UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OFNEW YORK

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION; CITIZENS EQUAL RIGHTS ALLIANCE; DAVID R. TOWNSEND, New York State Assemblyman; MICHAEL J. HENNESSY, Onieda County Legislator; D. CHAD DAVIS, Oneida County Legislator and MELVIN L. PHILLIPS.

Plaintiffs,

6:08-cv-00660-LEK-GJ0

SALLY M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; MICHAEL L. CONNOR, in his official capacity as Deputy Secretary of the U.S. Department of the Interior; ELIZABETH J. KLEIN, in her official capacity as Associate Deputy Secretary of the Department of Interior; CHESTER MCGHEE, in his official capacity as Eatern Region Environmental Scientist.

Defendants.

Motion for Reconsideration

I. INTRODUCTION

On March 26, 2015 this Court issued a Memorandum Decision and Order dismissing the remaining claims of New York Central Fair Business Association (CNYFBA) and the Citizen's Equal Rights Alliance (CERA). In the order this Court states that "The Secretary is delegated broad authority over Indian affairs. See 43 U.S.C. § 1457; see also 25 U.S.C. § 9." The order then questions whether the Chevron or the Skidmore standard should be applied to the Secretary's interpretations deliberately defying the Carcieri v. Salazar, 555 U.S. 379 (2009) decision. See Chevron, USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), Skidmore v. Swift & Co., 323 U.S. 134 (1944). This Court concludes that Chevron deference to the Secretary's interpretations applies because "the Court must examine whether the Secretary's interpretations of under federal jurisdiction" and "recognized Indian tribe" were promulgated with "the force of law. Mead, 533 U.S. at 227." See United States v. Mead Corp.,533 U.S. 218 (2001).

This Court uses the two statutes it cites, 43 U.S.C. § 1457 and 25 U.S.C. § 9, to conclude that the Secretary has the power to redefine both phrases of significance in Carcieri v. Salazar.

The Secretary confined her arguments in all of the briefing to her authority pursuant to 25 U.S.C. § 465. CYNFBA and CERA accept that 25 U.S.C. § 9 is a defining statute of the Secretary's authority. However, the background and history of 25 U.S.C. § 9 are directly related to the Removal Act of 1830 argued in the plaintiff's memorandum in opposition to the motion for summary judgment to prove that New York State has primary jurisdiction over the Oneida that remained in New York. The historical context of how and why 25 U.S.C. § 9 was adopted in 1834 as the means to execute the Removal Act should have been a part of this Court's analysis. This Court should reconsider how 25 U.S.C. § 9 applies to this case. Instead of giving the Secretary the force of law in finding that the Oneida were a recognized tribe now under federal jurisdiction, 25 U.S.C. § 9 actually confirmed state jurisdiction over the remaining Oneida Indians that did not remove to Wisconsin or Kansas.

CNYFBA and CERA challenge using 43 U.S.C. § 1457 as a primary statutory source of Secretarial authority. The statute as it appears today is a bare list of undefined categories over which the Secretary "is charged with the supervision of public business relating to the following subjects and agencies." The statute was originally codified in 1 Rev. Stat. 74-5 and is the basis of the Secretary exercising continuing military authority over the Indians. According to the notes of 43 U.S.C. § 1457, the Secretary does claim this statute grants plenary power over the listed subjects to the Secretary. One of the listed subjects is "Indians." From this bare list that has no definitions, the Secretary concludes that she has the authority to promulgate the 25 CFR Part 83 regulations to recognize any group of Indians as a tribe without any statutory authorization from Congress. CNYFBA and CERA challenge the constitutionality of 43 U.S.C. § 1457 as a grant of territorial war power authority to the Secretary of the Interior as violating the equal protection clause of the 14th Amendment. While placing the Indians under the direct territorial war powers may have been justified in 1871, the continuing status of the Indians remaining under these territorial war powers is the reason the rights of all other persons are displaced and state jurisdiction is lost over any and all Indian lands placed into trust.

This Court has determined that the Secretary has authority to remove lands from the state jurisdiction of an original Colony and place those lands under the continuous territorial authority of the Secretary of the Interior. This determination, if it is allowed to stand, means that the territorial war power of the Executive is unlimited and can and eventually will threaten the very existence of every state in the union. This is exactly the scenario President Richard Nixon hoped to create with his Indian policy to create unlimited federal Executive power. It is President Nixon's Indian policy that is destroying our right to self-governance. It is time to choose between Nixon's Indian policy and President Lincoln's view of how we as one people with equal protection for all could move forward by prohibiting the use of the territorial war power in our domestic law.

//

II. BACKGROUND

This case turns on whether the Secretary is entitled to Chevron deference in her interpretation of the Carcieri v. Salazar decision. The Secretary is not entitled to Chevron deference if her actions to avoid the Carcieri ruling are *ultra vires*. On its own initiative this Court has decided that the Secretary has acted within her authority citing two statutes not raised by the United States in their briefing for summary judgment. As the opinion cites, this is not the first federal court to do this. This case is just another example of how any citizen's group does not have access to an impartial forum to resolve any dispute over the authority of the federal government. This breakdown of the rule of law within the federal courts in favor of government authority is no accident. It is a direct result of how the territorial war power has been expanded in domestic law since the Civil War.

