WAMPUM, BUFFALO, AND TALIBAN:

How embracing lessons on violence and negotiation from the American Indian Wars will help end the War in Afghanistan

By Jon McClurg, Brigham Young University, J. Reuben Clark Law School

---

1 By analyzing negotiation from these two tragic conflicts, the author risks offending those who infer such analysis conflates the moral position of the respective causes, actors, and outcomes. This is not the intent. The two conflicts provide a unique context in which to analyze several key elements of negotiation. The author hopes the analysis provides a thoughtful and respectful homage to the victims of the two conflicts; that future generations may learn from the mistakes of the past, and not repeat them.
Introduction:

In the early morning hours of May 1, 2011, Navy SEALs radioed from a compound in Abottabad Pakistan to inform their commanders that “Geronimo” had been killed. Using that code name for Osama bin-Laden, was both ironic and revealing. While the Obama administration asserted there was no malice intended in using the name, some Native American groups were understandably upset about one of their cultural icons being used for such a macabre purpose. Regardless of the intent, the administration’s reference to Geronimo indicates an almost subconscious assertion of startling and insightful parallels between America’s longest war, and the current conflict in Afghanistan.

Foremost among those parallels are the challenges associated with seeking a negotiated settlement between the belligerents. The Afghan War has changed substantially since “Geronimo’s” death in 2011, with both sides signaling a desire to engage in peace talks. Such a reversal is a stunning move considering the cost in blood and treasure to both sides. If similar instances during the American Indian Wars are any indicator, the move towards negotiating an end to the Afghan War is a development presenting both incredible opportunities and pitfalls for the participants, their respective militaries, and civilian populations.

---

3 Geronimo was the leader of Chiricahua Apache warriors who refused a negotiated peace and life on a reservation. He waged a brutal guerilla war on both sides of the U.S./Mexican border before his capture in 1886.
4 The leader of al-Qaeda, infamous fugitive, and mastermind of the 9/11 Terror Attacks.
6 Peter Maslowski, The 300-Years War, in BETWEEN WAR AND PEACE: HOW AMERICA ENDS ITS WARS 133 (Matthew Moten ed., 2011). Although most Americans think of Vietnam as America’s longest war, if taken as a whole the conflicts between the United States and the indigenous peoples of the American continent spanned over a hundred years, and culminated in a far more shocking death toll.
8 Jonah Blank, How to Negotiate like a Pashtun; A field guide to dealing with the Taliban, FOREIGN POLICY, (June 3, 2013). At the peak of the Afghan War the U.S. was expending $100 billion dollars a year to keep 100,000 military personnel operating in the country.
Impediments to negotiating an end to the War stem from the complex multicultural differences, political factors, and respective bargaining positions of the United States and the Taliban. Those impediments are more easily mitigated if considered within a broader context of historical examples from the American Indian Wars, and the tenets of Principled Negotiation. Principled Negotiation provides a working strategic foundation for how to approach negotiations during ongoing violence, and examples from the Indian Wars help provide tactical instruction on how to succeed in solving complex conflict.

I. The Role of Violence in Principled Negotiation:

To be successful, negotiators approaching the conflict in Afghanistan will first have to decide how to strategically engage the ongoing violence plaguing the parties. This is not a new issue; in fact, it has been debated since the Afghan War’s beginning in 2001. But how, at this stage, do negotiators try to talk to the Taliban while bombings, kidnappings, and assassinations are being carried out in the country? Almost anyone trying to approach peace talks would be challenged not to ask: “What the f--- are we doing here?”

In October 2001, as the U.S. began bombing Taliban targets in Afghanistan, Roger Fisher and Robert Mnookin sat down at Harvard’s Center for Negotiation for a debate on whether the U.S. might want to pursue negotiation with the Taliban. While Fisher and Mnookin’s debate was designed to answer whether to negotiate or not, their arguments actually revealed a much

---


10 Jeff Stein, Donald Trump’s Desire to ‘Get the Hell Out’ of Afghanistan amid Taliban Gains Could Lead to Catastrophe, NEWSWEEK, (Sept. 9, 2018). In the summer of 2017, U.S. President Donald Trump allegedly responded to his national security advisor’s presentation about a new military strategy in Afghanistan by simply asking “What the f--- are we doing there?”

11 ROBERT MNookIN, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT. 3 (1ST ed. 2010).
deeper philosophical tension on a foundational theoretical question: is violence a part of negotiation, or is it an end to be avoided through negotiation? In order to ensure success in the peace process, those seeking to negotiate U.S. interests need to decide which theory of violence is more compelling.

In the 2001 debate, Fisher spoke first to present his argument on the options available to the United States. Fisher advocated as he had many times previously, that negotiation and peace talks should always be pursued. In his writings, Fisher counsels those considering war that the decision to negotiate “depends on the alternative.” Deciding on the scope of alternative options is important because, “war offers no guarantee of results better than could be achieved through other means.” Fisher advocates analyzing parties’ BATNA, or the Best Alternative to a Negotiated Agreement. It is beneficial for parties to evaluate and identify their BATNAs, and how they engage with the anticipated outcomes from commencing negotiations or military operations. But if war is to be pursued, Fisher championed not abandoning the context of the negotiated relationship with the opposing side. “Violence,” Fisher argues, ”is intended to change the other side's BATNA, or their perception of it, so that they will more readily agree to our terms for peace.”

By taking such a stance, Fisher advocates for a position with provocative philosophical and strategic implications. In Fisher’s construct, all interactions between opposing parties

---

12 Id.
13 Id. Fisher thought “that President Bush was wrong to issue an ultimatum and that the Unites States should accept the Taliban’s invitation to negotiate. His argument was consistent with his view, that one should always try to resolve conflict through a problem-solving approach to negotiation based on the interest of the parties.”
14 Fisher, supra note 9, at 167.
15 Id.
16 Id. at 105. BATNA is a tenet of Principled Negotiation involving the process of “inventing a list of actions you [might] take if no agreement is reached; improving some of the more promising ideas into practical alternatives; and selecting tentatively the one alternative that seems best.”
17 Id. at 167.
(including inflicting violence on one another) can be interpreted within a fluid state of negotiation. To Fisher, violence against another human being (or another state) serves as a tool in negotiation to manipulate the recipient’s calculus regarding their BATNA. This seems callous without the contextual background of Fisher’s theory, which is that negotiation’s ultimate goal (including while inflicting violence) is to facilitate peaceful problem solving among parties that meets their respective interests as human beings. By espousing such a paradigm, Fisher is saying the best chance for success is to not categorize parties’ actions into a bimodal construct of either pursuing non-violent negotiation or violent war. To Fisher, it’s all negotiation! Viewing war through the lens of BATNA constantly orients parties in conflict to the goal of a non-violently negotiated peace.

