

THE CENTER FOR INDIGENOUS LAW,
GOVERNANCE & CITIZENSHIP
at Syracuse University College of Law



Research Paper Series
No. 05-3

“COMMENTS IN OPPOSITION TO THE WESTERN HEMISPHERE TRAVEL INITIATIVE
REQUIRING AMERICAN INDIANS TRAVELING INTO THE UNITED STATES FROM CANADA
TO CARRY A U.S. OR CANADIAN PASSPORT”

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October 31, 2005

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I. *Comment Summary.*

The Center for Indigenous Law, Governance & Citizenship at the Syracuse University College of Law opposes any proposed regulation¹ that American Indians traveling from Canada into the United States carry and produce a U.S. or Canadian passport as identification. Such a requirement would infringe upon the treaty-protected rights of Indigenous peoples living within the United States and Canada to travel freely across the border on the basis of their American Indian citizenship. The proposed regulation should be amended to allow American Indians to identify themselves through a means respectful of this treaty-protected right.

II. *Summary of the Proposed Federal Regulation.*

Under the Immigration and Nationality Act (“INA”), it is generally unlawful for a United States citizen to depart or enter the United States without a valid U.S. passport.² However, the Act allows for alternative means for demonstrating one’s American or Canadian identity and citizenship. Accordingly, U.S. and Canadian citizens traveling from anywhere within the Western Hemisphere (other than Cuba) are exempted from the passport requirement.³ American citizens need only satisfy Bureau of Customs and Border Protection (“CBP”) officers of their U.S. citizenship, which is most commonly accomplished by presentation of a validly issued state driver’s license.⁴ This is also the case for Canadian citizens, who need only prove their citizenship to CBP officers by any available means.⁵

The Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”)⁶ changes the requirements relating to passports for entry into the United States. The Act purports to limit the discretion of the Secretary of Homeland Security and Secretary of State to waive or make exceptions to the passport requirements under the INA.⁷ IRTPA also provides that by January 1, 2008, United States citizens and non-immigrant aliens must possess a passport -- “or such alternatives as the Secretary of Homeland Security may designate as satisfactorily establishing identity and citizenship”⁸ -- in order to cross the border into the United States.

¹ See Documents Required for Travel Within the Western Hemisphere, 70 Fed. Reg. 52,037 (Sept. 1, 2005) (to be codified at 8 C.F.R. Chapter 1 and 22 C.F.R. Chapter 1.)

² 8 U.S.C. § 1354.

³ 22 C.F.R. § 53.2(b).

⁴ Other acceptable documents include birth certificates from the United States, Certificates of Naturalization, and Certificates of Citizenship.

⁵ 8 C.F.R. § 212.1(a)(1).

⁶ P.L. 108-408, 118 Stat. 3638.

⁷ 118 Stat. 3638 § 7209.

⁸ Documents Required for Travel Within the Western Hemisphere, *supra* note 1, at 52,037.

As a result, the Department of Homeland Security (“DHS”) submitted on September 1, 2005 a public notice of rule making to follow the new IRTPA requirements that “travel to the United States by United States citizens and others from the Western Hemisphere will require a passport or acceptable alternative documents in circumstances where travel was previously permitted without such documents.”⁹ By December 31, 2006, all individuals traveling to the United States by air or sea will be asked to present a valid passport or other document that has been deemed by the Secretary of Homeland Security to be sufficient to establish identity and citizenship.¹⁰ And by December 31, 2007, all individuals arriving at U.S. land borders will need to present a valid passport or other documents deemed sufficient by the Secretary to establish identity and citizenship.¹¹ The public was invited to comment on the implementation of the new travel requirements to assist the Secretary of Homeland Security in making the final determination on what documents will be accepted at border crossings.

III. *Treaty Recognition of an American Indian “Right of Free Passage.”*

Indigenous peoples living within the United States and Canada have a treaty protected right to pass “freely” as Indians across the international border. The Jay Treaty of Amity, Commerce and Navigation, entered into by the United States and Great Britain on November 19, 1794, clearly provides for this right:

It is agreed that it shall at all times be free to his majesty’s subjects, and to the citizens of the United States, *and also to the Indians dwelling on either side of the said boundary line*, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of American (the country within the limits of the Hudson’s Bay Company only excepted.)¹²

Subsequent treaties between the United States and Great Britain have affirmed and expanded this Right of Free Passage. In 1796 the United States and Great Britain added an additional article to the Jay Treaty providing that

no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the

⁹ *Id.*

¹⁰ *Id.* at 52039.

