

# THE THREAT OF BORDER SECURITY ON INDIGENOUS FREE PASSAGE RIGHTS IN NORTH AMERICA

Joshua J. Tonra \*

## INTRODUCTION

Over the past few decades, border security has raised issues of paramount concern for the nations of North America due to problems associated with illegal immigration, drug trafficking, and the Global War on Terror.<sup>1</sup> By 2001, the borders between the United States and its neighbors had become increasingly more open, a result in part of the North American Free Trade Agreement (NAFTA).<sup>2</sup> This openness changed, however, on September 11, 2001.<sup>3</sup> Though none of the September 11th hijackers had entered the country through either Canada or Mexico, their attacks made the nation consider whether or not a change in border policy was necessary.<sup>4</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 was designed to restructure several different areas of government in the interests of national security, including border policy.<sup>5</sup> The bill included a mandate for the Department of Homeland Security to create and implement new documentation requirements for all persons entering the United States by January 1, 2008.<sup>6</sup> The Department's efforts resulted in the Western Hemisphere Travel Initiative (WHTI).<sup>7</sup> The WHTI's staged implementation requires individuals coming to the United States by air and sea to present a passport or other valid document to gain entry by December 31, 2006 and those entering by

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1. See Western Hemisphere Travel Initiative, 70 Fed. Reg. 52,037 (Sept. 1, 2005) [hereinafter WHTI]; DAVID E. LOREY, *THE U.S.-MEXICAN BORDER IN THE TWENTIETH CENTURY* 153-57 (1999).

2. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 1992 WL 812383 [hereinafter NAFTA].

3. Judith Golub, *Immigration Reform Post- 9/11*, 13 U.S.-MEX. L.J. 9 (2005).

4. *Id.*

5. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat 3638.

6. WHTI, *supra* note 1.

7. *Id.*

land by December 31, 2007.<sup>8</sup> The goal, undoubtedly, was to make both the U.S.-Canada and U.S.-Mexico borders more difficult to cross for would-be terrorists or criminals.

However, in the rush to secure the nation's borders, the traditional rights of Native Americans, Canada's First Peoples, and Mexico's Indigenous Peoples who live along the borders are threatened.<sup>9</sup> Prior to Western discovery, traditional tribal boundaries extended beyond the international borders established over the past 500 years. Under United States, Canadian, and Mexican law, the people of several indigenous nations have enjoyed rights of free passage through the borders, though these rights have been abrogated and restricted over time. The proposed changes in the WHTI and the general clamor for more controlled borders may, in the end, result in the complete abrogation of free passage rights still held by indigenous peoples.<sup>10</sup>

To further understand the border rights of indigenous people in North America, this note will examine the development and current state of passage rights under United States (Part I),<sup>11</sup> Canadian (Part II),<sup>12</sup> and Mexican law (Part III).<sup>13</sup> Part IV of this note will then critically explore the current state of the law as it affects two tribes whose homelands are bisected by the United States' borders with its neighbors: the Mohawk Nation, along the U.S.-Canada border; and the Tohono O'odham, on the U.S.-Mexico border.<sup>14</sup> The Note will conclude with an examination of a number of possible changes to border policies affecting the indigenous nations, and a proposal for a unified policy for the United States, Canada, and Mexico in cooperation with the tribes along the border.<sup>15</sup>

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8. WHTI, *supra* note 1, at 52,039.

9. The author has chosen to use three different terms because each country has a different name for their indigenous populations.

10. See generally, Eric Pianin & Bill Miller, *U.S. Borders Remain Vulnerable Despite New Measures, Ridge Says*, WASH. POST, Feb. 12, 2002, at A23; Mary Beth Sheridan, *U.S. Moves to Tighten Security on Borders; In Wake of Terrorist Attacks, Congress and INS Are Changing Their Priorities*, WASH. POST, Oct. 18, 2001, at A8; Michael Janofsky, *In California, Border Is Focus of an Election*, N.Y. TIMES, Dec. 4, 2005, at 42.