The Framers of the Constitution were well aware of the great problem the territorial war powers of Great Britain were to control. The territorial war powers encompass every military and domestic authority conceivable under the law. When invoked a specific area is declared to be a war zone. Concomitantly all civil or domestic individual rights and liberties within that zone are nullified so that all rights of citizenship are suspended. Any individual in the war zone literally is treated as a "federal instrumentality." During an actual war this makes sense because the area is not under the clear control of any government. These powers are necessary to conquer a new land and civilize it or to defend one's own nation when attacked. When the war powers are invoked normal domestic law is suspended. See generally War Powers by William Whiting.

These war powers were initially all powers of the British Sovereign that could be invoked at his will. But starting with Magna Carta the authority of the Sovereign to invoke the war powers was limited to prevent the disruption of the domestic law that was steadily expanding the rights of individuals in the development of the concept of due process of law. Then beginning in the 1720's Great Britain resolved part of the problem of controlling the territorial war powers brought to the forefront by the African slavery issue through Lord Mansfield's pronouncements that the rights of Englishman could not be infringed upon the soil of England. This precursor to our own discussion of equal protection under the law prevented slavery on the British Isles but left all of the territorial land under British jurisdiction even more vulnerable to the whims of the King and Parliament. Since the American Colonies were not considered to be the soil of England they had no right to due process of law, American Colonists had only the rights and privileges allowed by the King and Parliament. This was the main reason for the Revolutionary War—taxation without representation in the government that had absolute control over every aspect of their lives.

Because of African slavery, the American Indians, and the great expanse of unsettled Western Territory, the nascent United States could not copy Lord Mansfield's solution when it adopted the Constitution. Instead, the Framers accepted the Three Fifths Compromise, a

complex and balanced political solution built into the Constitution itself to attempt to limit and control the territorial war powers. The Three Fifths Compromise had four major components. The first component was the Northwest Ordinance or Ordinance of 1787. Adopted as one of the last enactments of the Articles of Confederation, it was intended to be an interstate compact between the States defining the terms for setting up a new territory and setting the rules for admitting the new states that would be formed within that territory. The Ordinance of 1787 was also one of the first acts adopted by the new Congress under the Constitution to confirm and emphasize its importance in settling the question of how the new national government agreed to conform to the compact. The second component was the two clauses of Article IV. The Statehood Clause and the Property Clause of Article IV were intended to reinforce and protect the Northwest Ordinance of 1787. The third component was the Three Fifths Clause, Art. I, Sec. 2, P. 3, that set the terms of how Africans and Native Americans not taxed would not be counted as whole persons for representation or for the taxes assessed against the States. The last component was the express clause that the United States would never have a standing army, Art. I, Sec. 8, Cl. 12. The Framers reasoned that without a standing army the territorial war powers could not be exercised without the Congress authorizing the action.

The key to the Three Fifths compromise was the agreement by the Federalists who wanted a strong central government with the Anti-federalists that the Executive Branch should not have any territorial war powers except in times of war. The president was commander in chief for any war as declared by Congress. But Congress was given the exclusive responsibility for exercising the territorial war powers in the new territories under Article IV. Even with this compromise, the leaders of the Anti-federalist Framers did not sign the new constitution believing that the imposed limitations on the territorial war powers would not be sufficient to overcome the contradictions created by slavery. As history proved, they were correct and we fought a Civil War to decide the slavery issue.

The limitations on the territorial war powers were destroyed before the Civil War in the Dred Scott v. Sandford decision, 60 U.S. 393 (1857). These were the only powers that could suspend all domestic law and preserve slavery indefinitely. Chief Justice Taney declared the Northwest Ordinance unconstitutional and then placed the territorial war powers into full force and effect against the domestic law to protect and preserve the institution of slavery in the territories and the rights of the Indian nations as separate sovereigns. An area designated as "Indian country" was already considered a designated war zone as explained in previous briefing to this Court.

Many attorneys and judges were appalled by the Dred Scott decision and its potential impact on the power of the national government. Only the very educated or those with a legal background understood that this was much more than a debate about whether or not slavery should be allowed to continue. Abraham Lincoln rose to national prominence in explaining why

the Dred Scott decision had to be changed. In his debates with Senator Stephen Douglas he proposed a new concept to control the territorial war powers—equal protection for all under the law. Lincoln first gave voice to this new concept of equal protection in the Galesburg debate with Douglas.

As President, Lincoln did not hesitate to use the war powers to suppress the rebellion. But as Lincoln himself made clear it was going to be the ability or inability to limit the use of the territorial war powers after the end of the war that would determine whether self-government under the Constitution would survive. Lincoln got the 13th Amendment through to forever end the slavery debate. While drafts and discussions of the 13th Amendment had also included Native Americans, the final draft did not. In fact, the 14th Amendment adopted the exact language of "Indians not taxed" originally penned for the Three Fifths Clause to deliberately preserve the territorial war powers over the Indians. The territorial war powers over the Indians was deliberately given to the Executive by placing all Indians under the military authority of the Executive Branch in the Indian policy of 1871 as partly codified today as 43 U.S.C. § 1457. This deliberate action led by Congressmen from Ohio and New York is what Richard Nixon began to reach for and abuse as Vice President assigned to deal with Indian Affairs.

