

XII

Taking Sides:

Federal-New York State-Iroquois Negotiations, 1796-1800

Federalist Dominance in New York State.

From 1793 forward, U.S. national politics was dominated by the intensifying rivalry between factions headed by Alexander Hamilton and Thomas Jefferson. In 1794 and 1795, the federal and New York State governments had lined up on opposite sides of this growing divide. From 1796 to 1800 in contrast, Hamiltonian Federalists dominated both national and New York State administrations. This presented an opportunity to address Iroquois land claims within New York State independent of partisan suspicions. The good working relationship established by U.S. Secretary of State Timothy Pickering and New York Governor John Jay helped clarify the type of federal control over New York tribal concerns ideally desired by Pickering, who had spent the preceding years reacting with alarm to the tribal policies of Governor George Clinton.

At Canandaigua in 1794, Federal Treaty Commissioner Pickering had devoted much effort to trying to sort out the separate land claims of all tribes in attendance. These discussions were necessarily preliminary however, because neither New York State nor Massachusetts preemption right holders were represented, and because a full resolution of tribal land issues within New York State was not possible until the British renounced their policy of covert support for tribes within the claimed bounds of the United States. While Pickering was at Canandaigua negotiating with the Iroquois, John Jay, then also a Federal Treaty Commissioner,

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was in London successfully negotiating with Great Britain. But the British did not withdraw their troops from Fort Niagara pursuant to Jay's Treaty until the summer of 1796.

With Jay's Treaty finally implemented and Jay himself New York's Governor, the stage was set for four federally supervised treaties involving Iroquois land claims, which were expeditiously negotiated between 1796 and 1798: one with the Mohawks of British Canada, one with the "Seven Nations of Canada," one with the Oneidas and one with the Senecas. Three of these treaties were responsive to tribal requests and generated little controversy, but the Seneca Treaty represented a humiliating surrender by the federal government to Robert Morris's increasingly desperate attempt to avoid debtors' prison.

The British Mohawk Treaty.

The least problematic of these four treaties extinguished the New York State land claims of the two principal British-allied Mohawk groups, which had opted to settle in Canada following the Revolutionary War. Pickering had discussed Mohawk claims at Canandaigua with Henry Young Brant, a nephew of British Army Captain Joseph Brant. As Pickering recorded in his journal, on November 13, 1794, "Henry Young Brant came to my quarters with the Cornplanter to deliver the following speech....

Brother, I hope that you will take a right understanding of what I am going to say.... The Mohawks have not for a number of years come forward to the different treaties that have been held by the U. States, and our voices have not been heard by General Washington. But whenever a strong peace was to take place, we intended that he should hear our voices....As you are here representing General Washington and the 15 fires we consider it proper to inform you that we have

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some lands left within the State of New York which Governor Clinton acknowledged at the treaty held ten years ago at Fort Stanwix. The Governor told us he would not take the land from us without making us a compensation.

At another treaty held 4 years ago last June with Governor Clinton, he made the same acknowledgement. . . . We wish the Commissioners from New York may come forward to this place next February, for the purpose of bargaining with us for our lands.

What I have said I wish to have forwarded to the President, and from the President to the Governor of New York; and that as soon as the Governor receives it, he should write to the Superintendent upon it, that we may know what to expect.

The procedure outlined was presented as a petition from Henry Young Brant, but he had clearly been instructed by Pickering. Pickering's journal also recorded his own reply:

Brother, I have attended to your speech made in behalf of the Mohawk nation: and agreeably to your request I will present it to the President of the U. States, who I doubt not will with pleasure forward it to the Governor of New York. And I trust the Legislature will do what is right in regard to any just claims of the Mohawk nation to land within that State.¹

Pickering agreed only to relay these Mohawk requests, without expressing an opinion on their validity or likely resolution. On January 30, 1795, in his new capacity as Secretary of War, Pickering wrote New York Governor Clinton about these claims, as well as the desire of the Onondagas and Cayugas to dispose of their State reservations.²

As Henry Young Brant related, British-allied Mohawks had been discussing their grievances with Governor Clinton since 1784. Nor were these claims to be settled as requested within three months. Finally in 1797-98, in exchange for a one-time payment by New York State of one thousand dollars, all land claims within New York State of the "Mohawk Nation of

¹ TPP 62:100-101a.

² See above, page 251.

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Indians, residing in the province of Upper Canada, within the dominions of the King of Great Britain” were “wholly and finally extinguished.” This was accomplished at Albany during a swing through the United States by Captain Brant, leader of the Mohawks who had settled along the Grand River north of Lake Erie. In order to settle all emigrant Mohawk claims at one time, Captain John Deseronto, leader of the Mohawks settled on the Bay of Quinte north of Lake Ontario, traveled to Albany to join with Captain Brant in a comprehensive settlement with New York State.

The State was represented by three commissioners. The Federal Treaty Commissioner was New Jersey Judge Isaac Smith. The resulting Treaty, signed March 29, 1797, was sent to the Senate by President Adams on April 12, 1798, with an apology for the delay, which he attributed to “accident.” In the Senate, the Treaty was referred to a committee consisting of Senators John Laurance of New York, Samuel Livermore of New Hampshire and Timothy Bloodworth of North Carolina. The Treaty was unanimously consented to by the Senate on April 24, and proclaimed by President Adams on April 27, 1798.³

The “Seven Nations of Canada” Treaty.

