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In this report, Starna examines the Treaty of Canandaigua, assessing how courts have construed and applied the plain words contained in its provisions.

Starna prepared a historical report on the 1784-1794 treaty period and the Six Nations for the plaintiffs in *Cook v. United States*, 32 Fed. Cl. 170 (1994).

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Introduction

Addressing the nature of Indian treaties — whether the colonial-period treaty, the act of negotiating, or a compact between two sovereign states — is a complicated undertaking. Fundamentally a political endeavor, treaties, once constituted and ratified by the government, are regarded as the "supreme Law of the Land," their interpretation and application relegated to questions of law and fact.[1] Nonetheless, Indian treaties did not arise, nor were they negotiated, in a vacuum. They were the product of historical circumstances that for the United States and American Indians required attention, made in response to conditions on the frontier and the immediacy for pragmatic solutions. By extension, treaties and the way parties contemplated their reach into the future, and then their relevance in the present, frame a history worthy of examination. They are, in the end, historical documents created in the milieu of historical events.[2]

On November 11, 1794, after weeks of often difficult negotiations, federal Indian commissioner Timothy Pickering and the chiefs and warriors of communities of the Six Nations gathered to sign a treaty at Canandaigua, in western New York. Officially designated "A Treaty Between the United States of America, and the Tribes of Indians Called the Six Nations," its purpose was to remove "all causes of complaint" and establish "a firm and permanent friendship with them." For the United States, the treaty secured peace and a cession of the claims of the Six Nations to the Ohio Valley; returned to the Senecas lands taken by the Fort Stanwix treaty of 1784; and acknowledged the lands of the Cayugas, Onondagas, and Oneidas reserved in their treaties

[1] U.S. Const. Art. VI, section 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

[2] The most authoritative and comprehensive discussion on the history of Indian treaties is Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (1994).

with New York. Article VII, which set out the government-to-government relationship between the United States and "the Six Nations or any of them," recognized their sovereign status. A central element of the treaty is the promise made to each of the Six Nations, found in articles II, III, and IV. Of the land returned and reserved to them — "their property" — "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." Also in Article IV, the Six Nations "and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof."[3]

In this assessment of the Canandaigua treaty, the question at hand is how courts have construed and applied the plain words contained in its provisions — in particular on the matter of federal taxation — and what a clear-eyed reading of the treaty's history offers in return. As such, it does not pose legal arguments or directly interrogate judicial outcomes. Addressed instead are the courts' interpretations of the treaty, a task assumed to have been attended by a familiarity with its historical context.

Historical Background

The 1783 Treaty of Paris, which ended hostilities between Great Britain and the United States and recognized the independence and sovereignty of the colonies, was silent regarding loyalist Indians and the western lands — the Ohio country or upper Ohio Valley. In October of the following year, the United States concluded a treaty with the Six Nations at Fort Stanwix, whereby the Senecas, Cayugas, Onondagas, and Mohawks, who had sided with the Crown, were dealt with as a defeated people. Article III of the treaty compelled a surrender of the Six Nations' claims to the Ohio country, fixing a line of cession generally south from about the mouth of the Niagara River to Pennsylvania, then south along that colony's western boundary to the Ohio River. Although the Six Nations — including the Oneidas and Tuscaroras, who had joined the Americans in the war — were "secured in the peaceful possession" of their lands remaining east and north of this line, the Senecas were forced to give up most of their land in New York to the national government. Soon after, Pennsylvania commissioners, under the authority of Congress, acquired from the Six Nations a release to a large tract of the northwest quadrant of the commonwealth not yet purchased from the Indians.[4]

Federal treaty commissioners next turned to the Native groups in the Ohio Valley, concluding the Fort McIntosh treaty in 1785. Here the western Indians surrendered most of their lands in the Ohio country, except a reservation between the Cuyahoga and Maumee rivers. However, this and the Fort Stanwix treaty caused considerable agitation and resentment among Indians on the frontier. Beyond the hostility that Native participants in the Fort Stanwix treaty encountered from their own people upon returning home and the Senecas' anger over the land cession to Pennsylvania, the United States had dismissed any notion of an alliance operating independently from that of the Ohio Valley Indians. It chose instead to deal with the Six Nations' communities individually rather than as the confederacy they asserted. All signs pointed to a joining of the Ohio Indians, determined to fight for their homelands, with at least four of the Six

[3] The Six Nations is the collective term first applied in the 18th century to the Senecas, Cayugas, Onondagas, Oneidas, Mohawks, and Tuscaroras — Iroquoian-speaking groups that resided generally in what is now upstate New York. Today these Native communities use the self-referent Haudenosaunee (Seneca, Hodinöhsö:ni'), "People of the Longhouse." For the text of the Canandaigua treaty, see 2 Charles J. Kappler, ed., *Laws and Treaties: Indian Affairs* 34-37 (1904). The best treatments of the history and implications of the Canandaigua treaty are William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (1998); and Jack Campisi and William A. Starna, "On the Road to Canandaigua: The Treaty of 1794," 19 *Am. Indian Q.* 467 (1995). *See also* Edward Hake Phillips, "Timothy Pickering at His Best: Indian Commissioner, 1790-1794," 102 *Essex Inst. Press* 163 (1966); G. Peter Jemison and Anna M. Schein, eds., *Treaty of Canandaigua 1794* (2000); Michael Leroy Oberg, *Peacemakers: The Iroquois, the United States, and the Treaty of Canandaigua, 1794* (2015); and Gerard H. Clarfield, *Timothy Pickering and the American Republic* (1980).

[4] Kappler, *supra* note 3, at 5-6; Campisi and Starna, *supra* note 3, at 468-469; and Prucha, *supra* note 2, at 45-48.

Nations — a threat that forced the United States to rethink its policy of taking Indian lands.[5]

As the Confederation period ended, the national government moved to remedy what was a failing Indian policy. In treaties signed at Fort Harmar in January 1789, the cessions agreed to at the Fort Stanwix and Fort McIntosh treaties were reaffirmed along with commitments to mutual respect and a permanent peace. Still, the treaties proved no more acceptable to the Indians than previous agreements. The Ohio Indians repudiated their treaty with the United States while the Senecas' ongoing complaints about the loss of their land went unattended. With war on the frontier appearing inevitable, concerns mounted over what course the Six Nations tribes would take.[6]

Secretary of War Henry Knox brought a newly conceived national Indian policy to President Washington in summer 1789, which he projected to end the disturbances on the frontier. He offered two approaches: "raising an army, and extirpating the refractory tribes entirely," or "forming treaties of peace with them, in which their rights and limits should be explicitly defined." Knox cautioned that the first presented a problem — whether the United States had a "clear right" to take such action consistent with "the principles of justice and the laws of nature." Moreover, he continued, "it is presumable, that a nation solicitous of establishing its character on the broad basis of justice, would not only hesitate at, but reject every proposition to benefit itself, by the injury of any neighboring community." As for the second, the "principle of the Indian right to the lands they possess" is "conceded," and moreover, "the dignity and interest of the nation will be advanced by making it the basis of the future administration of justice towards the Indian tribes" — that is, an administration exercised through treaties. This fundamental principle would dominate federal Indian policy through to 1871, the end of the treaty-making period.[7]

In September 1790 Knox, frustrated by the continued unrest in the Ohio country, approved plans to launch a military operation to contain the Wabash Indians there. In the meantime, diplomatic efforts were undertaken to ensure the neutrality of the Six Nations tribes, especially the Senecas. The considerable task of dealing with these Indians and persuading them to remain disengaged from events along the Ohio was put into the hands of Timothy Pickering, the newly appointed Indian commissioner.[8] Pickering would spend the next four years in meetings and negotiations with representatives of the Six Nations, primarily the Senecas. The first took place at Tioga Point (Athens, Pennsylvania) in late October 1790, where Pickering eased the Indians' concerns about their relationship to the federal government, renewing with them the metaphorical "chain of friendship." The fact that there were "no lands to be bargained for, no boundaries to be disputed, and no alliances to be formed" made his task much less complicated. Following the meetings at Tioga, a delegation of Seneca chiefs returned with Pickering to Philadelphia, where government officials explained the reasons behind the military campaign against Indians in the Ohio country. But the Senecas were also warned not to permit their young men to side with the Indians there.[9]

The national government pressed to secure the neutrality of the Six Nations tribes and looked to prevent their joining with the western Indians. Incidents along the frontier provoked by settlers, some of which resulted in the deaths of Six Nations people, and the failure of the United States to intervene, set the Indians on edge. At the same time, the demands of whites for land on the frontier and the unrelenting anger of the Senecas

[5] Kappler, *supra* note 3, at 6-8; Campisi and Starna, *supra* note 3, at 469; and Prucha, *supra* note 2, at 49-50.

