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Lacrosse Players, Not Terrorists[†]: The Effects of the Western Hemisphere Travel Initiative on Native American International Travel and Sovereignty

Brian Kolva*

I. INTRODUCTION

Most sports fans would agree that a world baseball championship without Americans, a world hockey championship without Canadians, or a world golf championship without Scots—the respective creators of the games—would be inadequate and disappointing. But this was precisely the situation lacrosse fans encountered in July 2010, when the Federation of International Lacrosse World Championship tournament opened in Manchester, England. The team representing the sport’s creators was holed up in an airport hotel three thousand miles away, embroiled in a bureaucratic dispute over passports.¹ That absent team was the Iroquois Nationals, a team comprised of Native American² players

[†] The title of this Note is derived from a quote by Iroquois Nationals assistant coach Freeman “Boss” Bucktooth: “Granted, it’s the 9-11 era and people are more cautious. They should be, [b]ut we have 23 players. We’re lacrosse players, not terrorists.” Mike McAndrew, *Iroquois Coach: ‘We’re lacrosse players, not terrorists’*, POST-STANDARD, July 15, 2010, http://www.syracuse.com/news/index.ssf/2010/07/iroquois_coach_were_lacrosse_p.html.

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1. With respect to this particular dispute, the author agrees with (then) U.S. Representative Dan Maffei (D-NY) that “[c]learly this is not a security issue. It’s an issue of bureaucracy.” Mike McAndrew & John Mariani, *Passport Predicament Keeps Iroquois Nationals Team Grounded in New York City*, POST-STANDARD, July 14, 2010, http://www.syracuse.com/news/index.ssf/2010/07/passport_predicament_keeps_iro.html.

2. Throughout this Note the terms Native American, American Indian, Indian, and Indigenous people are used interchangeably. The term Indian is used primarily to avoid confusion, since this is the term used in many early federal policy documents, cases, and statutes. According to the Bureau of Indian Affairs (BIA), American Indian is used to delineate cultural and historical distinctions between indigenous tribes of the contiguous states, and Native Hawaiians and Alaskans. American Indian has a specific meaning from an administrative standpoint, referring to persons eligible for benefits and services funded or

from the six federally recognized tribes³ that form the Iroquois Confederacy.⁴ The dispute was the culmination of multiple poor policy decisions made by the U.S., United Kingdom, and Iroquois governments. Not only did missing the beginning of the tournament impose significant financial costs on the team⁵ and adversely impact

provided by the BIA. Native American has evolved from an alternative to American Indian in the 1970s to an encompassing term for indigenous people in all U.S. territories (i.e., Alaska Natives, American Samoans, Native Hawaiians, Canadian First Nations, etc.). U.S. DEP'T. OF THE INTERIOR, INDIAN AFFAIRS, Frequently Asked Questions, <http://www.bia.gov/FAQs/index.htm> (last updated May 29, 2012) [hereinafter BIA FAQs]. Unless further clarified, throughout this Note the term Native American will refer to American Indians and Canadian First Persons.

3. Of the twenty-five players on the roster, twenty-three were from the six tribes of the Confederacy: Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora. The remaining two players were members of the Cherokee Nation and Ojibway Nation. Sean Burns, *International: Iroquois National Team roster announced for Lacrosse World Championships*, INSIDE LACROSSE, June 23, 2010, <http://insidelacrosse.com/news/2010/06/23/international-iroquois-national-team-roster-announced-lacrosse-world-championships>. The Cherokee and Ojibway players did not attempt to travel on Haudenosaunee passports. McAndrew & Mariani, *supra* note 1. Although only seven players are members of the Onondaga nation, Burns at 1–2, the Onondaga Nation issues passports for the rest of the Iroquois players through its communications office. McAndrew & Mariani, *supra* note 1. Federally recognized tribes are considered as having a government-to-government relationship with the U.S. federal government; have specific responsibilities and powers (and the limitations that come with it); and are eligible to receive BIA funding and services. BIA FAQs, *supra* note 2.

4. The Iroquois Confederacy refers to the political, military, and economic alliance formed by the Seneca, Cayuga, Onondaga, Oneida, and Mohawk Tribes (the Tuscarora tribe joined later). ENCYCLOPEDIA OF THE HAUDENOSAUNEE 135 (Bruce E. Johansen & Barbara A. Mann eds., 2000). The Iroquois Confederacy was one of the most powerful collections of tribes, a fact reflected in the Treaty with the Six Nations, a treaty signed following the Revolutionary War. Treaty with the Six Nations (Treaty of Fort Stanwix), 7 Stat. 15, Oct. 22, 1784, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 4–5 (Francis Paul Prucha ed., 3d ed. 2000). The terms “Iroquois Confederacy,” “Iroquois Alliance,” and the “Six Nations” will be used interchangeably in this Note to refer to the Iroquois people. For a discussion of the historical differentiation between the terms, see RUFUS BLANCHARD, THE IROQUOIS CONFEDERACY: ITS POLITICAL SYSTEM, MILITARY SYSTEM, MARRIAGES, DIVORCES, PROPERTY RIGHTS, ETC. (2010); WILLIAM N. FENTON, THE GREAT LAW AND THE LONG HOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY (1998). As a native of the Central New York region and a product of New York State public schools, the author draws significantly upon his own personal knowledge of Iroquois history, the War of 1812, and Native American history.

5. While in limbo in New York City, the team incurred significant costs due to changing flight reservations, a prolonged hotel stay, and continued use of a chartered bus. According to a team spokesman, the team’s stay in New York City cost them over \$100,000. John Mariani, *Update: Iroquois Nationals heading home, but still hope to play in tournament*, POST-STANDARD, July 17, 2010, http://www.syracuse.com/news/index.ssf/2010/07/post_256.html.

their chances of winning the tournament,⁶ it also highlighted a much greater problem: the future of the Iroquois identity.

The Iroquois Nationals eventually missed the entire tournament⁷ after twenty-three players of the team were denied entry visas by British authorities. The visas were refused because the players insisted on travelling on Haudenosaunee passports, issued by the Onondaga Nation.⁸ British authorities refused to issue visas without an advance guarantee from the United States that the players would be allowed to return using their tribal passports, as they feared the Iroquois delegation being stuck in the United Kingdom after the tournament.⁹ British fears were based on an erroneous belief that the tribal-issued passports did not comply with the enhanced security requirements necessary to re-enter the United States¹⁰ as promulgated under the Western Hemisphere Travel Initiative (WHTI).¹¹ The Iroquois players were given two choices: (1) travel on U.S. or Canadian passports¹² (with both governments offering to expedite the

6. The Nationals entered the tournament ranked fourth in the world and were considered a contender to medal at the games. Thomas Kaplan, *Bid for Trophy Becomes a Test of Iroquois Identity*, N.Y. TIMES, July 12, 2010, <http://www.nytimes.com/2010/07/13/us/13lacrosse.html>. The team had finished fourth in the previous three World Championships. S.L. Price, *Pride of A Nation*, SPORTS ILLUSTRATED, July 19, 2010, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1172077/index.htm>. The magazine INSIDE LACROSSE opined that “[i]t was easy to think this was the year for the Iroquois Nationals.” John Jiloty, *Iroquois Grounded but Future Looks Bright*, INSIDE LACROSSE, Aug. 16, 2010, <http://insidelacrosse.com/news/2010/08/16/inside-lacrosse-september-issue-iroquois-grounded-future-looks-bright>. The players also believed that this was the year they could bring home a medal. Delby Powless, the team’s leading scorer at the 2006 tournament and former Rutgers University star, said “[t]his was by far the strongest team I’ve been a part of. We had our sights set on a medal big-time.” *Id.* When comparing the population from which they can draw their team to the other competitors, a medal for the Nationals would be a remarkable achievement.

7. Mariani, *supra* note 5.

8. Haudenosaunee is the native name for the Iroquois Confederacy. Joshua Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT’L L. & COM. 221, 231 n.82 (2006).

9. McAndrew & Mariani, *supra* note 1.

10. The refusal by the U.S. government to assure the British government that they would take the team back into the United States will be discussed in much greater detail, *infra* Parts II.C, III, IV, including the validity of such a refusal as well as the likely justifications for failing to give such an assurance.