Claims of the “Seven Nations of Canada” were not addressed by Pickering at Canandaigua because these claims were antagonistic to those of the “Six Nations.” The “Seven

³ Treaty in Kappler 2: 50-51. For Senate action, see *Senate Executive Journal*.

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Nations of Canada” claimed “Indian Title” to a large tract that New York State, the “Six Nations” and Pickering all thought of as aboriginally Mohawk territory.

The enclaves known as the “Seven Nations of Canada” were a string of Catholic mission stations scattered along the Saint Lawrence River. The tracts of land on which these enclaves were established were granted by the French government to French missionary societies. To these French cultural outposts came converts from a number of tribes. The best-known of these mission stations was Caghnawagha, near Montreal. Others included Odanak, at the confluence of the Saint Francis and Saint Lawrence Rivers; and Saint Regis, located on the southern shore of the Saint Lawrence River at the point where the international U.S.-British Canadian border, as determined in 1783, shifts from being the River to being the 45th parallel overland. Saint Regis was founded about 1755 as a colony of the Caghnawagha settlement, to bolster French defenses against an anticipated British offensive. The name Saint Regis honored a French Catholic saint.⁴

Defeated by the British in the Seven Years War, the French government withdrew from Canada in 1763, leaving all French Catholics under the protection of the Protestant British enemy. When the Revolutionary War broke out twelve years later, many French Catholics welcomed an opportunity to resume fighting against the hated British. But no special provision was made for pro-Revolutionary French Catholic tribal groups when the New York Legislature, on March 20, 1781, declared void all aboriginal land rights within the State, with the exception

⁴ In 1826, a Saint Regis Indian named Joseph Torakaron visited the Pope, who presented him with life-size portraits of Saint Francis Xavier and Saint Regis, which were installed in the Church at Saint Regis. Franklin B. Hough, *A History of Saint Lawrence and Franklin Counties, New York, From the Earliest Period to the Present Time*, Albany: Little & Co., 1853, 166.

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of those of the predominantly pro-Revolutionary Oneidas and Tuscaroras.

After the Revolutionary War, French Catholic tribesmen who had been pro-U.S. attempted to call attention to their services. At Fort Stanwix on September 10, 1784, “several Caghawagha chiefs and warriors and about forty of that tribe arrived” to confer with Governor Clinton. Clinton told them that New York State’s

business at this Council Fire was confined to the Six Nations; but that they were happy to see them there: that they considered them now as friends; that such of them as lived in the Village of Saint Regis or other parts within the limits of this State might return to their habitations without the least apprehension of injury, as the State had made ample provision against any frauds or impositions being committed against Indians residing within its limits; that it would at the same time be expected that they would strictly observe the good old rule which was revived by the Constitution of the State not to dispose or part with any of their lands without the consent and approbation of this Government.⁵

From 1784 until 1791, the Saint Regis community had nothing to rely on other than this verbal assurance from Governor Clinton. But Saint Regis was not forgotten, and when in 1791 the State sold 3,693,755 acres to Alexander Macomb, one condition of sale was that

a tract equal to six miles square in the vicinity of the village of Saint Regis, be excepted out of the above contract, and to remain the property of the state: Provided always, That if the said tract shall not be hereafter applied for the use of the Indians of the said village, that then the same shall be considered as included in this contract.⁶

New York State in 1791 considered that Saint Regis was on unencumbered State land, and that the State was at liberty to allocate it “for the use of the Indians” or sell it as the Legislature deemed appropriate.

⁵ Hough 62.

⁶ Hough *History* 254.

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The Macomb sale with its allusion to a possible six-mile-square grant to “the village of Saint Regis” stimulated a desire to resolve this question. Negotiations were however complicated by the fact that some members of the Saint Regis community were demanding compensation for relinquishing “Indian Title” to an extensive region west of Lake Champlain, as well as a State grant of a smaller but still sizeable territory stretching along the State’s northern border some forty-five or fifty miles and extending twenty miles in breadth, or as much as one thousand square miles. New York State officials found the rationale for these demands mystifying, and declared flatly, “your title is not only disputed, but utterly denied by us.” The State offered a small sum for relinquishment of these large claims “but from motives of prudence and good will, only.” Because of this gulf, the first federally supervised treaty negotiation between New York State and the “Seven Nations of Canada” (held in the fall of 1795 at Lake George) was broken off without any agreement.⁷

Mohawks who became tenants on lands owned by French Catholic missionary societies seem to have preserved an oral tradition that a division of Mohawk aboriginal territory had been agreed upon between pro-British and pro-French Catholic Mohawks in the seventeenth or early eighteenth century. Whether pro-British Mohawks actually agreed to this is unknown, nor is there any record that either the French or the British government ever recorded such an agreement. New York State officials considered themselves heirs to the British position on tribal

⁷ Hough *History* 140-42. This failed negotiation had been authorized by President Washington, responding to a request from Governor Jay relayed by Secretary of War Pickering. See above, page 213.

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rights within the claimed bounds of New York State, and were unaware of any British commitment to the French Catholic “Seven Nations of Canada.” Moreover, though the State’s 1781 abolition of all aboriginal land rights other than those of the Tuscaroras and Oneidas had ignored the loyalty of some French Catholic Mohawks, there was no doubt that the majority of Mohawks had sided with the British, and a reasonable case could be made that, under British and then New York State law, British-allied Mohawks had retained aboriginal “Indian Title” to all ancestral Mohawk territories not acquired by the British government right up until New York State’s 1781 confiscation. Furthermore, even if the “Seven Nations of Canada” had once possessed “Indian Title” to half of ancestral Mohawk territories, did the “Seven Nations of Canada” still exist in 1795?

