Unjustifiable Restitution

By Scott E. Peterman

And all the while, a strange and unusual guilt complex derived from notions of past treatment of native Americans by the "invading" Europeans clouds the ability of modern courts clearly to see and apply legal and equitable concepts to protect the unoffending landowners. There is with these Indian claims no better example of the oft-quoted maxim that hard cases make bad law.

From "When Fictions Take Hostages"
By Alan van Gestel

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PROLOGUE

"No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected."

Rhode Island v. Massachusetts, 4 How. 591, 639 (1846)
United States Supreme Court

Since the early 1970's, an almost silent but devastating barrage of legal battles and negotiated settlements have been occurring in many of the states on the eastern seaboard of America. Land claim lawsuits based on alleged violations of federal statutes known as the "Trade & Intercourse Acts" that, among other things, forbade the purchase of Indian lands without federal approval, have been filed by the Oneida Tribe of Wisconsin, Thames Band of Oneidas, Oneida Nation of New York, Passamaquoddy, Penobscot, Pamunckey, Gay Head Wampanoag, Narragansett, Mashantucket Pequot, Mohegan, Seminole, Miccosukee, Catawba, Aroostook, Micmac, Seneca, St. Regis Mohawk, Stockbridge Munsee, Schanghticoke, Mashpee Wampanoags, Chitimacha, Golden Hill Paugussett, and Cayuga Indian tribes against states. Employing a unique body of laws, today's courts have decided to hear cases based on alleged violations of federal law that occurred over 200 years ago. Even more incredible than the ability and willingness of our judicial system to resurrect these ancient claims, is its propensity to apply modern legal interpretations to ancient events and blatantly disregard the historical record.

In 1982 an attempt was made to legislate a resolution to Indian land claims based on violations of the Trade & Intercourse Acts. The bill was titled the "Ancient Indian Land Claims Bill," and was sponsored by Congressman Gary Lee, and Senators Alfonse D'Amato and Strom Thurmond. It called for a federal monetary formula to pay tribes with valid claims and the extinguishment of all Indian land claims six months after its passage. It was a good piece of legislation, but died in committee. A legal memorandum titled, "Response to Indian Counsel Memorandum Regarding the Alleged Constitutional Infirmities of The Ancient Indian Land Claims Settlement Act of 1982," with reference to land claim areas, read:

> "…the land has been occupied and developed by non-Indian landowners for nearly two centuries since the original transfers. During that time congressional electoral and judicial districts have included the lands now claimed by Indian tribes, federal post offices and other facilities have been constructed on the land, federal agencies have made or have guaranteed mortgage loans on property now subject to claims, and both Congress and the executive agencies of the federal government have in a myriad of ways treated the land as if the Indian title had been terminated on the date of the original transfer. Given the long history of the federal government's dealings with the land in a manner inconsistent with the Indian tribes' claimed interest, **it is unrealistic to believe that the courts would disregard the reality of federal governmental actions for almost two centuries**." (emphasis added)

Incredibly, the courts have chosen to totally disregard the reality of 200 years of federal governmental actions.

Before the 1974 U.S. Supreme Court decision, *Oneida Indian Nation v. County of Oneida* 414 U.S. 661, it was generally believed that the Trade & Intercourse Acts did not apply to purchases of land from Indian tribes by a state that had been one of the original thirteen colonies. This belief was held by both the Departments of Justice and the Interior. Indeed, judicial precedent supporting that position can be found in such cases as *George v. Pierce* 148 N.Y.S. 230 N.Y.Sup. (1914), *United States v. Franklin County*, 50 F. Supp. 152 N.D.N.Y. (1943) and *Seneca Nation v. Christie*, 126 N.Y. 122, 27 N.E. 275 (1891). Attorneys representing the federal government during the sitting of the Indian Claims Commission (1946-1978) employed defenses based on this "belief."

To Date, all but one of the resolved claims have been settled through negotiated settlements. The claim that was not resolved by a negotiated settlement, that of the Mashpee Wampanoags of

Massachusetts, was resolved by the courts, and the tribe lost its claim because of its inability to demonstrate its continuous tribal existence over time. In the State of Maine, some 12.5 million acres of land were claimed to be illegally taken by the state from the Passamaquoddy, Penobscot, and Houlton Maliseet Tribes, and a settlement of nearly $82 million, paid entirely by the federal government, was obtained by three tribes. The claims that remain unresolved are those within the State of New York and are currently seeking unimaginable levels of damages. A federal district court in Syracuse, New York recently awarded the Cayuga Indians nearly $248 million in a claim for some 64,000 acres of land. The State has appealed the decision, and the tribe has threatened to seek over one billion dollars in damages because of that appeal.

Monetary damages, land, and life estates[1] have been sought by the tribes. Private landowners have been, and presently are being sued by tribes seeking both eviction and damages. Incredibly, the U.S. Department of Justice has at times entered land claim litigation on the side of the tribes and sought identical remedies from private landowners.

Demonstrating an historic level of duplicity, the Department of Justice, in its amended complaint of 1998 in support of the Oneida tribes against totally innocent landowners, stated, "This amended complaint does not seek redress relating to lands within the 250,000 acres that are owned by the United States." While it was willing to help tribes obtain land and damages from the state, the Justice Department was not going to help the tribes "re-acquire" lands owned by the federal government, even though those lands were obtained from private individuals whose deeds, according to the Justice Department's complaint, were void.

Over the years, the federal government had purchased land within the land claim area from private landowners. At the time of purchase, it did not tell the landowners that they possessed bad deeds to their lands; indeed, it agreed that their deeds were without "encumbrances." Even more outrageous is the fact that the federal government continues to purchase land within the land claim boundaries even as land claim litigation is in progress.

By an act of Congress, signed by the President of the United States, Eisenhower College was named the National Memorial to former U.S. Army General and President, Dwight D. Eisenhower. When the college was absorbed by the Rochester Institute of Technology, the campus and its buildings became the property of the federal government. Later the government sold that land, along with the buildings, to the New York Chiropractic College. The college sits within the boundaries of the Cayuga land claim area. Was it the intent of Congress to place a national memorial on Indian land, and did the federal government sell Indian land to a private college?[2]

Largely funded by the federal government, the Native American Rights Fund (NARF) frequently assists tribes in financing their legal battles, and since the Department of Justice was also suing the landowners, the landowners were and are, in effect, actually paying the federal government and the tribes to sue them.

In the case of the currently ongoing Oneida land claim, some 26 "treaties" were entered into between the State of New York and the Oneida Indian Tribe over a period of 51 years. Only two

[1] A life estate is an estate held only for the duration of a specified person's life. In regard to Indian land claims, tribes have sought to take the property upon the death of the current owner.

[2] Hickman, Warren L., A Cayuga Chronicle, 1999. Hickman asks these questions.

of the 26 treaties appear to be able to demonstrate federal consent. During the 51 year treaty making period, the federal government knew about, participated in, and benefited from the land transactions between the state and the tribe. It took no action to stop the supposed violations of the Trade & Intercourse Acts, and it made no mention of any violations of the Acts in any of its congressional records of the period. Indeed, what little is revealed about the Acts by those congressional records leads one to conclude that the State of New York had not violated the Acts at all. Far from demonstrating outrage over repeated violations of federal statutes by states, the historical record reveals a deafening silence that is difficult to comprehend if one is to believe that the violations were actually occurring. Even if the new government had been too weak to enforce its laws, it would certainly have protested. The variability, from state to state, of state jurisdiction over Indian tribes and even from tribe to tribe within a particular state, as well as the ambiguity of the U.S. Constitution regarding Indian tribes, resulted in occasional bouts of congressional confusion, but there is simply nothing in the historical record to support the existence of rampant violations of the Acts by states.

These ancient claims, immune from any statute of limitations, can only be brought forth by Indian tribes armed with a unique and profoundly flawed body of federal Indian law that has evolved over the decades into what can accurately be described as legalized discrimination. Using this unique body of contemporary law to interpret ancient events, the courts have rendered rulings resulting in misplaced lawless conduct and monumental levels of unjustifiable restitution – not to mention the misery is has caused thousands of innocent law abiding citizens. It will herein be demonstrated that their rulings have ignored or misinterpreted the historical record, and are based primarily on judicial fiat and the misapplication of contemporary law to ancient events.

PART I

THE TRADE & INTERCOURSE ACTS

"Because of the persistence of traditional forms of tribal organization, and because of treaty arrangements with New York which preceded the Federal Constitution and special dealings with the state since that time, the various New York tribes have a peculiar status."

From Felix S. Cohen's, *Handbook of Federal Indian Law*

PURPOSE OF THE ACTS

The Trade & Intercourse Acts, inaccurately referred to as the "Nonintercourse" acts by today's courts, began their existence in 1790. The acts of 1790, 1793, & 1796 were in force for a term of two years and "from thence to the end of the next session of Congress and no longer."[3] The term of the 1799 Act was lengthened to three years, and the 1802 Act, no longer a temporary statute, remained in force, with occasional additions, until the enactment of the permanent 1834 Act. Today's Trade & Intercourse Act is section 177 of Chapter 5, under Title 25 of the United States Code. As stated in the title of most of the Acts, they were enacted "to regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers."

While "trade and intercourse" with the tribes was considered to be of real value to the federal government for a variety of reasons, "peace on the frontiers" was the primary purpose of, and impetus for, the enactment of the statutes. The emerging nation could ill afford Indian wars along its western frontiers. Prucha described the first act as striking directly at the current frontier difficulties and noted that the acts "gradually came to embody the basic features of federal Indian policy."[4] The Continental Congress of July 1787 realized:

> That it is apparent from every representation that unless the United States do in reality possess the power "to manage all affairs with the independent tribes of indians" to observe and enforce all treaties made by the authority of the union that a general indian war may be expected.[5]

Significantly, Reginald Horsman, a Distinguished Professor of History at the University of Wisconsin observed that at that point in time, "the Six Nations within American territory were in no position to present real opposition."[6] Horsman concluded that, "It was hoped that formal purchases of land would satisfy the Indians and that definite boundary lines would be established which the United States would guarantee to protect against its own citizens thus preventing incidents and wars. To effect this **a series of trade and intercourse acts were passed which attempted to maintain a strict control over the American frontier advance**."[7] (emphasis added)

As late as 1973, Professor S. Lyman Tyler was commissioned by the United States Department of the Interior to write an authoritative account of the history of federal Indian policy from colonial era to the present. In that account, Professor Tyler states that:

> Maintenance of peace and friendly relations was the first consideration of both Washington and Knox, but it was soon apparent that it took more than treaties to control the activities of those who resided on the frontier and regularly offended the Indians.