The more public fight after the Civil War was whether the rebellious Southern States had ever seceded from the Union. Lincoln argued they could not secede and therefore could reassume their prior status without being readmitted. Most Northern interests argued they had seceded and could now be treated as conquered territories subject to being readmitted to the union of the United States. Lincoln made his position clear by vetoing the initial Reconstruction Act known as the Wade Davis Bill. Just days before his assassination President Lincoln in his last public speech again spoke out strongly against any kind of formal Reconstruction Acts. With Lincoln's death the Radical Republicans and Northern Democrats passed Reconstruction Acts in 1867 actually drafted by Harvard University that claimed the authority to readmit the Southern States with conditions set by the Northern States including the ratification of the 14th Amendment. The Reconstruction Acts used the territorial war powers loosed by the Dred Scott decision. Only the holding that Negroes could never be citizens of the United States had been reversed by the passage of the 13th and 14th Amendments. The multiple other holdings of Dred Scott were all left intact.

Thus began what has become an alliance between the federal courts and the preservation of this territorial war power authority in Congress. Like the Federalist Framers, Harvard University's view has been a belief that as long as these territorial war powers resided in Congress, even if considered plenary authority they would not become unlimited authority that could destroy the constitutional structure. See United States v. Kagama, 118 U.S. 375 (1886) and Elk v. Wilkins, 112 U.S. 94 (1884).

Until Richard Nixon, the power preserved in the Indian policy of 1871 had only been abused in a few specific situations, most notably by John Collier himself trying to fulfill promises

he made about the Indian Reorganization Act before Congress gutted his bill. President Roosevelt through the Attorney General stopped Collier by requiring all departments to get approval for acquiring any land from a state as previously argued. Beginning from the moment he assumed the Vice Presidency under President Eisenhower and its traditional role over Indian affairs, Richard Nixon began scheming with how the territorial war powers preserved in the Indian law could be used by the Executive. Nixon had become aware of how these powers were preserved and of their potential as a young lawyer working in the Franklin Roosevelt administration in the Pricing Administration. Unlike Collier who openly argued for using the territorial war powers for the benefit of the Indians against all other interests, Nixon used and developed these powers without ever defining to Congress or any Court what the real basis of his asserted authority was. In fact, deliberate subterfuge was used to prevent anyone from realizing what he was doing in extending these powers into every aspect of government. As Vice President he aligned with William Veeder from the Department of Justice, Natural Resources Division with jurisdiction over the Indians.

After Richard Nixon assumed the Presidency he ordered that the historical files in the Department of the Interior be purged of any negative information that could have been used to argue against expanding tribal sovereignty. Then with the help of William Veeder who was directly connected to the leaders of the American Indian Movement (AIM) the Department of Interior building was seized and occupied by AIM. Veeder was a senior attorney in the Department of Justice that had his office in the White House as part of the Nixon administration. While AIM occupied the building the boxes of purged files were removed from the Department of the Interior building. The purged files were not destroyed but it has never been disclosed where they went or how they ended up back in the basement of the Interior building when President Clinton assumed the office. CERA knows they made it back to Interior because an attorney working for the California Indian Legal Services was allowed to make copies of some of the purged files in the early 1990's. His notes state that he saw the files in the basement of the Interior building. The copied files are now in a special collection at the University of California, Davis. CERA located these copied records in November 2014.

The purged records contain some startling information including how the Indian status as wards was continued despite the Citizenship Act of 1924. Many of the records concern how individual Indian allotments had been directly placed in future Reclamation projects in California to deliberately disrupt state authority over water. Some records prove how Nixon and Veeder undermined Congress in the 1950's and the finality that the Indian Claims Commission was supposed to create. Still another set concerns the Nixon administration's set up and funding of tribal rights organizations including the Native American Rights Fund and National Congress of American Indians with taxpayer money and private donations while trying to make them appear as purely tribal entities. This set up of creating tribal organizations as

fronts for litigation includes a direct reference to the Oneida I case and describes deliberately withholding information from the courts.

This case should have been a debate over the historical treatment of the Oneida by the United States. It could not be because the historical files have never been disclosed by the Secretary. Specifically, the files would have contained how the United States relinquished jurisdiction over the Oneida Indians that remained in New York after the Treaty of Buffalo Creek. Plaintiffs do not doubt the Oneida files were purged along with all the historical material adverse to the territorial war power position of the Nixon Indian policy. Once the files were purged the Secretary could assert anything because she was not bound by the historical record. As this Court has determined by citing 43 U.S.C. § 1457 and 25 U.S.C. § 9, the Secretary now asserts the territorial war powers to remove land that has always been under state jurisdiction and turn it into Indian country by taking it into trust status as if none of the history ever happened. Instead, we are required to rely on tainted court precedents manipulated by the Secretary and Department of Justice deliberately not disclosing information adverse to their asserted position in advocating for the tribe.

