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Federal Indian Law Cases in the Supreme Court's 2004-2005 Term

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FEDERAL INDIAN LAW CASES IN THE SUPREME COURT'S 2004–2005 TERM

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Lesson One: How to enforce a valid contract
Lesson Two: How to enforce a void contract

The highest responsibility of a judge is to promote confidence in our legal system. When an opinion ignores recent authority . . . , attacks the veracity of prior judicial opinions, and cites inapposite precedent in order to achieve a specific outcome, public confidence in the rule of law will suffer . . . and confidence in the Court most certainly will be eroded. Both results are very troubling.

Judge Sven Erik Holmes[1]

I. INTRODUCTION

We would be remiss, indeed, were we to fail to celebrate the life and legacy of the Honorable William H. Rehnquist as we provide these works for the *Tulsa Law Review*'s Supreme Court Review for practitioners. William H. ("Bill") Rehnquist was appointed as an Associate Justice of the United States Supreme Court in 1971, and was elevated to the office of Chief Justice in 1986, in which capacity he served until his death in the late summer of 2005.

During his nineteen-term tenure as Chief Justice of the Supreme Court, Rehnquist authored at least two books[2] and numerous articles.[3] These articles, of course, often

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1. Sven Erik Holmes, *Symposium: 2002–2003 Supreme Court Review, Introduction*, 39 Tulsa L. Rev. 1, 10 (2003).

2. William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (William Morrow & Co. 1992); William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow & Co. 1987).

3. *E.g.* William H. Rehnquist, Dedication Address, *Act Well Your Part: Therein All Honor Lies* (Pepp. L. Sch., Malibu, Cali., Nov. 17, 1979), in 9 Hum. Rights 42 (1980); William H. Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 Ariz. L. Rev. 973 (1980); William H. Rehnquist, *Government by Cliché: Keynote Address of the Earl F. Nelson Lecture Series*, 45 Mo. L. Rev. 379 (1980); William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 Alb. L. Rev. 533 (1980); William H. Rehnquist, *The Supreme Court of the United States: The Ohio Connection*, 4 U. Dayton L. Rev. 271 (1979); William H. Rehnquist, *Sunshine in the Third Branch*, 16

dealt with the Court and issues which were relevant to his duties as an Associate Justice and, later, Chief Justice of the Court, but also included musings on other issues.[4] His activism on behalf of fundamentalist and states'-rights causes set a mark that only the most ambitious can hope to approach.

During Rehnquist's tenure, the Court attained new affirmative action heights in its ability to attract and hire minority law clerks, although four Justices, including Chief Justice Rehnquist, were generally unable to find minorities able and willing to work for them.[5] Data has shown that of the four-hundred-plus law clerks hired through the end of the 1998 Term of the Court, seven were African-American, four were Hispanic, and eighteen were Asian.[6] Regretfully, the Court has not been successful in attracting a member of a federally recognized Indian tribe as a judicial clerk.[7]

During his tenure on the High Court, Justice Rehnquist authored at least ten federal Indian law cases for the Court.[8] In these opinions, the Court ruled against tribal interests in all but two cases,[9] to somewhat critical acclaim.[10]

Washburn L.J. 559 (1977); William H. Rehnquist, *Chief Justices I Never Knew*, 3 Hastings Const. L.Q. 637 (1976); William H. Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 Gonz. L. Rev. 1 (1976); William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976); William H. Rehnquist, *Civility and Freedom of Speech*, 49 Ind. L.J. 1 (1973).

4. *See supra* n. 3.

5. *See generally* Tony Mauro, *"In Other News. . .": Developments at the Supreme Court in the 2002–2003 Term That You Won't Read about in the U.S. Reports*, 39 Tulsa L. Rev. 11, pt. III (2003).

> [T]he Court also reached a milestone in the October 2002 Term. Nine of the thirty-five law clerks hired by the Court's Justices for the Term were African-American, Hispanic, or Asian-American—the highest number of minority law clerks in the Court's history. . . . [T]he first ever "census" of all the clerks hired by the current Justices . . . revealed that only seven among the 394 clerks hired during the tenure of all nine sitting Justices were African-Americans, four were Hispanics, and eighteen were Asian-Americans. No Native American had ever served as a law clerk. Only one-fourth were women. And four Justices, including Chief Justice William Rehnquist, had to that point never hired an African-American as a law clerk. The next Term [1998], only one minority—a Hispanic—was among the ranks of the clerks.

Id. at 17 (footnotes omitted).

6. *Id.*

7. *Id.*

8. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996); *Negonsott v. Samuels*, 507 U.S. 99 (1993); *Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *U.S. v Cherokee Nation of Okla.*, 480 U.S. 700 (1987); *Nev. v. U.S.*, 463 U.S. 110 (1983); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *U.S. v. Mazurie*, 419 U.S. 544 (1975).

9. *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) [hereinafter *Oneida II*]; *Mazurie*, 419 U.S. 544. The *County of Oneida* case is particularly relevant to the subject of this paper as it is a direct precursor to one of the cases decided this Term, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478 (2005). One could consider *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, to be a draw. In that case, the Court held the tribe could not be sued to enforce payment of the state cigarette tax at issue, although it also ruled the State could tax the commercial transaction between a non-Indian and the tribe occurring within the territorial jurisdiction of the tribe. *Id.* at 510–12.

10. *See generally* G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty,"* 76 Marq. L. Rev. 401 (1993); Geoffrey C. Heisey, Oliphant *and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 Ind. L.J. 1051 (1998); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater than the Sum of the Parts*, 19 J. Contemp. L. 391 (1993) (commenting upon *Oliphant*, 435 U.S. 191); Michael Minnis, *Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit* Moe *and* Colville, 16 Am. Indian L. Rev. 289 (1991) (commenting upon *Moe*, 425 U.S. 463); Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme*

During the nineteen years of Rehnquist's tenure as Chief Justice of the Supreme Court, the Court ruled in favor of Indian interests on nine occasions,[11] ruled against such interests on twenty-six occasions,[12] and four cases might be considered a "tie."[13] In two cases the ruling unanimously favored the tribe.[14] Conversely, the Court held unanimously against tribes on twelve occasions.[15]

An attempt to analyze these cases is beyond the scope of the present work, although many of them have been roundly criticized.[16] These decisional numbers, the thinly veiled insinuations of cultural and racial superiority contained in the Courts' decisions,[17] the failure of the Court to acknowledge and apply two hundred years of

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Court, 13 Kan. J.L. & Pub. Policy 59 (2003). There are, of course, many additional articles criticizing the Indian law jurisprudence of the Court.

11. *Cherokee Nation of Okla. v. Leavitt*, 125 S. Ct. 1172 (2005) (The Chief Justice took no part in this decision.); *U.S. v. Lara*, 541 U.S. 193 (2004); *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (Rehnquist, C.J., joining the dissent); *Idaho v. U.S.*, 533 U.S. 262 (2001) (Rehnquist, C.J., dissenting); *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (Rehnquist, C.J., dissenting); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Commn. v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Miss. Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989) (Rehnquist, C.J., joining the dissent); *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Rehnquist joined the majority in only four of these nine cases.

12. *City of Sherrill*, 125 S. Ct. 1478; *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003); *U.S. v. Navajo Nation*, 537 U.S. 488 (2003); *Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001); *Nev. v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co.*, 532 U.S. 645; *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Ariz. Dept. of Revenue v. Blaze Const. Co.*, 526 U.S. 32 (1999); *Ala. v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520 (1998); *S.D. v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Seminole Tribe of Fla.*, 517 U.S. 44; *Okla. Tax Commn. v. Chickasaw Nation*, 515 U.S. 450 (1995); *Dept. of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Hagen v. Utah*, 510 U.S. 399 (1994); *S.D. v. Bourland*, 508 U.S. 679 (1993); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Negonsott*, 507 U.S. 99; *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Duro v. Reina*, 495 U.S. 676 (1990); *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163 (1989); *Okla. Tax Commn. v. Graham*, 489 U.S. 838 (1989); *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988); *Cherokee Nation of Okla.*, 480 U.S. 700. Justice Rehnquist did not vote against the majority in any of these cases.

13. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (It may be too generous to call this case a "tie" since, although the Court did not decide the Indian plaintiffs lacked a claim and remanded for further proceedings, it did place a further limitation on the exhaustion of tribal remedies requirement of *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) (holding tribal court remedies must be exhausted before a non-Indian can challenge the jurisdiction of the tribal forums based on a federal question).); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (This challenge to Congressional attempts to escheat *de minimis* interests in individual Indian allotments to the tribes is probably a true tie between the interests of the heirs of allottees to inherit and the tribe to receive those interests via escheat.); *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (In this case, Rehnquist wrote for the Court that the State had the right to tax non-Indians who purchase cigarettes at a tribal retail outlet within the Indian Country, but could not sue the Tribe to collect that tax due to the Tribe's sovereign immunity.); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (holding tribal court remedies must be exhausted before a non-Indian can challenge the jurisdiction of the tribal forums based on diversity of citizenship, although where the federal court obtains jurisdiction over such challenge is not adequately explained).

14. *Leavitt*, 125 S. Ct. 1172 (The Chief Justice took no part in this decision.); *Sac & Fox Nation*, 508 U.S. 114.

15. *Inyo County, Cal.*, 538 U.S. 701; *Hicks*, 533 U.S. 353; *Atkinson Trading Co.*, 532 U.S. 645; *C & L Enterprises, Inc.*, 532 U.S. 411; *Blaze Const. Co., Inc.*, 526 U.S. 32; *Native Village of Venetie Tribal Govt.*, 522 U.S. 520; *Yankton Sioux Tribe*, 522 U.S. 329; *Strate*, 520 U.S. 438; *Milhelm Attea & Bros.*, 512 U.S. 61; *Lincoln*, 508 U.S. 182; *Negonsott*, 507 U.S. 99; *Cherokee Nation of Okla.*, 480 U.S. 700.

16. *See e.g. supra* n. 10. This list is not exhaustive.

17. A number of the Court's recent decisions to prohibit tribes from exercising basic governmental powers or functions with respect to non-Indians are based on the theory that it is "inconsistent with the status" of Indian tribes to do so. *See Hicks*, 533 U.S. 353; *Atkinson Trading Co.*, 532 U.S. 645; *Strate*, 520 U.S. 438;

Supreme Court Indian jurisprudence prior to *Oliphant v. Suquamish Indian Tribe*[18] and *Montana v. United States*,[19] and the colonialist policies being perpetuated by the Court[20] do not promote "confidence in the rule of law" or "confidence in the Court" within the community of those who work regularly in the field of Federal Indian Law. Thus, the indictment of *United States v. Kagama*,[21] has been oft applied to the Supreme Court

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Duro, 495 U.S. 676; *Mont. v. U.S.*, 450 U.S. 544 (1981); *Oliphant*, 435 U.S. 191. One struggles to understand precisely what is meant by the phrase "inconsistent with their status." *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009) (internal quotation marks and emphasis omitted). If one looks to prior federal law to determine the status of Indians or Indian tribes, the results are, indeed, troubling. For instance, the following people are not "Indians":

> In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic religion, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all of their blankets, clothing, agricultural and culinary implements, &c. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.

U.S. v. Joseph, 94 U.S. 614, 616–17 (1876). However, the following people are "Indians":

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.
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> . . .
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> With one accord the reports of the superintendents charged with guarding their interests show that they are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants.

U.S. v. Sandoval, 231 U.S. 28, 39, 40–41 (1913).

These two cases, of course, are referring to the Pueblo peoples of the Southwest. Again, "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force." *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 289–90 (1955). Other cases labeling Indians as "savage," "heathen," or "inferior," or referring to Indian people or tribes in derogatory racial terms are common in federal court jurisprudence. One must ask whether the Court denies legitimate powers of self-government to Indian tribes because it continues to view Indian tribes as savage, heathen, barbarous, and inferior peoples, although *sub silentio*. It is submitted that the Court's explanations for its unilateral policy attacks upon the scope of tribal governmental authority over all persons and property within the Indian Country fall flat as unsupported by law or logic—unless the logic is simply: brown people do not put white people in jail or otherwise control their behavior unless other white people say it is all right. Is that what is meant by the phrase "inconsistent with their status"? If so, is that rule acceptable in a civil society? One would hope not. Article I, section 8, clause 3 of the United States Constitution recognizes Indian tribal governments, the states, and foreign governments as distinct, legitimate governmental entities. *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163, 191–93 (1989); *U.S. v. Mazurie*, 419 U.S. 554, 557 (1975). The Fourteenth Amendment left individual Indians in their former place as citizens of a government which is legally and politically distinct from the government of the United States and other legitimate sovereigns. *See Elk v. Wilkens*, 112 U.S. 94 (1884).

18. 435 U.S. 191 (1978).

19. 450 U.S. 544 (1981).

20. Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal↔Federal Cooperation*, 36 Ariz. St. L.J. 1 (2004); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002); Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 Iowa L. Rev. 1595 (2004).

21. 118 U.S. 375 (1886).

of late.[22]

It should come as no surprise, then, that the 2004 October Term was greeted by many Indian law scholars and practitioners with the blasphemous prayer generally reserved for use by those watching a torpedo tracking their ship or listening to an incoming artillery barrage.[23] Once the smoke cleared, however, it became at least arguable that, while the Court has, once again, given cause for even conservative Republicans to be deeply troubled by its continuing failure to honestly evaluate and apply long standing history, precedent, and law in federal Indian law cases coming before the Court, the two cases decided this Term were split with one case decided in favor of the tribe, and the other decided against the tribe.[24]

The two federal Indian law cases decided this term were *Cherokee Nation of Oklahoma v. Leavitt*[25] and *City of Sherrill v. Oneida Indian Nation of New York*.[26] In *Leavitt*, the Court upheld a contract claim by the Cherokee Nation of Oklahoma against the United States for money damages for breach of the Cherokee Nation's self-determination/self-governance contracts.[27] In *City of Sherrill*, the Court ruled that New York had stolen the Oneida's land fair and square, and the equitable doctrine of laches prevented the Oneida's from complaining about it now.[28] Even though the Oneidas had voluntarily purchased the non-Indian "owner's" claim to a fee title and joined it to their unextinguished aboriginal title, and even though the land lay within the treaty reservation of the tribe, the Supreme Court ruled the City of Sherrill had obtained governmental jurisdiction over the land for tax purposes.[29]

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22. "[The tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *Id.* at 384. One need only to substitute "Court" for "State." A danger in quoting this portion of the *Kagama* case is that it tends to be cited for the proposition that the federal government is the "friend" of Indian Tribes while the states are the "enemy." *Id.* People tend to forget that, while in some cases the "local ill feeling" may be tempered by appeals to the larger entity, the federal government is made up of, and ultimately responsible to, the very "people of the states" referred to in *Kagama*. *Id.* Should people be surprised when one or more of the political branches of the federal government adopts policies inimical to the continued health, safety, or welfare of Indian tribes? The Court is, of course, one of the political branches of the United States government, and first and foremost decides cases based upon what it believes to be in the best long-term interests of the United States, not the interests of the tribes. U.S. Const. art. III.