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[3] Actual wording of the 1790 & 1793 Acts.

[4] Prucha, Francis Paul, American Indian Policy in the Formative Years, Lincoln, Nebraska: University of Nebraska Press. 1962, page 45.

[5] Journals of the Continental Congress, XXXII, page 368.

[6] Horsman, Reginald, Expansion and American Indian Policy 1783-1812, University of Oklahoma Press. 1967, page 91.

[7] Ibid., page 171.

> The continuing requests from the executive branch for Congressional action to meet this problem were met by a series of laws "to regulate trade and intercourse with the Indians." While originally designed to implement the treaties and enforce their terms against the unruly action of non-Indians on the frontier, these laws gradually became the foundation upon which Federal Indian policy was established.[8]

Whatever purposes the acts may have acquired over the years, it is clear that their original intent was to maintain peace with the powerful independent tribes inhabiting the frontiers. Establishing good trade relations with those tribes would not only help to ensure the peace, it was hoped that by increasing the tribes' reliance on European technology, the tribes would slowly be integrated into American society.

"INDIAN COUNTRY"

Prucha credits the Articles of Confederation for clarifying one element of Indian relations:

> The concept of Indian Country was strengthened. Not only was the Indian Country that territory lying beyond the boundary lines and forbidden to settlers and to unlicensed traders;[9] but it was also the area over which federal authority extended. Federal laws governing the Indians and the Indian trade took effect in the Indian Country only; **outside they did not apply**.[10](emphasis added)

That this concept prevailed even after the ratification of the constitution is substantiated by U.S. Supreme Court Justice Baldwin in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Baldwin states, "The legislation of congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old congress and under the old confederation," and continued, "In 1802 congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations."

Significantly, the first designation of the boundaries of the Indian country in statute law was to be found in the Act of 1796. Professor Emeritus of History, Francis Paul Prucha, referring to the acts, writes:

> The fact that the law applied strictly only to the Indian Country - territory where the Indian title had not yet been extinguished - caused confusion and disruption, for the lines were not well marked and were only imaginary barriers that were freely crossed back

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[8] Tyler, S. Lyman, A History of Federal Indian Policy, U.S. Department of the Interior, Bureaur of Indian Affairs, Washington, D.C. 1973, page 39.

[9] Concerning the licensing of Indian traders within the State of New York, the Indian Agent for the New York Agency, D. Sherman, replied to the Commissioner of Indian Affairs on August 16, 1878 and wrote, "I have the honor to state that there have never been to my knowledge any licenses granted to white men to trade with the Indians of this Agency. The Indians in this Agency are pretty competent to trade for themselves in buying and selling personal property." National Archives Microfilm Publication #235, roll 595, Records of the New York Agency, frame 505.

[10] Prucha, Francis Paul, American Indian Policy in the Formative Years, Lincoln, Nebraska: University of Nebraska Press. 1962, page 31.

> and forth. Even the agents of the Indian department were not clear in their own minds about the distinctions of the law, and missteps in the enforcing of the law weakened their authority.[11]

In *Worcester v. Georgia* 35 U.S. 515 (1832), concurring U.S. Supreme Court Justice McClean stated, "It is true, New York extended her criminal laws over the remains of the tribes within that state, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the state of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime." Considered one of the foremost authorities on federal Indian law, Felix S. Cohen, in his "Handbook of Federal Indian Law," states:

> The Indian country at any particular time must be viewed with reference to the existing body of federal and tribal law. Until 1817 it is country within which the criminal laws of the United States are not generally applicable, so that crimes in Indian country by whites against whites, or by Indians, are not cognizable in state or federal courts, any more than crimes committed on the soil of Canada or Mexico.[12]

If we are to take Justice McClean at his word, we must conclude that the tribes within New York, by Cohen's definition, were not, by pre-1817 standards, considered to be within the "Indian country."

On a writ of error, the case *Veazie v. Moor* was heard by the Supreme Court of the United States in 1852. Mr. William Moor and Mr. Daniel Moor, Jr. had obtained a state grant for the exclusive right to navigate a portion of the Penobscot River wholly within the State of Maine for a period of twenty years if they agreed to complete certain improvements in the navigability of the river. It should also be noted that the Penobscot Indian tribe owned all the islands within that portion of the river. For navigating his steamboat within that part of the Penobscot River relegated to the Moors by the state grant, Mr. Samuel Veazie was arrested by an injunction granted at a suit brought by the Moors. Mr. Veazie lost in the state court, *Moor v. Veazie* 32 Me 343 (1850), and he appealed to the U.S. Supreme Court. Veazie claimed that the State of Maine had no right to grant the Moors exclusive navigation rights because the commerce clause of the U.S. Constitution grants such power to regulate commerce with both states and Indians tribes exclusively to congress. The Court ruled against Veazie stating:

> The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the States and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the States, or the management of the transportation upon and by means of such improvements.[13]

The Court also noted, and did not disagree with, the lower court in that "the constitution manifestly refers only to independent tribes with which the general government may come in conflict; not to those remnants of tribes scattered over the country, which are under State

[11] Ibid., pages 70-71.

[12] Cohen, Felix S., Handbook of Federal Indian Law. Buffalo, N.Y.: William S. Hein Co, copyright 1940 reprint of 1988, page 5.

[13] *Veazie v. Moor* 55 U.S. 568 (1852).

jurisdiction and guardianship." It is evident that, at this point in time, the U.S. Supreme Court clearly did not see the Penobscot Indians of Maine as either inhabiting the Indian country or being under the Trade and Intercourse Acts. Indeed, the Court seems to exclude the Penobscots from any federal jurisdiction that is derived from the commerce clause of the U.S. Constitution!

Today's courts have ruled that the Trade & Intercourse Acts were not intended to apply solely to the "Indian country," and that "by failing to use language restricting applicability of the Nonintercourse statute, Congress intended the statute to apply throughout the United States."[14] It is clear from the historical record that Congress used language in the acts that it deemed sufficiently restrictive to be understood at the time, and it is also clear that the acts were intended to be applicable in the "Indian country," whether within or without the territory claimed by states. Had the acts been applicable "throughout the United States," no delineation or description of the Indian country boundaries by the acts would have been necessary.

"SURROUNDED BY SETTLEMENTS" EXCEPTION

Introduced in the Act of 1793 was an interesting section that remained in succeeding acts until it was removed in the 1834 Act. Section 13 read:

> *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

The section was reworded into section 19 of the 1796 Act and read:

> *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

Commonly referred to by today's courts as the "surrounded by settlements" exception, the various interpretations of this section by contemporary courts demonstrate the unbelievable levels of absurdity that the courts are willing to embrace. The district court in *Narragansett Tribe v. Southern Rhode Island Land Development Corp*., 418 F. Supp. 798 (1976) ruled that the exception applied only to trade with individual Indians who had left their tribes and chose to reside in non-Indian settlements. In *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (1978), the district court accepted the *Narragansett* interpretation. In a letter to the United States Senate dated February 22, 1831, President Andrew Jackson, reporting on the enforcement of the Trade & Intercourse Act of 1802 interpreted the exception as applying to "Indian tribes," and wrote, "This provision I have interpreted as being prospective in its operation, and as applicable not only to **Indian tribes** which at the date of its operation were subject to the jurisdiction of any State, but to such also as should thereafter become so." (emphasis added)[15]

[14] *Mohegan Tribe v. State of Connecticut,* 638 F.2d 612, 2nd Cir. (1980).

[15] Journal of the Senate, Second Session of the 21st Congress, page 165.

The Second Circuit Court of Appeals however, in *Mohegan Tribe v. State of Connecticut* (1980), rejected the *Narragansett* and *Mashpee* view, and ruled that the exception was simply not meant to apply to Indian land transactions. Incredibly, it arrived at this view by noting that the land provisions of the Acts always remained distinct from those regulating trade and intercourse. That "land provisions" were within a "Trade & Intercourse" Act, seems to have totally escaped the court. Moreover, it is difficult to comprehend how the court could have totally discounted the use of the word "any" in the wording, "That nothing in this act shall be construed to prevent **any** trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States,"(emphasis added) Apparently the court, unlike the federal government of the 1700's, simply did not regard "land transactions" as either trade or intercourse.

Long before either the Narragansett, Mashpee, or Mohegan rulings, another court had considered the "surrounded by settlements" exception. In *Worcester v. Georgia* 35 U.S. 515 (1832), United States Supreme Court Justice McClean said of the exception:

> **To constitute an exception to the provisions of this act**, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a state; not only within the limits of a state, but within the common exercise of its jurisdiction. (emphasis added)

Justice McClean was undoubtedly alive when the first Trade & Intercourse Acts were enacted and from his contemporary position, it is clear that the exception does not distinguish between the various provisions of the act; that the Indian settlement, at the time of the act's passage, must have been surrounded by settlements of the citizens of the United States and within both the limits and ordinary jurisdiction of a state, were the important requirements which, once fulfilled, constituted an exception to all the provisions of the act. They are requirements that today's courts have either ignored or arbitrarily overruled.

In *Mashpee Tribe v. Town of Mashpee* (1978), District Court Judge Skinner, concerning the exception, stated, "the underlying policies of the act insofar as it relates to land, i. e., (1) to keep peace with the Indians, and (2) to prevent the Indians from becoming homeless charges, would apply with equal force to tribes surrounded by white settlements as to any other tribes." The contrast between Justice McClean's 1832 view and that of District Court Judge Skinner's 1978 view is nothing short of astounding.

The concern of the federal government over Indians becoming "homeless charges" is clearly demonstrated by President Washington's April 10, 1792 response to Bishop John Carroll's request for an appropriation of funds to provide Catholic priests for Indian tribes, including tribes within the State of Massachusetts. As to "those who dwell in the eastern extremity of the United States, are, according to the best information that I can obtain, so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections. Any application therefore relative to these Indians, for the purposes mentioned in your memorial, would seem most proper to be made to the Government of Massachusetts," wrote Washington. At the time of Washington's letter, lands that were to become the State of Maine were part of the State of Massachusetts; yet, tribes in both states received awards in the 1980's from negotiated settlements of lawsuits based on those states' alleged violations of the Trade & Intercourse Acts. While on the subject of Indian tribes in the states of Massachusetts and Maine, it should be noted

that the U.S. Supreme Court, referring to the Penobscot Indian tribe of Maine, noted that this "tribe always have been, and now are, under the jurisdiction and guardianship of the State of Maine."[16]

Cohen, describes the Section 13 "exception" of the 1793 act as specifying "that Indians within the jurisdiction of any of the individual states shall not be subject to trade restrictions."[17]

Similarly, Professor S. Lyman Tyler's description of the new provisions of the 1793 act leaves no doubt concerning the interpretation of the "surrounded by settlements" exclusion; he writes:

> The new provisions of the 1793 act prohibited settlement on Indian lands and authorized the President to remove such settlers; dealt with horse thieves and horse traders; prohibited employees in Indian affairs from having "any interest or concern in any trade with the Indians;" provided for the furnishing of various goods and services to the Indian tribes; and **specified that Indians within the jurisdiction of any state should not be subjected to trade restrictions**.[18] (emphasis added)

Again, it should be noted that this interpretation was also that of the Department of the Interior as well as that of the Secretary of the Interior, Rogers C. B. Morton since it is expressed in a work that the department under Morton commissioned and endorsed.