¹¹ *Id.*

¹² The Jay Treaty of Amity, Commerce and Navigation, 8 Stat. 116, Art. III (emphasis added).

subjects of his majesty and to the citizens of the United States, *and to the Indians dwelling on either side of the boundary line aforesaid*; but that all the said persons shall remain at full liberty to pass and repass, by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.¹³

The Jay Treaty was reaffirmed by the Treaty of Ghent between the United States and Great Britain:

The United States of American engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights and privileges which they may have enjoyed or been entitled to [in on] thousand eight hundred and eleven previous to such hostilities...¹⁴

IV. *U.S. Recognition of the Treaty-defined Right of Free Passage.*

The United States has long recognized the border crossing rights of American Indians defined and protected by the Jay Treaty.

In *Diabo v. McCandless*,¹⁵ a case decided in 1927, the U.S. courts first recognized the right of Indians to pass freely between the U.S. and Canada. With the passage of the Indian Citizenship Act of 1924,¹⁶ Indians in the United States were unilaterally made citizens of the United States and Indians in Canada who traveled and worked within the U.S. were rendered “aliens.” Diabo was an ironworker from *Kahnawake* Mohawk Territory in Quebec who was, by all accounts, 100% Indian. Despite working in the U.S. for 10 years, Diabo was arrested and deported in 1925 as an illegal alien. He immediately petitioned for a writ of *habeas corpus* on the grounds that, as a member of a North American Indian Tribe, he was exempt from immigration laws as guaranteed under Article III of the Jay Treaty.

¹³ *Id.* (explanatory article).

¹⁴ Treaty of Ghent between the United States and Great Britain, 8 Stat. 218, Art. 9.

¹⁵ *Diabo vs. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), *aff'd*, *McCandless v. United States*, 25 F.2d 71 (3rd Cir. 1928).

¹⁶ 8 U.S.C.A. section 1401(b)

The district court concurred and found that the right for Diabo and other Indians to cross the border was in fact an aboriginal right, a right that was inherent, and a right that was recognized and confirmed by the Jay Treaty. In so doing, the court reasoned that:

The turning point of the cause is thus to be sought in the answer to the question of whether the Indians are included among the members of the alien nations whose admission to our country is controlled and regulated by the existing immigration laws. The answer, it seems to us, is a negative one. *From the Indian viewpoint, he crosses no boundary line. For him this does not exist. This fact the United States has always recognized, and there is nothing in this legislation to work a change in our attitude.* This does not mean that the United States could not exclude him, but it does mean that the United States, having recognized his right to go from one part of his country to another unobstructed by a boundary line, which as to him does not exist, will not be taken to have denied this right, unless the clear intention so to do appear. We do not find such denial in any of the cited exclusion acts of Congress.¹⁷

On appeal, the Third Circuit Court of Appeals affirmed.¹⁸ The Court found that

The confederation of the Six Nations and the land held by it long preceded the Revolution. The proposed boundary line passed through this land. When the Revolution came, the Six Nations as a whole determined on neutrality, but left the constituent tribes to side with either party, which they did. Naturally the Six Nations resented the establishment of any boundary line through their territory which would restrict intercourse and free passage to their people, and remonstrance was made to the assumption of sovereignty over what they regarded, and then occupied, as their own.¹⁹

On the basis of this assessment, the Court found that the Right of Free Passage contained in the Jay Treaty – and enhanced by the subsequent article to the Jay Treaty in 1796 – “was in the nature of a *modus vivendi*, to be thereafter observed in the future by Canada and the United States in reference to the Indians.”²⁰

Congress, too, has recognized the Right of Free Passage provided under the Jay Treaty. In the Immigration Act of 1924, Congress stipulated that nothing contained in the Act was intended to

¹⁷ *Diabo*, 18 F.2d at 283 (emphasis added).

¹⁸ *McCandless v. United States*, 25 F.2d 71 (3rd Cir. 1928).

¹⁹ *Id.* at 72.

²⁰ *Id.*

infringe upon the right of “American Indians born in Canada to pass the borders of the United States.”²¹ Such statutory recognition derives directly from the existence of the Right of Free Passage contained in the Jay Treaty.