23. "For what we are about to receive, may we be truly thankful." Jerry Pournell, *Old Gunner's Prayer*, http://www.jerrypournelle.com/archives2/archives2view/view180.html (Nov. 29, 2001).

24. *See City of Sherrill*, 125 S. Ct. 1478; *Leavitt*, 125 S. Ct. 1172.

25. 125 S. Ct. 1172.

26. 125 S. Ct. 1478.

27. 125 S. Ct. at 1173–75.

28. 125 S. Ct. at 1491–93.

29. The Court stated:

> OIN sought equitable relief prohibiting, currently and in the future, the imposition of property taxes. OIN also sued Madison County, seeking a declaration that the Tribe's properties in Madison are tax exempt. The litigation involved a welter of claims and counterclaims. Relevant here, the District Court concluded that parcels of land owned by the Tribe in Sherrill and Madison are not taxable.
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> A divided panel of the Second Circuit affirmed.

City of Sherrill, 125 S. Ct. at 1488 (citations omitted).

II. *CHEROKEE NATION OF OKLAHOMA V. LEAVITT*[30]

Like many other Indian tribes, bands, and nations across the United States, the Shoshone-Paiute tribes of the Duck Valley Reservation (Nevada) and the Cherokee Nation of Oklahoma entered into self-determination contracts and/or self-governance compacts with the Indian Health Service ("IHS") pursuant to the Indian Self-Determination and Education Assistance Act of 1975 ("ISDA").[31] Pursuant to these compacts, the tribal parties agreed to provide some or all of the programs and services the IHS had been providing on behalf of their tribes.[32] The ISDA requires that, upon request of the tribe, the secretary will fund the tribe to operate those programs and services in an amount which is not less than the amount the secretary would have expended for such programs and services on behalf of the tribe.[33] This "secretarial amount" is generally thought of as the direct program cost portion(s) of the compact.[34]

In addition to these direct program costs, the ISDA requires that tribes be paid an amount known as "contract support costs" ("CSCs").[35] These contract support costs[36] include both indirect contract support costs[37] and direct contract support costs.[38] Contract support costs are intended to reimburse the tribe for the legitimate expenses of administering the compact, which are not included in the funds for direct program services.[39] Generally, examples of contract support costs include costs of audits, accounting, property procurement and disposal systems, administrative oversight, personnel management systems, rent, utilities, and similar expenses the federal government would have otherwise paid in order to operate the program, or costs necessary to meet requirements imposed on the tribe by the federal government in order to operate the program.[40]

The problem in *Leavitt* developed when the Secretary of the Department of Health and Human Services failed or refused to pay the total contract support costs due for the

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30. 125 S. Ct. 1172.

31. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450–450n (2000)). Both tribes had self-governance compacts with the IHS. The funding rules are basically the same regardless of which form of contract or compact is at issue. *Cherokee Nation of Okla. v. U.S.*, 190 F. Supp. 2d 1248, 1249 n. 1 (E.D. Okla. 2001), *aff'd sub nom. Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *rev'd sub nom. Leavitt*, 125 S. Ct. 1172.

32. *Leavitt*, 125 S. Ct. at 1176.

33. 25 U.S.C. § 450j-1(a)(1).

34. *See* 25 U.S.C. § 450j-1 (a)(1); *Thompson*, 311 F.3d at 1056; *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (describing the "secretarial amount" as the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe").

35. 25 U.S.C. at § 450j-1(a)(2).

36. Contract support costs consist of the "reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management" not included in the direct program costs. *Id.* at § 450j-1(a)(2).

37. Indirect contract support costs consist of "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." *Id.* at § 450b(f).

38. "'Contract support costs' can include indirect administrative costs, such as special auditing or other financial management costs, they can also include direct costs, such as workers' compensation insurance, and they can include certain startup costs." *Leavitt*, 125 S. Ct. at 1176 (citations omitted).

39. *Id.*

40. *Id.*

Tribe's IHS compacts for the years 1994, 1995, 1996, and 1997.[41] The ISDA authorizes tribes who are aggrieved by such action to proceed either with agency review on the record to an administrative law judge,[42] or to file an action in the federal district court to challenge the agency decision.[43] After the contracting officer denied their claims under the contract, the affected tribes chose to file their claims for 1997 contract support costs in the United States District Court for the Eastern District of Oklahoma,[44] and their claims for contract support costs for the years 1994, 1995, and 1996 before the Interior Board of Contract Appeals.[45] Different decisions by these two processes eventually resulted in a grant of certiorari by the Supreme Court.[46]

A. The Claim for 1996 and 1997 Contract Support Costs

The tribes filed their claim for 1996 and 1997 contract support costs as case number 99CV92 in the United States District Court for the Eastern District of Oklahoma.[47] Founding their claim on both the ISDA and the Contract Disputes Act,[48] the plaintiffs' claim was simple: "they are entitled to their full contract support costs under their respective contracts because the terms in these documents are legally binding."[49]

The defendants raised several defenses, among which were: (1) the contract language making payment subject to the "availability of appropriations" defeated the Plaintiff's claims; (2) the Omnibus Consolidated and Emergency Supplemental Appropriations Act[50] precluded payment by establishing a "cap" on agency expenditures for contract support costs for the year in question; and (3) the secretary was not obliged to reduce program funding to other tribes in order to pay these tribes the full contract support costs to which they were entitled.[51] Plaintiffs countered that sufficient legally unrestricted appropriations were available to the IHS for the fiscal years in question, which would have been sufficient to pay the balances due under their contracts for contract support costs,[52] but the IHS had simply chosen to spend their available

41. *Id.*

42. 25 U.S.C. § 450f(e)(3).

43. *Id.* at § 450f(b)(3).

44. *Cherokee Nation of Okla.*, 190 F. Supp. 2d 1248.

45. *App. of Cherokee Nation of Okla.*, Compact No. 6OG 930002-01-18, IBCA No. 3877, 1999 WL 440045 (Int. Bd. Contract Apps. June 30, 1999).

46. *Cherokee Nation of Okla. v. Thomson*, 124 S. Ct. 1652 (2004) (mem.).

47. *Cherokee Nation of Okla.*, 190 F. Supp. 2d 1248.

48. 41 U.S.C. §§ 601–613 (2000).

49. *Cherokee Nation of Okla.*, 190 F. Supp. 2d at 1258–59. The apparent simplicity of these cases is belied by the Court's historical refusal to enforce federal contractual commitments to Indian Tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

50. Pub. L. No. 105-277, § 314, 112 Stat. 2681–89, 2681–288 (1998).

51. *See Cherokee Nation of Okla.*, 190 F. Supp. 2d at 1259. Section 450j-1(b) of title 25 of the United States Code states:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

These provisions were included in the plaintiff's compacts. *Cherokee Nation of Okla.*, 190 F. Supp. at 1259.