Were the State Reservations in New York considered to be "surrounded by settlements of citizens of the United States," thereby satisfying the "surrounded by settlements" exception? On March 3, 1795, Congress passed an act appropriating fifty thousand dollars for the purpose of trade with the Indians in order to improve the harmony between the tribes and the United States. The act was considered to be an "experiment" in trade with the tribes and was to be treated as a temporary trial measure. Secretary of War Timothy Pickering reported to the vice president and the Senate on the measures being taken for implementing the act and chose the "Southern tribes" with which to "make the experiment." Among those considered, the Six Nations of New York as well as the tribes of the northwest of the Ohio river were excluded. Pickering stated:

> The situation of the Six Nations, surrounded either wholly by the settlements of citizens of the United States; or, on one side by them, and on the other, by the British of Upper Canada; and by both in near neighborhoods; seemed to exclude them from the experiment proposed to be made, of commencing a trade on the principle of furnishing cheap supplies to the Indians: for the familiar intercourse between them and the whites, would have subjected the public to continual impositions, against which no checks were provided.[19]

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[16] *Veazie v. Moor* 55 U.S. 568 (1852).

[17] Cohen, Felix S., Handbook of Federal Indian Law, page 70.

[18] Tyler, S. Lyman, A History of Federal Indian Policy, U.S. Department of the Interior, Bureau of Indian Affairs, Washington, D.C. 1973, pages 40-41.

[19] American State Papers: Indian Affairs, vol. 1:583-584.

Pickering's choice of words, "surrounded… by the settlements of citizens of the United States" immediately invokes the "surrounded by settlements" exception clause of the Trade & Intercourse Acts. Based upon Pickering's exclusion of the Six Nations, and his particular choice of words, it is reasonable to conclude that the reservations within the State of New York were indeed exempt from the provisions of the acts.

Evidence revealing the inapplicability of the acts to New York Indians appears in unlikely places. In *U S v. Joseph* 94 U.S. 614 (1876), a U.S. Supreme Court decision dealing with the Pueblo Indians, the Court decided whether the Pueblo, after the acquisition of New Mexico by the United States, were a tribe whose lands fell within the meaning of Section 11 of the Trade & Intercourse Act of 1834. The Court stated, "At the time the act of 1834 was passed there were no such Indians as these in the United States, **unless it be one or two reservations or tribes, such as the Senecas or Oneidas of New York, to whom, it is clear, the eleventh section of the statute could have no application**." (emphasis added)

"STATE" RESERVATIONS

Were State Indian reservations considered to be in the "Indian country" within which the Trade & Intercourse Acts applied? In his most recent book, Francis Hutchins writes, "In 1790 for example, the term 'Indian reservation' referred to state-regulated tracts, many of which had been originally established by colonial legislatures in the seventeenth century. Federally protected tribal hunting grounds in 'Indian country' and state-protected 'Indian reservations' were separate legal categories."[20]

Land claims filed by the Cayuga and Oneida Tribes involve state purchases of State Indian Reservation lands. Maps from the Bureau of Indian Affairs as late as 1971 still show the reservations of the Seneca, Cayuga, Onondaga, Mohawk, and Oneida Tribes within the State of New York, as "state" reservations. The precise legal status, however, of these "state" reservations during the late 1700's and early 1800's is now nearly impossible to assess with any degree of certainty. When attempting to litigate centuries old events, this uncertainty is not only inevitable, it is the very reason for avoiding such litigation. Contemporary courts have either been unmoved by the uncertain legal status of state reservations or have discounted that status altogether.

That Indian reservations within the state of New York have an ambiguous if not unique status, is further revealed by the introduction in 1914 of a Congressional Bill (H.R. 18735) that unsuccessfully attempted, among other things, to designate all Indian reservations within the State of New York as "Indian country" within the contemporary meaning of the federal statutes. That reservations within the State of New York were exempt from the General Allotment Act (Dawes Act) of 1887, and traders with tribes within New York have traditionally not been required to obtain licenses (as required by the Trade & Intercourse Acts), only emphasizes the unique status of New York's Indian Tribes and their State Reservations. Again however, the courts have ignored these issues.

[20] Hutchins, Francis G., Tribes and the American Constitution. Brookline, Massachusetts: Amarta Press. 2000, page 111.

PART II

TREATIES

Under the constitution, no state can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians.

Worcester v. Georgia 35 U.S. 515 (1832),
concurring U.S. Supreme Court Justice McClean

"STATE" TREATIES

When Justice McClean stated that under the constitution, no state can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians, just what was he talking about? Was he unaware of the dozens of treaties that states had entered into with the Indian tribes within their borders since the ratification of the U.S. Constitution?

The confusing situation surrounding state Indian treaties is epitomized by a Seneca treaty signed at Buffalo Creek on August 31, 1826. It was presented to the Senate by President John Quincy Adams on February 24, 1827, but was denied ratification by the Senate. In a formal resolution of April 4, 1828, the Senate resolved, "That by the refusal of the Senate to ratify the treaty with the Seneca Indians, it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim the necessity of an interference by the Senate with the subject matter."[21] Prucha claims that the federal government was torn between provisions of the 1802 Act; "one stipulated (following the act of 1790) that no purchase of Indian land was valid 'unless the same be made by treaty or convention, entered into pursuant to the constitution,' while the other authorized state agents, with the approval of the United States commissioners, to be present at an Indian treaty council and to deal with the Indians regarding compensation for claims to land extinguished by the treaty."[22] If Prucha is correct, the Senate may well have decided the issue by giving the exception a close reading; it only relates to lands within the state.

Professor of History, Laurence M. Hauptman claims that "Prucha's contention does not appear to legitimize the so-called 'treaty' of 1826 because all treaties, to be treaties, must be ratified by a two-thirds vote of the United States Senate."[23] Hauptman's contention ignores numerous court rulings and the well established fact that states were allowed to enter into treaties with tribes; such treaties were not treaties under the constitution requiring a two thirds vote of the Senate for approval. Significantly, the 1826 "treaty" was not between nations, but between the Seneca Indians and a land company known as the "Ogden Land Company." This fact was obvious to the Senate, and its resolution of April 4 referred to the treaty as a "contract entered into by individuals who are parties to that contract." Moreover, the department of Indian Affairs, in papers transmitted by it to the senate, expressed its opinion as regarding the transaction as one which did not require the consent of the senate under the treaty-making power.

Much of the contemporary confusion about initial dealings between Congress and the tribes, "arises from reading back into the past our modern understanding of the word *treaty*," writes Prucha, and continues, "in the colonial and early national periods of United States history the term also had an alternate meaning, now considered rare or obsolete, that was widely used; a 'treaty' in that sense was the 'act of negotiating,' the discussion aimed at adjustment of

[21] Senate Executive Journal, 19th Congress, Second Session, page 603.

[22] Prucha, American Indian Treaties, page 145.

[23] Hauptman, Laurence M., Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State, Syracuse, New York, Syracuse University Press, 1999, page 159.

difference or the reaching of an agreement, and by extension the meeting itself at which such negotiations took place."[24]

While no rule applies reliably to all situations that can be found in the historical record, the general rule appears to have been that treaties held with the independent tribes in the Indian country beyond the borders of states were, without exception, "treaties held pursuant to the constitution" and required the approval of the president and the senate; these were the "treaties" that states were forbidden to execute. Treaties involving purchases of land considered to be in the "Indian country" within the unceded western extremities of state borders in which a preemption right or fee title was held by a state, company, or individual, only required the presence of a federal commissioner. Purchases of state Indian reservation lands surrounded by settlements of citizens of the United States and within the ordinary jurisdictional boundaries of states, outside the "Indian Country," did not even require the presence of a federal commissioner although, at times, a commissioner was present. The opinion *Seneca Nation of Indians v. Christie* (1891) of the Court of Appeals of New York supports these views. Section 12 of the 1802 Act which reads:

> *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, **within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution:** and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty, or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: ***Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.** (emphasis added)

Regarding Section 12, the Court held that:

> The first part of the section invalidates any purchase of Indian lands, except where made in pursuance of a constitutional treaty; that is, a treaty entered into between an Indian nation or tribe and the United States, by the president with the consent of the senate. **This clause has a peculiarly appropriate application to purchases of Indian lands owned by the United States, for the sale of which its consent was indispensable. The proviso was intended to except from the sweeping scope of the first part of the section dealings with the Indian tribes for the purchase of their right to lands within the states, and of which the states owned the pre-emptive title.** (emphasis added)

[24] Prucha, Francis Paul, American Indian Treaties, Berkeley/Los Angeles/London, University of California Press. 1994, pages 24-25.

The Court concluded that the proviso would have little if any meaning, if construed as requiring a formal constitutional treaty for purchases from tribes within the states, which were manifestly intended to be excepted from the operation of the primary clause. The Court further noted that:

> It is very significant of the construction of section 12 of the act of 1802 that the first Indian intercourse act of congress, passed July 22, 1790, declared that no sale of lands within the United States, made by any Indians, or nation or tribe of Indians, should be valid to any person or persons, 'or to any state, whether having the right of pre-emption or not,' unless made at some public treaty, etc. The clause quoted was omitted in the next act of March, 1793, and a section was inserted with a proviso substantially like section 12 in the permanent act of 1802. **This change indicates that it was the intention of congress to place purchases of Indian lands within the states upon a different footing than other purchases.** (emphasis added)

Treaties providing for land purchases within the ordinary jurisdictional boundaries of states weren't constitutional treaties at all; they were contracts and were frequently referred to as "contracts," "indentures," or "conventions" even within the documents themselves. The historical record provides unambiguous proof of the distinction between "state" Indian treaties and federal Indian treaties. State treaties were legitimate binding contracts and not constitutional international treaties requiring presidential and senatorial ratification.