CNYFBA and CERA submitted the Nixon Memoranda to this Court as evidence of the incredible power being pursued in the Nixon Indian policy by the Executive. As the memorandum says the power can be used to destroy any State. The Nixon Indian policy was not based on any new acts of Congress or any shift of policy that Congress decided to make. The Nixon Indian policy is based on the Executive branch finding ways to activate the territorial war powers left intact after the Civil War and using them in any manner the Secretary or President choose. The academic debate over whether these territorial war powers can be controlled by attempting to confine them to Congress has been rendered moot. CNYFBA and CERA have no choice but to challenge the constitutionality of allowing the Secretary this unlimited authority to turn central New York State into a war zone as Indian country.

III. STANDARD FOR SUMMARY JUDGMENT

Plaintiffs do not contest the standard applied by the Court for a Motion for Summary Judgment.

IV. REVIEW OF AGENCY ACTION UNDER THE APA

Plaintiffs do not agree with the Court that the Secretary is entitled to Chevron deference but do not disagree that the cases cited in the Court's opinion are controlling precedent.

V. SUMMARY OF THE ARGUMENT

This case turns on whether the Secretary is entitled to deference under Chevron or is subject to the stricter standard in Skidmore. The Supreme Court in interpreting 25 U.S.C. § 479

of the Indian Reorganization Act in Carcieri v. Salazar as unambiguous and subject to being interpreted as intended by Congress as it was written in 1934 unknowingly challenged a key component of the Nixon Indian policy. Nixon and the executive branch assumed all these powers without any act of Congress. The whole Nixon scheme is based on the authority of the executive branch to reinterpret old laws into a new policy and use those laws outside of how they were intended to apply by Congress. Without the almost absolute deference to the executive branch's interpretation of its own authority as determined in Chevron, the Nixon Indian policy cannot exist.

If the old laws, even those in the Revised Statutes that placed the Indians under military authority, are interpreted as they were intended by Congress at the time they were made law then they are limited to applying only where Indian country already exists or in an area that actual hostilities have arisen. Cite. Even the Radical Republican Congress heeded some of Lincoln's warnings and attempted to confine these territorial war powers. This means the standard of deference this Court applies to the Secretary's interpretations actually determines whether the Secretary has acted within her authority or not as required by the Administrative Procedures Act (APA).

VI. ARGUMENT

Plaintiffs do not agree with the Court that the Secretary is entitled to Chevron deference.

A. This Court has not decided that the Secretary's authority to promulgate the Part 151 regulations to take fee lands into trust derives solely from 25 U.S.C. § 465

This Court cites 25 U.S.C. § 465 at the beginning of its memorandum opinion in the legal framework section quoting the Federal Handbook of Indian Law that the Part 151 regulations derive from the authority of the Indian Reorganization Act of 1934. But in the section of the opinion that actually decides that the Secretary's decisions that the Oneida tribe was recognized in 1934 and was under federal jurisdiction and thus entitled to Chevron deference cites 43 U.S.C. § 1457 and 25 U.S.C. § 9 as the basis for the Secretary's authority. This Court never decides that 25 U.S.C. § 465 is the only legal basis of the 25 CFR Part 151 regulations. The Secretary confined her arguments in the briefing to her authority pursuant to 25 U.S.C. § 465 to take the subject fee lands into trust status and based her authority for the Part 151 regulations on the Indian Reorganization Act. Plaintiffs argued that 25 U.S.C. § 465 as intended by Congress in 1934 granted no authority for the Secretary to take fee titled lands into trust. For this proposition plaintiffs cited the fact that an actual fee to trust provision was in the original draft of the Indian Reorganization Act bill submitted by John Collier to Congress. That Congress specifically removed the fee to trust provision of the bill and did not adopt it in its final version.

Plaintiffs also argued that the first fee to trust regulations were not promulgated until 1978, 43 years after the Indian Reorganization Act with 25 U.S.C. § 465 were made law.

The fact is that the notes to 25 U.S.C. § 9 cite that the authority to promulgate the 25 CFR part 151 regulations derive from its authority. According to the notes attached to the statutes, between 25 U.S.C. § 9 and 43 U.S.C. § 1457 these two statutes are the basis for virtually every part of the current regulations for Indians. The reality is that the Secretary under the Nixon Indian policy reinterpreted 25 U.S.C. § 465 in 1978 as being within the territorial war power authority given to the Secretary pursuant to 25 U.S.C. § 9 and 43 U.S.C. § 1457 and promulgated the 25 CFR Part 120a regulations that became the Part 151 regulations.

Once the power to reinterpret the old statutes was allowed the Secretary could rewrite any old law because the historical records had all been removed to prevent any argument from arising. The Part 151 regulations are therefore beyond the Secretary's authority if she does not have the authority to use 25 U.S.C. § 9 and 43 U.S.C. § 1457 to reinforce her authority under 25 U.S.C. § 465.

B. 25 U.S.C. § 9 was the enforcement provision of the Removal Act of 1830.

CYNFBA and CERA accept that 25 U.S.C. § 9 is a defining statute of the Secretary's authority. However, the background and history of 25 U.S.C. § 9 are directly related to the Removal Act of 1830 argued in the plaintiff's memorandum in opposition to the motion for summary judgment to prove that New York State has primary jurisdiction over the Oneida that remained in New York. The historical context of how and why 25 U.S.C. § 9 was adopted on June 30, 1834, 4 Stat. 738, by Congress as the means to execute the Removal Act should have been a part of this Court's analysis.