[6] On the Fort Harmar treaties, see Kappler, *supra* note 3, at 18-25; Prucha, *supra* note 2, at 54-58; and Campisi and Starna, *supra* note 3, at 470-471.

[7] Class II, 1 *American State Papers, Indian Affairs* 13, "Report From H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians" (June 15, 1789); and Campisi and Starna, *supra* note 3, at 470-471.

[8] *American State Papers*, *supra* note 7, at 100, "The Secretary of War to Governor St. Clair" (Sept. 12, 1790). For histories on events in the Ohio country, see Randolph C. Downes, *Council Fires on the Upper Ohio* (1940); and Eric Hinderaker, *Elusive Empires: Constructing Colonialism in the Ohio Valley, 1673-1800* (2008).

[9] Campisi and Starna, *supra* note 3, at 471-472; and Phillips, *supra* note 3, at 170.

and others of the Six Nations over the Fort Stanwix treaty demanded immediate attention. Knox ordered a second meeting between Pickering and the Six Nations tribes that took place at Newtown Point (Elmira, New York). In Pickering's message to the Indians, he reminded them that at Tioga, "I assured you that in all my conduct you should find me open and sincere." He intended to "again brighten the chain, and to remove all causes of jealousies and discontents." In their reply, Seneca chiefs said that peace was possible, and an effort would be made to reconcile the differences between the United States and the western Indians and "stop the effusion of innocent blood."[10]

At the Newtown meeting, Pickering addressed the key issue of land. He described for the Indians the provisions of the Indian Trade and Intercourse Act first passed in July 1790 in response to the continued complaints about the violation of boundaries, set by treaty, and the protests of settlers about Indian depredations.[11] He then read from a speech Washington had made before Seneca chiefs in Philadelphia. "When [the president] speaks," said Pickering, "all who know believe him. All the people of the United States believe his words: for they have always found them true. . . . Let his words therefore sink deep into your hearts, let them never be forgotten." The Indians' foremost concern, Washington had acknowledged, was the security of their lands, now protected by legislative guarantees. The Nonintercourse Act and Washington's words, Pickering declared, "are the highest possible security."[12] The Six Nations, however, would remain vigilant. Seneca Chief Red Jacket warned Pickering: "We wish Congress to be very careful how they speak; and to speak to us of nothing but peace; and we desire they would do the same among their own people."[13]

In an August 1791 letter to Knox, Pickering summarized his dealings to that point with the Six Nations tribes. They were given to understand their rights to the soil by the Indian Trade and Intercourse Act and that the right of preemption was in the United States or subject to its dominion. Pickering repeated a proposal delivered to the Six Nations in Philadelphia regarding the introduction to them of "the primary and most useful improvements of civil life." These included the art of husbandry, the manual arts, and the arts of reading and writing, all of which required an essential complement — "a separate occupancy and enjoyment of the land" that was the "exclusive property" of the tribes of the Six Nations.[14]

In March 1792 the Six Nations' chiefs were once again in Philadelphia to discuss with Pickering arrangements for bringing farming to their communities. However, the crushing defeat of General St. Clair's army by the Miamis in the Ohio country the previous fall, a year after an Indian victory over General Harmar's forces near the Miami towns, had changed Knox's view of the meeting's purpose. Rather than talk about farming, Knox wanted to persuade the Six Nations to join with the United States against the western tribes.[15] Knox's interference infuriated Pickering, who sent a sharply worded protest to President Washington arguing that any negotiations with the Six Nations should follow from what was offered to them in his invitation. Complicating matters was the pro-British Mohawk War Chief Joseph Brant's warning to the Indians that "the real design of [Pickering's] invitation was not *on* the paper but *behind* it."[16] But Pickering's message to Washington could not have been more clear: "Indians have been so often deceived by white people that *White Man* is, among many of them, but another name for *Liar*.

[10] Campisi and Starna, *supra* note 3, at 472; and The Timothy Pickering Papers, Massachusetts Historical Society 60: 56, 63-63A.

[11] On the Nonintercourse Act (Act of July 22, 1790, ch. 33, 1 Stat. 138; Act of March 1, 1793, ch. 19, section 8, 1 Stat. 330) as it regarded the Six Nations, see Starna, "'The United States Will Protect You': The Iroquois, New York, and the 1790 Nonintercourse Act," 83 *N.Y. Hist.* 5 (2002). *See also* Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (1970).

[12] Pickering Papers, *supra* note 10, at 60: 79.

[13] *Id*. at 93.

[14] *American State Papers*, *supra* note 7, at 170, "Copy of a Letter From Timothy Pickering to the Secretary of War" (Aug. 16, 1791); Pickering Papers, *supra* note 10, at 60: 82[A]-84, 92A; and "To George Washington From Timothy Pickering, 8 January 1791," Founders Online, National Archives.

[15] Downes, *supra* note 8, at 318, 320-321; Phillips, *supra* note 3, at 178; *See also* Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815*, 318 (1992).

[16] Pickering Papers, *supra* note 10, at 62: 11-12; "Enclosure: Timothy Pickering to George Washington, 21 March 1792," and Founders Online, National Archives (emphasis in original).

Really, Sir, I am unwilling to be subjected to this infamy. I confess I am not indifferent to a good name even among the Indians. Besides, they viewed, and expressly considered me, as '*your Representative*.'"[17] Knox quickly withdrew his proposal, granting Pickering a free hand in the meetings and negotiations he would conduct with the Six Nations. Pickering's integrity, a mark of his character throughout his diplomatic career and in his professional and personal relationship with Indians, was intact.[18]

The situation in the Ohio country did not change for the remainder of 1792 and into the next year. Although the United States readied itself for war, it continued efforts to reach a peace deal with the western Indians. In the meantime, the Six Nations sat down with the western tribes to draw up a response to the offers that Pickering and two other commissioners planned to discuss with them at Sandusky. But British agents refused the party permission to travel farther west than the mouth of the Niagara River. There the commissioners met with Indian envoys, whose demand that the United States relinquish the lands north of the Ohio was rejected out of hand. The Indians' reply was dark: "We can retreat no further, because the Country behind, hardly affords food for its present inhabitants; and we have therefore resolved to leave our bones, in this, small space, to which we are confin'd."[19] Their backs against the wall, the Indians in Ohio country would go to war. General Anthony Wayne prepared for the American military response while the Six Nations would not commit.[20] In the shadows lingered the threat of British intervention. The thorny matters of setting a boundary line to protect the western lands and restoring and ensuring the security of the territories of the Six Nations went unresolved.

Between October 1793 and summer 1794, the United States and the Six Nations held a series of councils. The central and overriding concerns for the United States were the threat of war in the Ohio country, that the Six Nations would join with the western Indians, and the possibility of British involvement. By mid-1794 the Six Nations' anger and resentment regarding their lands reached a dangerous level. Meeting at Buffalo Creek with Israel Chapin, United States superintendent of Indian affairs, the Six Nations raised again the issue of land cessions, rejecting out of hand the Fort Stanwix and Fort Harmar treaties. "We pay no attention to what has heretofore been done by Congress," declared Cornplanter, the Seneca speaker, putting the United States on notice: "We, the Six Nations, have determined on the boundary we want established, and it is the warriors who now speak. . . . It is not because that we are afraid of dying that we have been so long trying to bring about a peace. We now call upon you for an answer, as Congress and their commissioners have oftentimes deceived us; and, if these difficulties are not removed, the consequences will be bad."[21] Without the restoration of the Senecas' land, there would be war. Yet, throughout it all, the Six Nations remained anxious to develop another treaty.

The volatility of the situation demanded action. Letters exchanged between Chapin, Knox, and Pennsylvania Gov. Thomas Mifflin, followed by Chapin's recommendation to Washington that commissioners be appointed to negotiate a settlement, produced results. Washington directed that a council be held with the Six Nations at Canandaigua to commence that September, invitations to which would be delivered by Chapin's son. Timothy Pickering was appointed sole negotiator. A federal treaty to settle all outstanding issues was in the offing.[22]

The Canandaigua Treaty

The result of the council Washington called for was the Canandaigua treaty, signed by all parties on November 11, 1794, and proclaimed on January 21, 1795. In a letter to "the Sachems Chiefs and Warriors of the Six Nations," Pickering reported that the treaty was ratified in Philadelphia on January 22 "by the President, by

[17] "To George Washington From Timothy Pickering, 21 March 1792," Founders Online, National Archives (emphasis in original).