Mnookin responded to Fisher’s advocacy by rejecting the idea that negotiation is always an option, or must be considered. Instead, Mnookin argued the decision to go straight to war in Afghanistan seemed reasonable when evaluated for traps or fallacies that impede wise decision making on when to negotiate. In his writings, Mnookin points to human neurology as the greatest impediment in making a good decision between war and negotiation. To Mnookin, humans have two reasoning modes: intuitive reasoning (automatic responses relating to feelings and emotion), and analytical reasoning (conscious, deliberate, or rational thought). Both create problems in evaluating options, or “traps” that result in an erroneous choices between fighting

---

18 This argument raises the question of whether in Fisher’s construct human beings are even capable of “choosing” to participate in actions constituting violence or negotiation, and if instead their decision is limited to simply whether they “engage” with the other side. Such ontological musings are probably beyond the scope of this paper, but worth examining in future discourse.

19 Mnookin, supra note 11, at 3.

20 Id. Mnookin argues the U.S. BATNA in 2001 was a good one; there was a strong possibility of success of the military campaign to shut down terror training camps. There was only a slim chance an agreement meeting the needs of both parties could be carried out. The costs for negotiation would include an undermining of the credibility of the U.S., and the chance any delay would allow the terrorists to escape.

21 Id. at 17
and negotiating. While the “intuitive system picks up nonverbal cues and makes rapid appraisals,” it is also “quirky and selective about data, [which] can lead to mistaken conclusions.” While the analytical system is disciplined and systematic, “it may not always yield a clear answer, [and] and may miss the forest for the trees.” Embracing either reasoning mode too exclusively or extremely will lead to a flawed choice. Before electing to negotiate or not, Mnookin advocates parties ensure good decision making by engaging in a self-evaluation with both reasoning modes.

Mnookin’s process utilizes a vastly different philosophical context compared with Fisher’s. In Mnookin’s theory, violence does not fit as a part of negotiation. While Fisher sees violence on a spectrum of negotiable acts, Mnookin explains negotiation and violence as the options our two reasoning modes are competing to resolve. This distinction is significant because in Mnookin’s world, a party applying violence to the other side would be seen as choosing between negotiation and war. In Fisher’s context however, both sides may pursue violence and negotiation simultaneously to achieve peace. Whether to embrace either a Fisher or Mnookin paradigm regarding violence is an extremely important strategic decision when negotiating during conflict.

Case studies from the American Indian Wars highlight the implications of embracing these theories at the strategic level. In 1867 the United States Congress sought to end a conflict which engulfed the Northern Plains and the Sioux Nation known as Red Cloud’s War.

---

22 Id. at 19-20, Traps that inhibit negotiation when it should actually occur include things like Tribalism, Demonization, Delumanization, Moralism, Zero Sum Fallacy, Call to Battle, and Fight/Flight. Traps that incorrectly promote negotiation when it should be eschewed include Universalism, Contextual Rationalization/Forgiveness, Rehabilitation and Redemption, Shared Fault, Win-Win, Appeasement, and Calls for Peace.

23 Id.

24 Id.

25 Id. at 20. Mnookin identifies one of the most compelling reasoning traps affecting the decision to negotiate as the “Fight/Flight Trap.” In his explanation of the trap, “negotiation” is substituted for “flight.”

Congress sent a Peace Commission to negotiate with their Sioux adversaries, in the hope it might facilitate removing the Native population to reservations. The Commissioners’ strategy in approaching violent projections by Red Cloud and his warriors (an application of what we can now identify as Fisher’s theory of violence) was a key contributor to the peace process’s success.

Red Cloud’s War was arguably the most successful Native American military operation in history. The Army’s campaign against Red Cloud was costing “the government nearly $1 million dollars for every Indian killed. Many [in Congress] feared that unless they acted quickly the current operations would burden the treasury for nearly $100 million before the end of [1867].” Given the difficult military position, General Ulysses Grant ordered local commanders to begin conceding to Red Cloud’s demands for the U.S. to abandon forts along the Powder River, and closing the contested Bozeman Trail to settler traffic. In light of these proposed concessions, the Peace Commission began to negotiate with Sioux chiefs at Fort Laramie to end the conflict. But Sioux chief Red Cloud refused to participate.

Red Cloud wasn’t buying the Commission’s message. He sent word to the Commissioners that “when we see the soldiers moving away, and the forts abandoned, then I will come down and talk.” The U.S. complied, and began abandoning the trails and contested fortifications. Upon their abandonment, Red Cloud and his warriors rode into the forts and

---

27 Boyd Cothran & Ari Kelman, Opinion, How the Civil War Became the Indian Wars, THE N.Y. TIMES, (May 25, 2015). This conflict included the infamous Fetterman Massacre in which over 80 U.S. troopers were killed. U.S casualties inflicted by Native warriors during Red Cloud’s War were only exceeded by Custer’s disaster at the Little Bighorn.
28 This figure, when adjusted for inflation, translates to a conflict at least as costly in treasure to the American taxpayer as the War in Afghanistan.
29 Kerry R. Oman, The Beginning of the End: The Indian Peace Commission of 1867-1868, 22 GREAT PLAINS QUARTERLY, 42 (Winter 2002). Grant wrote to Sherman: “I think it will be well to prepare at once for the abandonment [of the forts,] and to make all the capital with the Indians that can be made out of the change.” This likely constituted the only time in history the U.S. directly conceded the demands of a Native American leader during an active military operation. The stance is even more remarkable considering Grant’s campaigns during the Civil War, in which he was renowned for his grueling tactics of attrition.
30 Id. at 43.
31 Id. at 44. Not unlike similar demands from the Taliban that U.S. troops be removed from Afghanistan before meaningful negotiations to end the broader conflict take place.
burned them to the ground. They did not however, appear afterwards for negotiations.\footnote{Id.} The Commissioners held out hope Red Cloud would talk, and pressed on working peace deals with other Sioux tribal elements who made themselves available.\footnote{Id. at 46.} Red Cloud however, continued violent attacks against U.S. targets throughout the late summer. The Commission was dissolved that fall, but left a copy of the proposed peace treaty with the garrison at Ft. Laramie should Red Cloud ever arrive.\footnote{Id.} Finally after the fall hunt, Red Cloud and over a hundred of his warriors rode into at Ft. Laramie to make peace. Although the Commission had already left, after reading the treaty Red Cloud signed his name and ended the War.