The Removal Act of 1830 set up a means for the President to negotiate with the Indians and Indian tribes remaining east of the Mississippi River for their removal to other lands. The Removal Act contains no means to force the removal of the Indians. In 1834 Congress wrote two acts confirming and expanding on the Removal Act. The first was an update to the Non-Intercourse Act altering the definitions and defining where Indian country would be within the territories of the United States. 4 Stat. 729. All Indian country was defined as being outside of any existing state. The second act of Congress passed in 1834 was to enforce the Indian removal westward into the Indian country. Section 17 at 4 Stat. 738, now codified as 25 U.S.C. § 9 is the specific provision of the act that placed the President in charge of making all the necessary regulations needed to enforce the Removal Act. Once the Removal Act was executed with the Congressional ratification of the Treaty of Buffalo Creek the federal government ceased to have any jurisdiction in New York over the remaining Indians.

This Court should reconsider how 25 U.S.C. § 9 applies to this case. Instead of giving the Secretary the force of law in finding that the Oneida were a recognized tribe now under federal jurisdiction, 25 U.S.C. § 9 as adopted in 1834 actually confirmed state jurisdiction over the remaining Oneida Indians that did not remove to Wisconsin or Kansas. This military power to

remove the Indians by force and relocate them was cited and used by the Radical Republican Congress as the basis of the Indian Policy of 1871 as cited in 1 Rev. Stat. 74, Sec. 441. It therefore became a much broader power as codified today in 43 U.S.C. § 1457.

C. The Secretary cannot have plenary power under 43 U.S.C. § 1457 over Indians when they were made Citizens of the United States in 1924.

The initial codification of what is now 43 U.S.C. § 1457 was in 1 Rev. Stat. 74. This statute along with its adjoining parts is the actual implementation of the Indians being removed from being treated as separate nations subject to the Secretary of State and being placed under the military authority vested in the Secretary of the Interior and Commissioner of Indian Affairs following the Civil War. See 1 Rev. Stat. 74, Sec. 442. One section even incorporates the language from 4 Stat. 738, 25 U.S.C. § 9 to enforce the Removal Act into a much broader general authority to make regulations to administer the Indian affairs. See 1 Rev. Stat. 78, Sec. 465. These statutory sections confirming territorial war power authority over all Indians have never been directly repealed by Congress.

Congress did in effect repeal the territorial war power authority over the Indians when it passed the Indian Citizenship Act of 1924. This act caused a major contradiction to exist in our laws. The Bureau of Indian Affairs and the Secretary continued to claim that despite the Citizenship Act that the Indians remained wards of the United States and racially inferior people. See Exhibit 1. Memoranda of Assistant Secretary appealing decision of Comptroller General. (Pages 3 and 4 of the memo are missing from the original). Congress and other parts of the executive administration treated the Citizenship Act as conferring actual citizenship. See Exhibit 2. Decision of Comptroller General, April 18, 1924.

This absolute contradiction between the Indians being used to preserve the territorial war power authority and the Civil War Amendments that were supposed to end racial discrimination against all citizens has deliberately been left unresolved. It is the difference between Lincoln's vision for applying equal protection of the law for all versus the old European view that government could maintain a subservient class (serfs) subject to the complete control of the government. The Memorandum of the Assistant Secretary defines on p. 9-10 the status of the Indians as of 1924 according to the Department of the Interior.

Commissioner Collier attempted to shift this blatant racial discrimination into a positive position of supporting the old tribal ways and tribal sovereignty. He proposed rebuilding the shattered tribal cultures to give the Indians a means to become independent citizens. His very radical bill that became the Indian Reorganization Act of 1934 relied on the territorial war powers to preserve the Indian land. Collier was an avowed communist who may have

deliberately been reaching for these very dangerous preserved powers. He certainly was fully prepared to use the territorial war powers the moment the very pared down IRA was passed until stopped by President Roosevelt. The IRA opened the door to using the preserved territorial war powers as an offensive weapon against the States and people. In addition, combining the application of the IRA as a stated policy in conjunction with declared emergency acts to combat the Great Depression like the National Recovery Act (NRA) was quickly shown to be almost untouchable. Collier restored many reservations and tribes using the NRA when he was not able to use the IRA under its restricted terms. All of the old territorial war powers became usable in conjunction with the emergency acts that were based on the same war power authority.

When Richard Nixon became President, virtually every act he presented to Congress began with declaring it to be an emergency act of some kind. Every one of these emergency acts potentially alters the rights of every citizen if the Indians are included in any provision. It is no accident that since the Nixon Presidency that the liberty and rights of the people are being displaced by government requirements. This deliberate scheme has altered the separation of powers and restricted the ability to impose any checks or balances. Federalism becomes unenforceable because the Indian tribes are placed above the States by the federal government through their regulatory authority.

Today, most moderate media sources are openly asking what has happened to Lincoln's legacy and the Civil Rights Movement that gave us real hope for progressing as a people. What happened was the Nixon Indian policy and Nixon's deliberate use of the emergency or territorial war powers to turn all of his sweeping legislation into much more than improving the environment.