TREATY OF CANANDAIGUA 1794

In regard to the Indian land claims within the State of New York, the 1794 Treaty of Canandaigua not only gave the tribes of the Six Nations the right to sell their lands only "to the people of the United States, who have the right to purchase," it also provides considerable proof that the State of New York was not in violation of the Trade & Intercourse Acts.

The first treaty to be executed by the State of New York with a tribe of the Six Nations after the enactment of the first Trade & Intercourse Act of 1790 was that of November 18, 1793 with the Onondagas; the treaty actually falls within the term of the March 1, 1793 Act. Notably, the treaty predates the federal Treaty of Canandaigua of November 11, 1794. Article 2 of the 1794 treaty reads:

> The United States acknowledges the lands reserved to the Oneida, Onondaga, and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Clearly, Article 2 of the treaty acknowledges the 1793 treaty between the state and the Onondagas, and by implication, the treaty confirms that the Trade & Intercourse Act of 1793 was not violated by that treaty. Had the state treaty with the Onondagas violated the 1793 Act, this federal treaty, held only 51 weeks after the state treaty, would have provided the perfect opportunity for the federal government to unequivocally assert its primacy over such matters. It could have invalidated the treaty outright or given fair warning to the state that any further

treaties with the Six Nations without federal approval would be in violation of federal statute. Instead, the federal government not only made no mention of any such violation of the Act, it acknowledged the treaty!

Some 46 years later, a speech given by Senator Ambrose H. Sevier of Arkansas, Chairman of the Committee on Indian Affairs at the time, provides conclusive evidence that the state treaties with the tribes of the Six Nations were not in violation of the Trade & Intercourse Acts. In the United States Senate on March 19, 1840, in his explanation of why the Treaty with the New York Indians (the Buffalo Creek Treaty) should be rejected, Senator Sevier states:

> The third and last treaty ever made by us with the Six Nations of New York, in their confederated character, (unless the one we are now considering should constitute a single exception,) was made in 1794. This was an important treaty, and has governed us in all our intercourse with them ever since. In that treaty, we acknowledged *separately*, to each of the tribes composing the six Nations, their individual right and title to certain specific reservations of land; and we guarantied to them *separately* the possession and enjoyment of their respective reservations; and **conferred upon them the right to dispose of their reservations respectively, in whole or in part, to any citizen or citizens of the United States, whenever and however they might choose**; and for these rights, the Indians, on their part, engaged, in the same treaty, never to set up any claim to any other lands in the boundaries of the United States, than those granted in that treaty.
>
> This was the last treaty ever made by us with those Indians, collectively or separately, from 1794 up to 1838; a period of more than forty one years. From that time forward, to 1838 we acted in good faith, and permitted those Indians, according to the terms of the treaty of 1794, so far at least as the Senecas were concerned, to dispose of their New York lands as they chose. Since 1794, the Senecas have disposed of their lands on several occasions. In 1797, they were permitted to sell to Robert Morris of Philadelphia, a portion of their reservations. Afterward, in 1802, the same Senecas were permitted to sell another portion of their lands to Phelps, Bronson, and Jones; and again, in the same year, to Wilhelm Willick and others; and again, in 1823, to Grigg and Gibson. Each and all of those sales were made openly, freely, and voluntarily, and under the guardian care *only* of the United States on the one hand, and of the agent, or superintendent, of the State of Massachusetts on the other. These lands were transferred by the Indians to their granters**, *not by treaty***, but by the ordinary deeds of conveyance; nor does the transfer of those lands to Ogden and Fellows, in 1838, vary in any degree, but in the prefixture of a preamble to it, from all the other deeds of conveyance which have been made by them subsequent to 1794.
>
> Having then, as we have seen by the treaty of 1794, such ample power to dispose of these lands—a power so often and so satisfactorily exercised by them; and **the United states having no interest whatever in these lands, and being constitutionally incapable of having any, and not being bound by compact, as in the case of Georgia, to extinguish the Indian title to those lands, it may well be asked, why have we interfered in this affair?**[25] (emphasis added)

Sevier continued by relating the 1818 application by two small bands of Indians (St. Regis Mohawks & Oneidas) to President Monroe for permission to purchase, with their own money, some land from the Menomenee Indians of Green Bay, Wisconsin. Besides giving the bands the lands that they purchased from the Menomenees, Sevier calls attention to the $40,000 that was also provided as remuneration to them for their purchase of and removal to the Green Bay Lands.

[25] APPENDIX TO THE CONGRESSIONAL GLOBE, Blair and Rives of Washington, D.C., March 1840, page 290.

Finally he asks why the federal government has submitted to such an imposition for "these New York Indians, over whom we had no control or jurisdiction?" It is difficult to envision a more convincing and indisputable piece of evidence in support of the blamelessness of New York.

PART III

FURTHER GLEANINGS

"The best exposition of a law is to be found in the uniform and long-continued mode of its enforcement."

Congressman Charles E. Haynes of Georgia
addressing The House of Representatives,
June 27, 1836

THE CONGRESSIONAL RECORDS & JOURNALS

Aside from renewing or ammending the Trade & Intercourse Acts, the early Congressional Records, Journals, and Register of Debates reveal little about the acts. Indeed, until the advent of the Georgia-Cherokee controversy in 1827, an atmosphere of either indifference or confusion permeates the records of Congress in relation to the Acts in particular, and to Indian/State jurisdictional issues in general.

Perhaps the best portrayal in the congressional records of the relationship between the tribes and the United States up until 1826 is provided by a debate of March 10, 1826 concerning the Indians in the State of New York. Congressman Daniel G. Garnsey of New York had opened the debate to inquire into the expediency of making an appropriation for holding a Treaty with the Indians west of the Gennessee river (the Senecas), in the State of New York. Garnsey stated that the tribes of the "Western District" of the State wished to consolidate themselves onto one reservation, but that "no treaty could be made with them except by the General Government." Congressman Michael Hoffman, also of New York, asked if the Legislature of New York desired the General Government to interfere in the control of the Indian tribes within the State and that it was his impression that the State Government considered the disposition of these Indians as exclusively their concern. Garnsey replied that, "the Legislature of New York had no control over these Indians; it had sold its pre-emption right to their lands; it was true, the Indians resided within the bounds of the State, and in some respects, were bound by its laws, though it had been very seriously questioned if the Courts of that State have any jurisdiction over them; and, at one time, the Court itself had decided that it had no jurisdiction."

Congressman John Forsyth of Georgia remarked:

> The situation of the Indian tribes within the United States was known to every one to be peculiar. The Government of the United States had, from the very beginning, been governed by contradictory principles in its conduct towards them. In some of the States the Indians are considered as part of the population, and are governed by the State laws as dependents or citizens. In other States they seem to be subjected to a mixed authority, consisting in part of the authority of the United States, and partly of that of the State; while, in other States, the whole authority over them is usurped by the United States. New York he considered of the second class; the new States and the Territories as forming the third; and all the other States containing the Indians except those blessed with the presence of Creeks and Cherokees, as the first. North and South Carolina, and Georgia, and Tennessee, have the benefit of a peculiar code, an examination into which will no doubt hereafter be made. The present inquiry relates to those Indians who are placed under a mixed government, made of that of the United States, and that of the State of New York.[26]

Congressman Henry R. Storrs of New York agreed with Forsyth, noting that the Stockbridge and Brotherton Tribes were treated "in every sense, as subjects of the State jurisdiction; but other tribes, as the Senecas and Oneidas are not considered so." Storrs continued, "Some of the tribes in the State hold their lands under the State; but others retain their original title as tribes or nations. Commissioners have sometimes been appointed by the United States to form treaties with them."

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[26] Gales & Seaton's Register Of Debates In Congress, March 10, 1826, 19th Congress, 1st Session, "Indians In The State Of New York," page 1598.

Illinois Congressman, Daniel P. Cook said:

> that this subject, in our future intercourse with the Indian tribes and with the different States, was destined to produce considerable difficulty. I should like to know if it is intended to invest the lands which may be relinquished by the Indians, in the Government of the United States or in the State of New York. He thought, for his own part, that the whole history of our legislation toward the new States on the subject of Indian lands was directly in the teeth of the Constitution. The General Government could not constitutionally acquire land within the States without the consent of the States. He questioned whether the limitation in the Constitution which forbids the States to make treaties, refers at all to the agreements respecting Indian lands. He thought these agreements were to be distinguished from treaties. It was an inquiry of serious moment, whether the right to purchase Indian lands does not belong to the States rather than to the General Government. He knew of nothing in the Constitution which gives any preference in this matter to the General Government after a territory shall have been erected into a State.[27]

On the next day, March 11, 1826, Congressman Storrs of New York tried to clarify the situation. He stated that:

> there seemed to be some misconception of the nature of the resolution, or it would not meet with opposition. He would, therefore, state to the House, what the question before it really was. No proposition is offered that the United States should pay money out of the Treasury for the purchase of lands, or for obtaining them in any way. The resolution arises out of a statute passed by Congress, which makes it a penal offence for any person to purchase lands from any of the Indian tribes within the United States, without the consent of the United States. If the State of New York wishes to obtain lands held by the Indians, and which they are ever so willing or desirous to sell, she cannot do so without the presence of a Commissioner appointed by the United States, and the present resolution is only to inquire whether it is expedient to make an appropriation to enable a Commissioner on the part of the United States to attend and sanction a treaty between the State of New York and certain Indians in that State. Commissioners for this purpose have always been appointed. [Here **Mr. STORRS** referred to the 1st volume of the Laws of the United States, in which several such treaties are printed.] In 1819 a Commissioner was appointed to hold a treaty with the Seneca tribe, and all that is now asked, is, that the same thing may be done again. The lands which it is proposed to obtain belong to the State of New York, or to those to whom the State has sold the pre-emption right.[28]

It is truly ironic that it is a New York Congressman who had to educate the House of Representatives of the United States concerning the Trade & Intercourse Act.

Discussion continued and Mr. Forsyth of Georgia stated:

> On examination, I find that I was critically accurate yesterday when I stated the facts of their condition. There are in the Western part of that State, the remnants of several tribes; some of them are under the complete control of New York; among these are the

[27] Ibid., page 1600.

[28] Ibid., page 1604.