Applying the lessons from Red Cloud’s War shows how Fisher’s theory provides a strong strategic-level foundation for negotiating interests. Had the Commissioners working with the Sioux been grounded in Mnookin’s theory, they may have been less willing to interpret Red Cloud’s behavior in a way that allowed for continuing negotiation. The Commissioners may have been tempted to instead close negotiations with Sioux leaders when Red Cloud failed to appear, or treat the continued raids and fort burnings as a call to renewed war with the entire Sioux nation. They certainly would not have left terms negotiated by other Sioux leaders as the final proposal for Red Cloud to sign. But the Peace Commission exercised patience, and saw the continued aggressions for what they were: an attempt to ensure the Army’s compliance by demonstrating the cost of the BATNA (continued military operations). The Peace Commission’s ability to stay focused on the negotiation process, and see the violent projections by Red Cloud within the context of the ongoing talks, ensured the peace processes’ success.

\footnote{Id.}
\footnote{Id. at 46.}
\footnote{Id.}
Just as Fisher’s theory was helpful in ending Red Cloud’s War, the negotiation landscape to end the Afghan War will require a similar philosophical alignment. This is not just because the Taliban, like Red Cloud, is unlikely to stop fighting overnight. Fisher’s theory is also useful because it is more easily reconciled with “high-context cultures,” polychronic time systems, and traditional Afghan approaches to negotiation. Afghan culture is a “high-context” culture, or a culture in which the way something is said is much more important than the substance itself. This means rather than relying solely on the negotiator’s spoken words to understand intent, Afghans will likely understand a conveyed message by interpreting the relationship the speakers have when delivering a message. Fisher’s theory is useful in such an environment because language and understanding in “high-context” cultures are as fluid as the relationships between the speakers. Another reason Fisher’s theory is useful when applied to Afghan culture is their polychronic system of time. In polychronic cultures, time perception is flexible, and “several issues, private and personal, may take place along parallel time lines.” Interpersonal relations dictate “the way time is spent” and “schedules are not followed closely.” A negotiator from a monochronic culture (like the U.S.) who operates under Mnookin’s theory could easily find themselves frustrated with polychronic negotiating partners. However, Fisher’s theory allows for flexibility in dealing with polychronic constructs, where Taliban stakeholders may feel that they can pursue some peaceful objectives via talks, and wartime objectives via violent actions.

35 Edward T. Hall, BEYOND CULTURE 91, 1976. American anthropologist Edward T. Hall developed a scale for categorizing cultures’ reliance on the context in which verbal statements are delivered.
37 Annie Lowrey, How Osama bin Laden Escaped, FOREIGN POLICY, (Dec. 11, 2009). And in Afghanistan, allegiances can shift quickly. Distrust and fluctuating relationships between U.S. Special Operators and Afghan militias likely played a role in failing to seal off escape routes from bin Laden’s mountain fortress of Tora Bora to Pakistan, which protracted the conflict indefinitely. Hall, supra note 35, at 91-131. Hall delineates cultures as either operating within a polychronic or monochronic system of time.
38 Karrer supra note 36, at 4.5.
40 Id.
41 Id. A time system in which schedules are rigid, “time constraints are inflexible and override interpersonal concerns.”
Finally, the way in which Afghan tribes traditionally negotiate\textsuperscript{42} is vastly similar to the system in which Red Cloud operated. In Afghan tribal negotiations, deals are not transactions; they are a relationship-based memorialization of the status-quo.\textsuperscript{43} Furthermore, the Afghanistan’s demographic reality and tribal structure mean there are many fragmented groups representing the population as a whole.\textsuperscript{44} As was seen with Red Cloud, this likely necessitates negotiating with some groups while sustaining attacks from others.

While Fisher and Mnookin both present compelling theories regarding violence’s role in negotiation, and both may have merit in different contexts. Fisher’s violence theory from Principled Negotiation ultimately provides a stronger strategic foundation for negotiations with the Taliban. Unfortunately, orienting U.S. representatives on how to deal with the strategic framework for talks is simply a first step. They will then face a complex process for engaging in talks, and the tactics they employ will determine whether those talks are fruitful.

II. **Tactical Keys to Successful Negotiation from the American Indian Wars:**

U.S. negotiators in Afghanistan will face a difficult set of tactical issues, even after developing a strategic framework based on Fisher’s model for dealing with the violent context in which Afghan negotiations take place. Dissonance between the parties’ cultural values, negotiation styles, and multiple stakeholders are just a few. Negotiators representing the U.S. interests in Afghanistan benefit from the historical examples from the American Indian Wars. That chapter in American history is instructive for negotiators seeking to end an extremely

\textsuperscript{42} Karrer \textit{supra} note 36, at 4.1. A code of conduct called \textit{Pashtunwali}.

\textsuperscript{43} Id. at 4.6.

\textsuperscript{44} Richard Barrett, \textit{Talking to the Taliban}, FOREIGN Policy, (Aug. 20, 2012). The Taliban themselves are not a homogenous movement. The “older Taliban hands, many of whom were only in their twenties when they held power in the late 1990s, have grown wiser. They recognize their mistakes and understand Afghanistan cannot be ruled…[by] fundamentalist Islam…in [2018] any more than Marxism could be imposed…in the 1970s.”
bloody and expensive war. Like the War in Afghanistan, the American Indian Wars waged for decades, were fought with immense cruelty, between vastly different cultures, and in an environment where negotiations were particularly challenging.\textsuperscript{45} Examining the mistakes and lessons from negotiators in that terrible conflict help instruct modern negotiators seeking to forge peace in Afghanistan through four key lessons.