11. Western Hemisphere Travel Initiative (WHTI), 8 C.F.R. § 212 (2009).

12. Nine members of the team were Canadian. Mike McAndrew, *As Game Goes On, Iroquois Nationals Lacrosse Team Seeks Liberty*, POST-STANDARD, July 16, 2010, http://www.syracuse.com/news/index.ssf/2010/07/as_game_goes_on_iroquois_natio.html. The traditional homelands of the Six Nations stretched across most of New York State and vast tracts of

process), which would allow them to play in some of the later games, or (2) insist on recognition of their Haudenosaunee passports. Insisting on using the Haudenosaunee passports meant that if a deal could not be worked out between the U.S., Canadian, and British governments, the team would likely miss an important tournament. The Nationals were fielding a very competitive team for the Manchester games. With a combination of former collegiate All-Americans from lacrosse powerhouse Syracuse University, talented young players, and a group of wily veterans who had been playing the game since before they could walk,¹³ this team was being touted as “[the Iroquois’] most dynamic team yet.”¹⁴ Coming off a string of high finishes in recent international competitions, the Nationals had a good chance at medaling on the sport’s—*their sport’s*—biggest stage.¹⁵ For the players, the choice was an easy one.

The issues of tribal identity and sovereignty are issues that Native Americans and the U.S. government have grappled with ever since the Revolutionary War concluded. These issues have resulted in a number of embarrassing incidents for the United States and Native Americans, a tremendous amount of bloodshed, and an incalculable amount of hard feelings on both sides. The Iroquois Nationals’ passport dispute encapsulates several persistent problems with federal Indian policy and also exemplifies how post-9/11 national security policy, specifically the WHTI, affects tribal sovereignty.

Quebec and Ontario. Today, as with all Native American tribes, their territory has been greatly reduced, but members of the Six Nations reside in Upstate New York, Southern Quebec and Western Ontario. For example, the St. Regis Mohawk reservation spans the border between the United States and Canada. The focus of this Note will be primarily on U.S. federal Indian policy and not Canadian, except to the extent where it is required.

13. An important and still widely practiced and preserved tradition in Iroquois culture is that males are given a miniature lacrosse stick at birth. The wooden stick holds a level of importance that is unmatched by nearly any other object for the Iroquois. Price, *supra* note 6.

14. Jiloty, *supra* note 6. Brent Bucktooth, Jeremy Thompson, Sid Smith and Cody Jameison had each achieved All-American recognition at Syracuse University in the last fifteen years. Syracuse University has won more NCAA men’s lacrosse championships than any other school. Located in the heart of the traditional Iroquois homeland, the school has a long history of Indian players, including many from the nearby Onondaga Nation reservation. Lyle Thompson was ranked as the Number 1 “rising senior” by *Inside Lacrosse* and committed to play at the University of Albany.

15. In addition to their three straight fourth place finishes at the World Championships, Price, *supra* note 6, the team had numerous players who had attained third place at the Under-19 World Championships two years before. Jiloty, *supra* note 6.

Part II of this Note discusses Indian and federal constructions of the concept of tribal sovereignty; a history of federal Indian policy; the history of lacrosse in the Iroquois culture; and the post-9/11 national security policies with regards to travel documents, specifically new passport requirements. Part III of this Note analyzes the problems the new laws created for Indians, specifically the inability to attain full recognition as sovereign people by placing restrictions on the use of tribal documents. The mistakes made by the three principal actors (United States, United Kingdom, and the Iroquois) in creating this passport dispute are examined, concluding that with minimal cooperation and a proper, uniform enforcement of the applicable laws, the situation could have been avoided entirely. The analysis of the infringement that new passport requirements have on tribal sovereignty necessitates an examination of potential future sources of conflict, which are also identified in Part III. Part IV contains numerous proposals to avoid similar problems in the future and a discussion of how the Manchester situation could have been amicably resolved. The proposals specify measures that should have been (or should be) taken by each of the three principals in order to maintain the balance between protecting national security interests and tribal sovereignty.

II. HISTORY OF U.S. FEDERAL INDIAN POLICY AND CONSTRUCTIONS OF TRIBAL SOVEREIGNTY

A. Legal History of American Indians

Tribal sovereignty carries distinct meanings for both tribes and the U.S. government, with the latter frequently changing its conception in order to fit its current needs.¹⁶ Three major components underlie the concept of tribal sovereignty: (1) identity, (2) jurisdiction, and

16. For a general discussion of the evolution of tribal sovereignty, see T. ALEXANDER ALENIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* (2001); JOHN R. WUNDER, *RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS*, IN *BICENTENNIAL ESSAYS ON THE BILL OF RIGHTS* (Kermit L. Hall ed., 1994).

(3) power and control.¹⁷ The balance between advancing the federal government's interests and respecting Indian rights is a problem that predates the Constitution. The Northwest Ordinance, providing for the organization of the territories in today's Midwest, contains an early expression of federal Indian policy and recognition of tribal sovereignty. The ordinance provides in part:

The utmost good faith should always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.¹⁸

This early acknowledgment that tribes were to be treated as separate entities was an expression of an idealistic policy that would be systematically eroded in practice over the next two hundred years. This early conceptualization of tribes as separate entities is expressed in policy today, as current federal guidelines "purport to support tribal self-determination and the economic development of reservations."¹⁹ The Bureau of Indian Affairs (BIA), the federal agency chiefly responsible for dealing with American Indian issues, admits that "tribal sovereignty is limited today by the United States under treaties" and that the concept has greatly eroded coinciding with the development of America, yet insists that decisions about tribal members are always made with the tribes' participation and consent.²⁰ Most American Indians define the concept of tribal sovereignty differently.

17. WILKINS & LOMAWAIMA, *supra* note 16, at 5. The passport dispute is primarily a dispute over the identity and "power and control" elements of tribal sovereignty. The power and control element necessarily includes aspects of identity and jurisdiction.

18. Northwest Ordinance of 1787, art. 3, July 13, 1787, 1 Stat. 50.

19. ALENIKOFF, *supra* note 16, at 96. Whether or not the stated goal is actually applied in practice is subject to debate. *See generally id.*; WILLIAMS & LOMAWAIMA, *supra* note 16.

20. BIA FAQs, *supra* note 2 ("What does tribal sovereignty mean to American Indians and Alaska Natives?").

Tribal sovereignty from an Indian perspective is based on the core belief that the tribe is a separate and independent nation and should be recognized as such. The Iroquois stance on sovereignty was summarized in the following manner:

We have a right as a nation to have our own citizenship laws. We have a right to travel under our own documents. We've been recognized as nations under treaties with the United States and with Great Britain, and we're simply asking that [the United States and United Kingdom] *continue to recognize that we are nations, and that we can identify our own citizens.*²¹

It has been pointed out that this right of recognition predates the Constitution²² and derives from the fundamental principle that “[t]he legitimacy of Indian government is not based on the mere fact that indigenous people were prior occupants of the continent, but on the fact that they were prior sovereigns.”²³

The proffered solution of having the American-born players travel on U.S. passports would violate both prongs of the tribal conception of sovereignty. By travelling on such a document, the player would be (1) giving up his unique tribal identity and assuming that of an American (for travelling purposes) and (2) allowing the U.S. government to dictate the terms of travel for a tribal member. The fact that this option was proposed by the United States and so soundly rejected by the Iroquois reflects the historic tension between

21. Hart Seely, *Passports Help Define Haudenosaunee Identity*, POST-STANDARD, July 25, 2010, http://www.syracuse.com/news/index.ssf/2010/07/passports_help_define_haudenos.html (emphasis added). This was an answer given by Carrie Garrow in response to a question about the players' view that being forced to use a U.S. or Canadian passport would be an attack on their identity. Ms. Garrow is the Executive Director of The Center for Indigenous Law, Governance & Citizenship at Syracuse University College of Law and a member of the St. Regis Mohawk tribe.

