89.
310. Justice Black invoked the notorious Spanish Inquisition in a case discussing the merits of a public trial:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial.

In re Oliver, 333 U.S. 257, 268–70 (1948) (footnotes omitted).
In contrast, Michigan Indians recall a different tradition:

The following story offers insight into the values of some Indians today. Two Indian elders who had a beadwork display in a museum noticed a little white girl stealing two [art pieces] valued at five dollars apiece. After conversing in Indian, they decided to let the little girl go and not make a commotion. Afterwards one elder rationalized their decision. "But you see, you can't say, 'Now you stop that' or 'You put it down'. We musn't do that! It's not right. Do you know why? Now suppose you done something to me and I would stop you and I would force you and there were all strangers here. What would they think about you? Right away, I'd spoil your name wouldn't I? I musn't do that. I don't believe in it. Just look at the people who would have looked at you, say what you had done, you see. I would be blackening your name right now. We try to live peacefully with everybody. Indians are peaceful people."313

311. Justice Douglas wrote, concurring with the decision of the Supreme Court to declare capital punishment unconstitutional:

There is the naive view that capital punishment as "meted out in our courts, is the antithesis of barbarism." . . . But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised.


312. The Supreme Court decided Ernesto Miranda’s cases along with three others, all of which had these same basic facts:

[L]aw enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn’t shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him.


313. The Tree That Never Dies, supra note 121, at 144.
Tribes now employ this form of justice—focusing on the avoidance of the retributive form of punishment—in bodies such as Peacemaker Courts and Drug Courts. The form of healing that must take place in Indian Country to stem the onslaught of alcohol and drug abuse and addiction is not going to come from the conqueror, but from inside the tribes themselves. As Justice Blackmun wrote in dissent in the Smith case, “symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,” . . . cannot suffice to abrogate the constitutional rights of individuals. The goal of eradicating drug abuse from Indian Country is laudable but should not be accomplished by “sacrificing the life of the Constitution” in the war on drugs.

As a practical matter, many tribes are investing heavily in their capacity to attain economic self-sufficiency. Some tribes have adopted non-Indian manufacturing and industrial corporate structures. These forms simply do not work particularly well in Indian Country because Indian tribes are not hierarchical corporate bodies—they are tribal governments. Imposing the same form of rigid structural control over working conditions that private companies do—such as random drug testing—does not succeed with tribes. In order for a tribal government to succeed economically (outside of a hugely successful gaming enterprise), it must treat its workers well:

314. Peacemaker Courts, first created by the Navajo Nation, are “a new kind of court system that blend[s] traditional [tribal] methods of mediating disputes with regular court operations.” James W. Zion, The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New, 11 Am. Indian L. Rev. 89, 89–90 (1983). See also Howard L. Brown, The Navajo Nation’s Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum, 57 Disp. Resol. J., July 2002, at 44 (describing the Peacemaker Courts in the Navajo Nation, as a well-utilized and successful exercise of dispute resolution; suggesting that as the Navajo judiciary continues to use and develop these dispute resolution mechanisms, other Indian nations and non-Indian societies should take the opportunity to observe, learn from, and practice their methods); Nancy A. Costello, Walking Together in a Good Way: Indian Peacemaker Courts in Michigan, 76 U. Det. Mercy L. Rev. 875 (1999) (describing how the success of the Navajo Peacemaker Court gained national recognition by the federal government and inspired the revival and formalization of the traditional tribal justice systems of other indigenous peoples); James Zion, Navajo Therapeutic Jurisprudence, 18 Touro L. Rev. 563 (2002) (describing Navajo therapeutic jurisprudence and role of “peacemakers”). Peacemaker courts have spread throughout Indian Country and are acquiring legitimacy in the eyes of the dominant culture. See, e.g., Bowen v. Doyle, 880 F. Supp. 99, 126–27 (W.D.N.Y. 1995) (rejecting claim of Peacemaker Court bias).

315. See supra notes 56, 77 and accompanying text.


A stable and cohesive tribal workforce is, in turn, key to tribal economic development. It is not in tribes' best economic interests as sovereigns to subject their employees to employment practices and policies that are perceived by employees as unfair or arbitrary. Employees who perceive they or others have been treated unfairly are not likely to participate productively in the workforce or, for that matter, in tribal government as a whole. Unfair treatment of tribal employees will deter outsiders from dealing with the tribe, for fear they will be treated no better.\textsuperscript{318}

Random drug testing demonstrably reduces worker morale through the imposition of a suspicion- and judgment-based employer/employee relationship. Such a relationship severely detracts from productivity and efficiency in tribal government operations, effectively derailing budding economic development initiatives in Indian Country before they start.