52. *Cherokee Nation of Okla.*, 190 F. Supp. 2d at 1260.

appropriations for other IHS activities, and none of the defenses of the defendant precluded payment of their claim.[53]

The district court, however, accepted the Secretary's position and held that Plaintiffs' claims were without merit.[54] In doing so, it ruled that programming of these funds by the IHS to "recurring costs" at its area offices, to its "headquarters activities" budget, and to its discretionary budget, made those funds legally unavailable for the payment of its contractual obligations to the plaintiffs, leaving only those funds specifically mentioned in the committee reports earmarked for contract support costs as "available appropriations."[55]

Plaintiffs filed their timely appeal of the judgment to the United States Court of Appeals for the Tenth Circuit.[56] On appeal, the Tenth Circuit affirmed.[57] Agreeing with the district court that the statute was "clear and unambiguous," the court stated: "As the statute plainly states, the '*provision* of funds' is '*subject to* the availability of appropriations.' This is so '[n]otwithstanding *any other provision*' of the Act."[58] The court further found, the Secretary had the discretion to refuse to pay Plaintiffs' contract support costs and to expend the department's discretionary funds for purposes other than payment of contractual obligations to the tribes without liability under its contracts:

> Moreover, while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them. Nothing suggests that the IHS awarded the amount it did for ongoing program CSCs because it felt *legally* obligated to do so because of the committee report recommendations, as opposed to making that allocation as an exercise of the limited discretion inevitably vested in it. In sum, we agree with the district court that funding for the Tribes' ongoing CSCs was subject to the availability of appropriations from Congress, and there were insufficient appropriations to fully pay those CSCs.[59]

Finally, the Tenth Circuit agreed that "section 314"[60] was intended to create a retroactive "cap" on the contract support cost obligations of the secretary,[61] and, in a new twist, decided language in the appropriations acts for 1996 and 1997 relating to new or expanded contracts and stating that funds appropriated for contract support costs "shall remain available until expended"[62] created a cap on payment of those contractual

53. *Id.*
54. *Id.*
55. *Id.*
56. *Thompson*, 311 F.3d 1054.
57. *Id.*
58. *Id.* at 1061 (emphasis and bracket in original, citations omitted). One wonders how well italics can be substituted for reasoning.
59. *Id.* at 1063 (footnotes and citations omitted, emphasis in original). One is left to wonder whether the court would have ruled the IHS actions illegal had the IHS refused to pay the tribes CSCs because it believed that such a course of action was *legally* required by the committee report language. In short, it seems the IHS and the court were treating their contractual obligations toward the tribes under these contracts as though they were simply discretionary programs administered by the Secretary, and subject to all the secretarial discretion normally associated with such programs.
60. 112 Stat. 2681-288.
61. *Thompson*, 311 F.3d at 1065.
62. Pub. L. No. 104-134, 110 Stat. 1321-189 (1996); Pub. L. No. 104-208, 110 Stat. 3009-212, 213 (1996).

obligations for those years.[63] On March 22, 2004, the Supreme Court granted certiorari.[64]

B. The Claim for 1994 and 1995 Contract Support Costs

In the companion case, the Cherokee Nation of Oklahoma sought to recover its contract support costs for budget years 1994, 1995, and 1996 by appealing the contracting officers' denial of the claim[65] to the Interior Board of Contract Appeals ("IBCA").[66] Faced with facts and claims very similar to those presented to the federal district court, the IBCA took a wholly different view of the matter. The board acknowledged the Indian Committees of Congress had historically disagreed with the Appropriations Committees of Congress on how much funding was required for Indian self-determination contracts and self-governance compacts, and how to allocate the funds.[67]

Unlike the district court, the board asked whether the government would owe the claimed contract support costs to the tribe if section 314 had never been enacted.[68] Relying upon its previous decision in *Alamo Navajo School Board, Inc.*,[69] the board answered its own question:

> The simple answer is yes. Apart from section 314, IHS has raised no new issue, invoked no new principle, and asserted no legal argument that the Board did not fully take into consideration when it arrived at its decision in *Alamo*, which raised essentially the same issues as those in these appeals. Moreover, every case we know of that has considered these or similar issues, and particularly the issue of whether the language of the [Indian Appropriation Act] requiring the full payment of indirect costs under self-determination contracts is mandatory when the agency has received sufficient appropriations to do so, has found that full payment is required and that the Secretary has no discretion in the matter.
>
> The only qualification is that funds must be available; and that issue was put to rest as far as this Board is concerned in *Alamo*. In construing the "subject to the availability of funds" language of the ISDA, the Board relied on case law that dates back to the post-Civil-War period and that remains consistent to the present day, to the effect that, at least when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be, and it cannot avoid its obligations because of reduced appropriations in situations where the other party has already performed, unless the Congress has made abundantly clear its intention to repudiate the contract or contracts involved.[70]

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63. *Thompson*, 311 F.3d at 1063–64.

64. *Thompson*, 124 S. Ct. 1652 (mem.).

65. The contracting officer denied the claim on October 31, 1997. *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1083 (Fed. Cir. 2003).

66. *App. of Cherokee Nation of Okla.*, 1999 WL 440045. Section 450m-l(d) of title 25 of the United States Code authorizes the IBCA to hear all administrative appeals relating to self-determination contracts.

67. *App. of Cherokee Nation of Okla.*, 1999 WL 440045 at **7–9; *see also Sen. Indian Affairs Comm., Rpt. accompanying the 1988 ISDA amendments*, S. Rep. 100-274, 1987 U.S.C.C.A.N. 2620, 2627–32 (Dec. 1987).

68. *App. of Cherokee Nation of Okla.*, 1999 WL 440045 at *9.

69. IBCA 3560–62, 1997 WL 759441 (Int. Bd. Contract App. Dec. 4, 1997).

70. *App. of Cherokee Nation of Okla.*, 1999 WL 440045, at *9 (citations omitted).

In short, the board held the IHS could not allocate and expend its unrestricted discretionary lump-sum appropriation on items other than fulfilling its contractual obligations, and then avoid those obligations by claiming a lack of sufficient appropriated funds to pay its contracts.

The question, then, became the effect of section 314, which states in relevant part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by P.L. Nos. 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for [fiscal years] 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.[71]

The board found, even if this section precluded the secretary from using the supplemental appropriations for the payment of overdue contract support costs, this section did not purport to modify the Indian Self-Determination Act or the contractual obligation of the IHS to pay.[72] Noting the Treasury's Judgment Fund[73] would be available to pay the contractual obligation, the board granted the tribe's motion for summary judgment on the liability issue and remanded the case to the parties to attempt to reach an agreement as to the amount owed.[74]

After this decision by the IBCA, the United States Court of Appeals for the Federal Circuit reversed the board's related decisions in the cases of *Babbitt v. Oglala Sioux Tribal Public Safety Department*,[75] and *Secretary of the Interior v. Miccosukee Corp.*[76] On October 31, 2000, the board granted IHS's Motion for Reconsideration to consider the effect of these decisions.[77] On reconsideration,[78] the board noted the language in the appropriation acts at issue in *Babbitt* established an explicit "not-to-exceed" ceiling for contract support costs on that contract, and declined to modify its decision granting summary judgment to the tribe.[79] The board stated:

> What is controlling is whether the appropriations as enacted were or were not subject to statutory restrictions, and in this case they were not. They were unearmarked, uncapped, lump sum, increased-amount appropriations. Therefore, adequate funds were readily

71. *App. of Cherokee Nation of Okla.*, 1999 WL 440045 at *7 (quoting 112 Stat. at 2681–88).

72. *Id.* at *9.

73. *Id.* at *12 (discussing 31 U.S.C. § 1304 (1994)).

74. *Id.*

75. 194 F.3d 1374 (Fed. Cir. 1999).

76. 217 F.3d 857 (Fed. Cir. 1999) (unpublished slip opinion) (The Federal Circuit relied upon its decision reversing *Oglala*.).

77. *App. of Cherokee Nation of Okla.*, Compact No. 60G 930002-01-18, IBCA No. 3877–98, 2000 WL 1661493 (Int. Bd. Contract Apps. Oct. 31, 2000).

78. *App. of Cherokee Nation of Okla.*, Compact No. 60G 930002-01-18, IBCA No. 3877-3879-98, 2001 WL 283245 (Int. Bd. Contract Apps. Mar. 21, 2001) (on reconsideration).

79. *Id.* at *2.

