



## **Coulter: Equal justice under law - except for Indians?**

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by: **Robert Coulter**

Robert T. Coulter and John D. B. Lewis

Guest columnists

The Cayuga Indian Nation had to wait more than 185 years to be allowed to bring its historic land claim lawsuit, and for 25 years thereafter litigated to gain some redress for the illegal taking of its lands by the state of New York. Last month, the full bench of the U.S. 2nd Circuit Court of Appeals effectively upheld the dismissal of that lawsuit by a divided three-judge panel.

Unless the Supreme Court reverses this determination, other Indian nations may forever lose their rights to sue for the illegal takings of their lands, and the country will have lost an historic opportunity to provide justice to indigenous people who have experienced centuries of oppression and discrimination.

Over one judge's strong dissent, the two judges in the majority in the Cayuga case said that the Cayuga Indian Nation had delayed too long in bringing its lawsuit and, citing that alleged delay, threw out the \$248 million judgment that the Cayugas had won in the District Court. To reach this result, the majority was obliged to overrule two 2nd Circuit precedents and vastly extend a recent Supreme Court decision.

The Cayuga are one of the Haudenosaunee, or Six Nations, that were dispossessed of most of their lands in New York state between 1790 and 1850 in violation of the U.S. Constitution and the Indian Trade and Intercourse Act of 1790. That legislation, enacted by Congress to stop the plundering of Indian nations, is still on the books. The law declared transactions that violate the act to be of "no validity in law or equity" and forbade all transfers of Indian land without the federal government's approval. Nevertheless, the state made many deals to get Indian land, almost of them without federal approval. This history of fraud, deceit and dishonorable conduct by New York left the Cayuga Nation entirely landless, and other Indian nations lost all but tiny remnants of their homelands.

The federal government did nothing to stop the lawlessness, even though the United States had repeatedly promised the Six Nations in formal treaties to respect and protect Indian lands. President George Washington, for instance, acknowledging the illegal takings, assured Indian leaders: "But ... these evils arose before the present government of the United States was established ... [Now] the General Government only has the power to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding. Here then is the security for the remainder of your lands."

But Indian lands continued to be sold away by unauthorized individuals in nefarious transactions; and the Six Nations, weakened by the economic desperation and political oppression that followed the Revolutionary War, were unable to resist the greed for their lands.

In the 1920s, the Indian nations in New York secured legal counsel willing to test whether a lawsuit based on the Trade and Intercourse Act could be brought. But the 2nd Circuit held that the federal courts were closed to Indian nations seeking a remedy for the violation of federal laws protecting their lands. Not until 1974 did the Supreme Court hold that Indian nations could bring claims for damages for the taking of their lands in violation of the Trade and Intercourse Act. Just six years later, the Cayuga Nation filed its lawsuit.

After a federal district judge found that New York state had acquired Cayuga Indian Nation lands unlawfully and awarded money damages, New York appealed. Before the appeal was decided, the Supreme Court, in another Indian case, ruled that land parcels illegally taken by New York from the Oneida Indian Nation, but thereafter purchased by the Oneidas, could not be returned to the tax-exempt status that typically applies to Indian land throughout the United States. The Supreme Court based its decision on various supposed facts - the Oneida Nation had long ago sold the land in question; most of the Oneidas had moved away; and the Oneida Nation had not protested the loss of its land and, in any event, had delayed in seeking to reclaim it.

To grant the Oneidas tax-exempt status, the court concluded, would be "disruptive." However, not one of these assertions had been litigated in the lower courts and most of the "facts" leading to the court's conclusion are incorrect.

Although the Oneida Nation lost its suit for tax-exempt status, the Supreme Court explicitly stated that its taxation decision did not affect the court's 1985 ruling that the Oneidas have title to lands lost in violation of the Trade and Intercourse Act and the Oneida Nation has a cause of action for damages for such dispossession.

Notwithstanding the court's stance on these two key issues at the time of its decision in the Oneida case, the 2nd Circuit reached diametrically opposite conclusions barely three months later in the Cayuga case.

The two judges in the Cayuga case's majority read the Supreme Court's taxation opinion as deciding that a delay in initiating a land claim could bar Indians from proceeding, even when such a claim is legally viable and within legal time limits. Viewing the Supreme Court's core concern as the "disruptive" nature of reasserting Indian jurisdiction and tax exemption over land purchased by the Oneida Indian Nation, the two 2nd Circuit judges found the Cayuga Nation claim similarly "disruptive" and therefore barred due to the Cayugas' supposed delay in bringing their claim.

This determination was in direct opposition to a previous 2nd Circuit decision that delay does not bar Indian land claims under the Trade and Intercourse Act. The majority's conclusion that even an award of money damages against the state was "disruptive" underscored its evident stance that any remedy at all for the concededly illegal takings would be "disruptive."

One of the most startling aspects of the Cayuga decision is that it reversed the district court's judgment and entered judgment for New York without sending the case back to the district court for a determination of any factual issue relating to the alleged delay, such as the length of any delay, the reasonableness of any delay, the extent of any prejudice to New York, and whether the state, given its historic misconduct, should be permitted to avoid all the consequences thereof.

It is difficult to ignore the extent to which the panel majority made new law and disregarded long-established rules about delay in initiating lawsuits. Either the panel made sweeping changes in the law respecting such delay or it made law that applies only to Indian cases. Either way, the result is disturbing.

History attests that Indian nations and peoples have long been denied the even-handed application of the law. In the case of the Cayuga Indian Nation, where a straightforward application of the law would have benefited the Indians, the law was changed - or ignored - to their extreme detriment.

*Robert T. Coulter, president of the Indian Law Resource Center, has practiced in the field of Indian Law for more than 30 years.*

*John D.B. Lewis is an attorney and member of the Indian Law Resource Center's board of directors. For more information, please go to [www.indianlaw.org](http://www.indianlaw.org).*