> Onondagas, &c. but the situation of the Seneca tribe is somewhat different, as regards the soil.[29]

Following Forsyth, Congressman Storrs stated:

> a number of facts in explanation. He referred to a treaty made in 1793 by George Clinton, then Governor of the State, in relation to several tribes, in which the Senecas were not included. This tribe remained as before the treaty, and held their lands under their original title, subject to a law of the United States, which prohibited the making of purchases of Indian land without the consent of the United States. The State of Massachusetts had a claim on part of those lands, and in the compromise which took place, New York confirmed to Massachusetts the pre-emption right, which was afterwards sold to Gorham and Phelps, with a reservation of 200,000 acres. The company have extinguished the Indian title to all the land, saving these reservations. At one of the treaties, Wadsworth was United States' Commissioner, at another Smith was Commissioner; attempts have frequently been made to treat with the Senecas, but hitherto without success. Now the company ask, and so does the State of New York, that Commissioners may be appointed; they ask not that Congress should violate State rights, but that they should enable this purchase to be conducted without any violation of the laws of the United States. Never was a more reasonable request presented. The resolution asks a simple inquiry, and can only produce a statement of facts.[30]

While Congressman Hoffman of New York claimed that the State of New York had an interest in all that relates to theses Indians (the Senecas), Congressman Garnsey of New York declared that the State had no control over the Senecas and that a detailed history of the treaties with that tribe would show that nine different treaties had taken place since 1784 at which commissioners of the United States had been present. Yet New York never applied to the General Government on any of those occasions. Garnsey maintained that the State of New York herself decided that these Indians are independent and that John Tayler, her Lieutenant Governor, was the United States' Commissioner at the treaty of Buffalo. Particularly noteworthy is the fact that there is no mention whatsoever throughout the debate of multiple violations of the Trade & Intercourse Acts by the State of New York.

On July 26, 1827, the Cherokee Nation within the borders of the State of Georgia adopted a written constitution patterned after that of the United States in which the Indians asserted that they were one of the sovereign and independent nations of the earth with complete jurisdiction over their own territory. Predictably, the State of Georgia moved against the Cherokees by extending state authority and laws over the Cherokee lands effectively withdrawing the Cherokee territory from the status of Indian country.[31] This "Georgia – Cherokee" controversy set the stage for the most unambiguous views concerning the Trade & Intercourse Acts to appear within the entire body of congressional records.

A Senate resolution of February 15, 1831 requesting the president of the United States to "inform the Senate whether the provisions of the act entitled, 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier,' passed the 30th of March, 1802, have been fully complied with on the part of the United States' Government; and if

[29] Ibid., page 1605.

[30] Ibid., page 1606.

[31] Prucha, The Great Father, page 189.

they have not, that he inform the Senate of the reasons that have induced the Government to decline the enforcement of said act." President Andrew Jackson responded in a letter dated February 22, 1831 and wrote:

> By the 19th section of this act, it is provided that nothing in it "shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual States." This provision I have interpreted as being prospective in its operation, and as applicable not only to Indian tribes which at the date of its passage were subject to the jurisdiction of any State, but to such also as should thereafter become so. To this construction of its meaning I have endeavored to conform, and have taken no step inconsistent with it.[32]

Jackson continued:

> From a view of the acts referred to, and the uniform practice of the Government, it is manifest that, until recently, it has never been maintained that the right of jurisdiction by a State over Indians within its territory was subordinate to the power of the Federal Government. That doctrine has not been enforced, nor even asserted, in any of the States of New England, where tribes of Indians have resided, and where a few of them yet remain. These tribes have been left to the undisturbed control of the States in which they were found, in conformity with the view which has been taken of the opinions prevailing up to 1789, and the clear interpretation of the act of 1802. **In the State of New York, where several tribes have resided, it has been the policy of the Government to avoid entering into quasi-treaty engagements with them, barely appointing commissioners occasionally, on the part of the United States, to facilitate the objects of the State in its negotiations with them.**[33] (emphasis added)

Regardless of what one may think of Andrew Jackson, his description of the "uniform practice" of the Government regarding the Trade & Intercourse Acts, is accurate and supported by the historical record.

SENECA NATION V. CHRISTIE

A lawsuit brought by the Seneca Nation of Indians to evict Harrison B. Christie and recover a 100 acre parcel of land that was formerly part of the Cattaraugus reservation was ruled upon by the Supreme Court of New York on October 19, 1988. The Senecas claimed that a treaty of August 26, 1826 which conveyed their right or interest in the land to the Ogden Land Company was void since the treaty had never been approved by the Senate of the United States. The court held that the treaty was properly "made" within the proviso of the 1802 Trade & Intercourse Act. Moreover, since the purchase money for the land was transferred to the treasury of the United States, pursuant to an act of congress of 1846, the court reasoned that the treaty of 1826 was "apparently not unlawful." The issue of section 12 of the 1802 Act and that of "state" treaties, would be made much clearer by the Court of Appeals of New York.

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[32] From the Journal of the Senate, February 23, 1831, page 165.

[33] Ibid., page 166.

The Court of Appeals noted the December 16, 1786 pact between the State of New York and the State of Massachusetts in which Massachusetts ceded to New York the right of sovereignty and jurisdiction over lands it had claimed in the western part of that state. In return, New York ceded the right of pre-emption of the soil and to extinguish the Indian title to some 6,000,000 acres of land within the western part of New York. The Court also noted that this compact was formally ratified by Congress after the adoption of the Constitution of the United States. In 1791 Massachusetts conveyed its pre-emption right over most of the land to one Robert Morris of Philadelphia. Land not conveyed to Morris had previously been conveyed to one Oliver Phelps in 1788 (known as the Phelps and Gorham purchase). Morris subsequently conveyed much of his land to persons of the Holland Land Company. Some 98,000 acres, including the land embraced by the 1826 treaty, were eventually conveyed to Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers of the Ogden Land Company. It was "material to observe," noted the court, that "there was no uniform procedure on the part of the purchasers from Massachusetts in acquiring the Indian title and that:

> In 1788, at a council of the Seneca Indians held at Buffalo Creek, which was attended by Mr. Phelps and by an agent of Massachusetts, a treaty was made by which the Indians conveyed to Phelps, for a consideration agreed upon, the lands embraced in the Phelps and Gorham purchase. The United States was not represented at this treaty, nor was any agent specially appointed in behalf of New York present at its execution. Under this title all the lands embraced in that treaty are now held. **The validity of this grant, made without the intervention of the state or federal authorities, is impliedly recognized in the Pickering treaty between the United States and the Six Nations, proclaimed January 21, 1795, which in defining the lands of the Senecas commences the description, 'Beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps,' and the tract is not embraced in the description.** [34] (emphasis added)

The Court reasoned that:

> … the making of treaties by the original states, having the pre- emption title to the Indian lands within their limits, directly with the Indians, was not regarded by the general government as inconsistent with federal jurisdiction, or as in contravention of the provision in the federal constitution prohibiting a state from entering into 'any treaty, alliance, or confederation.' The state did not so regard it, as the numerous treaties made by it show. That the same view was taken by the general government appears from the Pickering treaty of 1795, which expressly recognized the validity of the treaties of 1788 and 1789, made between this state and the Oneida, Onondaga, and Cayuga Nations.[35]

And continued:

> The practical construction given by the state of New York to the federal constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the federal authority of their validity, is very strong evidence that the clause in the federal constitution prohibiting the states from entering into treaties does not preclude a state, having the preemption right to Indian lands, from dealing with the Indian tribes

[34] *Seneca Nation of Indians v. Christie*, 126 N.Y. 122 (1891)

[35] Ibid.

> directly, for the extinguishment of the Indian title. Such a dealing is not a treaty, in the constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands.[36]

The Court further noted that in 1793, after the passage of the Indian intercourse act of that year, New York Governor George Clinton, as a "prudential measure," sent "exemplified copies" of the different treaties entered into by the state of New York with the various tribes of Indians within its borders to Thomas Jefferson, then secretary of state of the United States. That those treaties were, via the Pickering (Canandaigua) Treaty, formally approved by congress, "does not militate against the view that the right of the state to enter into those treaties was not prohibited by the constitution," stated the Court.

The Court held that the 1826 treaty was valid since the State of New York had the power and the right, under the Constitution, to make treaties with the Indians within the state for the purchase of lands, to which it held the pre-emptive right, and that, as previously stated, the 1826 purchase was not in violation of "the true meaning and effect of the 12th section" of the Act of 1802. To summarize, the court stated:

> The policy of the state of New York has been in full accord with that of the United States in prohibiting all private dealings with and purchases from Indians, except under the supervision of public officials and with the consent of the legislature. The purpose of the proviso in the twelfth section of the act of 1802 was to establish a federal supervision over contracts for the extinguishment of Indian title to lands within the several states, while in other cases such extinguishment was to be effected only by formal treaties between the United States and the Indian tribes.[37]

The Court stated that its judgment might be placed on a narrower ground by conceding the invalidity of the treaty; the treaty was nonetheless subsequently confirmed by an act of congress that authorized the president to receive and deposit in the U.S. Treasury the "purchase-money" from the treaty. This, the Court chose not to do, but placed its judgment on the broader grounds in order to remove any cloud upon the validity of titles originating from numerous Indian treaties by the state or in purchases made, with its approval, by individuals. Since it was a state statute of 1845 that allowed the Senecas to bring their action into the courts of New York, the Court also ruled that the tribe "could not invoke a special remedy given by the statute without being bound by the conditions upon which it is given," and that the "Statue of Limitations" was a bar to the action.

The case eventually reached the U.S. Supreme Court in 1896, and the Court chose to base its ruling on what it called "a distinct and independent ground, not involving any federal question" upon which, "in addition to other grounds," the court of appeals had made its decision. In other words, the Court avoided the issues of state Indian treaties and the Trade & Intercourse Act of 1802 by basing its dismissal of the case upon its inability to make federal questions out of the state's statute of limitations and the correct construction of the 1845 state statute.

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[36] Ibid.

[37] Ibid.

Nearly 90 years later, that same court would discard the statute of limitations when deciding upon the validity of land transactions between tribes and the State of New York. Dissenting Justices Stevens, White, and Rehnquist would state:

> Before 1966 there was no federal statute of limitations that even arguably could have supplanted a state limitation. Even the longest possibly applicable state statute of limitations would surely have barred this cause of action -- which arose in 1795 -- many years before 1966. Moreover, "state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978). Nor is the rejection of a generally applicable state law inappropriate merely because one party is an Indian tribe and the subject matter of the litigation involves tribal property. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673-674 (1979). Thus, a routine application of our practice in dealing with limitations questions would lead to the Conclusion that this claim is barred by the lapse of time.[38]

GEORGE V. PIERCE

Another revealing opinion of the courts, is *George v. Pierce* (1914) of the Supreme Court of New York. The case was an action brought by Lydia George and others against Eliza Pierce to recover possession of land. In reaching his opinion, Judge Andrews saw the need to recount the history of the relationship between the Indian tribes and the State of New York. Quoting U.S. Supreme Court ruling *United States v. Kagama* (1886) in which Justice Miller states that the Indian tribes are dependent wards of the nation that neither owe allegiance to, nor receive protection from, the states, Judge Andrews asserts that, "The rule, however, that the Supreme Court of the United States has adopted with regard to such Indians as the Cherokee does not apply to the Iroquois—the Five (later Six) Nations. Their historical position is distinct."