CNYFBA and CERA believe it is time to declare 43 U.S.C. § 1457 applying to the Indians unconstitutional as violating the 14th Amendment equal protection clause. This would end the Secretary's continuing authority to use the territorial war powers on behalf of the Indians rendering the Part 151 regulations *ultra vires*. This would also mean that the Secretary is not entitled to Chevron deference for her manipulations to find the Oneida are entitled to the benefits of the IRA. If we do not make a conscious choice now to choose Lincoln's path over the Radical Republican's and Harvard's path we will lose the right of self government to President Nixon's scheme.

Under this Court's decision there is more territorial war power authority in the Secretary to destroy the land base of New York at her whim than King George III had over the colony of New York at the time of the Revolutionary War because Parliament could limit King George. There is a major question whether Congress could undo how President Nixon has combined using the old territorial war powers through the Indians with emergency acts. As a matter of law each act would have to be amended to remove the emergency or remove the Indians from the application of the law. Then there are hundreds if not thousands of Court precedents that

have allowed the incredible expansion of the Executive authority without realizing what it was based on.

President Lincoln gave us the way out of Nixon's scheme. By applying equal protection of the law through the 14th Amendment to declare 43 U.S.C. § 1457 as applied to Indians unconstitutional could correct all of the current statutes and case law.

D. Preservation of other arguments.

CNYFBA and CERA are not conceding the Carcieri and Removal Act arguments made in the briefing in opposition to summary judgment. Instead, plaintiffs have responded to the new legal position presented in the opinion.

The clerk writing the opinion for the Court got a major fact wrong that needs to be corrected. The Oneida rejected the IRA when they were allowed to vote on the act. In addition to finding the legal memoranda over the application of the Citizenship Act in the Davis files Nixon purged from the historical files, the legal consultant for CERA found a memoranda from the Director of Lands over the application of the IRA to tribes that had rejected it. See Exhibit 3. Memoranda of J.M. Stewart, May 5, 1936. This memoranda clearly states that any tribe that rejected the IRA is not entitled to the benefits of Sec. 5 of the IRA, codified as 25 U.S.C. § 465. This memoranda should be enough to reject the Secretary's conclusion that the Oneida are entitled to have lands placed into trust.

Even if the Court ruled for Plaintiffs this case would not end. The Secretary would just go back and "reinterpret" the laws and regulations again just as she has done with the recognition issue. Plaintiffs are litigating against a completely stacked deck of cards that can be reshuffled and dealt again any time the government does not win. This also applies to the novel concept that plaintiffs were required to guess and disclose all of their cards before the Secretary decided which cards she was going to play after this Court required her to apply the Carcieri decision. Ruling that we were required to disclose every document we had found in order to preserve a claim under Section 18 is beyond unreasonable it violates due process of law. According to this Court the President and Secretary can purge the historical files of all adverse records, reinterpret any old statute into a new policy and can do it as many times as they want until they win.

When citizens are facing losing all their rights and no fair forum is available to them then we are back to the reasons the Revolutionary War was fought.

VII. CONCLUSION

This Court should reconsider its opinion of March 26, 2015.

Dated April 8, 2015

/s/

James J. Devine, Bar No. 101492
128 Main Street
Oneida, NY 13421
Tel. (315) 363-6600
Fax (315) 361-4414
Attorney for Plaintiffs

The Comptroller-General

of the United States.

My dear Mr. Comptroller-General:

This will refer to your letter of November 10, 1924 (A-1791), sustaining the disallowance of $60 in the accounts of James E. Jenkins, special disbursing agent, Reno Indian Agency, Reno, Nevada, paid to Dr. William L. Howell for medical services to the Indians at Gardnerville, that state, in 1923 (Certificate No. C-7036-In., February 18, 1924). The disallowance certificate states, "As these Indians are citizens of the United States and as such are entitled to the services of the county physician, the item is not a proper charge against a government appropriation."

So far as the certificate itself shows, the sole ground of the disallowance was the fact of citizenship. In your letter of April 18, 1924, on request of this Department for review, you say:

> It appears that the professional services rendered in this case were rendered not in pursuance of any contract or agreement made by any officer of the government having authority to obligate the appropriation x x x , but because it was a part of the duties of this physician under his contract with the county to look after the health of these Indians without charge. Therefore, the payment made to him of fees for such service was unauthorized.

From this it appears that the ground of the disallowance was the

fact that the services were rendered by the county physician because it was his duty under his contract with the county to look after the health of the Indians without charge.

In your letter of November 10, 1924, you refer to your previous communication of April 18, 1924, as holding that the appropriation is not applicable under the circumstances of this case "in the absence of a specific contract or agreement therefor." Thus the record discloses three different factors involved in the disallowance of this claim--viz:

(1) Citizenship of the Indians.
(2) The fact that the services were rendered by the county physician.
(3) The absence of a contract or agreement.

As this Department understands the matter, your holding is--

that the appropriation mentioned is not available to pay the county physician for services rendered citizen Indians in the absence of a specific contract or agreement therefor.

If, as stated in the certificate of disallowance, the ground thereof was the fact of citizenship, which made the appropriation inapplicable, it would seem that the person by whom or the circumstances under which the services were rendered would be immaterial.