> available for CSC distribution, and the Cherokee Nation is entitled to its full contractual share.[80]

The Secretary appealed the decision of the board to the United States Court of Appeals for the Federal Circuit.[81]

The Federal Circuit began its analysis by setting out five "fundamental principles of appropriations law" it believed to be applicable to the case:[82]

- "The first principle is that, if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit";
- "The second principle is that Congress generally uses standard phrases to impose a statutory cap. The most common language in appropriations acts provides that funds allocated to a specific program are "not to exceed" a particular amount";
- "The third established principle of appropriations law is that in order for a statutory cap to be binding on an agency, it must be carried into the legislation itself; such a cap cannot be imposed by statements in committee reports or other legislative history";
- "The fourth principle is that when there is a lump-sum appropriation without a statutory cap, an agency is free to reprogram funds from that appropriation from one activity to another";
- "The final relevant principle of appropriations law is that, in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations."[83]

Against these fundamental principles, the court found unpersuasive the Secretary's various arguments regarding his core claim that the "availability clause" of the contracts and statute excused his performance.[84] Finally, the court affirmed the board's decisions that section 314 did not prevent payment to the tribe, and the Secretary could have paid these claims without reducing funding to other tribes.[85] The Supreme Court granted certiorari.[86]

C. *The Supreme Court Decision*

Justice Breyer's introduction to the opinion in these cases raised eyebrows in the federal Indian law community:

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80. *Id.* at *4 (citations omitted).

81. *Thompson*, 334 F.3d 1075.

82. *Id.* at 1084–86.

83. *Id.* (citations omitted, emphasis in original).

84. The court here explicitly rejected the Ninth and Tenth Circuit decisions which held that the secretary was not required to reprogram or otherwise use unrestricted lump sum appropriations to fulfill contractual obligations. *Id.* at 1086–87 (rejecting *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Dept. of Health & Human Servs.*, 279 F.3d 660, 668 (9th Cir. 2002); *Thompson*, 311 F.3d at 1066).

85. *Id.* at 1090–93.

86. *Thompson*, 124 S. Ct. 1652 (mem.).

> The United States and two Indian Tribes have entered into agreements in which the Government promises to pay certain "contract support costs" that the Tribes incurred during fiscal years 1994 through 1997. The question before us is whether the Government's promises are legally binding. We conclude that they are [even when the promise is made to an Indian Tribe].[87]

Do not run right out and draft a complaint to enforce the promises the government made in numerous treaties and other agreements with Indian tribes. Except for the above bracketed addition to Justice Breyer's concise statement of the case and decision, it would be a stretch to label this case an "Indian law" case. In sum, the Supreme Court agreed with the Federal Circuit and affirmed its decision respecting the rules applicable to government contract and appropriation law and reversed the decision of the Tenth Circuit for, essentially, the reasons given in the Federal Circuit's decision.[88]

From the Indian law perspective, perhaps the most interesting part of this case is the government's argument that contracts it enters into with Indian tribes pursuant to the Indian Self-Determination Act and/or Indian Self-Governance Act are not binding on the government because they are made with an Indian tribe.[89] In this case, the government did not deny it made the promises as alleged, failed to keep those promises, or that in standard procurement law the contracts it entered into would be legally binding.[90] In essence, the government argued the "unique, government-to-government nature" of the relationship between the United States and the tribes created a federal agency of the tribe for the purpose of operating the programs for which the tribe had contracted.[91] This status, according to the government's argument, precluded governmental liability because government agencies (i.e., the tribes) have no legal entitlement to funds promised from Congress.[92]

Although the Court spent some effort to reject this theory and confirm the Federal Circuit's application of normal appropriation law principles to the instant contracts, perhaps the most telling statement by the Court was this:

> [T]he Government must again shoulder the burden of explaining why, in the context of Government contracts, we should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary. *We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services.*[93]

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87. *Leavitt*, 125 S. Ct. at 1176 (Breyer, J.).

88. *Id.* at 1183.

89. *Id.* at 1178. One would assume that the government would insist that such contracts were binding upon the tribe should the tribe, for instance, divert federal funds received pursuant to such contracts for purposes other than the provision of the services, functions, and activities which the tribe had agreed to provide under the contract.

90. *Id.* at 1177.

91. *Id.* at 1178 (internal quotation marks omitted).

92. *Leavitt*, 125 S. Ct. at 1178.

93. *Id.* at 1181 (emphasis added).

Simply stated, it appears the Court viewed this action not as an Indian law case, but as an appropriations law case, and that probably made all the difference.[94]

III. *CITY OF SHERRILL V. ONEIDA INDIAN NATION OF NEW YORK*[95]

> Unlike the executive and legislative branches of the government, the judiciary cannot turn a deaf ear in the face of disputes such as these. Rather, a judge must put aside any personal opinions or ideas and apply the Constitution, Treaties, and laws of this great country. This is the result.[96]

From time immemorial, the Oneida Indians have resided in their territory, located within what is now known as upstate New York. The Oneida's aboriginal claims included approximately six million acres from Pennsylvania north into Canada, and from the Adirondack foothills to Lake Ontario.[97] The first treaty between the United States and the Oneida in 1784 "secured" to the Oneida "the possession of the lands on which they are settled," and, in return for a cession of claims to lands west and south of a line described in article 3 of the treaty, guaranteed "peaceful possession of the lands they inhabit east and north of the same" with a limited exception for Fort Oswego.[98] In 1785, and again in 1788, the State of New York entered into agreements with the Oneida in which the State purchased the bulk of the lands guaranteed to the Oneida by the 1784 federal treaty.[99] The lands retained by the Oneida after these agreements included a 300,000 acre tract reserved to the Oneida Nation.[100] The Second Circuit determined these purchases, which occurred during the time in which the Articles of Confederation were in force,[101] were lawful, and the State had the right to make these purchases during

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94. The Chief Justice did not participate. Justice Scalia filed a concurring opinion. *Id.* at 1183 (Scalia, J., concurring). On remand, the Tenth Circuit reversed the United States District Court for the Eastern District of Oklahoma and remanded. *Cherokee Nation v. Leavitt*, 404 F.3d 1263 (10th Cir. 2005).

95. 125 S. Ct. 1478.

96. *Oneida Indian Nation of N.Y. v. City of Sherrill*, 145 F. Supp. 2d 226, 231 (N.D.N.Y. 2003), *rev'd in part and aff'd in part and remanded*, 337 F.3d 139 (2nd Cir. 2001), *rev'd*, 125 S. Ct. 1478.

97. *Oneida II*, 470 U.S. at 230.

98. *Treaty with the Six Nations*, 7 Stat. 15 (available at http://www.utulsa.edu/law/classes/rice/Treaties/07_Stat_015_SIX_NATIONS.htm) (signed Oct. 22, 1784 at Fort Stanwix). The treaty provides in relevant part:

> ARTICLE 2. The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.
>
> ARTICLE 3. A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said land from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

99. *Oneida II*, 470 U.S. at 231.

100. *Id.*; *see also City of Sherrill*, 337 F.3d at 152.

101. *Worcester v. Ga.*, 31 U.S. 515, 557–59 (1832). Justice Marshall described the state of affairs during the period in which the Articles of Confederation were in force:

the period in which the Articles of Confederation were in force.[102]

In 1789, the United States discarded the Articles of Confederation and adopted the Constitution of the United States. The Commerce Clause,[103] granted to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and

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> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.
>
> Is this the rightful exercise of power, or is it usurpation?
>
> While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were entrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connexion with the mother country, and declared these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.
>
> Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, respectively, unless a state be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated."
>
> The ambiguous phrases which follow the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to annul the power itself.

Id.; *see also* Articles of Confederation, art. IX, cl. 1, 5 (available at http://www.utulsa.edu/law/classes/rice/Constitutional/Articles_Confederation.htm (last visited Nov. 20, 2005)). Apparently the State of New York also construed these ambiguous provisions in such a manner as to annul the power.