Four men claimed to represent the “Seven Nations of Canada.” William Gray, one of the four, who also served as their interpreter, was a white man who had been born in Cambridge, New York, joined the Revolutionary Army, been captured by British troops in 1780, then moved at the War’s end to Saint Regis where he married a member of the community, adopted “the language and customs of the tribe” and eventually prospered to such an extent that his parents and other members of his family came to live with him at Saint Regis.⁸ If one thousand square miles of New York territory were allocated by New York State to the “Seven Nations of Canada,” who would actually control this tract? Amidst such uncertainties, no rapid resolution was possible, and the federal treaty session held in the fall of 1795 at Lake George ended in frustration.

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⁸ Hough *History* 198.

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At a second federally supervised treaty session held in New York City in May of 1796, agreement was reached between the four representatives of the “Seven Nations of Canada” and three New York State agents, in the presence of Federal Treaty Commissioner Abraham Ogden of New Jersey. The Treaty signed May 31, 1796, allocated to the Saint Regis community only the six square miles withheld from the 1791 Macomb grant, plus two additional one-mile-square tracts which were to be acquired by purchase from their current owners, William Constable and Daniel McCormick, who also signed the New York City Treaty. The addition of these two tracts reflected the fact that “the Indians of the Village of St. Regis have Built a Mill on Salmon River and another on Grass River and that the Meadows on Grass River are necessary to them for hay.”

The four representatives of the “Seven Nations of Canada” agreed to “the extinguishment of their claim to all lands within the state.” In return, the State agreed to pay the community a one-time sum of “one thousand two hundred and thirty-three pounds, six shillings and eight pence” and an annual sum of “two hundred and thirteen pounds, six shillings and eight-pence, lawful money of the said state...forever.”⁹

In response to an inquiry about this transaction from Captain Brant, former Governor Clinton on December 1, 1799, carefully explained the State’s legal position throughout these protracted negotiations with the “Seven Nations of Canada”:

In the winter of 1792-93, our Legislature being in session in Albany, a committee from the Seven Nations or tribes of Lower Canada, attended there, with whom I had several conferences. They complained that some of our people had settled on their lands near Lake Champlain, and on the River Saint Lawrence, and requested that commissioners might be appointed to enquire into the matter, and treat with

⁹ Kappler 2:45. See also ASPIA 1:617-20.

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them on the subject. In my answer to their speeches, I answered that it was difficult to define their rights and their boundaries; and that it was to be presumed that the Indian rights to a considerable part of the lands on the borders of the lake, had been extinguished by the French Government, before the conquest of Canada, as those lands, or a greater part of them, had been granted to individuals by that government before that period. In their reply they described their southern boundary, as commencing at a creek or run off water between Fort Edward and George, which empties into South Bay, and from thence extending on a direct line to a large meadow or swamp where the Canada Creek, which empties into the Mohawk opposite Fort Hendrick, the Black and Oswegatchee Rivers have their sources. Upon which I observed to them that this line would interfere with lands patented by the British Government previous to the Revolution, and particularly mentioned Totten and Crossfield's purchase and Jessup's patent; but I mentioned at the same time that I was neither authorized nor disposed to controvert their claims, that I would submit them to the Legislature, who I could not doubt would pay due attention to them and adopt proper measures to effect a settlement with them upon fair and liberal terms. This I accordingly did, and some time after commissioners were appointed to treat with them in the presence of an agent of the United States, the result of which, I find you are informed of.¹⁰

This 1796 Treaty climaxed a process of negotiation that had begun twelve years earlier at Fort Stanwix. The resulting agreement paralleled in crucial respects those reached by the State with the Oneidas, Onondagas and Cayugas in 1788-89, in the months immediately preceding the inception of the federal Constitution on March 4, 1789. Like these agreements, the Treaty with the "Seven Nations of Canada" involved relinquishment of all claims to land within New York State by right of aboriginal "Indian Title," in exchange for land to be held by State grant. The big difference between the pre-Constitutional agreements with the Oneidas, Onondagas and Cayugas and this 1796 agreement was that it was negotiated by means of a federally-supervised Treaty. The Treaty was forwarded to the Senate by President Washington on January 4, 1797, and approved by a vote of twenty-four to one on January 16. The negative vote was cast for reasons

¹⁰ Hough *History* 147-48.

unknown by Senator Stevens T. Mason of Virginia. President Washington proclaimed the Treaty on January 31, 1797.¹¹

The Oneida Treaty.

Unlike the British Mohawk and “Seven Nations” Treaties, which were one-time extinguishments of federally protected “Indian Title” claims settled after lengthy preliminaries, the 1798 Oneida Treaty was one in a long series of periodic agreements through which the Oneidas relinquished back to the State portions of the reservation they had been allocated by the State in 1788. The 1798 agreement was however distinctive, being both approved by the Senate and proclaimed by the President. The immediately preceding agreement, negotiated by the State with the Oneidas in 1795, had been protested as illegal because it was *not* a federal treaty, a question precluded in 1798. By the time of the next Oneida installment sale in 1802, the applicability of the federal treaty procedure to such transactions was once again being challenged.