11. See *infra* Part I.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

## I. NATIVE AMERICAN BORDER PASSAGE RIGHTS UNDER UNITED STATES LAW

### A. *Treaties*

The borders of the United States and the U.S. government's policy regarding Native American passage rights were originally functions of treaties with Great Britain<sup>16</sup> and Mexico.<sup>17</sup> However, these rights have not remained static. Acts of Congress and court decisions have served to restrict them through the years. This section will examine the recognition and restriction of passage rights first for Native Americans along the U.S.-Canada border and then for Native Americans along the U.S.-Mexico border.

The foundation of the United States' border policy regarding Native Americans along the northern border is the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain, otherwise known as the Jay Treaty.<sup>18</sup> Though the Revolutionary War had ended more than a decade earlier,<sup>19</sup> tensions still remained between the United States and Great Britain, primarily a result of issues over military outposts along the U.S. northern frontier and British interference with shipping.<sup>20</sup> The Jay Treaty, named after John Jay, who negotiated its terms, concentrated primarily on commercial and navigational rights between the two countries but also contained important provisions regarding Native Americans.

Article III of the Jay Treaty guaranteed the rights of free passage of people and goods through the northern border with Canada for U.S. and British citizens "and also to the Indians dwelling on either side of the said boundary line."<sup>21</sup> Though several of the Treaty's articles contained "sunset provisions," Article III was one of the few to be made permanent.<sup>22</sup> Between the time the treaty was signed and its ratification

16. Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]; Treaty of Peace and Amity, U.S.-U.K., Dec. 24, 1814, 8 Stat. 218 [hereinafter Treaty of Ghent].

17. Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe-Hidalgo]; Gadsden Purchase Treaty, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031 [hereinafter Gadsden Purchase].

18. Jay Treaty, *supra* note 16.

19. U.S. Dept. of State, *John Jay's Treaty*, available at <http://www.state.gov/r/pa/ho/time/nr/14318.htm> (last visited Nov. 16, 2006) [hereinafter State Department].

20. *Id.*

21. Jay Treaty, *supra* note 16, at art. III.

22. *Id.* at art. XXVIII.

by the United States, an explanatory article was added. This provision was particularly necessary to determine the effect of treaties made between Native American tribes and either the U.S. or Great Britain.<sup>23</sup> This explanatory article made clear that no treaty or agreement made between the U.S. and other nations or Native American tribes could

be understood to derogate in any manner from the rights . . . secured by the aforesaid third article of the treaty . . . but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties on either side of said boundary line.<sup>24</sup>

These words, along with Article XXVIII, made clear that the rights of free passage of Native Americans and American and British citizens were permanent, and could not be abridged by subsequent treaty or agreement.<sup>25</sup>

Though the Jay Treaty was intended to bring an end to tensions and hostilities between the two countries, a series of trade and navigation disputes arose as a result of continued U.S. trade with Napoleonic France, over British objections.<sup>26</sup> The conflict escalated through the first decade of the 19th Century and came to a head when the United States declared war on Great Britain in 1812.<sup>27</sup> The War of 1812 lasted two years and was fought primarily on the North American continent.<sup>28</sup> This is important for two reasons: it created an issue of whether the terms of the Jay Treaty were still viable and Native American tribes renewed old alliances and sided with either the British or Americans.<sup>29</sup> By 1814, the war had essentially resulted in a stalemate, and both sides sought peace.<sup>30</sup>

Any questions concerning the applicability of the Jay Treaty after the War of 1812 were answered by the Treaty of Ghent, as most of the

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23. *Id.* at Explanatory Article. Specifically, the article was intended to explain what effects, if any, a treaty signed between the United States and a number of Native American tribes in the Ohio River Valley on August 3, 1795, would have on Article III of the Jay Treaty. *Id.*

24. *Id.*

25. *Id.* at art. XXVIII.