Their distinct history showed that the Iroquois were "subject" nations as acknowledged by treaties dating back to 1664. In "a treaty of peace in 1684, the sachems of the Cayuga and Onondagas put themselves and their lands under the protection of the king and under no other government than New York," states Andrews. As perhaps "the last clear instance of the claim," Judge Andrews cites the 1774 quote of Governor Tryon:

> The second source to the title of this government is grounded on the claim of the Five Nations who are in the treaty of Utrecht acknowledged by France to be subject to Great Britain. Soon after the English conquered this country from the Dutch, pursuing their system of policy, they entered into strict alliance with the natives, who by treaties with this colony subjected themselves to the crown of England and their lands to its protection, and from this period were always treated as subjects and their country considered by this government as part of the province of New York.[39]

Conceding that the treaties of peace of 1784 and 1789 should be made "as a whole, by the United States as a whole," the Court nevertheless held that "it does not follow that under the guise of a treaty of peace with the Six Nations Congress might regulate the status of the Onondagas occupying a territory wholly within the boundaries of New York," and that the care

[38] *Oneida Indian Nation of New York v. County of Oneida New York* 470 U.S. 226 (1985).

[39] *George v. Pierce* 148 N.Y.S. 230 N.Y.Sup. (1914).

taken by the framers of the Articles of Confederation to preserve the independence of the several states is "an answer to such a claim."

In 1793, the state entered into a treaty with the Onondagas, and in 1795 the United States again proclaimed a treaty with the Six Nations whereby it acknowledged the lands reserved to the Oneida, Onondaga, and Cayuga Nations. This, claimed the Court, thus recognized the right of the state to make treaties with the Onondagas as to their lands and that such treaties are not those prohibited by the Constitution. The Court noted that the treaty power is not unlimited and may neither deprive a state of property nor part of its inherent rights.

Next the Court touched upon the Trade & Intercourse Act of 1802 noting that it was the first permanent act to be passed by the "national government" to regulate commerce with the tribes. Quoting the "surrounded by settlements" exception, the Court stated, "The state treaties referred to, treaties with other Iroquois nations, acts of the Legislature, all show that this act and later acts amending it were not held to apply to the Onondagas and their relations to the state of New York." The Court further asserted that:

> Over 30 treaties have been made by the state with the Six Nations without the supervision or control of the general government. Our courts have assumed criminal jurisdiction over them. Our Legislature has asserted their right so to do. And this jurisdiction has been mentioned by the Supreme Court of the United States without disapproval.

U.S. V. FRANKLIN COUNTY

In 1943, a federal district court of New York ruled on an action brought forth by the United States of America on behalf of the St. Regis Tribe of Indians against Flanklin County and the State of New York to cancel any tax liens upon certain lands and to have those lands declared exempt from all taxation. Of some 50 exhibits consisting of "written instruments generally described as 'treaties,' which purported to convey or release the rights or interests of Indian tribes in lands within the State of New York,"[40] it appeared that only six demonstrated the presence of a United States commissioner at the time of execution.

The County and the State denied the tribe's claim that the lands in question were tribal lands of the St. Regis Indians by reason of a treaty of December 14, 1824 that conveyed all interest and right in those lands to the State of New York. It was the tribe's contention that neither of two leases of 1817 nor the subsequent treaty of 1824 were valid since they lacked the approval or presence of a Commissioner appointed by the United States. The Court noted that the voluminous briefs filed by the parties as well as the research and exhibits covering a period from 1785 to 1846 did not reveal that the question before the Court had been definitely addressed by the Courts.

The Court stated, "We then come to the question as to whether or not the provisions of the Indian Intercourse Act of 1802 apply to the transaction of December 14, 1824 to which the State of New York was a party." Citing *Seneca Nation v. Christie*, the Court found that the State had the power and right to make treaties with tribes within the State. The plaintiff did not dispute the

[40] *United States v. Franklin County*, 50 F. Supp. 152 N.D.N.Y. (1943).

holding, but did assert that the absence of a commissioner rendered the 1824 treaty invalid. The Court however held that the plaintiff's assertion "would be contrary to the practical construction placed on the Act by both the State of New York and the United States." Again citing *Seneca Nation v. Christie*, the court concluded that the United States could not impair the title of the states, nor purchase the lands, nor authorize any purchase, without the consent of the state within which they were situated, and cited *Johnson v. McIntosh*, "the existence of this power must negative the existence of any right which may conflict with and control it."[41]

Since the *Seneca Nation v. Christie* case had dealt with a transaction in which a commissioner was present, that court had not decided the question before the court of *U.S. v. Franklin*. The *U.S. v. Franklin* court decided the issue and found that the Act did not require the presence of a United States Commissioner as a prerequisite to the validity of the treaty. It further held that the Act was at most "regulatory, designed to prevent fraud," and that the conveyance of 1824 was valid. The complaint was dismissed.

TUSCARORA V. POWER AUTHORITY OF THE STATE OF NEW YORK

An action brought forth by the Tuscarora Nation of Indians on April 19, 1958 in the Southern District of New York, later transferred to the Western District, sought a declaratory judgment claiming that the Power Authority of the State of New York had no power to acquire lands from their reservation without the express consent of the United States. Some 1,300 acres of the Tuscarora's reservation were sought in order to build a reservoir that would be part of a hydroelectric power project that was to be built along the Niagara River. The District Court held that the lands of the Tuscarora were unique among the tribal lands of New York since they were purchased with moneys obtained from the sale of lands owned by the tribe in North Carolina rather than ceded by the government, and that the Power Authority did have the right of eminent domain. The tribe could seek compensation for the taking of their lands in the New York Court of Claims and Section 177 of Title 25 (the current Trade & Intercourse Act) of the United States Code was held to not bar the exercise of eminent domain. The complaint was dismissed and the case was appealed to, and heard by, the Second Circuit Court of Appeals.

The Second Circuit noted that:

> between the earliest years of this Nation's existence and 1950, a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians. Despite this situation the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them.[42]

The Court held that neither the Trade & Intercourse Act nor an act of 1950 conferring state civil jurisdiction over Indian reservations contained language that could be construed as authorizing

[41] *Johnson v. McIntosh* 8 Wheat. 543 (1823).

[42] *Tuscarora Nation of Indians v. Power Authority of State of New York* 257 F.2d 885 (1958).

the alienation of lands within a reservation by the state through the exercise of eminent domain. Congress could exercise such eminent domain, but even a licensee of the federal power commission could exercise only such power as prescribed by Congress. Appropriation of the land by state statutes was not permitted.

George Shattuck claimed that it was the Tuscarora case that was the key that helped him see the legal issues in the correct perspective during his development of the Oneida land claims. The Tuscaroras lost their case but "established a very important point: that the Nonintercourse Act does apply to such cases," wrote Shattuck.[43] Shattuck's view notwithstanding, holding the act to be applicable in an eminent domain case of 1958 in no way suggests that the act had applied to transactions that had been executed 200 years ago.

Interestingly, when the case was appealed to the U.S. Supreme Court, dissenting justices in its split decision provided a footnote No.7 that read:

> See, e. g., Report of the Commissioner of Indian Affairs, H. R. Exec. Doc. No. 1, Pt. 5, Vol. I, 45th Cong., 2d Sess. 397, 558-564 (1877). **See also 64 Stat. 845, 25 U.S.C. 233, which specifically subjects all New York tribes to** Rev. Stat. 2116 (1875), **25 U.S.C. 177,** which bans alienation of their lands without the consent of Congress. And see generally notes 6, supra, 9, 11, 16, 17, 20, infra.[44] (emphasis added)

The federal statute 64 Stat. 845, referred to in the footnote, is the act of 1950 that gave the state civil jurisdiction on Indian reservations. The act also provided:

> That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13,1952.

It might well be asked that if the statute specifically subjects all New York tribes to 25 U.S.C. 177, were the tribes subject to 25 U.S.C. 177 before enacting 64 Stat. 845?

[43] Shattuck, George C., The Oneida Land Claims: A Legal History, Syracuse, New York: Syracuse University Press, 1991, page 7.

[44] *Federal Power Commission v. Tuscarora Indian Nation* 362 U.S. 99 (1960).

PART IV

THE ONEIDA LAND CLAIMS

> The majority holds today that the Oneida may maintain a direct action to recover damages for wrongful occupancy. Despite the majority's claim to the contrary, this is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law.

Dissenting Circuit Judge Meskill
Oneida Indian Nation of New York v. County of Oneida 719 F.2d 525 (1983)

OPENING THE FLOODGATES

The Oneidas filed a "test" case in 1970 seeking only monetary damages for two years rent on some 870 acres of land owned by Madison and Oneida Counties in upstate New York that were part of 100,000 acres purchased by the state in 1795. Although neither county even existed in 1795, only the counties were sued. The District Court of Northern New York dismissed the complaint for want of federal jurisdiction and on appeal, the Second Circuit Court of Appeals, on July 12, 1972, affirmed the district court ruling. While initial results were undoubtedly discouraging for the Oneidas, their luck was soon to take an abrupt change in direction when the United States Supreme Court granted the Oneidas certiorari.

By unanimously reversing the Second Circuit in 1974, the U.S. Supreme Court decision, *Oneida Indian Nation v. County of Oneida* 414 U.S. 661 opened the floodgates for Indian tribes to file land claims based on federal common law. The Court was able to throw the statute of limitations out the window by claiming that the "federal controversy" at hand, "rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." Indian tribes, armed with federal common law and a "special" body of Indian laws, could now sue landowners for questionable violations of federal statutes that supposedly occurred some two centuries ago; federal common law would give the tribes access to federal courts and the "special" body of Indian laws would render the innocent landowners virtually defenseless in those courts. Incredibly, the burden of proof in these claims would fall upon the defendants.

Regarding the termination of Indian occupancy, the Court made and rewrote history with a sweeping generalization that stated:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original thirteen. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State*, Fletcher v. Peck*, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.[45]

The rudimentary propositions of which the Court spoke may seem "rudimentary" today, but today's "rudimentary propositions" were certainly not the "rudimentary propositions" of 200 years ago.