Upon receipt of word from the Oneidas early in 1798 that they wished to yield another portion of their State reservation, Governor Jay referred the matter to the Legislature, which by an Act passed on February 26, 1798, approved the Oneidas’ request in principle. This Act authorized the Governor to appoint commissioners to negotiate “on the part of the State with the chiefs of the Oneida tribe of Indians for the extinguishment of their claim to...part of the lands

¹¹ *Senate Executive Journal*; Kappler 2:45-46.

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reserved for their use” by the State.¹² Governor Jay then appointed three State Commissioners who held discussions with Oneida representatives in Albany. These State Commissioners reported back to the Governor what land the Oneidas wished to sell and what price they would be willing to accept, adding that “as some time may elapse before the authority to hold a treaty, and the appointment of commissioners can be obtained from the General Government, they are very desirous to have three hundred dollars, of the five hundred dollars, advanced to them at this time.”¹³ This letter from the State’s Commissioners to Governor Jay was the first indication that a federal treaty commissioner might be involved. Nothing had been said of this in the Legislature’s February 26, 1798, Act. It therefore seems likely that the Oneidas, recalling what had happened three years earlier, requested a federal treaty commissioner. If so, the State Commissioners readily agreed to involving a federal treaty commissioner, as did Governor Jay. While the legal requirement of federal supervision for sales of Oneida State reservation lands had apparently been quietly rejected by Governor Jay and quietly abandoned by Secretary of War Pickering in 1795, confusion and anxiety on this score would certainly have persisted among the Oneidas themselves.

On March 5, 1798, Governor Jay wrote the Oneidas that the State had accepted all their proposals. He would apply to the “General Government” for appointment of a federal treaty commissioner, and the Oneidas would also be receiving the three hundred dollar advance they desired. Next, on April 23, 1798, Governor Jay wrote to Secretary of State Pickering, reporting

¹² *Laws of New York* 21st Sess., Ch. 23.

¹³ ASPIA 1:642.

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on the progress of this new Oneida negotiation, and requesting that Pickering

Be so obliging, sir, as to lay these representations before the President, with my request that he will be pleased to appoint a commissioner to hold the said treaty, at the time and place before mentioned.

The moment I receive information from you that the appointment is made, I shall advise the Oneidas of it and immediately take other measures which will be proper and necessary on the part of the State.

I have the honor to be with great respect, sir, your most obedient and most humble servant, John Jay.

On May 3, President Adams nominated Pennsylvanian Joseph Hopkinson to serve as Federal Treaty Commissioner, and the Senate consented to his appointment on May 4, 1798. The treaty was completed on June 1, 1798.¹⁴

Though this did not appear in the Treaty text, during the negotiations the Oneidas requested that Federal Agent Israel Chapin, Jr., receive “two hundred forty acres of the tract of one mile square, lying eastward from New Stockbridge, and reserved out of their cession in 1795.” This was reported by Hopkinson in a letter to Secretary of State Pickering dated June 26, 1798. Hopkinson’s reference to “their cession in 1795” as presumptively completed in a letter to Pickering seems conclusive evidence that Pickering had dropped any thought that the 1795 land transactions between New York State and the Oneidas, Onondagas and Cayugas could be reversed. Federal Treaty Commissioner Hopkinson certainly assumed the Oneidas’ “cession in 1795” was an accomplished fact, and the Treaty itself referred to the 1795 transaction as the last purchase from them.”¹⁵

¹⁴ ASPIA 1:641-42. *Senate Executive Journal*.

¹⁵ ASPIA 1:641-43.

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President Adams forwarded the Oneida Treaty to the Senate on January 31, 1799, describing it as having been signed at the Oneidas’ “village.” In the Senate, the Treaty was referred to a committee consisting of Senators James Hillhouse of Connecticut, Uriah Tracy of Connecticut and Samuel Livermore of New Hampshire, a committee that was oddly narrow geographically. The Treaty was consented to unanimously by the Senate on February 13, 1799, and proclaimed by President Adams on February 21, 1799. Secretary of State Pickering then certified the Treaty.¹⁶

The Seneca Treaty.

Unlike the three federally-supervised treaties discussed above, the Big Tree Treaty with the Senecas was not sought by the tribe concerned. Negotiations took place only after Robert Morris’s impassioned six-year campaign to be allowed access to the Senecas ultimately wore down President Washington’s resistance.

¹⁶ National Archives, Record Group 11, *Ratified Indian Treaties*, Number 28.

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Morris had begun trying to secure federal permission to bargain with the Senecas in the spring of 1791, almost as soon as he acquired Seneca preemption rights from Massachusetts. Told time after time that the frontier situation was too dangerous to risk alienating the Senecas by pressuring them to sell more of their “Indian Title” land rights, Morris seized on General Wayne’s victory at the Battle of Fallen Timbers on August 20, 1794, Pickering’s successful negotiation of the November 11, 1794, Treaty of Canandaigua and word that Jay’s negotiations in London were proving fruitful as indications that fear of offending the Senecas was no longer a concern. “I begin to look toward the Genesee Country with longing eyes,” Senator Morris exulted on January 6, 1795.¹⁷

As it turned out, Morris’s frustrations were not over yet. Jay’s Treaty provided for British withdrawal from forts on U.S. soil by the summer of 1796. But when Morris requested appointment of a federal treaty commissioner in the spring of 1796, Secretary of State Pickering pointed out that the Senate had already adjourned, and so could not consider the nomination of a commissioner until fall. This was strictly a delaying tactic; ironically, Pickering himself had negotiated the 1794 Treaty of Canandaigua on a recess appointment.¹⁸ To discourage Morris further, Pickering asked the U.S. Attorney General whether the President had the power to make an interim appointment. On May 26, 1796, Attorney General Charles Lee offered the Opinion that Pickering wanted, that the President did not possess this power:

17 Norman B. Wilkinson, “Robert Morris and the Treaty of Big Tree,” *Mississippi Valley Historical Review* 40(1953):260.

18 See Pickering to Jay, March 11, 1797, *Pickering Papers*, Manuscript Division, Library of Congress, Washington, D.C. See also above, page 23.