22. ALEINKOFF, *supra* note 16, at 96. The right of recognition is reflected in the Jay Treaty, *infra* note 27, and the Treaty of Ghent, *infra* note 31. Obviously the existence of Indians was not unknown prior to the signing of the Constitution and creation of the U.S. government.

23. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1333 (1993). This language is based upon Chief Justice Marshall's seminal determination of the sovereign status of the Indian tribes in the Marshall Trilogy, *see infra* notes 33, 34, 35. The impact of Marshall's decisions in the three cases is clearly illustrated throughout subsequent federal Indian policy.

the two parties. This fundamental difference in opinion is the result of two hundred years of mistrust, stemming from policies that were inconsistent both in their formulation and application.

The idea that the federal government would need to develop a formal policy for dealing with the Indian populations was apparent during this country's infancy. Indians were integral actors in the Revolutionary War, fighting both for and against American forces. At the end of the war, popular sentiment supported a retaliatory policy against those Indians who chose to fight with the British.²⁴ Despite such considerable, recent history with the Indians, the Constitution made few references to Native Americans.²⁵ Except for two mentions of the separateness of Indian tribes,²⁶ the Constitution was silent as to how the federal government should govern the Indians within its borders. Constitutional recognition of separateness signaled an intention to continue the principles expressed in the Northwest Ordinance and that some of the post-war hostilities had dissipated.

The Treaty of Amity, Commerce, and Navigation (the "Jay Treaty") between the United States and Great Britain is an important starting point in tracing the border crossing rights of Native

24. George Washington aptly summarized this sentiment:

and during the prosecution of the War [Indians] could not be restrained from acts of Hostility, but were determined to join their Arms to those of G Britain and to share their fortune; so, consequently, with a less generous People than Americans they would be made to share the same fate; and be compelld [*sic*] to retire along with them beyond the Lakes.

Letter from George Washington to James Duane (Sept. 7, 1783), in 27 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, 133–40 (John C. Fitzpatrick ed.), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 1 (Francis Paul Prucha ed., 3d ed. 2000). See also Report of Committee on Indian Affairs (Oct. 15, 1783), in 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 681–83 (Gaillard Hung ed., Washington Government Prtg. Office 1922), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 3, 4 (Francis Paul Prucha ed., 3d ed. 2000) ("a bare recollection of the facts is sufficient to manifest the obligation [Indians] are under to make atonement for the enormities which they have perpetrated, and a reasonable compensation for the expences which the United States have incurred [*sic*] by their wanton barbarity; and they possess no other means to do this act of justice than by a compliance with the proposed boundaries").

25. Tonra, *supra* note 8, at 225.

26. U.S. CONST. art. I, § 8 ("Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); U.S. CONST. art. I, § 2 (when determining population for House of Representative allotments "Indians not taxed" are to be excluded from the calculation).

Americans.²⁷ The Jay Treaty explicitly mentioned Native Americans in addition to British and American citizens, guaranteeing the free passage of “the Indians dwelling on either side” of the U.S.-Canadian border.²⁸ This article of the Jay Treaty was meant to be permanent, reflecting the prominence of Native Americans in the region, their role in cross-border commerce, and also recognition that tribal lands bisecting the two countries may pose a problem if not addressed early on.²⁹

The War of 1812 cast some doubt on the continued validity of the recently ratified Jay Treaty.³⁰ However, the Treaty of Ghent,³¹ which ended military hostilities between the United States and Britain, contained many of the same provisions as the Jay Treaty, and most significantly extended the guarantee on free passage across the Northern border for the Indians.³²

Early federal Indian policy was formulated through a combination of treaties with the Indians and a series of Supreme Court cases which came to be known as the Marshall Trilogy: *Johnson v. M’Intosh*,³³ *Cherokee Nation v. Georgia*,³⁴ and *Worcester v. Georgia*.³⁵ The Marshall Trilogy established that the federal government, and not the states, had sole power over Native American tribes.

Tribal sovereignty was a principal issue in *Cherokee Nation v. Georgia*³⁶ after the Cherokee Nation sought to “prevent Georgia from

27. Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

28. *Id.* art. III. This is particularly relevant to the Iroquois, as their traditional homeland spans across Northern New York, and into Southern Ontario and Quebec. Border crossing rights have a prominent place in the Iroquois passport dispute. The role of border crossing rights will be discussed further *infra* Parts III and IV.

29. Jay Treaty, *supra* note 27, art. XXVIII.

30. Tonra, *supra* note 8, at 224.

31. Treaty of Peace and Amity, U.S.-U.K., Dec. 24, 1814, 8 Stat. 218 [hereinafter Treaty of Ghent].

32. Tonra, *supra* note 8, at 225.

33. 21 U.S. 543 (1823). The policy implications formulated in *Johnson* with respect to tribal sovereignty are, for purposes of this Note, practically limited to property rights. Consequently, this is the only case in the Marshall Trilogy that does not receive further discussion in this Note.

34. 30 U.S. 1 (1831).

35. 31 U.S. 515 (1832).

36. 30 U.S. 1 (1831).

executing its intrusive laws, which aimed to destroy Cherokee territorial and jurisdictional autonomy.”³⁷ Rather than directly ruling on whether Georgia had violated the Constitution or treaties, Chief Justice Marshall considered only whether “the Cherokee nation [was] a foreign state in the sense in which that term is used in the constitution.”³⁸ Marshall concluded that it was not a foreign nation or a constitutionally recognized state, but rather a “domestic dependent nation[],” analogizing its relationship to the federal government as one of a “ward to his guardian.”³⁹

Shortly after the ruling in *Cherokee Nation*, Marshall again addressed the issue of tribal sovereignty in *Worcester v. Georgia*.⁴⁰ The *Worcester* ruling was significant for acknowledging: a degree of sovereignty for Indian tribes; sovereignty as an inherent right; that tribes were independent and exempt from state laws; and that Indian treaties were to be considered with equal validity as treaties made with foreign nations.⁴¹

Describing a treaty between the Cherokees and the United States, Marshall declared that when entering the treaty the Cherokees had stipulated that they were being brought under the power of the United States and that “[the United States] receive[s] the Cherokee Nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.”⁴² Marshall’s ruling stood for the proposition “that the federal government assumed responsibility for the external affairs of the tribe.”⁴³

37. WILKINS & LOMAWAIMA, *supra* note 16, at 83.

38. JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 101 (1996) (quotations and citations omitted).

39. *Cherokee Nation*, 30 U.S. at 17.

40. 31 U.S. 515 (1832).

41. See WILKINS & LOMAWAIMA, *supra* note 16, at 84. The recognition of any degree of sovereignty, even to a diminished extent, was significant given Marshall’s prior ruling in *Cherokee Nation*. See *id.* Wilkins and Lomawaima assert that *Worcester* is frequently used by the Supreme Court to reaffirm the doctrine of tribal sovereignty, however its value as a precedent has been modified slightly by *Williams v. Lee*, 358 U.S. 217 (1959) and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *Id.* at 269 n.7.

42. *Worcester*, 31 U.S. at 515, 551–52 (1832).

43. ALEINIKOFF, *supra* note 16, at 97.

The Marshall Trilogy established the rights of Native American lands to be recognized as “self settled nations,”⁴⁴ and has served as the theoretical basis for United States Indian policy ever since. The concept of self-settled nations exists in current federal policy.⁴⁵ However, the Iroquois passport issue demonstrates that policy in theory and policy in practice can vary greatly.

B. History of Lacrosse in Native American and Iroquois Culture

The passport blunder became a prominent symbol of the further erosion (and possible elimination) of tribal sovereignty because of the involvement of lacrosse. Despite the current association of lacrosse with upper-class, white privilege,⁴⁶ the game’s beginnings are an integral part of the history of the Native Americans in the northeastern United States and Canada, specifically the Iroquois.

It is beyond dispute that the game now known as lacrosse was invented by the Iroquois.⁴⁷ However, this is hardly indicative of how important the game is to their culture and identity as a tribe. The team has been described as “the Iroquois’s most public expression of sovereignty”⁴⁸ and “much more than just the team that represents the Haudenosaunee people in local, regional, national, and international tournaments.”⁴⁹

The significance of the game in the Iroquois culture extends far beyond the fact that they invented it.⁵⁰ The game popularly known as lacrosse is derived from the French term for stick,⁵¹ but the Iroquois

44. ALEINIKOFF, *supra* note 16, at 99–100.

45. *See* BIA FAQs, *supra* note 2.