**Navigating Tribal Traditions**

U.S. negotiators in Afghanistan should see from the American Indian Wars the importance of learning organizational and procedural differences associated with an opponent’s negotiation style. This includes relying on tribal traditions to build trust between unfamiliar parties, navigating tribal structure to create windows for finding compatible negotiation partners, and leveraging tribal negotiation traditions regarding consensus decisions.

The Native American tribal structure presented challenges, but also opportunities for opening doors to negotiation. U.S. negotiators frequently mistook chiefs with whom they interacted as having executive authority, while in fact the Native American tribal structure was a vastly more complex “ethnic reality.”\textsuperscript{46} The Sioux for example, employed a tribal structure with “Seven Council Fires.” Just one of these Seven “included the Brules, Two Kettles, Oglalas, Miniconjous, Sans Arcs, Hunkpapas, and Blackfeet Sioux.”\textsuperscript{47} Native American society was also highly individualistic; warriors and families were free to accept or reject their chief’s counsel.\textsuperscript{48} Unsurprisingly, when Sioux contingents took actions contrary to negotiated treaties, U.S.

\textsuperscript{45} As stated on the title page, by comparing these two instances from history the author in no way seeks to equate the causes of the conflicts, or the respective moral positions surrounding the motives and actions of the parties involved. However, students of alternative dispute resolution would be negligent to demur learning from the myriad of mistakes and the rare successes of negotiating in earlier conflicts; especially when, as in this instance, those two conflicts share many useful parallels.

\textsuperscript{46} Maslowski, supra note 6, at 133-134.

\textsuperscript{47} Id.

\textsuperscript{48} Id.
officials felt it better to wage war than to invest time seeking out allies within the Native American tribal structure who could effectuate compliance. When the U.S. finally committed to speaking with the Sioux to end Red Cloud’s War, they wisely eschewed talking with just the first person they found willing to sign a written agreement. They instead sent “chief catchers,” or individuals with knowledge of tribal structures, and worked for months to find key stakeholders to come to a peace conference.\textsuperscript{49} The Sioux leadership’s fluid structure meant once “chief catchers” began to have success, their efforts snowballed. Eventually the U.S. was able to interface with even Red Cloud himself.\textsuperscript{50} U.S. negotiators in Afghanistan need to similarly evaluate their tactics when dealing with Taliban fighters and key Afghan tribal leaders.

The Afghan model of tribal council is called a \textit{jirga}. A \textit{jirga} is a "grand assembly, an Afghan tradition dating back at least three centuries, which brings together elders and community leaders from across the land to discuss matters of major national importance."\textsuperscript{51} Like Native American tribal councils, \textit{jirgas} rely on oral advocacy and a deliberation process that can take days to reach a consensus decision (known as a \textit{jaba}).\textsuperscript{52} Not only does the deliberation process take days, but \textit{jirga} members are treated as equals while in conference.\textsuperscript{53} This may lead to opportunities for U.S. negotiators who choose to utilize the \textit{jirga} format because the equal-

\begin{footnotes}
\footnote{49}{Oman, \textit{supra} note 29, at 42. These chief catchers were usually mixed-race individuals and missionaries who had extensive relationships in the Sioux community.}
\footnote{50}{See also Hekmatyar returns to Kabul after 20 years in hiding, Al Jazeera, (May 4, 2017), https://www.aljazeera.com/news/2017/05/hekmatyar-returns-kabul-20-years-hiding-170504145123325.html (last visited Feb. 23, 2019). Notorious Afghan warlord Gulbuddin Hekmatyar made peace with the Afghan government in 2017 before many other Taliban leaders were willing to talk. He has since called for other “Taliban brothers” to engage in discussions to end the war.}
\footnote{51}{Greg Myre, \textit{Everything you Wanted to Know About an Afghan Loya Jirga}, NPR.com, (Nov. 21, 2013), https://www.npr.org/sections/parallels/2013/11/21/246536898/everything-you-wanted-to-know-about-an-afghan-loya-jirga. Jirgas are present at varying levels of society. Standing local jirgas govern villages all the way up to the Loya Jirga (or nationwide council) that can be called on an as-needed basis for issues affecting the entire nation. A Loya Jirga was convened after deposing the Taliban in 2001 to decide on Afghanistan’s new leadership, and one is currently scheduled to take place in February 2019 to decide on the Afghan government’s stances towards talks with the Taliban and U.S. See also Associated Press, Afghans to hold Loya Jirga meeting to discuss peace talks, ABC News, (Feb. 20, 2019), https://abcnews.go.com/International/wireStory/afghan-envoy-council-elders-discuss-peace-talks-61183449.}
\footnote{52}{Karrer \textit{supra} note 36, at 4.1.}
\footnote{53}{Id. at 1.3. This principle is called \textit{musawat} and denotes an ideal of egalitarianism between elders during conferences.}
\end{footnotes}
voice format leads to promoting trust between parties with different strength and credibility. The customary traditions for interacting within a *jirga* also promote trust building between unfamiliar parties. Typically, parties negotiating in Afghan culture begin with *salamec*, a cultural questioning procedure about the opponent’s family and loved ones that takes longer the more unfamiliar the parties.\(^{54}\) Once talks begin, the customary *melmastia* (hospitality) rules govern trust building through offering tea, never leaving guests alone, and never answering in frankly negative answers.\(^{55}\)

One important distinction between the Native American tribal council and the Afghan *jirga*, is that a *jaba* is considered binding on the participating parties. The Native American model challenged negotiators because culturally, members were free to challenge decisions made by chiefs. However, in Afghan tribal culture since the *jirga* “takes decisions by consensus, not vote,” a strong “propensity for compromise” exists in the decision making bodies.\(^{56}\) Customary law in Afghan tribes also allow for *nagha* (penalties or fines) on those who violate a *jaba*. Given the *jirga* tradition’s characteristics, U.S. negotiators can find multiple avenues for effective bargaining. The Afghan model of verbal interaction and customary rules to build trust provides low-cost avenues for reaching those the U.S. was previously fighting. If the U.S. can patiently navigate and invest in building relationships through *jirga* with its previous enemies, there are multiple opportunities to create productive dialogue with lasting compliance to end the conflict.