[18] Phillips, *supra* note 3, at 179; and Campisi and Starna, *supra* note 3, at 474.

[19] Pickering Papers, *supra* note 10, at 60: 173A, Commissioners Journal, Aug. 16, 1793.

[20] Campisi and Starna, *supra* note 3, at 475-476.

[21] *American State Papers*, *supra* note 7, at 521, "Proceedings of a Council Holden at Buffalo Creek, by the Six Nations of Indians, on the 18th of June 1794"; and Campisi and Starna, *supra* note 3, at 476-478.

[22] Campisi and Starna, *supra* note 3, 478-479.

and with the advice of the Senate." He assured the Six Nations tribes that they could "rely on the complete performance of every Article of the treaty on the part of the United States," and that, in turn, the United States would "rely with confidence on the faithful execution on your part of a treaty so entirely calculated to promote the best interests of yourselves, and your posterity, the liberal and generous principles on which this treaty has been formed."[23]

"The great object of the treaty," Pickering wrote shortly after its signing, "was to remove complaints respecting lands." Renewed and confirmed was "the friendship which had now for some years subsisted between the Six Nations and the United States."[24] Still, Seneca land was the central issue and securing the neutrality of these people a crucial concern. The participation of the other tribes of the Six Nations was essentially ceremonial and incidental to the treaty's primary purpose — restoring and securing Seneca territory.[25]

The language and form of the Canandaigua treaty, when compared with previous treaties, is instructive on several levels. The acknowledgment that the tribes of the Six Nations were in government-to-government relationships with the United States and thus individually sovereign is demonstrated by the reciprocal language regarding land and reservations — "their property" — as found in Articles II, III, and IV: "The United States will never claim the same, nor disturb them [the Oneidas, Onondagas, Cayugas, and Senecas] or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof." Then, as stated in Article IV, "Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof." Historian Francis Paul Prucha has observed that in the treaties preceding Canandaigua, along with those that followed, the United States not only "recognized a measure of autonomy in the Indian bands and tribes," but that such recognition "contributed to that concept." Moreover, treaties "made no sense unless based on recognition of some kind of special legal status of the Indians."[26]

Further acknowledgement of the sovereign status of the Six Nations tribes is found in Article VII of the Canandaigua treaty, which draws a jurisdictional equivalency or mutuality between the parties. Here, regarding unenumerated transgressions — "the misconduct of individuals" — the United States and the tribes of the Six Nations agreed that "no private revenge or retaliation shall take place" for injuries done by persons on either side. Instead, the complaints of the aggrieved party would be presented to representatives of the other. Named in the article to hear complaints for the United States is the president of the United States or his representatives, and for the tribes of the Six Nations, their principal chiefs. "And such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken" until the legislature of the United States "shall make other equitable provision for the purpose."[27]

Of the 12 ratified treaties made before Canandaigua, dating from 1778 to 1794, all but two — Fort Stanwix and Fort Harmar — list what are standard-form processes to be followed in the event of criminal activity by American citizens or members of the relevant Indian tribe.[28] With the exception of the 1788 Delaware treaty, all are decidedly one-sided, privileging and regulated by the United States — that is, unlike the protocol implied by the Canandaigua treaty, there is only limited participation of the other treaty tribes in adjudicating violations. Both the American and

[23] E.A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe, With Allied Documents Relating to His Administration of the Government of Upper Canada* 339-340 (1923-1931).

[24] Pickering Papers, *supra* note 10, at 62: 108; *id.*, at 60: 218.

[25] Campisi and Starna, *supra* note 3, at 486.

[26] Prucha, *supra* note 2, at 2.

[27] Kappler, *supra* note 3, at 36.

[28] The 1794 treaty with the Cherokees, which does not contain wording about how criminal activity is to be addressed, is a full-force and binding restatement of the 1791 treaty held at Holston, which does. *Id.* at 33. The 12 treaties noted are as follows: Treaty with the Delawares, 1778; Treaty with the Six Nations, 1784; Treaty with the Wyandot, etc., 1785; Treaty with the Cherokee, 1785; Treaty with the Choctaw, 1786; Treaty with the Chickasaw, 1786; Treaty with the Shawnee, 1786; Treaty with the Wyandot, etc., 1789; Treaty with the Six Nations, 1789; Treaty with the Creeks, 1790; Treaty with the Cherokee, 1791; and Treaty with the Cherokee, 1794. *See* Kappler, *supra* note 3, at 3-34.

Indian parties are directed to report violations one to the other. However, an Indian who commits a "murder, or robbery, or other capital crime" against an Indian or American is to be delivered up to American authorities and "punished according to the ordinances of the United States" or, in some cases, "the laws of the state or territory." In turn, an American committing a crime against an Indian or American "shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States." Although provisions are sometimes made for Indians to witness the punishment meted out by American authorities, there is nothing to suggest they took part in judging the offender or in fixing the penalty. Moreover, in contrast to the procedure detailed in Article VII of the Canandaigua treaty, the persons before whom an offender is brought are unidentified as to title or position, suggesting an ad hoc, if not informal, setting. Of significance, the social controls — culturally derived sanctions — operating in tribes and Native communities do not appear to have been an option.[29]

The sovereign status of the tribes of the Six Nations is further defined by the absence of language in the Canandaigua treaty routinely found in ratified treaties to 1794 — that the tribe is "under the protection of the United States," with the occasional added qualification "and of no other sovereign whatever."[30] As before, of the 12 ratified treaties made before Canandaigua, all but Fort Stanwix, Fort Harmar, and that with the Delaware make reference to the signatory tribe being placed "under the protection of the United States." Although this phrasing may appear altruistic, the historical context and intent of these treaties, marked by the Revolution, frontier warfare, and forced land cessions, support a relegation of the tribes to a subordinate, dependent position relative to the United States. The Canandaigua treaty contains no such provision, nor is there anything in the extensive record of the negotiations to suggest other than the United States and the Six Nations tribes having acknowledged their opposite as a distinct, equal, and autonomous polity.

Also distinguishing the Canandaigua treaty from the 12 that preceded it are the listed treaty provisions. Each of the 12 provides for the drawing of a geographical boundary between the parties, a cession of Indian land to the United States, and the setting off of the lands remaining — reserved lands — for the tribes. Nearly all describe how trade is to be conducted and regulated. Few of these provisions and little of their language appear in the Canandaigua treaty.

Article II of the Canandaigua treaty acknowledges the lands reserved to the Oneida, Onondaga, and Cayuga nations in previous treaties with New York "to be their property." Moreover, "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." Article III lays out the boundaries of the lands of the Seneca Nation. Unlike any of the previous federal treaties, this article provides for a *retrocession* of land — some 1,600 square miles, or 1 million acres — to the Seneca Nation, taken by the United States in the 1784 Fort Stanwix treaty.[31] Acknowledging these lands to be the property of the Senecas, "the United States will never claim the same, nor disturb the Seneka [sic] nation, nor any of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof." Repeated is the United States' right to preemption.

Article IV contains the reciprocal language mentioned previously, offering protection to the United States from claims to land by the Six Nations tribes. "Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof." Unique in treaty construction from any period, this language was insisted on by the chiefs of the Six Nations in their negotiations with

[29] *Id.* at 3-36.

[30] *Id.*

[31] Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* 179 (1982).