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The Attorney General is of opinion that the President alone and without the advice of the Senate, cannot appoint a commissioner to hold or make a treaty with an Indian tribe, for the purpose of purchasing and extinguishing their title to land within the limits of the United States. The 12th section of the act to regulate trade with the Indians, passed the 19th instant, prohibits every person, *who is not employed under the authority of the United States*, from negotiating any such treaty or convention, directly or indirectly.

The expression *under the authority of the United States* cannot mean any other thing than the constitutional authority of the United States, which it is considered cannot be bestowed on any person but by the President, with the advice of the Senate.¹⁹

Lee's Opinion focused on the President's appointment power, but Lee's reference to "extinguishing their title" in connection with the land sale section of the Indian Trade and Intercourse Act suggests that he believed this section referred to land held by "their title"---in other words, land claimed by tribes by right of aboriginal "Indian Title." In the case of the Senecas, there was no question that they held their lands by "Indian Title" which could only be extinguished at a properly convened federal treaty.

After the unexpected death on August 23, 1795, of his thirty-nine-year-old Attorney General, Pennsylvanian William Bradford, President Washington had selected to replace him Virginian Charles Lee. Virginians Thomas Jefferson and Edmund Randolph having resigned, Washington felt at liberty to add a Virginian to his Cabinet. And being now so dependent on protégés of Alexander Hamilton, Washington probably considered it desirable to select an Attorney General from among his own Virginia connections. Charles Lee was the brother of

¹⁹ *Official Opinions of the Attorneys General of the United States Advising the President and Heads of Departments*, Washington, 1852, 65-66. The President's ability to make interim appointments was later established by statutory provision. See 2 Stat. 59.

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Henry (“Light Horse Harry”) Lee, who is best-known today as the father of Confederate General Robert E. Lee. Charles Lee is similarly best known today as the uncle of General Robert E. Lee. But the Lees of Virginia were illustrious long before General Robert E. Lee became the ultimate embodiment of the Old South.

When Secretary of State Pickering and Attorney General Lee proved unhelpful, Morris took his case directly to the President. Privately, Washington had not changed his opinion from that expressed in exchanges with Thomas Jefferson in 1791, when both men deplored the financial titan Morris’s greed as a serious threat to national stability.²⁰ But by the summer of 1796, Washington was running out of excuses to fend off Morris’s increasingly frantic pressure to be allowed access to the Senecas. In a letter to Washington dated August 25, 1796, Morris outlined his case as follows:

Sir: In the year 1791, I purchased of the State of Massachusetts, a tract of Country lying within the boundaries of the State of New York, which had been ceded by the latter to the former State, under the sanction and with the concurrence of the Congress of the United States.

This tract of land is bounded to the East by the Genesee river, to the North by Lake Ontario, to the West partly by Lake Erie and partly by the boundary line of the Pennsylvania triangle, and to the South by the North boundary of the State of Pennsylvania. A printed Brief of Title I take the liberty to transmit herewith. To perfect this Title, it is necessary to purchase of the Seneca Nation of Indians their *Native right*; which I should have done soon after the purchase was made of the State of Massachusetts, but that *I felt myself restrained from doing so, by motives of public consideration.*

The War between the Western Indian Nations and the United States did not extend to the Six Nations, of which the Seneca Nation is one; and as I apprehended that, if this Nation should sell its right during the existence of that

²⁰ See above, pages 101-02.

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War, they might the more readily be induced to join the enemies of our Country, *I was determined not to make the purchase whilst that War lasted.*

When peace was made with the Indian Nations, I turned my thoughts towards the purchase, which is to me an object very interesting; but upon it being represented that a little longer patience, until the western posts should be delivered up by the British Government, might still be public utility, I concluded to wait for that event also, which is now happily accomplished, and there seems no obstacle remaining to restrain me from making the purchase, especially as I have reason to believe the Indians are desirous to make the sale.

The delays which have already taken place and that arose solely from the considerations above mentioned, have been *extremely detrimental to my private affairs*; but, still being desirous to comply with formalities prescribed by certain Laws of the United States, although those Laws probably do not reach my case, I now make application to the President of the United States, and request that he will nominate and appoint a Commissioner to be present and preside at a Treaty, which he will be pleased to authorize to be held with the Seneca Nation, for the purpose of enabling me to make a purchase, in conformity with the formalities required by Law, of the Tract of Country for which I have already paid a very large sum of money. My right to the preemption is unequivocal, and the Land is become so necessary to the growing Population and surrounding Settlements, that it is with difficulty that the white People can be restrained from squatting or settling down upon these Lands, which if they should do, it may probably bring on contentions with the Six Nations. This will be prevented by a timely, fair, and honorable purchase.