46. Emmett L. Gill, Jr., *The Duke Lacrosse Scandal: A Case of White Privilege in College Sports*, 1 J. FOR STUD. SPORTS & ATHLETES IN EDUC. 17 (2007).

47. The game is known to the Iroquois as “Dey Hon Tshi Gwa’ Ehs,” meaning to bump hips, and, according to the Iroquois, it has been played by Native Americans in the Great Lakes region of North America for at least nine hundred years. In the late nineteenth century modern day lacrosse took shape, after the Indian game was adopted by a Montreal dentist, who refined and codified the rules. *See* Price, *supra* note 6.

48. *Id.*

49. Press Release, Onandaga Nation-People of the Hills, Iroquois Nationals Announce New Executive Director (May 25, 2010), http://www.onondaganation.org/news/2010/2010_0525.html (quoting Dr. Percy Abrams, Executive Director of the Iroquois Nationals).

50. *See* Price, *supra* note 6.

51. DONALD M. FISHER, LACROSSE: A HISTORY OF THE GAME 24 (2002). For additional history of lacrosse and its role in Native American culture, see generally THOMAS VENNUM,

refer to it as Deyhontsigwa'ehs ("they bump hips"),⁵² or simply as the Creator's Game.⁵³ By referring to lacrosse as the Creator's Game, the Iroquois express their sanctimonious respect and the "deep, indigenous tap roots of the game."⁵⁴ This reference also serves to clarify the popular misconception that lacrosse was a substitute for war: rather it is a way to honor their Creator.⁵⁵

Because of the deep connection between lacrosse and the community, in addition to fielding a competitive team to showcase the talented players on the Six Nations reservations, the Nationals are also expected to be leaders in the community.⁵⁶ The Nationals believe that they have a duty to be ambassadors for the game and their people.⁵⁷

LACROSSE LEGENDS OF THE FIRST AMERICANS (2007); MICHAEL J. ZOGRY, ANETSO, THE CHEROKEE BALL GAME: AT THE CENTER OF CEREMONY AND IDENTITY (2010); THOMAS VENNUM, AMERICAN INDIAN LACROSSE: LITTLE BROTHER OF WAR (1994); Winnie Hu, *Back in the Game*, N.Y. TIMES UPFRONT, Sept. 17, 2007, at 18(2).

52. *Onondaga Land Rights and Our Common Future II, Lacrosse: The Creator's Game*, ONONDAGA NATION—PEOPLE OF THE HILLS (Apr. 11, 2010), http://www.onondaganation.org/news/2010/2010_0411.html [hereinafter Creator's Game Discussion]. Discussion participants included Oren Lyons, Faithkeeper of the Onondaga Nation, Roy Simmons, Jr., former Syracuse University lacrosse coach, and Jim Ridlon, former professional football player and Professor of Art at Syracuse University.

53. *Id.*

54. *Id.*

55. See Price, *supra* note 6. Lacrosse is a substitute for war in the sense that it is an alternative method of resolving disputes, not in the sense that the game was played to prepare tribal warriors for an unknown war. Lacrosse has been a traditional way of resolving disputes for the Iroquois. See Creator's Game Discussion, *supra* note 52. Oren Lyons, Faithkeeper of the Onondaga Nation, explained that the Iroquois believe that the game is older than the earth, previously played in the sky world and passed down at creation. *Id.*

56. See Creator's Game Discussion, *supra* note 52.

57. *Id.* Upon becoming Executive Director of the Nationals, Dr. Percy Abrams summarized the plethora of roles the Nationals fill for the Iroquois people:

Finally, I believe it is important for the Iroquois Nationals to maintain our place in the world as the Originators of the Game of Dehontshihgwa'es. . . . As Haudenosaunee people, we can be proud to say that *Lacrosse is our gift to the world* and it is of *utmost importance that we show the world how the game should be played*. Through excellence, sportsmanship, perseverance, and camaraderie, the Iroquois Nationals can show the world what Lacrosse is truly all about.

Id. (emphasis added).

C. Post-9/11 National Security Policy and the WHTI

The terrorist attacks of September 11, 2001 drastically altered American national security policy, international relations, and international travel. International travel for U.S. citizens and non-citizens wanting to enter or leave the United States became much more difficult. In the immediate aftermath, travelers at all border crossings and ports-of-entry (POE) faced increased scrutiny and additional security measures.

As part of the War on Terror, President Bush signed into law the Intelligence Reform and Terrorism Prevention Act (IRTPA) in 2004.⁵⁸ The primary purpose of IRTPA was to “reform the intelligence community and the intelligence and intelligence-related activities of the United States Government. . . .”⁵⁹ In order to assist the intelligence community, Congress recognized the need to change the travel documents requirements that were in place at the time of the attacks.⁶⁰ Specifically, Congress found that the “[e]xisting procedures allow[ed] many individuals to enter the United States by showing minimal identification or without showing any identification” at all and that “[a]dditional safeguards [were] needed to ensure that terrorists cannot enter the United States.”⁶¹

IRTPA mandated that by January 1, 2008, all U.S. citizens and nonimmigrant aliens seeking to enter or leave the United States must present passports approved by the Department of Homeland Security as satisfactorily establishing both their identity and citizenship.⁶² In order to comply with the requirements established by IRTPA, the Department of Homeland Security (DHS) began drafting rules as part

58. Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

59. *Id.* at 3638. *See also* H.R. CONF. REP. 108-796 (2004); 150 CONG. REC. E2204-02 (daily ed. Dec. 20, 2004) (statement of Rep. Tom Udall) (describing IRTPA as the “most dramatic restructuring of our Nation’s intelligence community since the creation of the National Security Council and Central Intelligence Agency in 1947”).

60. IRTPA § 7209.

61. *Id.* § 7209(a)(1), (3).

62. *Id.* § 7209.

of the multi-phase plan known as the Western Hemisphere Travel Initiative (WHTI).⁶³

Prior to the adoption of the WHTI, travel document requirements varied and depended on a mixture of factors, namely “nationality of the traveler and whether or not the traveler [was] entering the United States from a country within the Western Hemisphere,”⁶⁴ but all U.S. citizens entering or departing from the United States were required to display a valid passport.⁶⁵ Whether the traveler was coming from another Western Hemisphere country was important because those travelers had historically been exempt from the requirement of producing a passport upon arrival.⁶⁶

During the public comment period on the WHTI, several comments expressed concern for Native Americans under the proposed rule.⁶⁷ Some comments sought exemptions for Native

63. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. 18,384 (Apr. 3, 2008) (to be codified at 8 C.F.R. pt. 212). The WHTI was designed specifically to enact the provisions established in section 7209 of IRTPA: Travel Documents. IRTPA § 7209. The WHTI was originally intended to be implemented in three phases. The initial stage had a December 31, 2005 deadline, requiring passports for all air and sea travel to or from Central and South America, and the Caribbean. New Passport Initiative Announced, 82 NO. 15 INTERREL 617 (Apr. 11, 2005). However, citing concern from the tourist industries in those regions, the WHTI was reduced to a two-step implementation: all air and sea ports-of-entry would require passports by December 31, 2006, and all land ports-of-entry would require them by December 31, 2007. W. Hemisphere Travel Initiative Formally Submitted for Pub. Comment, 82 NO. 35 INTERREL 1443, 1483 (Sept. 12, 2005); Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL 1728 (Aug. 14, 2006); Documents Required for Travel Within the W. Hemisphere, 70 Fed. Reg. 52,037 (proposed Sept. 1, 2005).

64. Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 72 Fed. Reg. 35,088, 35,089 (proposed June 26, 2007) (to be codified at 8 C.F.R. pt. 212). For purposes of the rule, “the Western Hemisphere is understood to be North, South or Central America, and associated islands and waters. Adjacent islands are understood to mean Bermuda and the islands located in the Caribbean Sea, except Cuba.” *Id.* at n.1.