**Using Culturally-Translatable Options**

The second tactical lesson U.S. negotiators in Afghanistan need from the American Indian Wars is to use culturally translatable options. Principled Negotiation explains how parties

\(^{54}\) Id. 3.2. In a humorous way, Afghan culture mirrors American custom during *salamec*: the answer to every interrogatory is “well” regardless of the actual condition.

\(^{55}\) Id. at 3.3.

\(^{56}\) Id. at 1.3.
have interests, and present options during negotiation that represent those interests. Fisher, in his book *Getting to Yes*, explains how these principles operate: “Desires and concerns are *interests*. Interests motivate people; they are the silent movers behind the hubbub of positions.” An option is one possible manifestation of a party’s interest. Fisher explains how challenging it is for parties to invent “realistic options” that “appeal to the self-interest of the other.” If parties are unable to assess problems in a “detached” state of mind, they will experience an emotional reluctance to be concerned with anything outside their own immediate interests. This problem is compounded in negotiations where there are substantial cultural differences between the parties. In such talks, negotiators must translate their interests into options that are both linguistically *and* culturally understood by the other side. The U.S. negotiators’ failure during the American Indian Wars to provide culturally-translated options to their counterparts led to inefficient bargaining and subpar results. U.S. negotiators in Afghanistan should consider how to translate interests such as security and democracy into a culturally understandable options.

The keynote negotiations during the 1867 peace talks to end Red Cloud’s War provide a prime example. The talks began with U.S. Senator Henderson explaining the Great Father’s wish “to remove the Sioux to a reservation . . . where the United States would provide homes, schools, churches, teachers, agricultural implements, cattle, sheep, hogs, and other tools needed to make the shift to civilization.” The Kiowa Sioux leader Satanta rose to respond to Henderson. He began by saying first he was very upset with U.S. soldiers’ actions, expressed his love for roaming the prairie, and closed by expressing that being confined to a reservation without

---

57 Fisher, *supra* note 9, at 45.
58 *Id.* at 61.
59 *Id.*
60 Oman, *supra* note 29, at 40.
buffalo to hunt would disgust him. Over the next few days the Commissioners heard several more chiefs express similar sentiments like Satanta; the Sioux were eager for peace, but wanted to maintain a connection to the land and their ancestral traditions.

While the Commissioners were dumbstruck by the chiefs’ blunt assessment of the U.S. proposals, they nevertheless refused to amend the options to fit the Sioux cultural paradigm. Civilization for the Sioux revolved around a rich context of traditions including things like buffalo hunts, naming ceremonies, puberty rites, weddings, pipe smoking, and dances. Each tradition represented a piece of the Sioux interest in maintaining their heritage and livelihood. Consequently, the Sioux had no concept of what life without traditions like the buffalo hunt would bring. The Commissioners were unable to analyze the situation from a detached emotional state, and provide options that considered the cultural impact of ending the buffalo hunt. Rather than seeking to find a way to communicate culturally-translatable options, the Commissioners decided to avoid engaging in exploring the Sioux interests. They instead resorted to lazily bestowing copious amounts of gifts upon the Sioux delegation. This had the effect in the Sioux culture of creating a peaceful environment and expressing assent, but it allowed the Commission to side-step the Sioux interests, and get them to sign off on options they vehemently opposed. It is no surprise that years later, when the written agreement’s implications were finally understood by the signees, the Sioux were dismayed.

The Commissioners could have taken several alternative paths to avoid such ineffective bargaining. Because the Commissioners seemed to think “solving [the Sioux’s] problems was the

---

61 Id.


63 Oman, supra note 29, at 41.
[Sioux’s problem],” the Commission did not present options that would ensure the survival of the Sioux traditions.\textsuperscript{64} This resulted in focus on a series of options centered on farming, which were inconsistent with Sioux society’s foundations. The Commissioners should have invested time in translating the U.S.’s interest in reducing interaction between buffalo-hunting warriors and white settlers, into options the Sioux could understand. The Commission could have possibly explored the feasibility of establishing buffalo preserves on reservation land, or developing processes for hunts outside of reservation land that didn’t conflict with settler’s trails. Perhaps best yet, the Commissioners could have involved the Sioux by asking how best they thought the U.S. could help solve the buffalo supply problem on the reservation.\textsuperscript{65} Ultimately, the Commissioner’s lost sight of their goal to achieve peace by creating space between the differing ways of life, and instead became fixated on assimilating the Sioux into their farming culture; a way of life the Sioux resented.

Just as the Peace Commissioner’s struggled to understand there was no easy way to convey the idea of abandoning the buffalo hunt to the Sioux, the U.S. has struggled to convey its interests in Afghanistan into culturally translatable options. A key issue plaguing talks is the two parties’ understanding of the others’ interests in democracy and security. American sentiments associated with democratic rights are rooted in the U.S. Constitution, where rights like freedom of speech, religion, assembly, and due process are sacred. However, Afghans’ understanding of democratic rights are interpreted within a unique Islamic tradition. The differences between the two cultures leads to divergence in the application of those ideals.

\textsuperscript{64} Fisher, supra note 9, at 61. Fisher explains negotiators fall into a mindset trap when they seek to rationalize their failure to present options that would meet the needs of the opposing side.

\textsuperscript{65} See also CHRIS VOSS, NEVER SPLIT THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT 35 (2016). In his book, Voss advocates meeting difficult demands with questions; particularly the use of “How?” Instead of simply responding with a traditional “No” to a disagreeable proposition, “How” questions put pressure on the counterpart to “come up with answers and to contemplate your problems when making demands.” They are in essence, “gentle and graceful ways to say ‘No’ while guiding your counterpart to develop a better solution.”
Identifying the issues on which Afghans are most split can help identify U.S. interests that will need the most work to create culturally translated options. A Gallup poll exploring the differences surrounding Afghan attitudes on protections for freedom of religion, press, and speech found many insightful trends. Overall, most Afghans agree they want legislation based on Shar’ia Law, and to have Islamic clerics involved in the legislative process. Most Afghans also support constitutional clauses for freedom of speech and assembly, but not for freedom of religion. Afghans are also equally divided on questions surrounding equal rights and due process for women. To many Americans, such options are non-negotiable. However, like with the Sioux and the buffalo hunt, U.S. negotiators will need to explore culturally-translatable options reflecting this sentiment when engaging in talks with the Taliban elements. Unless the U.S. can devise culturally-translatable options regarding such social issues, their protection will be delegated to the regional Afghan legislative process.