This question of citizenship has been raised by the General Accounting Office in several recent cases in view of the act of June 2, 1924 (43 Stat. L., 253), on the theory no doubt that it was the duty

In enacting the general citizenship law of June 2, 1924 (43 Stat. L., 253), Congress must be presumed to have had in mind the extent and scope of the Indian activities of this Department; and if that body had intended to take any such drastic and radical action as that contemplated by your decision, it would have clearly indicated that intention by specific language. This, however, it did not do but provided "that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

Treaties have been made by the government with many of the Indian tribes providing for education, support, and health and medical work. However, the obligation of the government to provide such facilities is not dependent upon treaties but arises primarily because of the relationship of guardian and ward which exists between it and the Indians, with the resultant duty on the part of the guardian to look after the welfare of the ward. Hence, that obligation is just as binding where no treaties have been made. It follows that the existence of this obligation on the part of the government toward the Indians necessarily implies that they have a vested right to expect and receive the things which it is the duty of the government to provide. This right is "property."

"Property x x x x x extends to every species of valuable right and interest." (Scranton v. Wheeler, 179 U. S. 141.)

Hence, the right of the Indians to receive such benefits from the

government is "property," which it is provided that the granting of citizenship shall not "impair or otherwise affect."

But it is submitted that even without the proviso the result would be the same, under the well-settled rule that Congress cannot impair vested rights by making a law retrospective in its operation. The Supreme Court of the United States has held that it is for Congress to say when and how the relationship of guardian and ward between the government and Indians shall terminate. The act of May 8, 1906 (34 Stat. L., 182), provides two methods of termination: (1) issuance of a fee-simple patent; (2) separation from the tribe and the adoption of the habits of civilized life.

The issuance of a fee-simple patent operates to emancipate an Indian from federal guardianship and jurisdiction. (Luck v. Dickson, 242 U. S. 371.)

When a member of a tribe takes up his residence separate and apart from any tribe outside of the reservation, adopts the habits of civilized life, and becomes a citizen, he ceases to be a ward of the government. (U. S. v. Seufert Brothers Company, 233 Fed. 571.)

In other words, so long as an Indian's land is held in trust and he maintains tribal relations, he is a ward of the government and hence entitled to share in the benefits provided by Congress for the Indians under federal supervision. It is not citizenship, then, which terminates the relation, but, in the one case, the issuance of a fee patent, with resultant release of the land from governmental control and supervision, and, in the other, separation from the tribe and the adoption of the

habits of civilized life, although under the law citizenship follows in both cases.

Various prior citizenship laws have been enacted by Congress, among which may be mentioned:

(1) Indian women who marry citizens. (Act of August 9, 1888,--25 Stat. L., 392.)
(2) Five Civilized Tribes. (Act of March 3, 1901,--31 Stat. L., 1447.)
(3) Soldiers and sailors of the World War. (Act of November 6, 1919,--41 Stat. L., 350.)
(4) Osage Indians. (Act of March 3, 1921,--41 Stat. L., 1250.)

All of said laws contain similar if not identical provisos to that found in the general act--viz: that the grant of citizenship "shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." About two-thirds of the Indians of this country had already become citizens under the prior acts when the general law was enacted. This Department continued to function as formerly with respect to such Indians after the passage of said acts.

The construction placed upon a statute by the officers whose duty it is to execute it, is entitled to great consideration (Union Insurance Company v. Hoge, 21 How 35), especially if such construction has been made by the highest officers in the executive departments (U. S. v. Finnell, 185 U. S. 236), and such construction should not be disregarded or overthrown unless it is clearly erroneous (Sells v. U. S., 36 Ct. Cl. 94).

The act of May 8, 1906 (34 Stat. L., 182), also provides:--"That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive

jurisdiction of the United States."

If until the issuance of fee patents the Indians are subject to the exclusive jurisdiction of the United States, they are certainly wards of the government. It might be urged, however, that in enacting the general citizenship law of June 2, 1924 (43 Stat. L., 253), Congress intended to repeal the proviso to this effect in the act of May 8, 1906 (34 Stat. L., 182), and to release all the Indians from governmental supervision regardless of the act of May 8, 1906 (34 Stat. L., 182), fixing the methods by which federal guardianship can be terminated. But there is no language to this effect. Hence, we must resort to the doctrine of implied repeal.

The repeal of statutes by implication is not favored by the courts. The presumption is always against an intention to repeal where express terms are not used. To justify a presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable or the intention to effect a repeal must be otherwise clearly expressed. (36 Cyc. 1071.)

Where two legislative acts are repugnant to or in conflict with each other, the one last passed being the latest expression of the legislative will must govern, although it contains no repeal clause. It is not sufficient to establish such repeal that the subsequent law covers the same or even part of the cases provided for by the prior statute. x x x x x Between the two acts there must be plain, inevitable, and irreconcilable repugnancy. If both acts can by any reasonable construction be construed together, both will be sustained. (36 Cyc. 1073.)

There is no such repugnancy here. Hence, the doctrine of repeal by implication cannot be successfully invoked here. But the case is even stronger. In U. S. v. Allen (179 Fed. 13), involving the effect

of the grant of citizenship to the Indians of the Five Civilized Tribes, the court said:

They are still members of tribes and of an inferior and dependent race. Clothing them with citizenship did not change their character. An intent to destroy the authority of the national government to protect the Indian ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language. Though a citizen of the United States he did not cease to be an Indian, and both he and his property remained subject to the national government.