65. Immigration and Nationality Act § 215(b), 8 U.S.C. § 1185(b).

66. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,385.

67. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL 1728 (Aug. 14, 2006). There is little legislative history to suggest why this broad exception to § 215(b) of the Immigration and Nationality Act for Western Hemisphere travelers was granted. One unstated assumption is a carryover of the Monroe Doctrine, the dominance of the United States in the region, and the relatively friendly relations between the countries in the Western hemisphere. However, given the effectiveness of the tourism lobby in eliminating the proposed

Americans based upon previously established treaty rights.⁶⁸ Despite these proposals, little was done to address the issue of Native American identity rights,⁶⁹ thus creating the necessary conditions for the Nationals' passport dispute.

III. ANALYSIS

After considering the inevitable effects on Native Americans who travel on tribal passports, DHS announced that it would work with federally recognized border tribes to comply with the new rules.⁷⁰ In order to receive cooperation from DHS, each tribe is required to: (1) continue to have strong cultural, historic, and religious cross-border ties and (2) be willing to improve the security of the tribal enrollment documents in the future.⁷¹

The WHTI stipulates that in order for a tribal passport to be classified as a valid travel document (1) it must establish identity and citizenship; (2) the tribe shall provide customs agents with access to tribal enrollment records; and (3) the tribe will agree to improve

initial phase of the WHTI, one may hazard a guess that the same forces were at work securing this exemption for their customers.

68. See Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL 1728 (Aug. 14, 2006). See also discussion *supra* Part II. While considering the implementation of Phase One of the WHTI (passport requirements at all air and sea POE), DHS acknowledged that Native American border-passage rights, whether guaranteed by statute or treaty, have typically applied only to land border crossings. Passport requirements for air and sea crossings would thus not infringe on those rights, and would be examined when Phase Two was implemented. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL at 1728.

69. There were some exceptions made for Canadian-born American Indians and Kickapoo Indians. Kickapoo Indians, of the Oklahoma and Texas tribes, are exempted from the passport requirement, provided that they instead possess a valid Form I-872, American Indian Card. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,406. American Indians born in Canada are exempt from the passport requirement provided that they possess at least 50 percent American Indian blood, in accordance with Exemption by Law or Treaty from Passport and Visa Requirements, 22 C.F.R. § 41.1 (2008). Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL at 1728. For further discussion regarding the "Indian blood" issue and Native American border crossing rights, see Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D.L. REV. 301 (2009); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

70. Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,396-97.

71. *Id.* Note that the rule specifies tribal enrollment documents, not passports.

security of its tribal documents in cooperation with customs.⁷² When the Nationals initially attempted to leave New York City, DHS deemed the Haudenosaunee passports unsatisfactory for POE,⁷³ despite the fact that the same passports had been used by nine of the twenty-three players to travel by land from Canada to New York City,⁷⁴ and also by ambassadors of the Iroquois Nation to fly to Sweden earlier in the year.⁷⁵

The solution proposed by both the U.S. and British governments was that the team members travel on U.S. and Canadian passports, with both the United States and Canada offering to expedite the process. All the players born in the United States were eligible to receive U.S. passports.⁷⁶ This was a short-sighted solution, ignoring

72. *Id.* Cooperation with customs is an important concession for the U.S. government to secure from the tribes. Cooperation with customs agents has been a particularly thorny issue with the Mohawk tribe, which is bisected by the U.S.-Canadian border. The Mohawk reservation has long been used by drug smugglers to circumvent U.S. and Canadian customs agents because the tribal government is responsible for policing the border on their reservation. Sarah Kershaw, *Through Indian Lands, Drugs' Shadowy Trail*, N.Y. TIMES, Feb. 19, 2006, at 1. In response to this problem, the Canadian government has placed official customs stations and border crossings on formally recognized Mohawk land. This has led to a large amount of litigation between the Canadian Government and the Mohawks. Tonra, *supra* note 8, at 246. The United States also faces a similar threat on its Southern border, as the Tohono O'odham tribal lands lay in both Mexico and the U.S. The tribal lands, like those of the Mohawk, are favored routes for drug smugglers looking to evade U.S. authorities. *Id.* at 247-48. By proposing tribal cooperation with customs in exchange for federal recognition of tribal passports, the United States is enticing border tribes in particular to sacrifice degrees of sovereignty in one area in exchange for increased sovereignty in another.

73. Customs regulations make distinctions between land ports of entry and sea and air ports of entry. Under the WHTI, the requirements are stricter for sea and air ports of entry. Customs and Border Patrol (CBP) does not have to respect a guarantee of Native American passage rights over land at a sea or air POE. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL at 1728. However, because the passports were deemed sufficient to establish identity at the land POE, it is unfathomable how the same passports were considered insufficient at an air POE.

74. Nine members of the team are Canadian. Mike McAndrew, *As Game Goes On, Iroquois Nationals Lacrosse Team Seeks Liberty*, POST-STANDARD, July 15, 2010, http://www.syracuse.com/news/index.ssf/2010/07/as_game_goes_on_iroquois_natio.html. Although not explicitly stated, it is presumed that these nine members entered the United States using Haudenosaunee passports at a land POE to accompany the rest of the team to New York City for the flight to England.

75. John Mariani, *Update: Iroquois Nationals Heading Home, But Still Hope to Play in Tournament*, POST-STANDARD, July 17, 2010, http://www.syracuse.com/news/index.ssf/2010/07/post_256.html. This same article also mentions a Haudenosaunee who was currently in Switzerland, having travelled on a tribe-issued passport. *Id.*

76. 8 U.S.C.A. § 1401(b) (2010).

the larger implications at hand. The team unanimously rejected the offer, saying they would only travel on Haudenosaunee passports. This was a major victory for the team, which is considered the “Iroquois’s most public expression of their sovereignty, of their long-held belief that they are an independent people.”⁷⁷

The proposed solution was destined to fail from its conception. Any solution other than allowing the team to travel on their Haudenosaunee passports would not be accepted. Any alternative solution was prematurely foreclosed upon by certain inadequacies in the drafting process (under the WHTI, “U.S. citizens” refers to both U.S. citizens and U.S. non-citizen nationals,⁷⁸ either of which includes the Iroquois), deficiencies in the final rule that was adopted, and the implementation of the final phase of the WHTI.⁷⁹

The unique situation presented by the existence of Native American populations at the borders of the United States is neither new nor novel to the American government.⁸⁰ It is therefore puzzling that such limited measures were taken to accommodate these populations in the drafting and implementation of the WHTI and the documentation requirements it imposed. This failure to accommodate the Native American populations in a mutually beneficial manner is a

77. S.L. Price, *Pride of A Nation*, SPORTS ILLUSTRATED, July 19, 2010, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1172077/index.htm>.

78. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. 18,384 (Apr. 3, 2008) (to be codified at 8 C.F.R. pt. 212). According to section 8 of the U.S.C.A.:

the following shall be nationals and citizens of the United States at birth . . . (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

8 U.S.C. § 1401(b) (1994) (emphasis in original). The U.S. Citizenship and Naturalization Handbook details the history of the U.S. government’s efforts to provide an avenue to citizenship for Native Americans born within the United States. U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 2.26 (database updated Sept. 2011), *available at* Westlaw. As early as 1924, Congress enacted a statute granting citizenship to all Native Americans born in the United States who had not previously become citizens at birth. Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b).

79. Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,384.

80. *See supra* Part II.

reflection of the U.S. government's continued treatment of Indians as second-class citizens.

The WHTI drafting process coupled an overall lack of consideration towards the indigenous populations with a general disregard for such issues when arose.⁸¹ The Iroquois Tribe and the Tohono O'odham Indians⁸² are impacted by the burdensome documentation requirements more so than other tribes because of their respective geographic location on the United States' northern and southern borders. Because of their location, international travel is a common occurrence in tribal life. While the WHTI was in the drafting process, both the DHS and Department of State (DOS) staffs disregarded potential problems the new requirements would cause for these tribes.⁸³ The failure of the final rule to preemptively prevent problems like those encountered by the Iroquois Nationals lacrosse team is troubling because it reflects a continuing deterioration in the relationship between the U.S. government and the Native Americans.