Another interest where culturally translatable options are possible is security. The Taliban demand that “all foreign troops leave Afghanistan, that all prisoners be released, and that the international community recognize the legitimacy of the movement.” Clear demands like these highlight Afghan cultural sentiments against invaders and foreign occupation, and require creativity on the part of the U.S. Simply sticking to options demanding the maintenance of a force of U.S. military advisors in Afghanistan may not be the best route. If the U.S. is serious about preventing the return of al-Qaeda and other extremists to Afghanistan, negotiators will

---

67 Id.
68 Id.
69 Id.
70 Id. The Gallup Poll showed local leaders in Afghanistan enjoy a much higher rate of approval and confidence than their national government counterparts. Local governments may serve as a more representative and effective forum for enacting important protections for women’s rights, and have a higher chance their decisions are received as legitimate by the populace.
need to propose culturally-translated alternatives. One option might be to build relationships with neighboring Uzbekistan, and build replacement bases where U.S. troops were staged before the 2001 invasion. Another would be to negotiate a presence at the U.S. embassy in Kabul that allows for a substantial cohort of intelligence officials who can help monitor the Afghan security situation. Exploring these kinds of alternative culturally-translated options will help ensure the U.S. interest of securing Afghanistan from terror groups.

**Rely on the Power of Oral Advocacy**

Negotiators representing parties from different cultures often have to work around diverse expectations for procedures and compliance measures. These differences can either be an asset or detriment to the negotiators’ efforts to ensure both parties understand and keep the agreements made. One particularly complicating factor can be the inherent difference between “high-” and “low-context” cultures’ reliance on written and spoken communication. Native Americans lived in “an oral rather than a written culture…[to] them speeches, ceremonies, and gift exchanges at a peace conference were of greater importance than the written record…because they created a peaceful environment.”\(^{72}\) To U.S. negotiators however, “these rituals were only the prelude to a written agreement.”\(^{73}\) Most U.S. negotiators today working with the high-context Taliban would experience a similar divergence in expected reliance on written vs. oral communication and advocacy. Nevertheless, this difference, if leveraged correctly, presents opportunities for low-cost and organic compliance that will serve U.S. interests in the region.

---

\(^{72}\) Maslowski, *supra* note 7, at 134.

\(^{73}\) Id.
An example of how oral communication and advocacy can be used to generate organic compliance within a “high-context” culture is the 1811 debate between Tecumseh and Pushmataha. These two great Native American chiefs met before the start of the War of 1812 to discuss the Choctaw Nation’s diplomatic position. Tecumseh was a Shawnee chief who “formed an intertribal confederation to oppose land cessions to the United States.”\(^{74}\) Tecumseh realized that to succeed in resisting white settlers flowing into Indian lands, the tribes needed to stand as one. After Tecumseh failed to renegotiate treaties which had ceded more than 50 million acres to the U.S., he headed south to try and rally Native support for a military solution.\(^{75}\) One of his main goals was to secure the Choctaw warriors’ allegiance, which would be invaluable in any upcoming conflict.

The conference began with “hundreds of Choctaw warriors in attendance,” and Tecumseh rose to speak first.\(^{76}\) He “roused the young men to anger against the Americans, and many of them excitedly agreed to join [the cause].”\(^{77}\) Following Tecumseh’s impassioned speech, Pushmataha addressed the group. He calmly and eloquently made the case the U.S. forces were “far too strong and had almost inexhaustible resources and men. He argued that taking up arms against the United States was doomed to failure, and that all Indian nations that did so would inevitably lose.”\(^{78}\) For Pushmataha, a non-violent solution was needed. After the impassioned and forceful speech by Pushmataha in favor of cooperation with the U.S., the warriors “declined to follow Tecumseh,” who left the conference disappointed.\(^{79}\) The Choctaws went on to aid their


\(^{75}\) Id. at 905.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) Id.

\(^{79}\) Id.
American allies in victorious battles against the Creek Nation at the battles of Horseshoe Bend, and against the British at New Orleans.  

The challenges facing the U.S. military during the War of 1812 would have been exponentially more complex if Pushmataha had failed to persuade the warriors to keep the tribe’s peaceful diplomatic standing. Ironically, the oral compliance system of the Native Americans, which the U.S. negotiators held in such disdain, was a vehicle responsible for saving U.S. prospects in the southern states. The dedication to peaceful relations between the U.S. and the Choctaw was not upheld because of the force of some written agreement, but rather through the effective oral advocacy of a friendly (or at least pragmatic) partner.

Compliance with agreements between U.S. and Afghan parties is most likely assured through similar methods of persuasion and advocacy. Pitching this principle to “low-context” U.S. stakeholders will be difficult. Detractors would allege such a strategy means relying on the word of people who had duplicitously slain their brothers and sisters for more than a decade. Pushmataha saw success because an ongoing relationship with U.S. officials created a clear understanding of his BATNA. Similarly, ensuring Taliban fighters’ compliance will require cultivating long-term diplomatic relationships with Afghan tribal leaders. If the U.S. can build relationships with the key stakeholders in Afghan culture, there is hope of persuading “low-context” stakeholders to rely on oral compliance. However, building those relationships is highly dependent on who the U.S. chooses to send to negotiate.

Id. Ironically, after the War of 1812, Pushmataha found himself dealing with calls by the U.S. government to annex Choctaw lands in the South, and exile their people to what is now Oklahoma. Pushmataha went to Washington D.C. to negotiate for his people’s lands given their previous allegiance and sacrifices in the war against the British. He died before he could complete the talks, and was buried at Arlington National Cemetery with full military honors after a parade through the streets of the U.S. capital.
**Leverage Non-Professional Negotiators**

When two nations utilize non-professional\(^{81}\) negotiators to solve their differences it can lead to diverse solutions, and help bridge differences by finding more culturally compatible bargaining partners. This phenomenon of success with non-traditional diplomats is not new to the United States. Former New Mexico Governor Bill Richardson has been involved in negotiations with North Korea over a period of decades to help release U.S. citizens being held there.\(^{82}\) American attorney James Donovan was called upon repeatedly during the Cold War to help the U.S. government negotiate tense situations such as captured U2 spy plane pilot Gary Powers, and soldiers being held after the failed Bay of Pigs invasion.\(^{83}\) The Quaker Friendly Association’s experience with Native Americans in colonial Pennsylvania helps provide another archetype for the success non-professional negotiators can have in Afghanistan.