Pickering, who explained their concerns in a letter to Knox four days before the treaty was signed:

> I supposed the day before yesterday that the treaty was closing very satisfactorily; the Chiefs not objecting to explicit relinquishments of all the lands belonging to Pennsylvania . . . but yesterday they uncovered the mystery that had veiled their proceedings: — they were desirous of a fresh confirmation of their lands; but were unwilling to *relinquish*, or *give up*, or use any words of that import, respecting the lands ceded by former treaties to the United States. When I pressed them for the reason of their objection, they would answer, that the lands having been ceded by former treaties [Fort Stanwix and Fort Harmar], there was no need of saying any thing about them. Do you then, said I, acknowledge yourselves bound by those cessions. . . . To this they gave no answer. As you decline saying that you *give them up*, do you mean to claim them hereafter: — No. Where then is the difficulty? — A War-Chief of the Tuscaroras present . . . solved the difficulty. "They are afraid of offending the British." This was not denied. . . . The War Chiefs . . . finally said they had no objection to engage that they would never claim any land out of their acknowledged boundaries . . . and added, "if the Sachems also say *yes* we shall soon close the treaty."[32]

In a follow-up letter to Knox the day after the treaty was signed, Pickering added that it was the fear of angering the western Indians that had "induced the Chiefs to persist in their opposition to an explicit *cession* of land; tho' finally they said they were willing to declare that they would never claim any of the land which we were solicitous to have relinquished. On this ground the treaty has assumed its present form."[33] The remainder of the articles — V, VI, and VII — address, in that order, the right to construct a wagon road through Seneca lands over which the United States would be given free and undisturbed use forever; the provision that a quantity of goods and an annual annuity be delivered to the Six Nations "and the Indians of other nations residing among and united with them"; and a process for addressing the "misconduct of individuals" mentioned earlier.[34] But a letter to Mohawk Chief Joseph Brant one week after the signing shed a clear light on what had been Pickering's intention all along:

> I did not come here [to Canandaigua] *to drive a bargain*; but to manifest the real desires of the United States to live in friendship with the Six Nations. I therefore did not consider *how much I could gain for the United States*; but, as far as circumstances would permit, *how I should promote the true interests of the Six Nations*. In thus consulting their interests, I expected to give them satisfaction: and I am not disappointed.[35]

The defeat of the confederated tribes in the Ohio country in August 1794, which Pickering learned of on September 20 from British sources while the treaty council at Canandaigua was taking place, mooted the question whether the Six Nations would join with the western Indians. In the end, the central issue was securing their land. One year later, with the signing of the Treaty of Greenville, the Indians there relinquished their claims to most of Ohio and a part of Indiana. The hostilities that had begun with the Fort Stanwix treaty were over, although now a new boundary line had been drawn which, like that previous, would prove no obstacle to American expansion.[36]

The Post-Treaty Period

The historical record provides little of substance on the Canandaigua treaty from its ratification until the mid-19th century. No complaints of potential or actual violations of its provisions appear to have been brought before

[32] Pickering Papers, *supra* note 10, at 60: 206-208 (emphasis in original).

[33] *Id.* at 208.

[34] Kappler, *supra* note 3, at 36.

[35] Pickering Papers, *supra* note 10, at 60: 211-212 (emphasis in original).

[36] *Id.* at 60: 201-202; Clarfield, *supra* note 3, at 149-150; Prucha, *supra* note 2, at 91-94; and Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* 111-113 (2013).

any tribunal, whether Indian or of the federal government. But questions were raised by the Seneca leader Red Jacket regarding promises for implementing husbandry and the provision of goods outlined in Article VI of the treaty in a July 1819 council with representatives of the Ogden Land Company. Determined to acquire Seneca lands, the company pressed the Senecas to consolidate their people on the Allegany and Cattaraugus reservations and to sell what remained of their other properties.[37] "When we made a treaty at Canandaigua," Red Jacket, who opposed the scheme, reminded the gathering, "we thought it was to be made permanent, to stand between us and the United States forever," and that the Indians would remain on their lands undisturbed. Then, he presciently touched on a matter of some concern:

> Brother. You told us, where the Country was surrounded by whites, and in possession of Indians, when it was unproductive, not liable to taxes, nor to make roads and other improvements, it was time to change.
>
> As for taxing of Indians, this is extraordinary. This was never heard of before, since the first settlement of America. The land is ours, by the gift of the Great Spirit. How can you tax it? We can make such roads, as we want, and we did so, when the land was all ours.[38]

Then, in 1821 came an opinion from the attorney general of the United States regarding Seneca lands and a further effort by the Ogden Land Company to enter them:

> We have acknowledged by treaty that these lands are theirs; and by the same treaty have bound ourselves not to disturb them in the free use and enjoyment of these lands. By the same treaty, also, we have disclaimed the right to pass through their lands, or to navigate their waters, without their consent.
>
> I am of opinion that it is inconsistent, both with the character of the Indian title and the stipulations of their treaty, to enter upon these lands, for the purpose of making the proposed surveys, without the consent of the Indians, freely rendered, and on a full understanding of the case.[39]

Despite its importance, the Canandaigua treaty was not the last federal treaty made with the tribes of the Six Nations in New York. From 1797 until 1857, an additional 11 treaties were entered into, one of which was between the Senecas and Dutch representatives of the Holland Land Company. As a group, the treaties addressed cessions of land, lands reserved or purchased, and the removal west of "New York Indians."[40]

The Canandaigua treaty arose from a decade of negotiations to resolve a land dispute stemming from the Fort Stanwix treaty, to adjust land boundaries in response to Seneca demands, and to convey clear title of the western lands to the United States. It was a treaty between sovereigns, under which the United States viewed the tribes of the Six Nations in the same way it wished the Six Nations to view it. The guarantees that the Canandaigua treaty provides the Six Nations — the plain words of its provisions — are unequivocal: to leave the tribes undisturbed so that they might exercise the free use and enjoyment of their lands. However, federal and state courts have taken differing views on the "free use and enjoyment clause" in nearly all cases on the matter of taxation, as discussed below.

Courts, Texts, and Taxation

The matter of levying taxes of any category on the Six Nations tribes or their people is first raised in the 1842 compromise treaty with the Senecas.

[37] For histories of the efforts of the Ogden Land Company and the response of the Seneca Nation, see Laurence M. Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* (1999); Christopher Densmore, *Red Jacket: Iroquois Diplomat and Orator* (1999); and Henry S. Manley, "Buying Buffalo From the Indians," 28(3) *N.Y. Hist.* 313 (1947).

[38] Granville Ganter, ed., *The Collected Speeches of Sagoyewatha, or Red Jacket* 211, 213 (2006).

[39] 1 U.S. Op. Atty. Gen. 465, 467 (Apr. 26, 1821).

[40] The 11 treaties are as follows: Treaty with the Mohawk, 1797; Agreement with the Seneca, 1797; Convention between the Oneida Indians and the State of New York, 1798; Treaty between the State of New York and the Oneida Indians, 1802; Treaty with the Seneca, 1802 (two treaties); Treaty with the New York Indians, 1838; Treaty with the Oneida, 1838; Treaty with the Seneca, 1842; Treaty with the Seneca, Tonawanda Band, 1857. *See* Prucha, *supra* note 2, at Appendix B, Ratified Indian Treaties.

Here, two of the original four reservations acquired by the Ogden Land Company in the 1838 "Treaty with the New York Indians" — Allegany and Cattaraugus — were returned.[41] In the exchange, the Senecas "shall and may continue in the occupation and enjoyment of the whole of the said two tracts . . . with the same right and title in all things" as they had possessed before the sale.[42] Moreover, the United States agreed to protect Seneca lands "as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose" until the lands were sold.[43]

Yet, in 1840 and 1841, the New York Legislature passed laws that provided for the taxation of Seneca lands for the construction and maintenance of roads and bridges. A suit was brought in the state's supreme court demanding that the assessments, which had led to a tax sale for failure to pay, be declared void. The court found for the defendants, holding that the assessment of taxes on Indian lands and the tax sale were proper, a decision affirmed in 1861 by the New York Court of Appeals.[44] However, in *New York Indians* the U.S. Supreme Court reversed, finding that the taxes assessed "are illegal, and void as in conflict with the tribal rights of the Seneca nation as guaranteed to it by treaties with the United States."[45]

Of the treaties the Court referenced in its decision, it paid special attention to the Canandaigua treaty — "a specimen," citing Article III, by which "the United States acknowledge all the land within the aforementioned boundaries (which include the reservations in question) to be the property of the Seneca nation, and the United States will never claim the same nor disturb the Seneca nation . . . in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." The Court repeated the "free use and enjoyment" clause, emphasizing: "These are the guarantees given by the United States, and which her faith is pledged to uphold." And again, "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them."[46] It is evident that on the basis of the Canandaigua treaty's "free use and enjoyment" clause in Article III, the taxation of Seneca lands was illegal because, under the plain meaning of that text, taxation interfered with the undisturbed use of those lands.[47]

The matter of taxation is not raised again in the courts until *Salamanca* in 1939.[48] In that case, the federal government filed an action against the City of Salamanca, located in the Allegany Indian reservation, for having sold a parcel of land held by a Seneca for nonpayment of taxes. The parcel had been inherited by a nation member in accordance with traditional cultural practices.[49] Although the court's interest was in whether the federal government had standing to bring the suit, it pointed to the Act of February 19, 1875, which protected the Indians living in Salamanca

[41] Kappler, *supra* note 3, at 502; and Manley, *supra* note 37. Charges were soon forthcoming that the 1838 treaty had been negotiated in a fraudulent manner, resulting in the compromise treaty with the Senecas in 1842. *See* Kappler, *supra* note 3, at 537-542; and Prucha, *supra* note 2, at 202-207.