The failure to accommodate the Iroquois marks another low-point in the history of U.S.-Indian relations. In 1994, President Clinton attempted to usher in a new era of increased cooperation between the federal and tribal governments. Clinton's goals for this new era included a hope that the executive agencies' rulemaking processes would be "implemented in a knowledgeable, sensitive manner respectful of tribal *sovereignty*" and to build "a more effective day-to-day working relationship reflecting respect for the rights of self-government due [to] the sovereign tribal governments."⁸⁴ These goals

81. During the public comment period, the Department of Homeland Security and Department of State received comments from twenty-six tribes and three individuals that Native Americans should be able to use their existing tribal cards as sufficient identification at any border crossing point. The response was that the "[departments] appreciate these comments" and as a result Indian cards would be accepted, provided that they were deemed "secure." Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,398. This language can be interpreted as patronizing the Native populations, since, at that time, with the exception of the American Indian Card carried by members of the Kickapoo Tribe of Oklahoma and Texas, no tribal documents were deemed "secure" in accordance with these new standards. *Id.* at 18,396.

82. See Kershaw, *supra* note 72, at 8.

83. Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,384.

84. Memorandum on Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994) (emphasis added).

were rooted in the principle that the “Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.”⁸⁵ Although the DHS and DOS reached out to the tribes for input into the proposed rule,⁸⁶ the failure to implement some practical ideas that may have benefitted the tribes casts doubt on how genuine the cooperation efforts of the departments really were. For example, section 7209 of IRTPA required that the Secretaries of the departments “expedite the travel of frequent travelers, *including those who reside in border communities.*”⁸⁷ Section 7209 also provided that the Secretaries were to establish a registered travel program to expedite these frequent travelers.⁸⁸ The Iroquois people appear to be a logical candidate for such “preferential” treatment under this law, however, that has clearly not been the case in practice.⁸⁹

Federal law enforcement agencies have already expressed security concerns over Iroquois tribal lands on the U.S.-Canadian border⁹⁰ and the bifurcation of their lands necessitates frequent international travel. This raises the question as to why the DHS has not devised a special program for the Iroquois that would reduce their travel burdens.

The answer to this question cannot be that the DHS and DOS were unaware of the problems the documentation requirements would

85. *Id.* The memorandum explains the specific steps that should be taken by the executive agencies to fully cooperate with the tribal governments. One of the steps says that “[e]ach executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts. . . .” *Id.* Certainly the policies of the Clinton White House were not binding on the Bush Administration (under which the WHTI was drafted and implemented), but the lack of involvement of the Bureau of Indian Affairs in the drafting process, as evidenced by the responses to comments by the DHS and DOS, is conspicuous by its absence. There is much discussion in the comments to the WHTI dealing with Native Populations, but the comments seem to have been largely solicited from tribes themselves or individual citizens. *See Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere*, 73 Fed. Reg. at 18,384.

86. *Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere*, 73 Fed. Reg. at 18,396.

87. *Documents Required for Travel Within the W. Hemisphere*, 70 Fed. Reg. 52,037 (proposed Sept. 1, 2005) (emphasis added).

88. *Id.*

89. *See supra* notes 81 and 83.

90. *See supra* note 72 and accompanying text.

raise for the Iroquois, or that there is a general lack of programs to expedite such frequent travelers. The DHS notes in its responses to public comments that the passport requirement may create difficulties for Native Americans and Canadian Indians, and so the acceptance of alternative documents will be “encouraged.”⁹¹ Multiple “Trusted Traveler Programs” have been established in order to expedite those frequent travelers denoted in section 7209 of IRTPA.⁹² However, the Iroquois are either ineligible to join these programs or enrollment would still not exempt them from having to present a U.S. or Canadian passport at air and sea POE.⁹³

The awareness of the federal government that the new requirements would impede international travel for vulnerable populations such as the Iroquois, coupled with the minimal effort made to accommodate them, is symptomatic of the difficulty the U.S. government has with recognizing tribal sovereignty.

The Indian concept of tribal sovereignty is that recognition is essential to the preservation of independence and that it necessarily implies that the federal government cannot circumvent the tribe’s authority. The federal government enacted the WHTI with the idea of protecting its borders, its citizens while travelling, and its airspace. These are undoubtedly legitimate national security goals, and a

91. Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,392-93.

92. The three programs are the (1) NEXUS Program, an airport border clearance program, jointly operated by the U.S. Customs and Border Protection (CBP) and the Canada Border Services Agency. This program “allows prescreened, low-risk travelers to be processed more efficiently by U.S. and Canadian border officials. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL 1728 (Aug. 14, 2006); (2) FAST Program, allowing “a U.S. citizen travelling as a participant in the FAST program to present a valid FAST card”; and (3) SENTRI Program, allowing “a U.S. citizen travelling as a participant in the SENTRI program [to] present a valid SENTRI card.” Nationality and Passports, Passport Requirements and Exceptions, 22 C.F.R. § 53.2. Under the rules of these programs, American Indians are not exempt. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL at 1728 (Aug. 14, 2006). Thus, enrollment in any of these programs would not have presented the dispute between the Iroquois, the United States, and United Kingdom. The decision to exclude Native Americans from these programs became more egregious when DHS announced that CBP was expanding the NEXUS, SENTRI, and FAST programs “to accommodate an increase in applications expected as a result of the implementation of WHTI.” Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,392.

93. Proposed Rules for Phase One of WHTI Issued, 83 NO. 31 INTERREL at 1728 (Aug. 14, 2006).

proper exercise of the fundamental right every nation has to protect itself. The fact that it comes at a direct cost to Native American sovereignty may or may not be an unintended consequence, but it is indicative of the ongoing struggle to find a balance of recognition and regulation that satisfies both the federal government and the tribes.

This is best reflected in two very different groups of travelers who are exempt from the new passport requirements. The first group is cruise ship passengers. A U.S. citizen is generally not required to present a passport if travelling on a cruise ship that has left from, and will return to, a U.S. port.⁹⁴ The decision to grant exemptions for cruise travelers is surprising, since an estimated 5.6 million Americans⁹⁵ take these types of cruises.⁹⁶ It is striking that a group of 5.6 million people could be granted an exemption, yet the Iroquois, a border tribe with only about thirty-three thousand U.S. members,⁹⁷ were not.

94. 22 C.F.R. § 53.2 (1999). The statute reads, in pertinent part:

(b) A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States:

(2) when traveling entirely within the Western Hemisphere on a cruise ship, and when the U.S. citizen boards the cruise ship at a port or place within the United States and returns on the return voyage of the same cruise ship to the same United States port or place from where he or she departed. . . .

The statute then states that such passengers may present alternative documents to establish citizenship. *Id.*

95. This estimate is the number of passengers who take cruises in the Caribbean, which would fall within the purview of 22 C.F.R. § 53.2(b)(2). The numbers are calculated by adding the number of passengers at each of the most popular Caribbean ports of call as follows (all numbers have been rounded): The Bahamas: 1,800,000; U.S. Virgin Islands: 1,200,000; St. Maarten: 700,000; Puerto Rico: 700,000; the Cayman Islands: 600,000; Jamaica: 600,000. POLLY PATTULLO, *LAST RESORTS: THE COST OF TOURISM IN THE CARIBBEAN* 156–58 (1996).

96. To be exempt, the cruise must take place entirely within the Western Hemisphere. 22 C.F.R. § 53.2(b)(2) (1999). For purposes of the WHTI, “the Western Hemisphere is understood to be North, South or Central America, and associated islands and waters. Adjacent islands are understood to mean Bermuda and the islands located in the Caribbean Sea, except Cuba.” Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 72 Fed. Reg. 35,088 (proposed June 26, 2007) (to be codified at 8 C.F.R. pt. 212).

97. The figure of Iroquois Indians in the 2000 Census of 33,269 can be further subdivided. The census counts 20,239 Iroquois reporting to be solely American Indian with ancestry from just one tribe; 518 solely American Indians with ancestry from two or more tribes; 11,487 American Indians in combination with one or more races and only one tribe; and 1,025 American Indians in combination with one or more races reporting ancestry from two or more tribes. U.S. Census Bureau, Census 2000, Special Tabulation, PHC-T-18, American Indian and

The large number of cruise passengers alone creates the argument that the exemption is a positive development, since it will dramatically reduce processing time for a large volume of tourists. However, giving a passport exemption to 5.6 million passengers annually raises serious security concerns at our nation's POE.