26. U.S. Dept. of State, *War of 1812*, available at <http://www.state.gov/r/pa/ho/time/jd/16314.htm> (last visited Nov. 20, 2006) [hereinafter *War of 1812*].

27. *Id.*

28. *Id.*

29. See generally, Jay Treaty, *supra* note 16; See also GERALD F. REID, *KAHNAWÀ:KE* 16 (2004).

30. *War of 1812*, *supra* note 26.

rights contained in the first treaty were reiterated.<sup>31</sup> Additionally, the Treaty of Ghent contained a provision specifically relating to Native American tribes who had taken sides during the war.<sup>32</sup> Article IX of the treaty provided that the United States and Great Britain would cease all hostilities with tribes in which they were each currently engaged, provided that the tribes ceased their hostilities with either country.<sup>33</sup> Finally, both countries agreed “to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in [1811].”<sup>34</sup> Presumably, this language would have guaranteed the rights of free passage for American and British citizens, as well as Native Americans, in Article III of the Jay Treaty, assuming that the article was indeed made permanent by Article XXVIII.<sup>35</sup>

The Treaty of Ghent largely settled the border between the United States and Canada and established free passage rights for Native Americans included in the Jay Treaty and Treaty of Ghent. These rights remained unaffected until Congress passed a series of Acts in the 1920s regarding citizenship and nationalization, generally, and Native American citizenship specifically.<sup>36</sup>

As with the northern border, the United States’ southern border, and border policy regarding Native Americans are the product of a series of treaties and international agreements, in this case, with Mexico.<sup>37</sup> In the decades following Mexico’s independence from Spain, disputes arose between the Mexican republic and the United States over territory.<sup>38</sup> These disputes culminated in the independence of Texas from Mexico and its subsequent annexation by the United States in 1845.<sup>39</sup> The Mexican-American War began a year later, and

31. Treaty of Ghent, *supra* note 16. It should be noted, however, that a subsequent U.S. Supreme Court decision held that the Treaty of Ghent had, in effect, abrogated Article III of the Jay Treaty and as a result, the rights of free passage could then be abrogated by act of Congress. *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 238 (1929).

32. Treaty of Ghent, *supra* note 16, at art. IX.; see also REID, *supra* note 29.

33. Treaty of Ghent, *supra* note 16, at art. IX.

34. *Id.*

35. See Jay Treaty, *supra* note 16, at arts. III & XXVIII. *But see Karnuth*, 279 U.S. at 238.

36. See *infra* Part I(C) (discussed in detail).

37. See Treaty of Guadalupe-Hidalgo, *supra* note 17; Gadsden Purchase, *supra* note 17.

38. U.S. Dept. of State, *Mexican-American War/Treaty of Guadalupe Hidalgo*, at <http://www.state.gov/t/pa/ho/time/dwe/16336.htm> (last visited Nov. 22, 2006) [hereinafter *Mexican-American War*].

39. *Id.*

ended in September 1847 with the U.S. capture of Mexico City.<sup>40</sup> The two treaties that officially brought an end to hostilities between the two countries, the Treaty of Guadalupe-Hidalgo in 1848 and the Gadsden Purchase in 1853, created the border between the two that, in large part, remains unchanged today.<sup>41</sup>

Additionally, as with the border between the United States and Canada, the U.S.-Mexico border also bisected the traditional lands of Native American tribes. However, as a result of a shift in both U.S. policy and the power dynamic between it and Native American tribes,<sup>42</sup> there were scant provisions protecting tribal rights in either treaty.<sup>43</sup> Those provisions that were included tell very little about what passage rights, if any, were either protected or abrogated.