[42] Kappler, *supra* note 3, at 538-539.

[43] *Id.* at 541.

[44] *Fellows v. Denniston*, 23 N.Y. 420 (1861).

[45] *In re New York Indians*, 72 U.S. 761, 771-772 (1867).

[46] *Id.* at 766-768, 770.

[47] In 1857 the U.S. Supreme Court decided *Fellows v. Blacksmith*, 60 U.S. 366, the first of many cases it and lower federal courts would hear in which the Canandaigua treaty played a part. It followed from *Blacksmith v. Fellows*, 7 N.Y. 401 (1852), an action for assault, battery, and trespass by employees of the Ogden Land Company against John Blacksmith, a Seneca Indian resident on the Tonawanda Reservation, heard by the New York State Court of Appeals from a complaint brought in 1846. *Fellows* is recognized as an originative litigation of aboriginal title and for the finding that "a treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress." *Fellows* turned on the 1838 Treaty with the New York Indians and the 1842 Treaty with the Seneca. The citation of the Canandaigua treaty simply satisfied the question of Seneca ownership and security of the land on which the offenses had occurred. *See Fellows*, 60 U.S. 366, 367, 372; and Kappler, *supra* note 3, at 502, 537.

The first appearance of the Canandaigua treaty in a New York state court is in 1823. The case addressed the validity of a land transaction between the heir of an Oneida patentee and a non-Indian. The treaty is cited narrowly as an acknowledgment of the sovereignty of the Six Nations tribes: "What more demonstrable proof can we require, of existing and acknowledged sovereignty residing in those Indians? . . . The U.S. have never dealt with those people, within our national limits, as if they were extinguished sovereignties. They have constantly treated with them as dependent nations, governed by their own usages, and possessing governments competent to make and to maintain treaties." *Goodell v. Jackson*, 20 Johns. 693, 714 (1823).

[48] *United States v. Salamanca*, 27 F. Supp. 541 (W.D.N.Y. 1939).

[49] *Id.* at 546.

from taxation by New York.[50] The court's references to the Canandaigua treaty's provisions stand in full support of its reasoning — that is, "by virtue of certain treaties," one of which was Canandaigua, the Seneca Nation was "entitled to the free use and enjoyment of all the tribal lands within the Allegany reservation," a right also extended to the member who had acquired the parcel "by virtue of the laws and customs of said nation."[51] Furthermore, by the treaties of 1789 and 1794, "the United States contracted never to disturb the Indians in the free use and enjoyment of such lands."[52] The court denied the motion to dismiss, observing that the state had "seemingly recognized" its lack of authority to tax Indian lands given that it had "never imposed any tax or enacted any statute authorizing the imposition of any tax upon such lands."[53] As in *The New York Indians*, the court without hesitation read and affirmed the plain words of the Canandaigua treaty in reaching its decision.

The Canandaigua Treaty and the Federal Income Tax

Whether individual American Indian people — distinct from nations or tribes — were subject to the federal income tax was settled in *Squire*: "Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." The Court also held that, "to be valid, exemptions to tax laws should be clearly expressed," adding an important qualification: "But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act."[54]

The Six Nations tribes, parties to the 1794 Canandaigua treaty, are today the federally recognized Seneca Nation, Tonawanda Band of Seneca, Cayuga Nation of Indians, Onondaga Indian Nation, Oneida Indian Nation of New York, Tuscarora Nation, Oneida Nation of Wisconsin, and the Seneca-Cayuga Nation. There remains a question whether the Mohawks were or should be considered a party to the treaty.[55] Until the late 1980s, there is little evidence for, and few records of, objections by members of the listed tribes to individually paying federal income tax on their earnings on or off reservations. In 1988 two members of the Seneca Nation appeared before the Tax Court claiming an exemption from federal income taxes on wages, interest, and a distribution from an annuity, citing the provisions of the Canandaigua treaty. Relying on *Capoeman* and *Anderson*, the court in *Nephew* concluded that the "petitioners have not supported their position by relying upon explicit language from either treaty or statute, and we believe there to be none." Without further explanation, it rejected the Senecas' argument and found for the respondent.[56]

In 1989 the IRS commissioner filed a motion for summary judgment challenging an exemption from the federal income tax claimed by a member

[50] Act of February 19, 1875, ch. 90, 18 Stat. 330. Section 8 of the act states: "Nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

[51] *United States v. Salamanca*, 27 F. Supp. at 543.

[52] *Id.* at 544.

[53] *Id.* at 546.

[54] *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). Acknowledged here, although not accepted by Indian tribes, is the doctrine of plenary power: "The United States retains plenary authority to divest tribes of any attributes of sovereignty." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011), citing earlier cases. For one of many published objections to the doctrine of plenary power, see Walter Echo-Hawk, *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided* 161-88 (2010). *See also* Gregory Ablavsky, "Beyond the Commerce Clause," 124 *Yale L.J.* 1012 (2015). See generally the application of the IRC to Indians and tribes. For a discussion on federal taxation in Indian country, see Erik M. Jensen, "Taxation and Doing Business in Indian Country," 60 *Me. L. Rev.* 1 (2008).

[55] Although the Mohawks do not appear to have sent representatives to the council at Canandaigua, a Mohawk is nevertheless among the treaty's signatories. Fenton, *supra* note 3, at 701, 704. In a letter to Mohawk Chief Joseph Brant, Pickering explained that, "As one of the Six Nations, I did not think it proper to name it [the Mohawks] as not included in the Treaty; nor to omit it, by enumerating the other five. For general concerns, I consider the whole Six as forming one Confederate Nation." Pickering to Brant, Nov. 30, 1794, 10 Henry O'Reilly Collection, New-York Historical Society. However, in *People v. Boots*, 106 Misc. 2d 522, 532 (1980), the court held that no Mohawks participated in the negotiations, nor did they sign the treaty, dismissing the presence of the signatory, Henry Young Brant, as simply the nephew of Joseph Brant, disavowed by the defense as an illegitimate Mohawk chief.

[56] *United States v. Anderson*, 625 F.2d 910, 913 (9th Cir. 1980); and *Nephew v. Commissioner*, T.C. Memo. 1989-32.

of the Onondaga Nation.[57] In *George*, the petitioner claiming the exemption cited provisions of the 1794 Canandaigua treaty in addition to the Treaty of Ghent (December 24, 1814), the U.S. Constitution (Art. I, section 2, cl. 3), and Title 25 of the U.S. Code. The court brushed aside all these arguments with a perfunctory "Petitioner's reliance is misplaced." Insofar as the Canandaigua treaty was concerned, the court followed *Nephew* and the holding in *Capoeman* in addition to *Anderson*'s "express exemptive language" requirement, finding that the petitioner was not relieved of his obligation to pay federal income tax.[58]

In 1991 attention turned to the "Mohawk Nation of Indians" and two of its members, residents of Deseronto, Ontario (Tyendinaga Mohawk Territory), who claimed an exemption from United States federal income taxes. Cited in their petition as authorities were "portions of the Articles of Confederation, 'The Treaty of the Six Nations, 1794 [Canandaigua treaty],' 'The Proceedings of the Commissioners Appointed to Negotiate a Treaty with the Six Nations, 1775,' the United States Constitution, and Title 25 of the United States Code."[59] Once again, the Tax Court referenced *Capoeman* and the "express exemptive language" stipulation in *Anderson*, using in its decision the identical language found in *Nephew*, *viz.*, "Petitioners have not supported their claimed exemption by relying upon explicit language from either a treaty or statute, and we believe there to be none."[60] Moreover, it offered no opinion on the relevance or application of the authorities set forth by the petitioners, including the Canandaigua treaty, relying on the rejection of the arguments presented earlier in *Nephew* and *George*.[61]

In *Brown*, the respondent, a member of the Mohawk tribe, appearing pro se, claimed an exemption from federal income tax, and on that basis was not subject to the subpoena issued to him.[62] He cited several treaties in support, two of which — the Canandaigua and the Jay treaties — were addressed by the court. Following a lengthy discussion and references to several cases, the court turned to the Canandaigua treaty, in which it did not find language that would provide for an exemption. Moreover, it found, "Taxation is not referred to at all in the Six Nations Treaty." Instead, the treaty "deals entirely with its professed objective of 'firmly' establishing perpetual 'peace and friendship . . . between the United States and the Six Nations.'"[63] The respondent was ordered to comply with the subpoena.