V. *Haudenosaunee History of Exercising the Right of Free Passage.*

Following the *Diabo* case, which presented the first real threat to the Right of Free Passage – there was vigorous resistance by *Haudenosaunee* (a/k/a “Six Nations Iroquois”) on both sides of the international boundary line. Any threat to the Right of Free Passage raises the prospects of serious disruption in the lives of the *Haudenosaunee* as a people. Numerous factors contribute to this prospect.²² First, the *Haudenosaunee* are large population of American Indians who reside on 19 different territories located on both sides of the U.S.-Canada border and along the St. Lawrence River.²³ As a result, there is much intermarriage and social interaction amongst *Haudenosaunee* from different communities. Second, *Haudenosaunee* possess a cultural attribute – especially amongst men – that induces them to travel great distances, if need be, to ensure economic security. Thirdly, *Haudenosaunee* possess a strong sense of political identity that is reflected by an exclusive sense of being citizens of their own nations. And lastly, the *Haudenosaunee* have had a long history of being able to pass freely across the international boundary within harassment. For these reasons, the ability to pass freely across the U.S.-Canada border is an essential attribute of *Haudenosaunee* culture, identity, and society.

One response by the *Haudenosaunee* to protect the Right of Free Passage was the formation in 1926 of the Indian Defense League of America (“IDLA”) by Tuscarora Nation Chief Clinton Rickard. The IDLA was inspired by the work of *Deskaheh*²⁴ of the Six Nations Territory in Canada and embodied the effort to assert Iroquois sovereignty and affirm Iroquois Jay Treaty rights. *Deskaheh* worked tirelessly to have the Six Nations *Haudenosaunee* Confederacy recognized and protected by the League of Nations when wampum belts were seized and traditional chiefs

²¹ 8 U.S.C.A. § 1359 (and also limiting the right to “persons who possess at least 50 per centum blood of the American Indian race”). The original Immigration Act of 1924 did not contain this qualification.

²² See generally Audra Simpson, *To the Reserve and Back Again: Kahnawake Mohawk Narratives of Self, Home and Nation* (unpublished Ph.D. dissertation 2004, on file with authors).

²³ The *Haudenosaunee* number approximately 50,000 and occupy 19 territories located on both sides and straddling the U.S.-Canada border along the St. Lawrence River and Lake Ontario. Eight of these territories are located in the United States (Akwasasne, Ganiekeh, Kanatohare [sp?], Oneida, Onondaga, Cayuga, Allegany, Cattaraugus, Oil Spring, Niagara Falls, Tonawanda, Tuscarora) and six of these territories are located in Canada (Kaknawake, Kanesatake, Tyendinega, Wahta, Oneida of the Thames, and Six Nations). One *Haudenosaunee* territory, Akwasasne, is bisected by the border.

²⁴ “Deskaheh” is a hereditary chief of the Iroquois Confederacy. Levi General was a Cayuga from Six Nations that occupied the title of Deskaheh until his death.

supplanted by Canadian officials in 1924.²⁵ Even though *Deskaheh's* struggle to gain international political recognition for the *Haudenosaunee* did not succeed, the IDLA has continued to conduct formal activities to acknowledge the Right of Free Passage through annual border crossing ceremonies supported by the United States and Canada.²⁶

VI. *The Problem of Requiring American Indians to Carry a U.S. Passport to Cross the U.S.-Canada Border*

By virtue of the fact that the United States entered into treaties with American Indian nations, Indian nations stand as sovereign entities²⁷ with whom the United States carries on government-to-government relations.²⁸ As a result, individual Indians who are enrolled in those nations are citizens of those nations.

It is also true that American Indians have been granted U.S. citizenship by virtue of the Citizenship Act of 1924.²⁹ The Citizenship Act, however, was passed without the consent of American Indians or their nations. Subsequently, many American Indians – in particular, the *Haudenosaunee* – do not identify themselves as either American or Canadian citizens and identify exclusively as citizens of their own Indigenous nations. This is not a casual or unrecognized matter of personal privilege. It is a reflection of an historic sense of individual loyalty to an indigenous sovereignty that pre-dated the formation of both the United States and Canada.