The proposed Treaty ought to be held immediately before the Hunting Season, or another year will be lost, as the Indians cannot be collected during that Season. The loss of another year, under the payments thus made for these Lands, would be ruinous to my affairs; and as I have paid so great deference to public considerations whilst they did exist, I expect and hope, that my request will be readily granted, now, when there can be no cause for delay, especially if the Indians are willing to sell, which will be tested by the offer to buy.²¹

Morris brazenly overstated his case, and made numerous dubious assertions, a fact that could not have been overlooked by President Washington. Morris mentioned for example that he

²¹ *Historical Magazine*, June 1869, 369-70. The “printed Brief of Title” is probably Miers Fisher, *Brief of the Titles of Robert Morris*, Philadelphia, 1791.

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had spent a great deal of money to acquire fee title to the Senecas' homeland, but he failed to mention that he had already sold most of it, on the condition that he extinguish the Senecas' "Indian Title" (termed by Morris "their *Native right*"). Morris may have supposed that the "Laws probably do not reach my case" because the Indian Trade and Intercourse Act passed May 19, 1796, specified use of the federal treaty procedure only west of the Cuyahoga River. The arguments *for* use of the federal treaty procedure were that pursuant to the Treaty of Canandaigua the Senecas now possessed "Indian Title" *recognized by federal treaty*. While the 1796 Indian Trade and Intercourse Act specified the geographic limits of *future* federal responsibility for "Indian Title" extinguishment, it was wishful thinking to suppose that the Act had "probably" invalidated an extant federal treaty.

The Senecas did not think they were just tenants occupying Robert Morris's land. The Senecas had never accepted the U.S. theory that they possessed their homelands by nothing more substantial than a hunting ground use right of negligible sale value. Instead the Senecas claimed full ownership of their lands, for any part of which they expected to be paid full market value. This difference of perspective had been glossed over in the Treaty of Canandaigua by use of the word "property" which could be interpreted as one chose. As holder of a kind of legal right to their lands that they repudiated, Morris was anathema to the Senecas. Nor was there any mistaking how the Senecas felt about relinquishing their homelands for a pittance to the man on whom they had bestowed the name "Big Bear." On September 23, 1796, a month after the U.S. Army took possession of Fort Niagara from the British, the Fort's new Commander, U.S. Army Captain J. Bruff, entertained a delegation of Seneca chiefs and presented them with a U.S. flag to

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emphasize that Fort Niagara and the entire region to the south and east were now under U.S. control. Red Jacket replied that U.S. control of Seneca territory was fine with them, provided Robert Morris was kept at bay. “We are much disturbed in our dreams about *the great Eater with a big Belly* endeavoring to devour our lands,” Red Jacket told U.S. Army Captain Bruff. “We are afraid of him, believe him to be a conjurer, and that he will be too cunning and hard for us, therefore request Congress will not license nor suffer him to purchase our lands.”²²

Much as he deplored Robert Morris’s avarice, President Washington believed that what Morris wanted to do would benefit the Senecas in the long run by reducing the extent of their aboriginal hunting grounds, which would encourage them to turn toward agriculture as a livelihood. So instead of proposing a radically alternative solution to the Seneca problem, Washington temporized with the importunate Morris. Finally, on March 2, 1797, two days before he left the Presidency for retirement at Mount Vernon, Washington sent the Senate a letter falling so far short of an endorsement that it left plenty of room for the Senate or his successor to terminate Morris’s scheme at any point. “Gentlemen of the Senate,” Washington wrote with elaborate qualification,

Application having been made to me, to permit a Treaty to be held with the Seneka Nation of Indians, to effect the purchase of a parcel of their land under a pre-emption right derived from the State of Massachusetts, and situated within the State of New York, and it appearing to me reasonable that such opportunity should be afforded, provided the negotiation shall be conducted at the expense of the applicant, and at the desire and with the consent of the Indians; always considering these as prerequisites, I now nominate Isaac Smith, to be a Commissioner to hold a treaty with the Seneka Nation, for the aforesaid

²² Wilkinson 257.

purpose.²³

Before the Treaty then launched was completed at Big Tree on September 15, 1797, Morris's financial situation deteriorated further. Fearing arrest by his creditors if he appeared in public, Morris let his son Thomas conduct the Treaty on his behalf. Lavish expenditure on whiskey and bribes carried the day. Thomas Morris freighted in 750 gallons of whiskey, costing \$1.50 a gallon. Federal Agent Israel Chapin, Jr., received \$5,000 for his help. Federal Treaty Commissioner Jeremiah Wadsworth of Connecticut (substituting for Washington's nominee Isaac Smith) made no effort to guide the course of negotiations at Big Tree until he fell ill, at which point he counseled Thomas Morris to harden his stance and speed things up. The finished Treaty provided for a payment to the Senecas of \$100,000 for relinquishing their claim to almost four million acres, amounting to something over two cents an acre. A month later, Robert Morris told Commissioner Wadsworth that he thought this far too high, and that \$20,000 would have been a fair price. But not even bribing the Senecas could save Big Bear from his creditors, and by mid-February of 1798, he was in prison.²⁴

President Adams forwarded the Big Tree Treaty to the Senate on December 6, 1797. The same day, it was referred to a committee consisting of Senators John Laurance of New York, Humphrey Marshall of Kentucky and Uriah Tracy of Connecticut. On December 12, the Senate consented to the Treaty by a vote of seventeen to two, the negative votes being cast by Senators

23. GWP.

²⁴ Wilkinson 264-66, 268, 273, 276. See also Anthony F.C. Wallace, *The Death and Rebirth of the Seneca*, New York: Vintage, 1972, 179-183.