Taxing Reservation-Earned Income and Businesses

In 1992 Mohawk citizens were before the Tax Court claiming in *Lazore* an exemption from federal income taxes based, in part, on the Canandaigua treaty.[64] It is important to note that the income that the Lazores had earned was from sources both *on* and *off* the reservation, although this distinction was not raised in their claim for an exemption. Referencing the "free use and enjoyment" clause found in articles II, III, and IV of the treaty, the court nonetheless held in *Lazore* that "as a congressional act of general application, the Internal Revenue Code applies equally to members of the Mohawk Nation as to all others."[65] The court augmented its argument by addressing the interpretation of agreements — that "tax exemptions by members of Indian nations are not granted solely by implication." In further support, it cited *Capoeman* on the subject of income tax liability for Indians, but also for the first time raised the canons of construction, under which

[57] *George v. Commissioner*, T.C. Memo. 1989-401.

[58] *Id.*

[59] *Maracle v. Commissioner*, T.C. Memo. 1991-98.

[60] *Id.*; and *Nephew*, T.C. Memo. 1989-32.

[61] *Maracle*, T.C. Memo. 1991-98.

[62] *United States v. Brown*, 824 F. Supp. 124 (S.D. Ohio 1993).

[63] *Id.* at 127.

[64] *Lazore v. Commissioner*, T.C. Memo. 1992-404.

[65] *Id.*, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

"ambiguous language in a treaty or statute is to be construed in favor of the Indians."[66] Finally, after a professed consideration of the treaties and the substantial historical record presented by the petitioners, in addition to the canons of construction, the court concluded that it was "unable to construe the language of these treaties as a restriction of the taxing authority of the United States to impose a tax not yet in existence." And then, "to do so would unreasonably stretch the plain meaning of the words expressed within in the treaties."[67] The court found that the petitioners were not exempt from their obligation to pay federal income taxes, a decision appealed to the Third Circuit the next year.

In the appeal, the question of Indian treaties being made before the advent of the federal income tax was raised, although years earlier the Supreme Court had held that a treaty-based exemption had to find support in the text of a treaty — that it must "derive plainly" and "be rooted" there.[68] Even so, given the absence of an income tax when, for example, the Canandaigua treaty was entered into, the appeals court could state the obvious: There was "no way for a treaty to contain language that could support an exemption from the income tax."[69] From this, and from the reality that parties did not negotiate treaties in anticipation of an income tax, the court acknowledged thea legal corner that the Indian petitioners found themselves painted in — that "silence as to matters of taxation will never be sufficient to establish an exemption."[70] The court then proceeded to address the canons of construction, rejecting the requirement in *Confederated Tribes of Warm Springs Reservation v. Kurtz* that a treaty contain a "definitely expressed exemption," accepting instead the approach adopted in *Holt*, in which a "treaty contains language which can be reasonably construed to confer income exemptions."[71]

Considered next were the treaties the Lazores relied on in claiming an exemption, with the Canandaigua treaty playing the most relevant role. But again, the *sources* of the Lazores' income — one off-reservation, the other on-reservation — were not addressed. The court nonetheless concluded that the Lazores' argument was insufficient "to create an exemption from the federal income tax . . . in the absence of some textual support." Nor did the court find "the treaty's statement that the United States will not disturb the Haudenosaunee [Six Nation tribes] in 'the free use and enjoyment' of their lands to be capable of being reasonably construed as supporting an exemption from the income tax."[72] However, the court, citing *Hoptowit*, reasoned: "The language relied on by the Lazores might be sufficient to support an exemption from a tax on income derived directly from the land." Still, language contained therein would have to be "capable of being construed more broadly. We cannot find any such language."[73] The court affirmed the Tax Court's decision that the Canandaigua treaty did not afford the Lazores an exemption from the federal income tax.

On the heels of *Lazore* came the question whether *on-reservation* fuel vender members of the Onondaga Nation should pay excise taxes for the importation, storage, and sale of diesel fuel. In *Cook*, the plaintiffs pointed to three federal treaties made with the Six Nations tribes, one of which was the Canandaigua treaty, to support their exemption claim.[74] In finding against the plaintiffs, the court laid out positions that in general followed those presented in previous tax cases, *Lazore* in particular. It first stated that

[66] *Lazore*, T.C. Memo. 1992-404. For an accounting of the standard canons of construction regarding Indian treaties, see *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). For background on the canons, see Richard B. Collins, "Never Construed to Their Prejudice: In Honor of David Getches," 84 *U. Colo. L. Rev.* 1 (2013); David J. Bederman, "Revivalist Canons and Treaty Interpretation," 41 *UCLA L. Rev.* 953 (1994); and "Note: Indian Canon Originalism," 126 *Harv. L. Rev.* 1100 (2013). Important critiques of the canons of construction in the context of taxation and American Indians are Jensen, "American Indian Law Meets the Internal Revenue Code: *Warbus v. Commissioner*," 74 *N.D. L. Rev.* 691 (1998); Jensen, *supra* note 54; and John Lentz, "When Canons Go to War in Indian Country, Guess Who Wins? *Barrett v. United States*: Tax Canons and Canons of Construction in the Federal Taxation of American Indians," 35 *Am. Indian L. Rev.* 211 (2010-2011).

[67] *Lazore*, T.C. Memo. 1992-404.

[68] *Lazore v. Commissioner*, 11 F.3d 1183-1184 (3d Cir. 1993).

[69] *Id.* at 1184.

[70] *Id.*

[71] *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878, 882 (9th Cir. 1982); and *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966).

[72] *Lazore*, 11 F.3d 1180, 1186-1187.

[73] *Hoptowit v. Commissioner*, 709 F.2d 564, 566 (9th Cir. 1983); *Lazore*, 11 F.3d at 1180, 1187.

[74] *Cook v. United States*, 32 Fed. Cl. 170, 172 (1994).

general acts of Congress apply to Indians and other citizens and that the Supreme Court has never declared a federal tax on Indians to be unconstitutional. The court then went to *Capoeman* and others in explaining that "exemptions to tax laws should be clearly expressed," a rule that it held applied to federal excise taxes. It restated the rule that tax exemptions are not granted by implication, and it referenced section 4041(a)(1)(A), stating that the excise tax on diesel fuel is "imposed on any person who sells to an owner, lessee, or operator of a diesel-powered highway vehicle." "Any person," it said, includes Onondaga Indians.[75]

The court also addressed the rule in *Capoeman* that income derived from allotted or restricted land would be exempt from taxation, a factor that did not apply to the plaintiff Onondagas when the lands of the Onondaga Nation are held in fee simple. But — as if anticipating a position that would be taken in future cases — the court held that "even if the *Capoeman* rule does apply in this case, it would not exempt plaintiffs from the excise taxes. This is because income from operation of a gas station is not considered to be income derived directly from the land."[76] Finally, the court provided a discussion on the canons of construction as they applied to the question at hand, here specifically the Treaty of Canandaigua.

In the context of the canons, the court approached the language found in the Canandaigua treaty by first noting the government's pointed reference to a holding in *Lazore* — that "the Canandaigua treaty is not capable of being reasonably construed as supporting an exemption from the income tax." The treaty provision of relevance concerns the land returned and reserved to the Onondagas, Cayugas, and Oneidas, which reads in full: "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."[77] The court asserted that this provision "applies to the use of the land."[78] Continuing with its analysis, the court concluded that while Indians may have understood the Canandaigua treaty and others "to confer them and their descendants exemption from federal taxation," this is not sufficient "to overcome the language of a treaty which strongly suggests that the terms do not prohibit federal excise taxes." Therefore, "viewed in historical context and given a fair appraisal, the plain language cannot reasonably be interpreted as prohibiting federal excise taxes."[79] The Cooks' motion for a tax refund, linked to the question whether they were exempt from the federal excise tax, was denied.