Further:

Federal guardianship is in full force, both as to property rights and personal status at least as long as the tribal relationship continues, except in so far as Congress has relinquished it. That there is no incompatability between citizenship of and guardianship over an Indian is well settled. As members of the tribe, whether citizens or not, they were subject to regulation and control by the federal government. (Katzenmeyer v. U. S., 225 Fed. 523.)

If guardianship is still in force, it necessarily follows that the responsibilities involved in this relation likewise continue to exist.

On a number of the reservations no allotments at all have been made, the land being still held in trust by the United States for all the members of the tribe residing thereon, who, of course, became citizens under the general act. Said Indians have neither received fee patents nor separated themselves from the tribe and adopted the habits of civilized life. Hence, they are still wards of the government. The Indians at Gardnerville, Nevada, involved in the present case, have

this status.

The salient points in the matter as set forth above may be summarized as follows:

(1) The Indians are wards of the government.
(2) This guardianship continues so long as their land is held in trust, whether tribal or individually, and they maintain tribal relations.
(3) As such wards the Indians are entitled to share in the benefits of appropriations made by Congress until the relationship is terminated by the issuance of a fee patent or separation from the tribe and the adoption of the habits of civilized life.
(4) The grant of citizenship by the act of June 2, 1924 (42 Stat. L., 253), and prior laws did not of itself terminate the relationship of guardian and ward.
(5) Hence, such grant did not destroy the obligation of the government to furnish or the right of the Indians to receive such benefits.
(6) This Department should continue to function as formerly with respect to its Indian activities in conformity with the applicable laws and regulations unaffected by the grant of citizenship, with resultant availability of the annual appropriations made by Congress for the Indian Service for the purposes and in the manner observed prior thereto.

Your further consideration of this matter in the light of the foregoing, with advice of the conclusion reached, will be greatly appreciated.

Very truly yours,

Assistant Secretary.

Respectfully referred to the

for his information and guidance.

Chief Clerk.

(COPY)

COMPTROLLER GENERAL OF THE UNITED STATES

A-1971 WASHINGTON April 23, 1924

The Secretary of the Interior on March 19, 1924, requested review of settlement No. C-7254-In, dated February 19, 1924, wherein was disallowed the sum of $40, voucher 30, fourth quarter 1923, accounts of James E. Jenkins, Superintendent and Special Disbursing Agent, Reno Indian Agency, Reno, Nevada. The voucher was in favor of Dr. William L. Newell, Carsonville, Nevada, March 12-23, inclusive, 1923, for 12 medical calls to the Indian Colony (Dresslar), Carsonville, Nevada, at $3.

In the disallowance certificate the statement is made:

"As these Indians are citizens of the United States and as such are entitled to the services of the County Physician, the item is not a proper charge against a Government appropriation. * * *"

The Secretary of the Interior states that Dr. Newell is the county physician for the county in which the service was performed, but contends that as the relationship of the United States to the Indians is that of a guardian to its ward, the Government is not relieved from its duties of guardianship and care merely because these Indians have become citizens of the United States.

The appropriation for Relieving Distress, and Prevention, etc., of Diseases among Indians, 1923, act of May 24, 1922, 42 Stat., 561, provides:

"For the relief and care of destitute Indians not otherwise provided for, and for the prevention and treatment of * * * and other contagious and infectious diseases, * * * $570,000: Provided, That this appropriation may be used also for general medical and surgical treatment of Indians, including the maintenance and operation of general hospitals, where no other funds are applicable or available for that purpose: * * *"

It appears that the professional services rendered in this case were rendered not in pursuance of any contract or agreement made by any officer of the Government having authority to obligate the appropriation, supra, but because it was a part of the duties of this physician under his contract with the county to look after the health of those Indians without charge. Therefore, the payment made to him of fees for such service was unauthorized.

Upon review the settlement is sustained.

(Sgd.) J. R. McCarl

Comptroller General

L-A
18852
R C C

3

Mr. E. M. Johnston,
Land Field Agent,
330 Post Office Bldg.,
Sacramento, California.

MAY -5 1936

My dear Mr. Johnston:

The receipt is acknowledged of your letter of April 16, requesting information as to just what class of Indians may benefit under the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and more particularly Section 5 which authorizes the acquisition of land for Indian purposes.

Section 19 of the Act, which reads in part as follows, explains the term "Indian" as referred to in the Act:

> "The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognised Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

In answer to your question, it may be said that Indians who have voted to exclude themselves from the provisions of the Act are not entitled to receive benefits thereof, and funds appropriated to purchase lands under Section 5 thereof will not be used to acquire lands for such tribes or bands of Indians. Tribes or bands who have voted to remain under the provisions of the Act and all other Indians of one-half or more of Indian blood who are not entitled to vote under the Act are entitled to receive benefits thereof. Only Indians of one-half or more of Indian blood may be settled on lands purchased for landless non-resident Indians.

Sincerely yours,

CHAS. J. McCARTHY

J. M. STEWART,
Director of Lands.

4 mlm 23

Carbon for Indian office