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Joseph Anderson of Tennessee and Jacob Read of South Carolina. President Adams had suggested that the Treaty not be ratified until all financial arrangements were completed, and the Senate consented to the Treaty with this understanding. On April 11, 1798, President Adams finally proclaimed the Treaty, which was then certified by Secretary of State Pickering.²⁵

The Four Treaties Compared.

Secretary of State Pickering (and not Secretary of War James McHenry, as one might have expected) supervised federal arrangements for all four of these treaties. In the 1790s, Cabinet Secretaries frequently assumed responsibilities beyond their departments, but the principal reason the State Department handled these four treaties was the fact that Pickering was the federal government's unchallenged authority on tribal land claims in New York State.

During his battles with Governor Clinton between 1791 and 1795, precisely what Pickering thought the nature of federal regulatory authority over tribes in New York State should be remained unclear. Between 1796 and 1800 on the other hand, Pickering and New York Governor Jay developed an excellent working relationship. New York State was not a party to the indefensible Seneca Treaty, which was supervised by Pickering in association with Massachusetts. But the other three treaties involved frequent consultations between Pickering

²⁵ National Archives, Record Group 11, *Ratified Indian Treaties*, Number 27.

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and New York State. All four treaties provide a better gauge of federal thinking about New York tribal issues than either the war-impacted 1794 Treaty of Canandaigua or the miscellaneous other federal interventions in New York State attempted between 1791 and 1795.

The British Mohawk and “Seven Nations” treaties were attempts to deal with separate parts of the situation created by the pre-Revolutionary division of the Mohawks into French Catholic and British Anglican sections. Sir William Johnson’s complete identification with the Anglican Mohawks and their support for him had resulted in his strong support for their viewpoint and their decision to remain loyal to Britain throughout the Revolution and then to settle in British Canada. The Anglican Mohawks received favored treatment in colonial New York, and again in British Canada. As successors to the British, the Revolutionary State of New York also took the position that the Anglican Mohawks were the “true” Mohawks of the “Six Nations” Confederacy. French Catholic Mohawks were favored by neither the British nor the Revolutionaries, and only persistence obtained a small land grant from New York State and a small payment for extinguishment of their disputed aboriginal “Indian Title” claims.

Since both the British Mohawk and the “Seven Nations” treaties were essentially quit-claims, no elaborate attempt was made to ascertain the validity of the claims extinguished by these treaties. The Senecas in contrast had federal treaty recognized “Indian Title” pursuant to the 1794 Treaty of Canandaigua. In all, three of the 1796-98 treaties involved extinguishments of aboriginal “Indian Title.” The fourth, the 1798 Oneida Treaty, is also often thought of as involving an “Indian Title” extinguishment. At issue was State-granted reservation land, over which Pickering in 1794-95 had tried unsuccessfully to assert federal regulatory control on the

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theory that the Oneidas, along with the Onondagas and Cayugas, had *retained* aboriginal “Indian Title” on their State reservations notwithstanding the fact that New York State thought it had extinguished all “Indian Title” claims, and with them any rationale for federal involvement.

Since New York State was not represented at Big Tree in 1797, it was not possible to replace the Senecas’ federal-treaty-guaranteed “Indian Title” with the more valuable land rights possessed by tribes on New York State-granted reservations. The Big Tree Treaty evasively described the reservations that were to be retained by the Senecas as lands held “in as full and ample manner as if these presents had not been executed.” In other words, the two hundred thousand acres accurately described as *retained* by the Senecas were only federal treaty reservations of aboriginal “Indian Title” land, and as such would in theory dwindle rather than grow in sale value. Under both the 1794 federal Treaty of Canandaigua and the 1797 federal Treaty of Big Tree, the Senecas were acknowledged to possess *federal treaty-recognized* aboriginal “Indian Title” rather than a mere claim, but no federal guarantee was offered that their “Indian Title” land would ever be worth more than the fast-disappearing commercial game animals on it. Nor would the Senecas’ hunting ground use right have allowed them to develop a silver mine, as the Cayugas had been permitted to do by New York on their State reservation.

The Oneidas and Senecas both suffered as a result of the State/federal jurisdictional tussle of the 1790s. Technically, the Oneidas were subject to ordinary New York jurisdiction from 1788 forward. But New York State failed to exercise effective guardianship over Oneida interests. Oneida insistence on maintaining its own decision-making autonomy combined with federal encouragement of Oneida participation in the “Six Nations” Confederacy discouraged the

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State's efforts to exercise trusteeship over Oneida assets of the sort that the State exercised with some success over other tribal groups. The Oneidas kept alive expectations raised by Timothy Pickering that the federal government would assist them more effectively than New York State, with the result that the Oneidas were not well served by either the State or the federal government. The Senecas fared even worse, because they really were being actively protected by the federal government, and the State in consequence felt no obligation toward them. With federal assistance, the Senecas sank into disarray and deep despair.

The presence of a federal treaty commissioner made no difference in the financial terms offered at any of the four treaties, because payments for the extinguishment of federally protected "Indian Title" were not expected to be high. In a letter to Governor Jay dated March 11, 1797, Secretary of State Pickering referred casually to the up-coming Big Tree Treaty with the Senecas as intended "to give Mr. Morris an opportunity of bargaining with them for their lands, or a part of them."²⁶ Pickering wanted the Senecas to retain enough land to support themselves by farming but, with regard to the lands they relinquished, any sum the Senecas would accept was okay with him. Once the Senecas were settled on individual family farms, Pickering might then have been more disposed to help, as he had tried to help the reservationized Oneidas in 1794-95.