102. *Oneida Indian Nation of N.Y. v. N.Y.*, 860 F.2d 1145, 1167 (2nd Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

103. The purpose of the Indian Commerce Clause is given as follows:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

James Madison, *Federalist No. 42* (Jan. 22, 1788) (available at http://www.utulsa.edu/law/classes/rice/Constitutional/FedPapers/Fed42.htm).

with the Indian Tribes."[104] The commerce power, the treaty power, and the power to make war and obtain peace were held by the Court to mean that, after the adoption of the Constitution, the relations between the Indians and the Americans were to be governed exclusively by federal law.[105]

Not surprisingly, in one of the first "Indian" cases heard by the Supreme Court, it rejected the theory that an enforceable Indian right of occupancy (aboriginal title) was inconsistent with an original state being seized of the fee simple title to a tract of property.[106] In the next Indian case, the Court rejected an attempt by an original state to annul a tax exemption granted by it in return for a tribal cession of other lands within the State of New Jersey (prior to the Constitution), and invalidated an attempt by the State to tax a non-Indian purchaser of the property after it was later lawfully ceded to the State.[107] Further, the Court later held, an original state, seized of the fee burdened by Indian title, could lawfully convey the fee title burdened by that right of possession until the Indian title had been lawfully extinguished.[108] The Court also rejected attempts by non-Indians to enforce a title derived from Indian tribes in a court of the United States, holding the most that could be obtained from a tribe was a right to occupy and use the lands according to the laws of the tribe. The Court stated:

> Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

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104. U.S. Const., art. I, § 8, cl. 3.

105. *Oneida II*, 470 U.S. at 234; *Worcester*, 31 U.S. at 561 ("The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

106. *Fletcher v. Peck*, 10 U.S. 87, 142–43 (1810). The Court stated:

> It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.
>
> Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.
>
> The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Id.

107. *N.J. v. Wilson*, 11 U.S. 164 (1812).

108. *Meigs v. M'Clung's Lessee*, 13 U.S. 11 (1815).

> As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.[109]

Finally, the Court held, an original state had no authority to extend its laws into the territorial area reserved by federal treaty to an Indian tribe even when the actions of a non-Indian were involved because:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[110]

The President and Congress had not been silent on these issues during the formative years of the Republic. Numerous treaties were negotiated and ratified by the United States with the various Indian nations setting aside land for those nations or engaging in land transactions.[111] With respect to the Oneida, the Treaty of Canandaigua[112] recognized the 300,000 acres of land remaining in Oneida ownership within New York at that time, and promised the United States "[would] never claim [this land] nor disturb [the Oneidas] . . . 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 shall have the right to purchase."[113] The enactment of the Indian Non-Intercourse Acts was of further direct importance to this case. In one of its first legislative sessions, Congress enacted the first Indian Trade and Intercourse Act in 1790.[114] In 1793, Congress amended the Indian Non-Intercourse Act to contain the language which is applicable today:

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109. *Johnson v. M'Intosh*, 21 U.S. 543, 592–94 (1823); *see* G. William Rice, *In the Supreme Court of the Indian Nations*, Johnson v. M'Intosh, 9 Kan. J.L. & Pub. Policy 889 (2000). (Opinion on "rehearing" of this case in the "Supreme Court of the Indian Nations" for the Indian Law Conference at the University of Kansas School of Law.).

110. *Worcester*, 31 U.S. at 561.

111. *See generally* Charles J. Kappler, *Indian Affairs Laws and Treaties* vol. II (GPO 1904).

112. (Nov. 11, 1794), 7 Stat. 44.

113. *City of Sherrill*, 337 F.3d at 147 (quoting 7 Stat. at 45) (brackets and ellipses in original, internal quotation marks omitted).

114. *An act to regulate trade and intercourse with Indian tribes*, Pub. L. No. 1-33, 1 Stat. 137 (1790). This Act required federal consent for all purchases of land from Indian Nations.

> [N]o purchase or grant of lands, or of any title or claim thereto, from any Indians 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 a treaty or convention entered into pursuant to the constitution.[115]

Undaunted by these developments, New York continued to purchase the federally protected Indian lands of the Oneidas, acquiring almost the entire 300,000 acre tract in a 1795 transaction, and eventually laid out that land in surveyed plots and sold it to private parties.[116] Apparently, the lands involved in the instant litigation were contained within the lands conveyed to New York in this 1795 conveyance.[117] During the fluctuations of federal Indian policy during the eighteenth and nineteenth centuries, the Oneidas attempted to obtain relief for their land claims and other grievances with the United States and the State of New York to no avail.[118] In 1970, the tribe brought suit under the Indian Non-Intercourse Act to assert their continuing aboriginal rights to the properties wrongfully conveyed in 1795, and the Supreme Court held, for the first time, that a tribe could sue in federal court to preserve its federally protected rights to land under the Non-Intercourse Act.[119]

While several such land claims were pending in the 1990s, the Oneida Indian Nation of New York undertook to acquire, by purchase on the open market, whatever rights the individual "owners" of the tracts involved in this lawsuit might have.[120] These acquisitions in the open market were characterized by the district court as vesting in the Oneida Indian Nation of New York the "fee simple title" to the properties.[121] The City of Sherrill and Madison County, New York, attempted to collect real estate taxes upon these Oneida lands due to the acquisition of the "titles" to these properties from the successors in interest to New York under its prohibited purchases from the Oneida, and the Oneida resisted the application of state tax laws to the lands within its treaty reservation to which it had extinguished the New York title.[122] In effect, the Oneida's claim was that their existing aboriginal title had been joined with the fee simple title claimed by New York as a consequence of the doctrine of discovery,[123] and by acquisition of that claim the Oneida title to the tracts was perfected.[124]

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115. *An act to regulate Trade and Intercourse with the Indian Tribes*, Pub. L. No. 2-19, § 8, 1 Stat. 329 (1793) (now codified at 25 U.S.C. § 177 (2000)). "The general rule . . . is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer." *Waskey v. Hammer*, 223 U. S. 85, 94 (1911).

116. *City of Sherrill*, 337 F.3d at 147–48.

117. *Id.* Applying the rules of the referenced cases and the Indian Non-Intercourse Act to these purchases, it would appear that New York obtained, at best, only whatever right the Oneida's had granted pursuant to the laws of the Oneida Indian Nation as that Act and the cited Supreme Court cases precluded New York from obtaining the Oneida's aboriginal title without the consent of the United States.

118. *City of Sherrill*, 145 F. Supp. 2d at 236; *see also Oneida Indian Nation of N.Y. v. County of Oneida*, 719 F.2d 525, 529 (2d Cir. 1983) (noting that the Oneidas perceived their treatment by the State during this period as "improper, deceitful, and overreaching").

119. *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 678 (1974).

120. *City of Sherrill*, 145 F. Supp. 2d at 236.

121. *Id.*

122. *Id.*

123. *See Worcester*, 31 U.S. 515; *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831); *M'Intosh*, 21 U.S. 543.

124. *City of Sherrill*, 125 S. Ct. at 1489.