The passport requirement exemption for cruise ship passengers but not for border tribes like the Iroquois can be explained in part by the desire to expedite processing times for a large number of travelers and the powerful reach of the tourist lobby.⁹⁸ It can also be explained by the lack of a cohesive federal policy regarding American Indians and international travel, further evidenced by the second group of travelers who are currently exempt from this requirement.

Native Americans who are holders of the American Indian Card (Form I-872) are also exempt from presenting a passport under the WHTI.⁹⁹ However, the only tribe that currently carries such cards is the Kickapoo Tribe of Oklahoma.¹⁰⁰ Comments received by the DHS

Alaska Native Tribes in the Northeast Region: 2000, *available at* <http://www.census.gov/population/cen2000/phc-t18/tab002.pdf>. This estimate does not include Iroquois residing in Canada or Canadian citizens. Those tribal members are not necessary for purposes of the author's estimate since they are not U.S. citizens and would therefore not be eligible for any waiver of presenting a U.S. passport at border crossings. Some reconciliation between the numbers presented for cruise passengers and American Iroquois may be in order. The 5.6 million passenger estimate may, and probably almost certainly does, include travelers who take multiple Caribbean cruises each year, making the actual number of cruise passengers less than 5.6 million. On the other hand, the Iroquois estimate is fixed, counting each individual once. However, the discrepancy between the two "populations" is so large that even if the cruise passenger number were discounted significantly to five million, each member of the Iroquois tribe would have to make approximately 151 international trips yearly to equal this amount. The number is so large that it is two times greater than the *entire* American Indian population, which was 1,978,099 in the BIA's 2005 American Indian Population and Labor Force Report, which is the latest available. BIA FAQs, *supra* note 2. Even using a less conservative estimate, the number of cruise passengers exempt from the passport requirement exceeds the 2000 Census estimate of the total Native American population: 4.5 million. *Id.*

98. *See supra* note 63.

99. 22 C.F.R. § 53.2(b)(5) (1999). This card is issued by U.S. Citizenship and Immigration Services and may be presented in lieu of a passport at border crossings. *Id.*

100. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. 18,384, 18,398 (Apr. 3, 2008) (to be codified at 8 C.F.R. pt. 212). Many members of this tribe were displaced to Mexico after an independent Republic of Texas conquered their lands. After Texas became American territory, and as a result of the Dawes Act and other Indian relocation policies, the Kickapoo were largely relocated to Oklahoma. The right to cross to their Mexican lands has been negotiated directly with the U.S. government. *See generally* ARRELL M. GIBSON, THE KICKAPOO: LORDS OF THE MIDDLE BORDER (1963). Despite being the only tribe that possesses

and DOS leading up to the implementation of Phase II of the WHTI specifically requested an expansion of the American Indian Card program.¹⁰¹ These comments were met with silence by the departments.¹⁰²

The disparate treatment of the American Indian tribes with regards to passport requirements and international travel is a direct result of inconsistent federal Indian policy. This variable treatment of tribes has resulted in rules and regulations that subjugate indigenous people to second-class status, and the federal government's treatment of a given tribe directly correlates to the level of tribal sovereignty the federal government will recognize. Those tribes willing to accede to greater government control (i.e., the Kickapoo) receive different rights and privileges than those that do not (i.e., the Iroquois).

Despite openly acknowledging potential problems the WHTI could create, there is a glaring lack of feasible passport requirement exemptions for the majority of American Indian tribes in the WHTI guidelines.¹⁰³ The Indians' second-class treatment is exemplified when a small fraction of the thirty thousand Iroquois cannot receive a waiver for passports, but millions of passengers on American cruise ships receive that exemption for the likely reason that they purchased tickets through a corporation with a powerful lobby.

these cards, the federal government has not issued them continuously. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,399. Several comments the DHS and DOS received during the WHTI comment solicitation period specifically requested that the issuance be restarted. These comments did not receive a direct response from the departments. *Id.* at 18,398.

101. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,398.

102. *Id.* This silence is puzzling when one considers the measures the DHS took to accommodate Canadian Indians. Congress requested that DHS consult with the Canadian government to develop a more secure identification card ("INAC Card") to be issued by the Canadian Department of Indian Affairs and Northern Development, Director of Land Trust Services (LTS). DHS said it would accept the INAC Card for Canadian Indians when it became available (provided that it met certain security specifications). *Id.* DHS could learn something from LTS with regard to issuing proper tribal identification expeditiously. LTS maintains Indian Registration Lists, confirming the heritage of each Indian. Because of this detailed information gathering process, the Canadian government can easily identify those who are officially registered and as such are eligible to apply for the INAC Card. All Canadian Indians who are officially registered are eligible to receive the INAC Card. *Id.*

103. *See supra* note 92.

The U.S. government's interactions with the United Kingdom over the Iroquois passports serve as a primary example of the second-class treatment American Indians receive today. The DOS specifically provides for favorable treatment of British Commonwealth subjects entering the United States from jurisdictions within the Western Hemisphere.¹⁰⁴ Yet when the time came to reciprocate, the United Kingdom refused and the United States applied very little pressure and only after the opportunity for any meaningful resolution had passed. Most striking is the fact that Secretary of State Hillary Clinton did not have to use any special diplomatic tools, nor consult with DHS in order to provide the United Kingdom with the guarantee they sought that the United States would accept the Iroquois Nationals back into the country. This is because United States citizens *cannot* be denied entry into the United States.¹⁰⁵ The British fear that the Iroquois contingent would remain in Manchester, in perpetual diplomatic limbo, was not necessarily fabricated by the British, but it was essentially an impossible outcome. The United States' refusal to call attention to this fact is beyond puzzling, unless one considers how Indians in the United States have generally been treated.¹⁰⁶

104. "The Department of State regards citizens of all Commonwealth countries, as well as citizens of Ireland, to be eligible for the waiver of passport and visa requirements." 3B AM. JUR. 2D *Aliens and Citizens* § 1245 (2010); Documentary Requirements for Nonimmigrants, 8 C.F.R. § 212.1(a) (2008); Exemption or waiver by Secretary of State and Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants, 22 C.F.R. § 41.2(b) (2011).

105. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,394. The Iroquois' reentry may have been severely delayed as they would have been subject to "additional inspection and processing until the inspecting [CBP] officer [was] satisfied that the traveler is a U.S. citizen." *Id.*

106. Had this fact been relayed to Britain and the Iroquois were allowed to travel for the games, it is doubtful that the team would have encountered any significant delays upon reentry to the United States. Even if the team did not perform well, having travelled on their tribal passports to represent their nation at the world championships of the game they created would have garnered considerable media attention. This media attention would have called to light the players' identities and citizenship, making proof of such facts easier even if accompanied by "unsatisfactory" documents. With the support of U.S. Senator Kirsten Gillibrand and U.S. Representative Dan Maffei, both from New York, it seems unlikely that the players would have had difficulties. *See* Letter from Kirsten Gillibrand, U.S. Senator, to Hillary Clinton, U.S. Sec'y of State (July 13, 2010) (on file with author), available at <http://media.syracuse.com/news/other/GillibrandIroquoisLetter.pdf>; *see also supra* note 1 and accompanying text.

It is not coincidental that holders of the American Indian Card are exempt from the passport requirement while other Indian tribes are not. This exemption would be fairer if the American Indian card were more widely available to Native American Tribes, but it is not. An exemption is granted to the Indian tribe that has subjected itself to the identification processes of the federal government.¹⁰⁷ The right of Kickapoo tribal sovereignty, to identify its people in an official capacity, was bargained away in exchange for unimpeded border crossing rights.¹⁰⁸ Perhaps this is an option for the Iroquois, but the likelihood that they would adopt a similar plan approaches zero. But perhaps there is a middle option, one that would allow American Indian tribes to be treated equally and travel internationally, an option not dependent on the amount of tribal sovereignty they will relinquish.