Professor Lyman describes the beginnings of Indian policy as being based on the experiences of the European powers with the tribes as well as precedents established during the colonial period of the United States. While Lyman recognizes that relations with the tribes were considered to be between nations and to be handled by the central government, "An exception would be cases where the original colonies had already 'internalized' relations with particular

[45] *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974).

tribes. In such cases those states continued programs already established during the colonial period."[46]

Professor of Law, Sidney L. Harring, at the City University of New York Law School describes federal and state Indian law as being based on a "scant" constitutional framework that was carved out by nineteenth-century judges one case at a time. He writes, "Opportunism and pragmatism alone cannot account for the development of U.S. Indian law, for there was a great struggle over its fundamental character, the nature of the legal doctrines that outlined the development of the government's relationship to the Indian tribes."[47]

In the fifty years between the "Cherokee Cases" of the 1830's (cornerstones of federal Indian law) and the *Crow Dog* case of 1883, Harring states that perhaps as few as 20 significant Indian cases came before the U.S. Supreme Court and that the Court did not develop a coherent doctrine of Indian law, "but applied basic doctrines of federalism."[48] Harring continues:

> During these fifty years, tribal rights were attacked on all sides: by the states, by the federal government, and by local citizens acting extralegally. Lower federal courts and state courts, facing increasing numbers of Indian cases, did not have a coherent doctrinal base to the legal decisions they applied to Indians, producing dozens of diverse and incoherent opinions.[49]

Harring credits the Crow Dog case of 1883 as "marking the beginning of the field of federal Indian law as a coherent body of legal doctrine."[50] Might not this date also mark the beginning of the "rudimentary propositions" described by the U.S. Supreme Court in 1974?

In surveying the evolution of "judge made"[51] U.S. Indian law, today's sharp edges of the "rudimentary propositions" of federal Indian law, referred to by the Supreme Court in the Oneida case of 1974, become increasingly blurred and imprecise as they are projected, decade after decade, two centuries into the past. What is not blurred and imprecise is the historical fact that congressional journals and records of debates during a fifty-one year period in which the State of New York repeatedly purchased land from the Oneidas, mention no violations of the Trade & Intercourse Acts by the State of New York. Moreover, the state was also purchasing land from other tribes, but again, the congressional records chronicle no violations of the Acts. If indeed the Oneida's reservation fell into the category of those lands covered by the Trade & Intercourse Acts, the federal government remained mute and had inexplicably decided not to exert its authority over those lands. To accept the Court's opinion, one must reject the historical record and submit to judicial fiat.

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[46] Lyman, A History of Indian Policy, page 32.

[47] Harring, Sidney L., Crow Dog's Case, American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century, Cambridge University Press, 1994, pages 1-3.

[48] Ibid., page 4.

[49] Ibid., page 4.

[50] Ibid., page 5.

[51] Harring describes U.S. Indian law as by and large "judge made law." Page 20.

THE PORT RULING OF 1977

Upon remand to the lower courts for further proceedings, it fell to the Federal District Court of Northern New York, presided over by Judge Edmund Port, to address the question of the alleged violations of the Trade & Intercourse Acts by the State of New York. The Oneidas presented their proof in a three-day trial. Relying solely on the Oneidas' proof and the law, the counties submitted no evidence. In the Forward of George Shattuck's book titled "The Oneida Land Claims: A Legal History," Jack Campisi, a professor of anthropology, described the trial thus:

> Trial was set for Wednesday, November 12, in the ornate nineteenth-century courthouse in Auburn, New York. On Tuesday, the eleventh, Shattuck, Freyer, and I drove to Auburn for a pretrial session, at which time Freyer introduced some fifty exhibits that we planned to use. It was a beautiful day for golf, as one of the defense attorneys remarked, and they did seem anxious to end the hearing. The judge in the case was Edmund Port, a diminutive gentleman with, as I was to find out, a wry sense of humor and a sharp mind. After a few moments of courtroom pleasantries, the defense attorneys collected their copies of the documents and left, assuming the materials were the same ones they had seen many times before, ones included in a previous Indian Claims Commission case. The trial lasted three days. The defense called no witnesses; they later complained that the counties had refused to provide funds for experts. I felt a sense of smugness on their part, that although Shattuck had won the jurisdictional battle at the Supreme Court, they believed there was no real evidence to sustain such a radical remedy as a finding for the Oneidas.[52]

Of all the evidence submitted by the Oneidas' attorneys, that of some brief correspondence between then Secretary of War Timothy Pickering and U.S. Attorney General William Bradford contributed most significantly to the court's decision.

Judge Port's ruling describes a conflict that had developed in 1795 between the United States and the State of New York over the State's power to negotiate purchases of land from the Oneidas and that "Secretary of War, Timothy Pickering, wrote to United States Attorney General William Bradford for an opinion on whether or not New York had the power to purchase Indian land without the intervention of the United States government. The Attorney General responded by stating the language of the Nonintercourse Act was 'too express to admit of any doubt upon the question.'" In fact, Bradford's sentence continues, "unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law." Pickering's December 12, 1795 report of the measures taken for opening trade with the Indians to the Vice President and the Senate provided just such a circumstance that would remove the purchases from the "general prohibition of the law," namely, the "surrounded by settlements" exception; the unique legal status of state Indian reservation lands would have provided another exception. Moreover, the federal Treaty of Canandaigua that acknowledged New York's treaties and reservations had been proclaimed less than a year earlier on January 21, 1795.

Hutchins describes Pickering as a federalist bureaucrat that knew little about Indians and accepted a position as an Indian commissioner because he needed the money. Pickering became

[52] Shattuck, George C., The Oneida Land Claims: A Legal History, Forward by Jack Campisi, Syracuse University Press, 1991. pages xi-xii.

fascinated with the Iroquois and that, "Ever an activist, Pickering attempted to nudge federal involvement with tribes beyond mere certification of the end of tribal use of 'Indian lands' into a positive guardian-ward relationship," writes Hutchins [53]

On July 3, 1795 Pickering wrote to New York's new governor, John Jay, notifying him of the State's inability to negotiate land purchases with the tribes unless federal treaty commissioners were appointed. In response:

> Jay wrote Pickering that, "on this occasion I think I should forbear officially to consider and decide" whether the "Act of 1 March 1793" was constitutional or whether the conduct of New York violated either the United States Constitution or the 1793 Nonintercourse Act. He observed, however, that under the New York Constitution, transactions with Indian tribes must be pursuant to acts of the Legislature; that the enabling legislation in this instance was silent "(a)s to any intervention or concurrence of the United States", nor did it "by implication direct or authorize the Governor to apply for such intervention.". Jay noted that arrangements for the meeting with the Six Nations planned for later that summer were finished "before I came into office."[54]

According to Hutchins, Jay's response was "calculated to remind Pickering he was accustomed to reaching his own conclusions on matters of law, and that the Opinion of a U.S. Attorney General was far from being the last word."[55]

Chosen in 1788 as the president of the Continental Congress, the federalist John Jay was a Founding Father of the United States and the country's first chief justice of the Supreme Court. Indeed, in the Court's most notable decision under his tenure, *Chisholm v. Georgia*, Jay affirmed the subordination of the states to the federal government. He authored five of the Federalist Papers, served as a federal treaty commissioner in 1794 negotiating the "Jay Treaty" with Great Britain, and it is simply inconceivable to think that he either misunderstood or intentionally violated the Trade & Intercourse Act of 1793.

History does not support Judge Port's analysis of the "Pickering–Bradford–Jay" correspondence as it relates to New York's supposed violation of the Trade & Intercourse Acts. The congressional journals and records are totally devoid of any demonstrated dissatisfaction with New York's dealings with the Indian tribes within its borders. Hutchins' analysis of the Pickering-Bradford affair is far closer to reality. He concludes:

> More than two hundred years after it was written, this Opinion remains the basis of numerous federal court decisions, including two Supreme Court decisions rendered in 1974 and 1985. But Bradford's Opinion is fundamentally deficient. By Bradford's own admission, his Opinion – completed three days after Pickering's request – was based solely on documents supplied him by Pickering. While it is not known what these were, it is certain that Bradford was not given the most recent and authoritative expression of New York State's position, the Legislature's April 9th Act, because Pickering himself did not see it until July at the earliest. The April 9th Act declared repeatedly that the lands occupied by the Oneidas, Onondagas and Cayugas had been "appropriated" by New York State for the "use" of these tribes. Instead of analyzing and refuting this

[53] Hutchins, Tribes and the American Constitution, page 115.

[54] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, (1977).

[55] Hutchins, Tribes and the American Constitution, page 124.

> State contention, Bradford seems to have been unaware of what New York's position was. But even with access only to the 1794 federal Treaty of Canandaigua and the 1793 federal Trade and Intercourse Act, **Bradford might well have concluded that it was a stretch to extend the legal definition of "Indian lands" requiring federal treaty supervision to State reservations which were clearly within what Jefferson called "the limits of our society".**[56] (emphasis added)
>
> Like U.S. Attorney General Bradford in 1795, the Supreme Court in 1985 ignored entirely New York's theory that State reservation lands "appropriated for the use" of the Oneidas, Onondagas, and Cayugas were not the kind of "Indian lands" subject to regulation by the 1793 Trade and Intercourse Act. **The Court's 1985 position is in accord with modern-day federal law. But in using a retrospective legal lens**, the Court missed the distinction drawn at the time by New York State, and thereby dismissed as culpably lawless conduct what was in fact part of a **state-federal jurisdictional dispute resolved without litigation in New York's favor**.[57] (emphasis added)

Describing the situation as a "state-federal jurisdictional dispute" is probably not as accurate as describing it as "ill informed bureaucrats advising the president," but regardless of what explanation is used, the entire issue is absolutely incapable of demonstrating the applicability of the Act of 1793 to New York's purchases of state reservation lands.

Port's ruling mentions that within a week after Jay's response to Pickering, "Jay wrote Pickering and requested the appointment of United States Commissioners to negotiate a treaty between New York and the St. Regis Indians. In a letter to President Washington, suggesting that a commissioner be appointed for the treaty with the St. Regis, Pickering pointed out New York's inconsistent policy for negotiating with Indians. The State was complying with statutory requirements for the St. Regis, but refused to do so when dealing with the Six Nations."[58] Port points out that professor of anthropology, Dr. Jack Campisi suggests that the differential treatment of the St. Regis Indians versus the Oneidas was due to the state's perception of the federal government's preferential treatment of tribes that had been allies to the United States during the Revolutionary War and that the state feared excessive "federal protective intervention" in the case of the Oneidas. Hutchins' more credible explanation is that the differential treatment was a result of the State-St. Regis history in that the St. Regis Mohawks had never placed themselves under State protection by pre-Constitutional treaties as had the Oneidas.[59] That the Mohawks inhabited lands of the remote northern borders of New York that were quite possibly considered to be on the northern "frontier" in "Indian country" also seems more credible than Campisi's view.