In the 1980s, reviewing the years of "militant" Indian activism, one commentator wrote that there is a "crisis in tribal government."\textsuperscript{319} The commentator argued that the federal government had imposed a European form of democratic government on Indian tribes that, although well-suited for Europeans and their descendants, might not work as well for Indian tribes.\textsuperscript{320} It is safe to say that tribal governments remain in crisis nearly twenty years later. A glance at Indian news sources on any given day is likely to identify infighting within many tribes.\textsuperscript{321} Though random drug testing appears unlikely to foment the kind of rebellion and hostility every tribal government fears,\textsuperscript{322} the atmosphere of suspicion between tribal councils and tribal government employees created by random drug testing does not help.


\textsuperscript{320} See id. at 135 ("To many Indian people, especially those who have knowledge of their traditional tribal value systems, democratic elections more often than not create artificial elites who then rule more or less in an arbitrary manner.").


\textsuperscript{322} See generally Porter, supra note 309, at 120–21 ("After decades of stable, but relatively insignificant government, the weakness of the [Seneca] Nation's government in the modern era has generated factionalism, instability, and civil war."); id. at 99 ("One of my primary concerns is... the cause of the crippling division and distrust of tribal government now observed in many Indian nations.").
While the federal government and private sector employers test only employees in safety-sensitive positions, tribal governments often go further and randomly test the entire tribal government employee roster.\textsuperscript{323} The non-Indian ways of fighting the drug war—historic and modern—failed,\textsuperscript{324} so why continue and even expand the policy? A tribal council takes a drastic step when it chooses to drug test its employees. It is nothing less than adopting the retributive and judgment-laden system of the conqueror. It amounts to propagating judgment and stigma instead of understanding and respect. It delegitimizes tribal governments by encroaching on civil rights and by generating public resistance.\textsuperscript{325}

Most insidiously, drug testing, in the eyes of both non-Indians and Indians, creates a perception of legitimacy for the myth of the “drunken Indian” by incorporating the bad federal anti-drug policy into Indian Country.\textsuperscript{326} Adopting these types of policies effectively creates ruin in place of the possibility to rebuild and to exercise tribal sovereignty and self-determination:

While the “drunken Indian” myth is not the reality, the reality is that the myth exists as a powerful force in federal Indian policy. The myth has perpetuated alcohol problems because, in its theory and practice, the myth interferes with solutions. Tribes challenge this prejudice in both Washington D.C. and in Indian country. The reality, on the other hand, demonstrates that solutions come and will continue to come from tribes that reach beyond the myth to govern and lead their people. But the tribes battle largely without federal

\begin{itemize}
\item \textsuperscript{323} See, e.g., supra note 259 and accompanying text.
\item \textsuperscript{324} See supra Part IV.
\item \textsuperscript{325} As Porter states:
\begin{quote}
Legitimacy is a terribly important requirement for governmental effectiveness. As Russel Barsh has explained, for any government to be effective—that is, “to make things happen”—it must have adequate power, resources, and legitimacy. Legitimacy is defined as “public confidence in and support for the government” that “can arise from the way leaders are chosen, the extent to which they respond to public wishes, whether they succeed in satisfying public expectations, and whether they respect human rights.” With legitimacy, resources and power are enhanced; without it, “leaders must work against public resistance, and expend more power and resources to get things done, if at all.”
\end{quote}
\item \textsuperscript{326} See Porter, supra note 309, at 99 (quoting Russel L. Barsh, Aboriginal Self-Government in the United States: A Qualitative Political Analysis, A Report to the Royal Commission on Aboriginal Peoples 11 (June 1992)) (emphasis in original).
\end{itemize}
resources that were promised through treaties and laws by the very
protector that actually persecutes them with the myth.\textsuperscript{327}

Every tribe is a laboratory of experimentation in favor of self-
determination and the preservation of traditional tribal values, and no other
governmental body is more capable than a tribe's own leadership.\textsuperscript{328} Every tribe
can learn from one another at conferences, pow-wows, and ceremonial
gatherings, and through other forms of professional networking. It bears telling
that no tribe has declared its random drug testing policy a huge success in
reducing drug and alcohol abuse and addiction on the reservation or in the
workplace. With all of the anti-drug experiments already succeeding in Indian
Country, it makes no political, cultural, or economic sense to give up, take the
easy route out, and adopt harmful and unsuccessful non-Indian anti-drug
policies.