The Jay Treaty specifically acknowledges this matter of personal political identity. Article III stipulates three classes of people who may potentially cross the international border: (1) subjects of the Crown; (2) citizens of the United States; and (3) Indians dwelling on either side of the border identified by the Treaty.³⁰ Because of this treaty-defined acknowledgment of American Indian

²⁵ See DESKAHEH, RED MAN'S APPEAL FOR JUSTICE (1924); Joelle Rostkowski, *The Redman's Appeal for Justice" Deskaheh and the League of Nations*, in *Indians and Europe: An Interdisciplinary Collection of Essays* (Christian Feest ed., 1999); Grace Li Xiu Woo, *Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations* Law, Social Justice & Global Development (2003) http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/woo/.

²⁶ Homepage of the Indian Defense League of America, <http://www.idloa.org/>.

²⁷ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Talton v. Mayes*, 163 U.S. 376 (1896); *U.S. v. Wheeler*, 435 U.S. 313 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 532 U.S. 751 (1998).

²⁸ See Exec. Mem., Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,451 (1994).

²⁹ 8 U.S.C.A section 1401(b).

³⁰ 8 Stat. 116, Article III.

citizenship, American Indians should not be required to provide proof of American or Canadian citizenship to cross the border.

VII. *Proposed Amendment to the Proposed Regulations.*

The proposed regulations deny American Indians the Right of Free Passage protected by the Jay Treaty. This right has been continuously acknowledged and respected by the United States courts, Congress, and the Executive Branch for over 200 years.

It is proposed that the new regulations adopted pursuant to Section 7209 of the IRTPA include specific authorization that CBP officers be allowed to accept official evidence of American Indian citizenship in lieu of a U.S. or Canadian passport to cross the U.S.-Canada border. Such evidence could include:

- (i) official tribal identification cards issued by American Indian nation governments;
- (ii) official passports issued by the *Haudenosaunee* Confederacy or any other Indigenous nations;
- (iii) status cards issued by First Nations governments in Canada; or
- (iv) DHS issued identification cards that recognize American Indian citizenship on the basis of the aforementioned official sources.

At minimum, the Department should consult with the governments of the American Indian nations affected by its proposed regulation before taking any action. Such consultation is an essential requirement that flows from the Presidential Executive Orders that require government-to-government dialogue on Federal government initiatives that impact American Indians.³¹

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³¹ See Executive Memorandum, *supra* note 28.

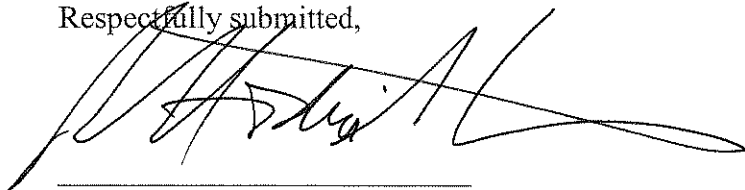
VII. *Conclusion.*

In *McCandless v. the United States*, the Third Circuit Court of Appeals concluded that:

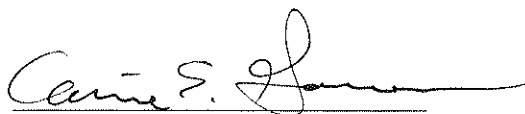
Both Great Britain and the United States have resident in them the Indians of the Six Nations, both have reservations where members of this tribe live and toward them both countries hold the guardian relation pointed out by Chief Justice Marshall in words quoted above. So far as we are advised, neither Great Britain nor the Dominion of Canada have denied to the Indians of the Six Nations resident in the United States passage across the boundary line, and if the Jay Treaty is in force, as we find it to be, good faith and the observance of the treaty calls for the same course of conduct by the United States.

The Jay Treaty has not been withdrawn by the United States and thus the Right of Free Passage it provides to American Indians to cross the U.S.-Canada border remains intact. The Department should thus not take any action that would undermine that right.

Respectfully submitted,



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Robert Odawi Porter is the founding director of the Center for Indigenous Law, Governance & Citizenship, the Senior Associate Dean for Research, a Professor of Law and the Dean's Research Scholar of Indigenous Nations Law at Syracuse University College of Law. He is a citizen (Heron Clan) of the Seneca Nation of Indians and was raised on its Allegany Territory in New York. He earned his undergraduate degree from the Maxwell School of Citizenship and Public Affairs at Syracuse University and his law degree from Harvard Law School. He is a former Attorney General of the Seneca Nation.

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