The Quaker Friendly Association was a group of Quaker citizens dedicated to bargaining with their Native American neighbors when the need arose.\(^{84}\) One of its first big tests came in April 1756, as war was brewing along the Pennsylvanian frontier. Delaware Indian\(^{85}\) war parties wreaked havoc by pillaging various colonial settlements throughout the Susquehanna River Valley that winter.\(^{86}\) White settlers sought to persuade the government in Philadelphia to declare war by parading through the streets with processions displaying the mutilated bodies of their slain comrades.\(^{87}\) As the Pennsylvania Assembly was preparing to publish a declaration of war

---

\(^{81}\) Non-professional in this context is meant to include negotiators who are not formally employed in an official capacity by the national entity they represent.


\(^{84}\) Robert Daiutolo, *The Role of Quakers in Indian Affairs During the French and Indian War*, 77 QUAKER HISTORY, 1 (Spring 1988).

\(^{85}\) Fixico, *supra* note 74, at 874. The Delaware Tribe (or Lene Lenape Indians) lived all along the Delaware River Valley, and had never been defeated militarily by the Dutch or Swedes who had previously tried to colonize the area before the British.

\(^{86}\) Daiutolo, *supra* note 84, at 5.

\(^{87}\) Id. at 6.
and scalping bounties, John Pemberton, a wealthy Quaker businessman and former Assemblyman, reached out to Pennsylvania’s Governor Morris.

Pemberton asked the Governor for permission to meet with Indian representatives who were then in Philadelphia before the scalping bounties went out. Governor Morris agreed, and Pemberton welcomed over twenty Quakers and Indian stakeholders into his home for a massive feast. The negotiators continued to meet over three days, and at the end of the talks, Pemberton gifted a large wampum belt to the Indian delegates to convey to their people. The Indians accepted the gift and agreed to further talks to end the hostilities. After conferring with their people, the Indians agreed to a conference with the Pennsylvanian government at Easton, so long as their Quaker contacts agreed to be present. That conference eventually settled the hostilities along the Susquehanna, and prevented violence spreading beyond the frontier. Had Pemberton and the Friendship Association (ordinary citizens in the community with few or no government ties) failed to step in to try and facilitate dialogue with the Indian representatives, the conflict likely would have escalated with disastrous results.

Several factors contributed to the Quaker negotiators’ effectiveness, including their investment in building trust through consistent interaction. The Quakers at Pemberton’s feast continued to interface with their Indian counterparts throughout the subsequent negotiations at Easton. During such talks, the Quakers were careful to employ trusted interpreters who could convey both the metaphors and ritual speech essential to conveying their interests in the Native

88 Id. at 7.
89 Id.
90 Jane Merritt, Quakers and the Language of Indian Diplomacy, in At the Crossroads: Indians and Empires on a Mid-Atlantic Frontier, 1700-1763. 210 (2003). “Indians customarily used strings and belts of wampum to perform and remember [peace] rituals and to send messages between communities. In many ways, wampum, being a record of formal council proceedings, served as written language and as a symbol of authority; similar to a commission, it gave an individual power to speak, and its form—color, size, and design— indicated its function.”
91 Daiutolo, supra note 84, at 8.
92 Id. at 10.
language.\textsuperscript{93} The Quakers also invested in learning the Native American negotiation model, where speakers could give discourses for hours or even days. Pemberton’s conference in Philadelphia lasted three whole days, and concluded with recognized Delaware peace tokens.\textsuperscript{94} The Friendly Association did this, not “because they admired these forms,” but because they understood speech-making or wampum’s role in “consensus formation” in the Native tribal councils.\textsuperscript{95}

The Association was also known to take part in more nuanced tribal procedures to ensure success. It was not uncommon for Association members to take part in pipe-smoking, cleansings, and ritual dances before beginning meetings with their Indian counterparts.\textsuperscript{96} The Friendship Association was also an effective vehicle for negotiation because of the autonomy it enjoyed from the Pennsylvanian government. While Governor Morris at times decried the Quakers as people who had “no prerogative in official business,” he could not deny their efficiency in bringing Native American bargainers to the table.\textsuperscript{97} The resentment with which the Quaker efforts were met by those in power is evidence the Association’s involvement helped dilute or filter pro-war voices in the government who would have derailed the peace process. Despite the government’s disdainful attitude towards the Association’s efforts, the Quaker’s skills and approach to the negotiation process achieved success where the government had failed.

The Quaker Friendly Association’s success gives hope to negotiators in Afghanistan, and provides a helpful archetype for the composition of a non-professional peace delegation. First, like the Quakers, the U.S. will still want to utilize prominent community members who have

\textsuperscript{93} Merritt, supra note 91, at 213. See also Stephanie Gamble, Treaty Negotiations with Native Americans, ENCYCLOPEDIA OF GREATER PHILADELPHIA, https://philadelphiaencyclopedia.org/archive/treaty-negotiations-with-native-americans (last visited Feb. 23, 2019). “While chiefs and colonial officials were key players, more often than not it was skilled orators who conducted negotiations, aided by interpreters. Metaphorical language, compelling voice and gestures, and command of an audience were all key to being a skilled native orator.”  
\textsuperscript{94} Daiutolo, supra note 84, at 8. 
\textsuperscript{95} Merritt, supra note 91, at 214. 
\textsuperscript{96} Gamble, supra note 93, at 1. 
\textsuperscript{97} Daiutolo, supra note 84, at 8.
some experience in public service. The Trump administration took a good first step in this
direction, when earlier this year Zalmay Khalilzad was recalled to serve as a special envoy to
Afghanistan. 98 Like Pemberton, Khalilzad has served in previous diplomatic missions before
leaving public service. As an Afghan-American he is one of few in government who understands
both U.S. and Afghan interests. 99 The Friendly Association also enjoyed the participation of
business leaders (who were no doubt savvy negotiators in their respective industries). A modern
delegation might include people like Shahid Khan, the Pakistani-American billionaire owner of
the Jacksonville Jaguars, or Mansoor Ijaz, a Pakistani-American hedge fund manager who helped
negotiate between the U.S. and Sudanese government for information on bin-Laden. 100 Other
prominent Afghan-Americans like Professor Ali Ahmad Jalali 101 could bring credibility to the
delegation’s actions.