The unique status of state reservation lands, the "surrounded by settlements" exception of the Trade & Intercourse Act, and the fact that the St. Regis Mohawks inhabited the "Indian country" of the northern frontier of the State of New York, all coalesce to form a reasonably coherent view of the applicability of the Act in 1795 as it applied to New York's Indian tribes. It explains the congressional silence of the period and demonstrates the innocence of the State.

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[56] Ibid., pages 122-123.

[57] Ibid., page 141.

[58] *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, (1977).

[59] Hutchins, Tribes and the American Constitution, page 125.

The Port ruling would be the only ruling in this particular land claim that would address the equitable doctrine of laches[60] since the counties did not see fit to reassert that defense in their subsequent appeals. Not surprisingly, the Port court held that neither the doctrine of laches nor the statute of limitations barred the claim.

ON TO THE SECOND CIRCUIT

Judges Lumbard, Mansfield, and Meskill of the Second Circuit Court of Appeals heard the counties' appeal of Judge Port's ruling and affirmed Judge Port's decision on September 29, 1983 in *Oneida Indian Nation v. County of Oneida* 719 F.2d 525; Judge Meskill dissented.

The Court noted that on appeal the counties apparently did not question Judge Port's ruling holding that the Trade & Intercourse Acts had been violated, but submitted five arguments that sought to avoid liability. The arguments were that:

1. The Trade & Intercourse Acts did not provide for a private suit for the enforcement of their provisions.
2. If such a suit could be maintained, it abated upon expiration of the 1793 Act.
3. The Oneidas claims are barred by the statute of limitations.
4. The claims are nonjusticiable.
5. The federal government subsequently ratified the 1795 transaction.

While the Court admitted that the legislative history of the "Nonintercourse" Acts was "sparse and incomplete," and furnished "no clear expression on the question of whether Congress intended to create a private right of action for damages," it concluded that since the act declared certain contracts void by its terms, it "necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." In essence, the Court ruled that in 1795 it was the intention of Congress to allow Indian tribes to sue for land transaction grievances in the courts of the United States! If this outlandish assertion were correct, why had the tribes been denied such access until 1974, the year that the U.S. Supreme Court allowed the Oneidas land claims into the courts? Dissenting Judge Meskill correctly pointed out that Indian tribes have remedies available without resorting to the courts and that Indian land claims should not be resolved by judicial fiat. He wrote, "Congress has established administrative procedures to resolve Indian land claims and the federal government can sue in federal court to enforce Indian land rights. If the existing federal administrative mechanism is ineffective, the Indians' proper remedy is not in the federal courts, but rather in Congress."

Meskill reasoned that had a federal common law cause of action in favor of the Indian tribes existed in 1793, it was preempted by the Trade & Intercourse Acts, and that "When Congress addresses directly and comprehensively a question previously governed by federal or state common law, that common law is preempted. While the majority does not dispute this, it finds that Congress did not intend to preempt the field because the Trade and Intercourse Acts were not comprehensive statutes." The Court found that the Acts were not comprehensive since "they did not speak directly to the question of the Indians' ability to enforce their possessory rights by

[60] The doctrine of laches is unreasonable delay or negligence in pursuing a right or claim. It withholds normal relief because the granting of such relief would be unjust and unfair.

an action in ejecment. Rather, the Acts augmented the protection of Indian property rights previously afforded by federal common law by adding an additional staturory prohibition."[61] The problem with this view is that at the time of the alleged violations of the Acts, federal common law did not exist. Judge Meskill noted that they were not comprehensive by "today's standards."

The Court answered the counties' second argument by reasoning that since the pertinent provision of the 1793 Act remains operative in 25 U.S.C. § 177 (1983), abatement is inappropriate.

Regarding the statute of limitations, the Court noted that:

> Suits brought by the United States on behalf of Indian tribes are governed by the special statute of limitations set forth in 28 U.S.C. § 2415 which provides some guidance in the present situation. Under section 2415(c) there is no time limitation if the action is to "establish the title to, or right of possession of, real or personal property." Section 2415(a) provides that actions in contract seeking money damages that accrued prior to July 1966 are timely if filed prior to December 31, 1982. Thus, had the United States brought the instant suite in 1970 instead of the Oneidas, it would not have been time-barred. We conclude that "at the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States."

Instead of bringing suit in the stead of the Oneidas in 1970 however, attorneys representing the United States were claiming, in arguments against the Oneidas' land claims that had been brought before the Indian Claims Commission, that the Trade & Intercourse Acts did not apply within the original thirteen states.

The Court found that the Oneidas' claims were "justiciable," but Meskill countered, "There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law." Even the Oneidas' lead attorney, George Shattuck, who had won the Supreme Court decision of 1974, would have agreed with Judge Meskill. Commenting on Judge Port's 1971 Oneida opinion, Shattuck wrote, "In terms of legal precedents, Judge Port had been right, of course. At the time he wrote his initial 1971 opinion, all of the preceding cases had held that a claim by Indians for possession of land did not belong in federal courts. The Second Circuit Court of Appeals had squarely held this in 1928 in the *Deere* case."[62]

Judge Meskill further noted that the lower courts that have assumed a private cause of action for violations of the Acts, specifically, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 903 (D. Mass. 1977); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 805 & n.3 (D.R.I. 1976), are "in error," and have used neither legislative history nor valid precedent in arriving at their opinions. Meskill's closing statement is prescient:

> In sum, I believe there is no basis upon which the majority can imply a private cause of action by Indians to recover damages for wrongful possession. To hold otherwise is a

[61] Oneida Indian Nation of New York v. County of Oneida 719 F.2d 525 (1983).

[62] Shattuck, George C., The Oneida Land Claims: A Legal History, page 40.

novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.

RETURN TO THE SUPREME COURT

Less than two years after the Second Circuit's ruling, the U.S. Supreme Court granted certiorari, and delivered an opinion on March 4, 1985 in favor of the Oneida tribes. Interestingly, after their unanimous decision of 1974, the Court delivered a 5 to 4 split decision. It appeared that while the Court was only too willing to unlock "Pandora's Box," it was only very reluctantly willing to open that box. The courts' incremental inching toward the precipice of fantasy had finally resulted in an unbelievably foolhardy leap of delusion that would disrupt the lives of hundreds of thousands of innocent American citizens and cost the taxpayers hundreds of millions of dollars.

Needless to say, the Court found no merit to any of the counties defenses. Justices Brennan and Marshall dissented in part, and Justices Stevens, White, and Rehnquist dissented in whole. Dissenters in whole found that the Court had always applied the equitable doctrine of laches when Indians or others sought, "in equity, to set aside conveyances made under a statutory or common-law incapacity to convey," and announced that, "Today's decision is an unprecedented departure from the wisdom of the common law." The Court however, was unable to consider the doctrine of laches since, as herein stated before, the counties had unbelievably not reasserted that defense in their appeals. Justice Stevens wrote, "The Oneida have not met their formidable burden of disproving unjustifiable delay to the prejudice of others. In my opinion their cause of action is barred by the doctrine of laches. The remedy for the ancient wrong established at trial should be provided by Congress, not by Judges seeking to rewrite history at this late date."

TWO OTHER CLAIMS

The "test" case having been won, the Oneidas proceeded with their other claims. A suit that challenged the validity of state land transactions that predated the U.S. Constitution was filed in the late 1970's by the Oneidas. The land involved amounted to some 6 million acres encompassing lands within a dozen counties of the State of New York. The claim worked its way through the courts and was lost in 1988 when the Second Circuit ruled against the Oneidas, and the U.S. Supreme Court denied certiorari.

Alive and well is the Oneidas' final land claim seeking approximately 250,000 acres of land within the counties of Madison and Oneida. After years of sporadic negotiations, the case is now before Judge Lawrence Kahn in the District Court of the Northern District of New York. A ruling of March 29, 2002, addressing eight motions, has already struck down nearly all of the State's and Counties' defenses, including the doctrine of laches.

The defendants are claiming a defense that was not used during the "test" case; it is their contention that the 1838 Treaty of Buffalo Creek was an obligatory removal treaty that disestablished the Oneidas sovereignty over the lands within the State of New York. During the "test" case, the counties had claimed that the Buffalo Creek treaty had, by implication, ratified the previous state treaties, but the courts failed to agree with that contention.

CONCLUSION

The body of evidence presented in this work clearly establishes a considerable "shadow of doubt" as to the validity of Indian land claims based on alleged violations of the Trade & Intercourse Acts. No evidence was cited in this work that convincingly demonstrates that the State of New York intentionally or unintentionally violated the Trade & Intercourse Acts because none could be found.

While the land claims are not based on unconscionable consideration received by the tribes for their lands, it is important to note that the State of New York paid the tribes far more per acre (43 cents to $1.50) than the going federal rate of 1 to 2 cents per acre. Additionally, state treaties deemed valid because of their having federal participation differed in no meaningful way from those that lacked such participation. Had the federal government decided to participate in those treaties, there is every reason to believe that they would have approved of those treaties.

The constitution grants congress the power to regulate commerce with the Indian tribes, but from that constitutional grant, the federal government, with very considerable help from the courts, has persistently and increasingly expanded its power over the tribes. Nevertheless, assuming that contemporary levels of this constitutional grant of power over Indian tribes did indeed exist during the early years of our nation's history, it is evident that the federal government frequently chose not to exercise it. Where the federal government historically acquiesced, it is clear that the jurisdiction of the states historically and legitimately prevailed.

Notwithstanding the established guardianship of the federal government over the Indian tribes, it is beyond question that during the early period of this nation's history, the original 13 states possessed considerable jurisdiction over, and accepted responsibility for, the tribes living within their borders. It is also beyond question that states were not constitutionally denied the power or the right to hold "treaties" with the tribes within their jurisdictional boundaries since state treaties were in no sense regarded as the equivalent of "treaties" held under the constitution. It is ultimately reasonable to accept these conditions as an explanation of the total silence of the congress in regard to supposed violations of the Trade & Intercourse Acts by states.

In the courts hearing these land claim cases, rulings on "shaky ground" have become the rule rather than the exception. The tribes have been allowed to enter the courts to sue counties, corporations, and even private citizens for alleged violations that they had no knowledge of, or participation in, and those counties, corporations, and private citizens have been denied all customary legal defenses. The courts have ignored or misinterpreted the historical record, and they have applied contemporary legal notions and constructs to ancient events. As a result, the courts have not delivered justice; they have rewritten history. It is time for Congress to act.

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