The United States District Court for the Northern District of New York[125] and the United States Court of Appeals for the Second Circuit[126] rendered well-reasoned, scholarly opinions which reviewed the history of the Oneida Indian land claims within the State of New York, and determined:

> [T]he Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe; that it is the successor-in-interest to the original Oneida Nation; that in 1788 the Treaty of Fort Schuyler created a 300,000 acre reservation for the Oneida; that in 1794 the Treaty of Canandaigua established that tract as a federally protected reservation; and that the reservation was not disestablished or diminished by the Treaty of Buffalo Creek in 1838. It is undisputed that the City seeks to collect property taxes on parcels of land that are owned by the Tribe and located within the historic boundaries of its reservation.[127]

In sum, the courts' rulings were that the actions of New York, in attempting to acquire title to the Oneida properties after 1789, violated federal law and New York had not obtained a lawful right to the property. The courts below[128] then held the law required the State to cease its attempts to tax lands owned by the tribe within its reservation absent congressional consent to the tax.[129] It was also noted that section 233 of title 25 of the United States Code, which

> gives the courts of New York civil jurisdiction in actions "between Indians" or "between one or more Indians and any other person or persons," . . . also provides that nothing in it "shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes."[130]

The Oneida and the United States also argued, because the tribe retained the aboriginal title to their ancient reservation land, and because the tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion (and specifically tax immunity) over the parcels.[131]

The United States Supreme Court decided the interests of the land thieves outweighed the interests of the victims, even though the victim had made whole those who could possibly be considered innocent purchasers. Based on the "justifiable expectations of the people living in the area" the Court held:

> The wrongs of which [Oneida Indian Nation ("OIN")] complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation.

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125. *City of Sherrill*, 145 F. Supp. 2d 226.

126. *City of Sherrill*, 337 F.3d 139.

127. *City of Sherrill*, 125 S. Ct. at 1495 (Stevens, J., dissenting).

128. *City of Sherrill*, 145 F. Supp. 2d 226.

129. *City of Sherrill*, 125 S. Ct. at 1488–89. This decision was consistent with other Supreme Court decisions holding that within Indian reservations there is a per se rule against state taxation of Indian property within Indian Country (i.e., 18 U.S.C. § 1151 (2000)) in the absence of express Congressional consent. *Sac & Fox Nation*, 508 U.S. 114; *McClanahan v. Ariz. Tax Commn.*, 411 U.S. 164 (1973).

130. *City of Sherrill*, 337 F.3d at 162 n. 19 (quoting 25 U.S.C. § 233) (citation omitted).

131. Br. for Respts. 1, 12–19, *City of Sherrill*, 125 S. Ct. 1478; Br. for U.S. as Amicus Curiae 9–10, *City of Sherrill*, 125 S. Ct. 1478; *see also City of Sherrill*, 125 S. Ct. at 1489.

> This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.[132]

In order to reach this determination, the Court announced it would decide the case on an issue not expressed in the grant of certiorari or briefed by the parties;[133] that the general doctrine of laches was applicable against the Oneida (as if the issue had never arisen in Indian cases);[134] that the "Court applied the doctrine of laches in *Felix v. Patrick*, to bar the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction"[135] while in the hands of an apparently innocent purchaser for value;[136] and that the Court had applied laches in controversies between the several states.[137]

Of course, Congress knows exactly how to make doctrines of repose, whether state or federal, applicable to the lands of Indians:

> By the Act of April 12, 1926, § 2, 44 Stat. § 240, Congress made the Oklahoma state statutes of limitation applicable to Indians of the Five Civilized Tribes. It expressly so placed them in the same position as ". . . any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party . . ." The Act was so applied by this court in *Wolfe v. Phillips*, 172 F.2d 481 (10th Cir.), and there the holding is that the law of the state is applicable. The law of the state is applied whatever it may be from time to time. Congress left the period of time under the statute entirely up to the state and set none itself nor did it adopt any time period. It is obvious that Congress considered it necessary to place these persons on the

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132. *City of Sherrill*, 125 S. Ct. at 1491 (citations and footnote omitted). The Court did not consider the historical legal impediments to such claims including the immunity of the State of New York and the United States from unconsented suit.

133. *Id.* at 1490 n. 8; *see also id.* at 1495 (Stevens, J., dissenting).

134. *Id.* at 1491.

135. *Id.* (citing *Felix v. Patrick*, 145 U.S. 317 (1892)) (citations omitted).

136. *City of Sherrill*, 125 S. Ct. at 1491. The Court, however, failed to mention that in *Felix*, the heirs of the allottee at issue had been released from federal supervision, and were thereby subjected to all the rules applicable to non-Indians. The Court in *Felix* stated:

> But, conceding that the plaintiffs were incapable, so long as they maintained their tribal relations, of being affected with laches, and that these relations were not dissolved until 1887, when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill. The real question is, whether equity demands that a party, who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not be disproportionate to the offence, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands.

Felix, 145 U.S. 332–33. Here, of course, the Oneida had as much as paid the "innocent purchaser" the current market value of the property, leaving only the perpetrator of the wrong (New York and its political subdivisions) to be deprived of their ill gotten gains (continuing tax collections against the tribe without authority).

137. *City of Sherrill*, 125 S. Ct. at 1492. Unlike states, the tribes still do not have the right to sue a state in a federal court to assert their rights to land as against a state unless section 1362 of title 28 of the United States Code applies. *Seminole Tribe of Fla.*, 517 U.S. 44; *Cherokee Nation v. Ga.*, 30 U.S. 1.

> same footing as non-Indians in Oklahoma to require the prompt assertion of claims and filing of causes of action. Periods of limitation are of long standing as a practical and necessary device to require, regardless of what may be the equities of the situation, that persons make known, and take formal action to assert claims or rights they may have. It is also apparent that the doctrine of laches follows a parallel course, but with greater emphasis on the defendant's position, and without the requirement of the passage of a specified time. Thus we hold that the Act of 1947 in its application of Oklahoma law of limitations also included the Oklahoma doctrine of laches as it applied to all citizens. The two matters are not separable and for Congress to accomplish its purpose, both limitations and laches must be applied.[138]

Congress has not done so often, and it has not done so in the case of the Oneidas.

The Court has repeatedly held, in such circumstances, that the doctrine of laches and other similar defenses does not apply to the restrictions imposed upon Indian lands. In *Ewert v. Bluejacket*,[139] for instance, the Court held:

> "The general rule is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer." The qualifications of this rule suggested in the decisions are as inapplicable to this case as they were to the *Waskey* Case. The mischief sought to be prevented by the statute is grave and it not only prohibits such purchases but it renders the persons making them liable to the penalty of the large fine of $5,000 and removal from office. Any error by the department in the interpretation of the statute cannot confer legal rights inconsistent with its express terms.
>
> The purchase by Ewert being prohibited by the statute was void. He still holds the legal title to the land and the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.[140]

And in *Nevada v. United States*[141] the Court held:

> As we previously intimated, we think the Court of Appeals' reasoning here runs aground because the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. Our cases make this plain in numerous areas of the law. In the latter case, the Court said:
>
> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it."

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138. *Armstrong v. Maple Leaf Apts., Ltd.*, 622 F.2d 466, 472 (10th Cir. 1979) (ellipses in original, citation omitted).

139. 259 U.S. 129 (1922).

140. *Ewert*, 259 U.S. at 138 (citations omitted); *see also Kendall v. Ewert*, 259 U.S. 139 (1922). In *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562–63 (1961), the Court held that conduct in violation of a statutory restriction on the conduct of a government official could render the contract unenforceable.

141. 463 U.S. 110.

> And in the very area of the law with which we deal in these cases, this Court said in *Heckman v. United States*:
>
> > "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend on the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty."[142]

And, also in *Board of Commissioners of Jackson County v. United States*:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skilful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law. Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments.[143]

Given these authorities and the Court's failure to address them, it is difficult to see the Court's decision to apply the doctrine of latches as anything other than a result oriented opinion—which is very troubling.[144]

In addition, the Court announced that the "doctrine of impossibility" prevented the Court from declaring that New York could not tax land owned by the Oneida Indian Nation within their Indian reservation without Congressional authority.[145] Although the Court spoke of the difficulty of rescinding cessions and driving the Americans off the land, that result was neither requested nor contemplated by this suit, nor would such action have necessarily followed. The issue was simply whether reservation land, not subject to any claim of ownership other than the tribe's, could be taxed by the State in the absence of congressional consent.[146] It is difficult to see how it is any more

142. *Id.* at 141–42 (quoting, respectively, *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409 (1917); *Heckman v. U.S.*, 224 U.S. 413, 445–45 (1912)) (citations omitted, ellipses in original). By bringing suit pursuant to section 1362 of title 28 of the United States Code, the Oneida are entitled to bring the suit if it were possible for the United States to bring the suit. *Moe*, 425 U.S. at 472.