The Cooks failed in their appeal of the court's decision to grant the United States' counterclaim for payment of the excise tax. The U.S. Court of Appeals for the Federal Circuit reiterated and followed essentially in lockstep the reasons put forth in the 1994 opinion.[80] However, the court offered its own take on the canons of construction. Although it recognized that ambiguities in treaty language should be resolved in favor of the Indians, "we cannot create ambiguities where none exist." Neither the Canandaigua treaty nor the two others considered, it asserted, contain "any language which confers an exemption from excise tax or presents an ambiguity which could be resolved in favor of conferring such an exemption." Moreover, the "free use and enjoyment" clause of the treaty regarding land "cannot reasonably be interpreted as exempting them from the payment of excise tax." Finally, the same clause, "like other treaty provisions at issue which secure the Indians [*sic*] 'peaceful possession' of their lands, applies to the use of the land."[81]

In March 2020 the Tax Court issued a decision on an exemption claimed for business and rental income earned by a Mohawk couple on their reservation.[82] In *Thompson and Delisle* the petitioners argued they were exempt from the

[75] *Id.* at 172-173.

[76] *Id.* at 173.

[77] Kappler, *supra* note 3, at 35.

[78] *Cook*, 32 Fed. Cl. at 174.

[79] *Id.* at 174-175.

[80] *Cook v. United States*, 86 F.3d 1095 (1996).

[81] *Id.* at 1097.

[82] *Thompson and Delisle v. Commissioner*, Dkt. No. 27015-17 (Mar. 27, 2020).

federal income tax under the Jay Treaty, the Treaty of Ghent, and the Treaty of Canandaigua. Citing *Maracle*, *Lazore*, and *Perkins*, the Tax Court found that because "no treaty exists exempting these individuals from Federal tax . . . we grant the Commissioner's motion for summary judgment."[83]

The most recent decision, *Perkins* — on appeal from the Tax Court — is a comprehensive presentation of cases cited over the past three decades to reject claims for an income tax exemption by the Indian signatories to the Treaty of Canandaigua.[84] As with *Cook*, the Perkinses' claim arose from the operation of an on-reservation business that sold gravel mined from Seneca land. Beginning with the precedential *Capoeman*, applied in *Nephew*, the express exemptive language requirement in *Anderson*, and the canons of construction, the petitioners in *Perkins* encountered an insurmountable wall of previous holdings. Insofar as the canons are concerned, the court in *Perkins* dutifully made mention of interpreting Indian treaties "as the Indians themselves would have understood them," that "ambiguous provisions," should they be encountered, "are interpreted to the benefit of the American Indians," and offered the caveat that "treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." Viewing its central task as determining whether an Indian treaty creates an exemption from the federal income tax, the court would "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[85]

Insofar as the Perkinses' efforts to bring to bear the provisions of the Canandaigua treaty to support a claim to an income tax exemption — the "free use and enjoyment" clause in Article III — the appeals court held in its denial that (1) the treaty "offers no textual support for an exemption to the federal income tax"; (2) citing *Lazore*, Article III's promise not to disturb the Senecas cannot be "'reasonably construed as supporting an exemption from the income tax'"; (3) citing *Cook*, the "free use and enjoyment" clause applies and is restricted to the use of the land, "not to taxes levied upon individuals"; and (4) that the "free use and enjoyment" clause "is better interpreted as preventing American encroachment onto Seneca lands, or interference with the Seneca Nations' use of its lands." "Therefore," the court said, "we find the language 'free use and enjoyment' creates no exemption from federal income taxation."[86]

Aftermath

Each of the decisions described herein rejects all claims to an exemption to the federal income tax by individual members of the tribes, signatories to the 1794 Canandaigua treaty. However, those that involved *on-reservation* earned income and businesses merit special attention. They and their holdings will undoubtedly stand not only to discourage further such claims but also to signal no possibility of success should one be brought. This is the apparent legal view given the circumstances surrounding the treaty. However, a historical analysis of the Canandaigua treaty offers a different view.

In their judgments, courts have built their arguments, adding to case decisions, on the foundation of *Capoeman*. Here, as U.S. citizens, and when there is no governance by treaties, Indians are subject to the federal income tax.[87] From *Capoeman*, the rationale and explanation behind courts' interpretations of Canandaigua in later decisions can be summarized as follows: A treaty must contain explicit language in regard to a claim for an exemption; an exemption must be firmly anchored in the text of the treaty; and such claims are not granted solely by implication, but must have textual support.[88] Following from these requirements, courts have held that interpreting

[83] *Id.* at 1, with case citations at 4-5 to *Maracle v. Commissioner*, T.C. Memo. 1991-98; *Lazore v. Commissioner*, T.C. Memo. 1992-404, *aff'd in part, rev'd in part*, 11 F.3d 1180; and *Perkins v. Commissioner*, 150 T.C. 119 (2018).

[84] Dkt. No. 19-2481 (2d Cir. Aug. 12, 2020).

[85] *Id.* at 13-14.

[86] *Id.* at 22-24.

[87] *Capoeman*, 351 U.S. at 6.

[88] To avoid repetition, the cases from which the information in this discussion is drawn and summarized are not cited. Readers are referred to the section "Courts, Texts, and Taxation," *supra*, for information on the case particulars presented here.

the language of the Canandaigua treaty as a restriction to impose a tax, even one not yet in existence, is a stretch of the clear meaning of its words. Noting that the treaty contains no references to taxation, courts have held that its stated objective was only to establish peace and friendship between the Six Nations tribes and the United States. Moreover, the treaty's provisions securing the Indians' possession of land applies only to the undefined use of that land, not to a taxation of individuals.

A comment is necessary here on court opinions regarding *on-reservation* income and businesses — and the stated objective of the Canandaigua treaty and the conclusion that it was limited to the use of the land. On the first question, there is much more to the treaty and its provisions than what a court drew from the first article — peace and friendship. Left seemingly unexamined are the remaining and critically important six articles.[89] Moreover, the court's holding in *Cook* that the phrase in the treaty's articles, "disturb . . . in the free use and enjoyment [of land]," is limited "to the use of the land," reflects a narrow, stereotypical, and mistaken notion about Indian communities.[90] Here the court draws an analogy to what it calls the judicial interpretation of other treaties, when a treaty it consulted prohibited "molestation by the United States," meaning an "'interference with the rights of Indians to hunt and otherwise enjoy their land *not* the 'right' to be free from federal taxation.'"[91] Although the efficacy and relevance of drawing an analogy to an entirely different treaty deserves serious questioning, the court's placing any such limits on "the use of the land" does not reflect a historical or cultural reality. From the time of the Canandaigua treaty to the present, people of the Six Nations tribes lived on their reserved and bounded lands, governing themselves, building homes, raising families, sustaining themselves using a range and variety of subsistence practices, creating and operating economic enterprises, and holding ceremonies and worshiping — all practices that were and are not much different from those of the non-Indian communities that surrounded and surround them today. However, what distinguishes these Native people from their non-Indian neighbors, and was meant to protect them in the "free use and enjoyment" of their lands, is the Canandaigua treaty.

Court decisions also speak to the canons of construction, beginning with how ambiguous language in a treaty is to be construed in the Indians' favor, or, more specifically, to be construed to confer income tax exemptions. Nonetheless, in their examination of Articles II, III, and IV of the Canandaigua treaty, courts saw no ambiguity in language, nor could any ambiguity be created or broader language discovered, that would allow for an income tax exemption. Unable to find a place to apply the canons, the courts determined that the "free use and enjoyment" clauses in the treaty cannot be read as providing for a tax exemption.

Texts and Meaning

The historical context and events surrounding the treaty have been addressed. Made explicit are the profound and inextricably linked issues of war, peace, and Indian title to the western lands, especially those of the Ohio Valley, following the 1783 Treaty of Paris. Remaining is the question of how these concerns informed the making of the Treaty of Canandaigua and how its provisions were understood by the Six Nations tribes and the United States. Of special concern are the protections afforded to the activities of members of the Six Nations tribes *on their reservations*.

The relevant provisions in the treaty — the "free use and enjoyment" clauses that courts have considered in their decisions — are found in Articles II, III, and IV and repeated here once again: that the reservations and bounded lands of the Senecas, Cayugas, Onondagas, and Oneidas are "their property," and "the United States will never claim the same, nor disturb them[,] or either [any] of the Six Nations, nor [or, or of] their Indian friends residing thereon and united with them, in the free use and enjoyment thereof."[92] The articles' language is plain, direct, understandable, and unambiguous, and it conveys a clear meaning:

[89] *Brown*, 824 F. Supp. at 127.