Above all, respect and love form the archetype of Indian relationships.
Unlike the non-Indian community, where it is understood without comment that
respect and love stop at the front door to the office building or the factory,
Indians do not acknowledge that restriction. Indian tribal governments should
not either. To adopt the ways of the conqueror is no more than blatant abuse of
power.\textsuperscript{329}

\textsuperscript{327} \textit{Id.} at 298.

\textsuperscript{328} As Miller & Hazlett state:

\begin{quote}
Compared to the federal government's dismal track record in federal
Indian alcohol policy, Native Americans are far more qualified and
motivated to address the reality. The surest road to recovery from the
drunken Indian myth in federal policy is for the federal government to
support and allow tribes and Native Americans to take the lead in
directly formulating and carrying out the solutions.
\end{quote}

\textit{See id.} at 298. \textit{Cf.} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J.,
dissenting) ("It is one of the happy incidents of the federal system that a single courageous
State may, if its citizens choose, serve as a laboratory; and try novel social and economic
experiments without risk to the rest of the country."). \textit{quoted in} Chandler v. Miller, 520 U.S.

\textsuperscript{329} Consider Porter's argument:

\begin{quote}
Not surprisingly, the transformation of Indigenous tribal government as a
result of American colonization has had a number of effects on the
manner in which contemporary tribal governments function. One of the
most critical changes, in my view, is the manner in which power has
been redistributed within Indigenous societies through the disruption of
the traditional method of checks and balances. For some Indigenous
nations, there was a radical transformation from a decentralized form of
government where power was widely shared, and thus inherently
CONCLUSION

We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" Society come to life.  

Drug and alcohol abuse and addiction are a serious problem within Indian Country and without. The non-Indian culture, following the lead and directives of the Reagan and first Bush administrations, experimented with randomly testing many workers in safety-sensitive positions for drug use. These drug testing policies survived most constitutional challenges. According to the Supreme Court, the characteristics of a valid drug testing scheme include a plausible and tangible threat to public safety—a compelling governmental interest—that justifies the intrusion into a worker's individual privacy. Drug testing of workers involved in safety-sensitive positions is valid for this reason under the Fourth and Fourteenth Amendments. However, many Indian tribes have adopted drug testing schemes that randomly test all tribal government employees, regardless of whether those employees are employed in a safety-sensitive position. Indian leaders adopting these drug testing policies often justify the imposition on personal privacy by citing the unprecedented levels of drug and alcohol abuse and addiction in Indian Country.

Tribal councils and committees should seriously weigh the pros and cons of random drug testing of its employees and not rely on perceived quick political gains through acts of symbolism. The advantages of drug testing—creating the appearance of a hard-line stance against drug and alcohol abuse on the reservation—are vastly outweighed by its shortcomings: failure to follow traditional methods of healing and cooperation; direct and indirect monetary costs; ravaged worker morale; and the strong likelihood that drug testing does not reduce drug and alcohol abuse. There is an additional practical cost to Indian tribes. Often, tribes are located far from urban population centers and do not have the necessary resources to lure many talented employees. Random drug testing has rarely, if ever, served to recruit talented employees to a particular employer. Moreover, tribes can lose talented employees like my

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checked, to one in which power was concentrated in a handful of individuals with little or no accountability to their people.

Porter, supra note 309, at 98–99.

former co-worker John either through draconian zero-tolerance policies or simply by driving them away.

The indirect social and political costs to Indian tribes also outweigh any benefits to drug testing. A tribal government is not a federal or state government. They are unique in that tribal leaders are not separated from their constituents by distance, race, and class. They are often direct relations of many of their constituents or otherwise know them personally. Tribal governments are municipalities, national governments, and cultural preserves all in one. Whatever the imperfections of these bodies—and there are many—they function effectively only through utilizing an approach focusing heavily on respect and cooperation. Drug testing is the polar opposite of respect and cooperation and simply cannot work in Indian Country.

Migwetch.

\textit{Maetchi-ginoonitiwaugwaen}

\textit{Onauminauh, n'nitawaeh}.\textsuperscript{331}

\textsuperscript{331} (On those who malign one another/I will use my medicine.) Basil Johnston, Ojibwe Ceremonies 103 (1982).