143. 308 U.S. 343, 350–51 (1939) (citations omitted).

144. *See also Oneida Indian Nation of N.Y. v. N.Y.*, 194 F. Supp. 2d 104, 122–24 (N.D.N.Y. 2002) (detailing the understanding of the district court as to the effect of previous Supreme Court and circuit court rulings in similar cases); *U.S. v. Minn.*, 270 U.S. 181, 195–96 (1926) (holding that it is settled that state statutes of limitation neither bind nor have any application to the United States when suing to enforce a public right or to protect interests of Indian wards); *Cramer v. U.S.*, 261 U.S. 219, 233–34 (1923) (holding the acceptance of leases for the land from the defendant company by agents of the government was, under the circumstances, unauthorized and could not bind the government; much less could it deprive the Indians of their rights).

145. *City of Sherrill*, 125 S. Ct. at 1492–93. Such action did not seem impossible to prior Justices of the Court.

146. *Id.* at 1495 (Stevens, J., dissenting).

"impossible" for the Court to tell the State to cease its attempts to wrongfully tax tribally owned reservation property than it is for the Court to tell the tribe that they must now pay state taxes unlawfully levied upon their reservation property in the face of the unaddressed authority set out above, and two federal statutes which appear to prohibit such taxation.[147]

Finally, the Court seemed to indicate that its real problem with the facts of the case was that the Oneida were acting "unilaterally" in their attempt to regain sovereign rights of self-government (including exemption from state taxation) with respect to their land.[148] In this regard, the Court held out section five of the Indian Reorganization Act ("IRA")[149] as the congressionally approved mechanism "for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being."[150] The immediate question is whether the Court will read the statute for what it plainly says:[151]

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.[152]

The Oneida did not claim this act applied to their property. The Court seems to indicate that if the secretary exercised the discretion given to him/her in the first paragraph of this statute, it would have ruled differently.[153] The first paragraph of this statute grants the Secretary of the Interior discretionary authority to acquire land for Indians, the second

147. 25 U.S.C. § 233; 1 Stat. at 329 (codified at 25 U.S.C. § 177 (2000)).

148. *City of Sherrill*, 125 S. Ct. at 1493.

149. *Id.*; *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114–15 (1998).

150. *City of Sherrill*, 125 S. Ct. at 1482.

151. The Court's failure to apply sections 177 and 233 of title 25 of the United States Code to the Oneida's claims, and its failure to consider its prior precedent on point, give rise to this concern.

152. 25 U.S.C. § 465 (italics in original).

153. *City of Sherrill*, 125 S. Ct. at 1493.

paragraph authorizes an appropriation of federal funds to provide the secretary with the money needed to acquire the lands he/she decides to acquire under the first paragraph, and the third paragraph expressly makes the appropriations "made pursuant to this section" available until expended.[154] The fourth paragraph of this section, however, requires that "any lands or rights acquired *pursuant to this Act* . . . shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." Presumptively, congress knows the difference in the words "this section" and "this act."

This is important, because it raises the issue of (1) what authority congress granted in the IRA to acquire "lands or rights" for Indians, and (2) what entity is authorized to exercise those authorities. A review of the IRA reveals that section 3 authorizes the secretary to restore certain lands to tribal ownership,[155] section 4 authorizes certain transfers of restricted lands to tribes subject to secretarial approval of the conveyance,[156] section 5, of course, grants the secretary discretionary authority to acquire lands for Indians, and section 17 now provides that:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.[157]

Congress has established the procedure by which tribes can obtain this express congressional authority to acquire lands or interests therein. The tribe must request and obtain a charter of incorporation[158] from the secretary conveying the authority to acquire property.[159] It should also be noted that the statute authorizes the secretary to convey to

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154. 25 U.S.C. § 465. There are other appropriation authorizations contained in the IRA. 25 U.S.C. §§ 469, 470, 471.

155. This section states: "The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States." 25 U.S.C. § 463.

156. 25 U.S.C. § 464. Apparently, these transfers are instigated by an Indian, accepted by the tribe, and approved by the Secretary.

157. 25 U.S.C. § 477 (as amended). Arguably, a tribal constitution adopted pursuant to section 476 of title 25 of the United States Code could also convey authority to acquire lands or rights, and those lands or rights would then be subject to the fourth paragraph of section 465 of title 25 of the United States Code.

158. It has been held that these federally chartered tribal corporations may only exercise the powers that the secretary agrees to include in their charters, thereby providing a second federal "check" on the actions of the incorporated tribe and presumptively satisfying the Court's concern about unilateral tribal action. *Md. Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966).

159. The Court has previously approved such procedures as eliminating possible Commerce Clause problems. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198–99 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154–55 (1982).

the "incorporated tribe" general acquisition, management, and disposal authority over property subject to the limits stated in the statute. The Court has previously held that a leasehold interest acquired by an incorporated tribe outside its reservation was not taxable by the state because the tax was prohibited by section 465 of title 25 of the United States Code.[160] It would seem that, to the extent authorized by the secretary in the tribe's federal charter, the "incorporated tribe" is the acquiring authority, lands acquired by the incorporated tribe are held by the United States in trust for the incorporated tribe by operation of law, those lands or rights will be exempt from state or local taxation,[161] and those lands are subject to the federal restrictions contained in section 477 of title 25 of the United States Code, the federal corporate charter of the tribe, and other applicable federal law.

City of Sherrill may properly be limited to those tribes who are not organized and chartered under the IRA.[162] Only time will tell.

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160. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The Court held that the leasehold interests of the tribe in lands leased by the tribe from the forest service were exempt from state taxes, and the property which the tribe had attached to the lands were exempt from state taxes by the operation of section 465 of title 25 of the United States Code even though the tribe's interest had not formally been placed in trust. *Id.* The dissent agreed, but rejected the additional holding that the ski resort operated by the tribe on that land was subject to state income taxes because the land was outside the tribe's reservation. *Id.*

161. Acquisition of lands by an incorporated tribe which are held by "the United States in trust" for and managed by that incorporated tribe (instead of the Secretary of the Interior) would not be unique. The Tennessee Valley Authority, another federally chartered corporation, is also authorized to own and manage certain property it acquires on its own behalf although such property is to be titled in the name of the United States. *See* 16 U.S.C. § 831c(h). This Code section provides, *id.*:

> [The corporation s]hall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this chapter.

All lands acquired pursuant to the IRA may be made a part of the reservation of the tribe. *See* 25 U.S.C. § 467.

162. It appears that a tribe organized pursuant to section 503 of title 25 of the United States Code (the Thomas-Rodgers Oklahoma Indian Welfare Act) may also claim these authorities by adopting a federal charter issued by the secretary that claims the rights and privileges of a tribe organized pursuant to the IRA. 25 U.S.C. § 503. This statute provides in pertinent part:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which . . . may convey to the incorporated group . . . the right to . . . enjoy any other rights or privileges secured to an organized Indian tribe under the [Indian Reorganization] Act of June 18, 1934.

An Act to Promote the General Welfare of the Indians of the State of Oklahoma, and for other purposes, Pub. L. No. 74-831, 49 Stat. 1967 (1936) (citation omitted).