[90] *Cook*, 32 Fed. Cl. at 174.

[91] *Id.*, citing *Jourdain v. Commissioner*, 617 F.2d 507, 509 (8th Cir. 1980). *See also Jourdain v. Commissioner*, 71 T.C. 980, 990 (1979).

[92] Kappler, *supra* note 3, at 35.

The United States acknowledges that the Oneidas, Onondagas, Cayugas, and Senecas own their lands; the United States promises never to claim those lands; and further, the United States promises it will not disturb the Indian nations that reside on those lands in their free use and enjoyment of those lands. The provisions in Articles II, III, and IV have no other meaning but that the Six Nations tribes and their people would be left to themselves — sovereign and autonomous — assured of and protected from all forms of interference or intrusion by the United States.

Finally, the treaty speaks directly to what the United States and the Six Nations expected the treaty's duration to be: "Peace and friendship . . . shall be perpetual"; "the United States will never claim the same"; "nor ever disturb the people of the United States"; "the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands"; and in regard to the payment of annuities, they "shall be expended yearly forever."[93] Canandaigua was no ordinary treaty.

Presented in support of the clarity of language used in the treaty's articles are definitions of selected words, drawn from dictionaries, all of which are traceable to the *Oxford English Dictionary*. They are provided in conformance with the standard exercise of textual analysis when dictionary definitions and historical contexts are used to determine the meaning of treaties or, for that matter, the full range of statutes:

> *disturb*: to interfere with the settled course or operation of, to put out of its course; to hinder by interference; to deprive of; to agitate, destroy (quiet, peace, rest). In law: to deprive of the peaceful enjoyment or possession of.
>
> *free*: of a state, its citizens, institutions; enjoying civil liberty; not held or burdened by obligation; unhindered, unhampered; not confined to the usual rules or patterns; not limited by convention; not restricted by anything except its own limitation. From *Black's Law Dictionary:* absence of restraint; the power of acting, self-determination.
>
> *use*: to put or bring into action; employ for or apply to a given purpose; utilize. From *Black's Law Dictionary*: that enjoyment of property which consists of its employment, occupation, exercise, or practice.
>
> *enjoyment*: the possession, use, or benefit of something. From *Black's Law Dictionary*: the exercise of a right; the possession and fruition of a right, privilege.

Unlike treaties that the United States made with foreign governments (other than Great Britain), which were issued in both languages, federal Indian treaties were written in English. There are no examples of a treaty accompanied by a parallel text in an Indian language, whether there existed an alphabet, syllabary, or orthography for that language.[94]

At Canandaigua, meetings and negotiations were facilitated by at least three interpreters of Six Nations languages — Joseph Smith, Horatio Jones, and Jasper Parrish. Arriving with Pickering from Philadelphia was Henry Abeel, Cornplanter's son, who was educated in schools there and bilingual, and whose name was listed on the treaty below the interpreters.[95] Jones and Parrish had been captured by war parties as children and grew up in Indian families — Jones among the Senecas, learning their language, and Parrish with the Delawares and Mohawks, becoming a speaker of both languages. Nothing is known about Smith other than that he appears to have spoken Seneca. Also listed on the treaty as a witness is Israel Chapin Jr., who likely had some proficiency in Seneca.[96] He and his father, Israel Chapin Sr., served as United States Indian agents at Canandaigua.

In the late 1700s, linguists report, the languages of the Six Nations were to a limited degree mutually intelligible. However, given

[93] *Id.* at 35-36.

[94] Prucha, *supra* note 2, at 430.

[95] Fenton, *supra* note 3, at 661-664; and Jonathan Evans, comp., *A Journal of the Life, Travels and Religious Labours of William Savery* 66 (1844).

[96] Fenton, *supra* note 3, at 629, 635.

patterns of intermarriage and other cultural exchanges between communities, any number of individuals were multilingual. Moreover, different life experiences may have had an influence on a person's language skills, also leading to competent multilingualism. Six Nations leaders such as Red Jacket, Cornplanter, Farmer's Brother, Clear Sky, Fish Carrier, and Captain John, all of whom participated in the negotiations with Pickering, were seasoned, skilled diplomats and likely had acquired the ability to speak and understand more than one of the Iroquoian languages. To what extent they understood English is unknown. The claim is sometimes made that during negotiations government officials, often in collusion with interpreters, misled or deceived Indians about a treaty's terms. Although attractive, and acknowledging that interpreters on occasion may have misunderstood, misreported, or even misrepresented discussions and positions taken, this charge rarely stands up to scrutiny.[97]

As described above, the wording of the clauses in Articles II, III, and IV was arrived at after weeks of face-to-face negotiations between federal Indian commissioner Pickering and the leaders of the Six Nations tribes. The clauses' verbatim repetition and central place in the treaty are indicators that the parties agreed to and understood their meaning and implications. The interpreters not only were practiced speakers of the Iroquoian languages, but Jasper Parrish was also experienced in diplomatic protocol and translation. He had spent some two years at Canandaigua working alongside superintendent Israel Chapin and had carried messages for Knox. Most importantly, Pickering trusted Parrish.[98] Moreover, the entire proceedings of the treaty were closely observed by William Savery, spokesman for the Quakers from the Yearly Meeting for Sufferings of Philadelphia; John Parrish, unrelated to Jasper; James Emlen; and David Bacon. Although disputes arose between the parties during the negotiations, there is no mention in the journals and diaries kept by these men of any disagreement about the treaty's final wording.[99]

As for any suggestion that the Indian negotiators were misled or deceived by Pickering or others, or deficient in their ability to comprehend what they would put their signatures to, there is the full record of the proceedings which shows no such encumbrances. Among these materials is Pickering's revealing report of the Six Nations' chiefs' objections to wording proposed for the transfer to Pennsylvania of lands comprising the Erie Triangle and Presque Isle described before — that the Indians would not agree to Pickering's use of "relinquish" or "give up" regarding the cession, but instead would declare to "never claim" the land ceded. Their concern was not only to satisfy Pickering and secure their lands, but also to avoid putting their nations at a political and economic disadvantage, or possibly in peril, by offending the British and the western Indians — a multifaceted perspective earned by years of diplomatic engagements with friend and foe alike. This was not the act of a naive or inexperienced people.[100]

Conclusion

There is agreement here with *Cook* regarding the *plain language* of the Canandaigua treaty: "We recognize that if there are ambiguities in treaty language, they should be resolved in favor of the Indians. . . . But, *we cannot create ambiguities where none exist*. Neither the Canandaigua Treaty, the Fort Stanwyx [sic] Treaty nor the Treaty of Fort Hamar [sic] contains any language which confers an exemption from excise tax or presents an ambiguity which could be resolved in favor of conferring such an exemption."[101] Although the issue in *Cook* was the excise tax, the court's statement provides a point of focus for understanding the history of the Canandaigua treaty and the "free use and enjoyment" clauses in Articles II, III, and IV. That is, the lack of candor and forthrightness by courts in their reading of these articles, and their failure to acknowledge the "do not disturb" meaning they clearly express, raises questions that remain unaddressed.

[97] Prucha, *supra* note 2, at 215; and Calloway, *supra* note 36, at 40.

[98] Fenton, *supra* note 3, at 635, 655, 701.

[99] *Id.* at 629.

[100] *See* text, *supra* note 32; Campisi and Starna, *supra* note 3, at 483-484.

[101] *Cook*, 86 F.3d at 1097 (emphasis supplied).

There *is* no ambiguity in the treaty's language or its provisions. And there *is* no ambiguity in how the Six Nations tribes and the United States understood the treaty's guarantees. The sovereign and autonomous Six Nations tribes were to remain as such, with no interference of any kind from the United States. William Fenton, an authority on the Six Nations tribes and the history of the Canandaigua treaty, put it best: "The very essence of the treaty centers on this mutual agreement to quit claim and never disturb each other in the free use and enjoyment of their respective property."[102] However, what has occurred in courts and the law has been less than a careful consideration or an accurate read of the treaty's history, the treaty's meaning, or the treaty's significance to the Six Nations tribes, their communities, and the United States. Instead, courts have applied a form of presentism by which the antecedent narrative, the Canandaigua treaty and its historical context, is defined or interpreted in terms of the consequent, here a post-facto application of law — the federal tax on American Indian people (setting aside any discussion of whether the treaty has been abrogated). Hidebound adherence to the doctrine of stare decisis is not a substitute for historical truths. ■

[102] Fenton, *supra* note 3, at 626.