²⁶ Library of Congress, Manuscripts Division, *Pickering Papers*, Pickering to Jay, March 11, 1797.

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In a letter to Governor Jay about the planned “Seven Nations” negotiation, Pickering remarked almost chattily that

The form of proceeding prescribed by that law [the 1793 Indian Trade and Intercourse Act] is so peculiar, it may merit a little attention. Tho’ the cession of Indian land will be to the State, yet the instrument of cession is to be in the form of a treaty or convention, to be entered into Apursuant to the Constitution”; of course to be ratified by the President with the advice and consent of the Senate. The State Commissioners negotiate only for the price. I have taken the liberty to bring this to your view, that if the matter has not already been considered, the form of the treaty may be previously arranged: otherwise the Commissioners (especially if they should not be law characters) may be at a loss, or commit some mistake, in giving shape to the negotiations.²⁷

To President Washington, Pickering described New York State’s proposed “Seven Nations” treaty session as “uninteresting. The amount of it is merely a claim on the part of those Indians to the lands mentioned, and an agreement on the part of New York, to meet them at a convenient time and place to settle those claims.”

Observing that “no objection occurs to me to the proposed negotiation,” Pickering surmised that, “One Commissioner would seem sufficient.” Indeed, Pickering handled the appointment of federal treaty commissioners to supervise New York State treaties as little more than patronage junkets. “It may be agreeable to Col. Wadsworth to take a journey to Lake George at the season of the year proposed by the Governor for the treaty,” Pickering commented to Washington, offering no hint that special talents or diligence would be needed.²⁸ Nor did

²⁷ Columbia University Libraries Special Collections, *Jay Papers*, Pickering to Jay, September 1, 1795.

²⁸ TPP 35:209-10.

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Pickering two years later offer any criticism of Colonel Wadsworth's passivity at Big Tree.

The federal government was required by the 1793 Indian Trade and Intercourse Act to extinguish "Indian Title" by means of the federal treaty procedure. This meant serving as a kind of midwife, supervising the transfer of "Indian Title" land to ordinary state jurisdiction. No on-going federal "fiduciary" or "trusteeship" obligation to tribes under ordinary state jurisdiction was anticipated by Congress. Pickering personally would have gone further, but even Pickering made clear that he did not want routine responsibility for managing the day-to-day affairs of New York State's tribes. The extent of Pickering's ambition was to add a layer of federal supervision, a sort of Presidential veto power, evocative of the "pleasure" of the British monarch to intervene at will anywhere in his dominions. Pickering in other words was not the prescient visionary he has become in the eyes of latter-day admirers supposing that he tried in vain to enforce twenty-first century law upon a rogue State. This theory cannot account for Pickering's actions between 1796 and 1800, when he enjoyed a friction-free working relationship with Governor Jay.

Ironically, Pickering's relationship with New York Governor Jay was far more successful than his relationship with President Adams. Adams retained Pickering as Secretary of State, but the two strong-willed Massachusetts natives (Adams from Braintree, south of Boston, Pickering from Salem, north of Boston) were wholly incompatible. "Under the simple appearance of a bald head and straight hair, and under professions of profound republicanism," Adams remarked of Pickering, "he conceals an ardent ambition, envious of every superior, and impatient of

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obscurity.”²⁹ Pickering was equally scornful of Adams, and took direction instead from Alexander Hamilton, now a New York private citizen. The best idea Adams ever had as President was inviting Vice President Jefferson to help him run the government. But when the Hamiltonians in his Cabinet (including Pickering) threatened to resign en masse if the Vice President should be given a significant administrative role, Adams made the mistake of not accepting their resignations and so had to cope with a Vice President who was leading the opposition, as well as with disloyal members in his own Cabinet.

During the recent revival of interest in John Adams, both admirers and critics have agreed that the biggest stains on his Presidency are the Alien and Sedition Acts, which may have cost him re-election. Adams signed these Acts reluctantly, but Pickering zealously urged deporting thousands of immigrants under the Alien Act; and the Sedition Act, which abrogated the rights of U.S. citizens to criticize the government, also found a warm friend in Pickering. When asked by the President whether to pardon a hapless tax resister from western Pennsylvania named John Fries who had been sentenced to death, Pickering assured Adams, “I feel a calm and solid satisfaction that an opportunity is now presented in executing the justice of the law, to crush that spirit, which, if not overthrown and destroyed, may proceed in its career and overturn the government.” Adams decided to ignore this advice, and pardoned Fries.³⁰

On May 10, 1800, Adams belatedly requested Pickering’s resignation. On May 12,

²⁹ Henry Adams, *History of the United States of America During the Administrations of Thomas Jefferson*, New York: Library of America, 1204.

³⁰ David McCullough, *John Adams*, New York: Simon and Schuster, 2001, 505 , 540.

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Pickering refused to resign, explaining that he had been confirmed by the Senate and held his post as Secretary of State independent of the President. The same day, Adams fired him, and made it stick.

Adams chose as Pickering's successor Virginian John Marshall. After serving with distinction as the nation's fourth Secretary of State, Marshall in 1801 was nominated by Adams to be the nation's third Chief Justice. In the ensuing decades, Marshall carefully elaborated a systematic federal tribal policy, something that Pickering had only fitfully (and sometimes foolishly) struggled toward.