IV. PROPOSALS

The Iroquois Nationals lost the chance to represent their people in their native game at the lacrosse world championships.¹⁰⁹ However, their actions brought more respect for their people, and the entire indigenous population, than arguably any respect resulting from the outcome of the championship.¹¹⁰ In order to prevent the Nationals, or any Native Americans travelling on tribal passports, from

107. See *supra* note 69.

108. *Id.*

109. This lost opportunity was lamented throughout the Native American community: “Throughout 400 years of poverty, humiliation and genocide, [the Iroquois] have played this game that is as important to their nations as baseball is to America and soccer is to every other country on the planet.” Jed Morey, *Off the Reservation: Iroquois Nationals Lacrosse Team vs. America*, LONG ISLAND PRESS, July 14, 2010, <http://www.longislandpress.com/2010/07/14/iroquois-nationals-lacrosse-team-vs-iroquois-nationals-lacrosse-team-vs-america/>.

110.

If the team had capitulated and agreed to accept U.S. passports to travel abroad they would have established yet another dangerous precedent in U.S./Indian relations. Acquiescing to this solution would essentially have ceded the issue of sovereign recognition on a very significant level Every step closer to acknowledging that tribal lands are nothing more than bizarre extensions of U.S. territory is a step closer to losing the fundamental rights of indigenous nations. This is more than a lacrosse tournament.

Id. See also Kristen Hamill, *Identity, Federal Policy Clash for Iroquois Lacrosse Team*, CNN, <http://www.cnn.com/2010/SPORT/07/13/Iroquois.passport.controversy/index.html>.

encountering a similar fate in the future, more cooperation and better communication is needed between the U.S. and tribal governments.

The primary purpose of passports is to “establish citizenship and identity.”¹¹¹ They are “globally interoperable” and “usable regardless of the international destination of the traveler.”¹¹² Had the DHS and DOS made their viewpoints on the matter more forcefully known to their British counterparts, this embarrassing situation for both governments could have been avoided. Instead, the United Kingdom failed to reciprocate the amenable discretion that U.S. authorities exercise towards the citizens of the British Commonwealth.¹¹³ The fact that British authorities actually refused to admit the Iroquois despite pleas by Secretary of State Clinton is evidence of just how genuine American concerns were.¹¹⁴

The actions of the American government throughout the incident were indicative of the irregular federal Indian policy and a struggle to balance national security concerns and tribal sovereignty. The Iroquois Nationals dispute could have been amicably resolved had the DHS and DOS simply applied the law correctly. Secretary Clinton could have given the British their guarantee that the team would be allowed to return based on two alternative grounds. The first, as discussed earlier, is that the United States cannot bar its citizens from re-entering the United States.¹¹⁵ Additionally, admission to the country is permitted when an individual has satisfied the Customs and Border Protection (CBP) officer of their citizenship.¹¹⁶ This discretionary authority has not been diminished

111. Documents Required For Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. at 18,391.

112. *Id.*

113. *See supra* note 104.

114. At least one commentator has criticized the Obama administration for its handling of the dispute: “The Obama administration has paid generous sums of lip service to tribes in the United States yet has proven to be callous and ill-informed in practice.” Morey, *supra* note 109. This view is perhaps shared by the Iroquois Nationals delegation as well.

115. *See supra* note 105.

116. “To enter the United States . . . these U.S. citizens must satisfy the CBP Officer of their citizenship.” Documents Required for Travelers Departing From or Arriving in the U.S. at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 72 Fed. Reg. 35,088 (proposed June 26, 2007) (to be codified at 8 C.F.R. pt. 212); 8 C.F.R. § 235.1(b) (2005).

by the WHTI¹¹⁷ and should have been utilized in this instance to permit the Iroquois to travel.

To avoid a future incident, the U.S. and Iroquois¹¹⁸ tribal governments must cooperate. The United States should implement a frequent traveler program, similar to NEXUS or SENTRI, for members of border tribes. Implementation of such a program would not significantly burden either government, since the Indian population is relatively small¹¹⁹ and frequent traveler programs are already in the process of expanding.¹²⁰

The Iroquois government can further aid the DHS and CBP by compiling a “player pool” of players who may potentially make the roster of one of the Nationals’ teams.¹²¹ The tribal government would receive this information from coaches and then pass the information along to DHS. This would allow for any overt security concerns or additional screening measures to be addressed in advance of any international travel. The Iroquois must also upgrade their passports to address American security concerns.¹²² Upgraded passports that prove identity will reduce the viability of any concerns purported as reasons to bar the team from travelling on them.

117. “Full implementation of WHTI will not diminish CBP’s ability to utilize existing protocols and other inspection processes to admit travelers to and from unique geographic locations.” Documents Required For Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the W. Hemisphere, 73 Fed. Reg. 18,384 (Apr. 3, 2008) (to be codified at 8 C.F.R. pt. 212). This comes in a section discussing U.S. citizens who live in “unique geographic locations,” those who frequently travel between U.S. and Canada as part of ordinary life. *Id.*

118. The same steps should be applied for all tribal governments who wish to have their people travel on traditional passports.

119. The figure in the 2000 Census represents 1.5 percent of the U.S. population. *See supra* note 97.

120. *See supra* note 92.

121. Compiling a player pool of potential players is a very common practice in international sports, particularly soccer and basketball.

122. Shortly after the team was refused travel to Manchester, the Onondaga Nation announced that it would invest \$1.5 million in upgrading its passports. The passports will be ready and needed for the 2011 World Championships in the Czech Republic. The Nation contracted the work to Siemens Corporation and announced that the new documents would comply with “every international security measure.” Michael Benny, *Iroquois Spend \$1.5 million to Upgrade Passports* (July 19, 2010), <http://www.cnycentral.com/news/story.aspx?id=484701>.

V. CONCLUSION

The United States erred in not allowing the Iroquois Nationals to travel using their tribal passports. Not only were U.S.-Indian relations damaged, but the United States missed an opportunity to generate political capital for dealings with other countries. The Iroquois could have travelled on their Haudenosaunee passports if the secretaries of DHS and DOS had granted them a waiver based on “humanitarian or national interest.”¹²³ There is a legitimate national interest in promoting indigenous rights, spreading international goodwill through sports, and allowing the “Michael Jordans of the Native Communities”¹²⁴ to shine on the field. The United States should have been more accommodating to the Iroquois because it would have generated additional leverage to use in talks with countries the United States is trying to pressure to improve human rights or the rights of indigenous people, such as China and Russia.¹²⁵

The United States’ error in refusing to let the Nationals use their Haudenosaunee passports cost it a chance to generate political goodwill, forced an unnecessary confrontation with a Native American tribe over tribal sovereignty, causing old wounds to reopen in the process, and generally showed an irrational prioritization of national security claims over even the Indians’ most basic humanitarian causes. However, it is unlikely that the Iroquois and the tribal community as a whole were too distraught over the whole

123. 22 C.F.R. §§ 53.2(b)(9), (10) (1999).

124. Onondaga Nationals General Manager Ainsley Jemison:

These guys are also heroes to a lot of the young children that we have in our communities, and I think that would be a very negative message for the U.S. government to send to our people. We don’t have a lot of heroes, and it’s tough for us to have a lot of heroes. . . . These are the “Michael Jordans” of the native communities. These are the guys that we hold on a pedestal. These are the guys we look up to.

See Hamill, *supra* note 110.

125. See Barry Sautman, *Scaling Back Minority Rights? The Debate About China’s Ethnic Policies*, 46 STAN. J. INT’L L. 51, 100–08 (2010) (discussing how the United States’ ethnic policies, particularly with regards to Native and African-Americans, make it a poor example of how to treat minority populations and how this is problematic when the United States seeks to criticize other nations for similar policies); Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession, and The Great Powers’ Rule*, 19 MINN. J. INT’L L. 137, 162 (2010) (describing how the United States lacks the “geopolitical clout” to fully confront Russia over its Chechen policies).

affair. The outcome was perhaps fairly predictable, since advocating for tribal sovereignty with the U.S. government is another game that the Iroquois have been playing for many, many years.