Of course just as the Quakers discovered, structuring a peace delegation with largely non-
professional negotiators presents its own set of issues related to autonomy from the government
principals. Opponents to this approach would argue it creates another layer of complexity
“behind the table” 102 which is inefficient and unnecessary. However, if such a peace delegation
were granted autonomy, it would more easily build trust and credibility with their Afghan and

98 Jonathan Landay & John Walcott, U.S. to bring back Khalilzad as special Afghanistan envoy: sources, REUTERS, (Aug. 22,
2018). Former U.S. ambassador to Afghanistan, Kahlilzad has worked for four U.S. presidents, and has extensive knowledge of
Afghanistan’s culture, languages and politics.
99 Id. Pundits assert Khalilzad’s appointment is evidence of a serious approach to jump-starting a peace process. While he has
previously been critical of key stakeholders in the region like Pakistan, he has personal relationships with Afghan President
Ashraf Ghani and other key members of the Afghan government.
100 Issam Ahmed, Who is Mansoor Ijaz? The US businessman behind Pakistan's Memo-gate, The CHRISTIAN SCIENCE MONITOR,
(Jan. 25, 2012).
Defense Institute who fought the Soviets in Afghanistan and “the author of several books, strategic analyses, and articles,
including a three-volume military history of Afghanistan and an analytical review of the Mujahideen war against the occupying
Soviet forces.”
102 ROBERT H. MNOOKIN ET AL. BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES. 178 (2d ed. 2000).
“Behind the Table” considerations involve the processes of making sure the effects of the deal are amendable to the stakeholder
or person whose needs the negotiator is working to represent. Such negotiations may be as challenging as those with the parties
“Across the Table.”
Taliban counterparts. Autonomy made the Friendly Association credible with the Delaware because it was able to transparently express interests, and honestly acknowledge missteps by the Pennsylvanian government.\textsuperscript{103} As Governor Morris discovered before publicizing the scalping bounties, trust between unfriendly nations is often best brokered between ordinary citizens.

III. “Real Victory Will Come in Negotiations” – Hope for the Future

A declassified U.S. State Department memo from late September 2001 shows the head of Pakistani Intelligence, General Mahmud Ahmed, made several attempts to convince Taliban leader Mullah Omar to accept U.S. demands to turn over bin-Laden.\textsuperscript{104} Before U.S. combat operations began, Gen. Mahmud wanted to make another attempt to reach Omar with several Pakistani religious leaders.\textsuperscript{105} He hoped to persuade Omar to see the validity of the U.S. arguments and begin shutting down the terror camps.\textsuperscript{106} The Taliban and Omar found themselves in a tough place. They needed to reconcile what they held were the obligations to their Afghan and Islamic tradition to not endanger guests seeking refuge, with the legitimate U.S. demands for justice after the worst terror attack in history.\textsuperscript{107} Mahmud thought, with a little more time, he could persuade Omar that the religious obligation to provide refuge in this instance was exempted. However, time was not on his side.

With the invasion imminent, Mahmud pled with U.S. officials to “not act in anger.\textsuperscript{108} Real victory,” he promised, “will come in negotiations.”\textsuperscript{109} Mahmud reasoned that convincing the Taliban to remove al-Qaeda would prevent bloodshed across the country. A war between the

\textsuperscript{103} Daiutolo, supra note 84, at 8.
\textsuperscript{104} U.S. DEP’T OF STATE, Case ID 200401242, MAHMUD PLANS 2\textsuperscript{ND} MISSION TO AFGHANISTAN, 1 (Sept. 23, 2001).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 2.
\textsuperscript{107} Karrer supra note 36, at 3.3. “The Pashto word ‘\textit{pana kawel}’ encompasses the Afghan value of unconditionally granting asylum, which ‘is considered a pious deed’ by Afghans. It is therefore for many Afghans a ‘religious affront’ to deny aid to those seeking asylum.
\textsuperscript{108} U.S. DEP’T OF STATE, supra note 121, at 2.
\textsuperscript{109} Id.
U.S. and the Taliban would undoubtedly end in Taliban defeat, but would plunge Afghanistan into “warlordism.” Such a collapse in Afghan structure would “produce thousands of frustrated young Muslim men. It [would] produce an incubator of anger that would explode.”

Such prophecies seem haunting to readers with hindsight. But it is not too late to implement Gen. Mahmud’s counsel. The Trump administration has signaled that talks, and not military action, will end the War in Afghanistan. While negotiators called upon to complete such a task will operate in a complex environment, their dilemmas are not without precedent. If the mistakes from the American Indian Wars are to be avoided, there are several points modern negotiators will need to remember. By aligning with Fisher’s view from Principled Negotiation on the role of violence, carefully analyzing and participating in tribal traditions, using culturally-translated options, and using non-professional negotiators, there may still be a chance to forge peace between two vastly different peoples. By learning from the past’s lessons, American negotiators can facilitate productive talks to save the lives of future generations in both countries. Ultimately, it requires negotiators work “hard until the end, the day when peace will return to our country and violence and hatred no longer claim the lives of both our countrymen.”

---

110 Id.
111 Id.
112 Mashal, supra note 8, at 1.
113 Courtney Tanner, *Afghan army pilot writes letter to the wife of slain Utah National Guard Major Brent Taylor*, SALT LAKE TRIBUNE, (Nov. 6, 2018). Afghan Army Major Abdul Rahman Rahmani wrote these words to the widow of Utah National Guard Lt. Col. Brent Taylor. Taylor was killed in Afghanistan by an insider attack on Nov. 3, 2018 just weeks before he was due to return home to his wife and seven children.