Article XI of the Treaty of Guadalupe-Hidalgo recognized that Native American tribes would be affected by the newly created border between the United States and Mexico.<sup>44</sup> However, the provision contains no language relating to free passage rights, as had been included in the Jay Treaty and Treaty of Ghent.<sup>45</sup> The final clause of the article required only that the United States "restrain" itself from taking any actions to remove Native American tribes, causing them to flee to Mexico.<sup>46</sup> The lack of language in Article XI pertaining to Native American passage rights, or any rights at all, can be interpreted in two ways: the traditional rights of the tribes are unaffected by this provision or the language guaranteeing U.S. "restraint" recognizes their control over the Native Americans now within the territory of the

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40. *Id.*

41. *Id.*

42. During the period running from pre-Independence until roughly the 1820s, the United States took a relatively cautious approach in their dealings with Native American tribes, due in large part to equal populations and military strengths. At some point, this changed, and the U.S. took a much more decisive approach towards Native Americans, culminating in the Removal Policy. An examination of the changing power dynamic is beyond the scope of this article. For the purposes of this Note, it is enough to know that the shift occurred. See generally, Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J. L. REFORM 899, 920-39 (1998).

43. See Treaty of Guadalupe-Hidalgo, *supra* note 17, at art. XI; Gadsden Purchase, *supra* note 17, at art. II.

44. Treaty of Guadalupe-Hidalgo, *supra* note 17, at art. XI. It should be noted, however, that the bulk of Article XI of this treaty dealt with the guarantee of rights of Mexican citizens living in the area to be purchased by the United States.

45. *Id.*

46. *Id.* ("[S]pecial care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.").

country.<sup>47</sup>

One cannot answer the questions raised by Article XI of the Treaty of Guadalupe-Hidalgo regarding Native American free passage rights by merely examining the provisions of the Gadsden Purchase, signed five years later.<sup>48</sup> If anything, the provisions of the Gadsden Purchase serve to complicate matters. Article II of the Gadsden Purchase states only that the United States was released from its obligations under Article XI of the Treaty of Guadalupe-Hidalgo.<sup>49</sup> As such, Article II operated as a general release and contains no language relating to any specific clauses of Article XI or to Native American tribes.<sup>50</sup> Therefore, there is no answer as to whether these two treaties, taken as a whole, guarantee Native American passage rights, limit them, or abrogate them completely. Some of the tribes affected by the treaties and the establishment of the U.S.-Mexico border have interpreted the treaties as recognizing the sovereign rights of trans-border tribes, including the rights of free passage.<sup>51</sup> However, this interpretation has not been challenged or asserted in any United States court to date, so there is yet no definitive interpretation under U.S. law.

Though the treaties discussed in this section establish the foundation of Native American passage rights under United States law, this is by no means the end of the inquiry in determining the state of the law today. Passage rights have been altered or abrogated through the years by acts of Congress. Before turning to those acts, and subsequent court interpretation of their effects, it must be understood where Congress derives its power to alter the rights of Native Americans.

### *B. Congress's "Plenary"<sup>52</sup> Power*

There are few provisions in the United States Constitution which discuss Native Americans and their place under U.S. law. However, the federal government, specifically Congress, wields a substantial amount of power over the rights and privileges of Native Americans. To understand where Congress derives this power, one must examine a series of U.S. Supreme Court decisions stretching back to 1823.<sup>53</sup> The

47. *See id.*

48. Gadsden Purchase, *supra* note 17.

49. *Id.* at art. II.

50. *Id.*

51. Indigenous Peoples' Human Rights Initiative, The Tohono O'odham, <http://www.hrusa.org/indig/reports/Tohono.shtml> (last visited Nov. 21, 2006) [hereinafter Tohono O'odham].

52. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

53. *See Johnson v. McIntosh*, 21 U.S. 543 (1823).

roots of "Federal Indian Law" were sown in three Supreme Court decisions written by Chief Justice John Marshall. These cases, *Johnson v. McIntosh*,<sup>54</sup> *Cherokee Nation v. Georgia*,<sup>55</sup> and *Worcester v. Georgia*,<sup>56</sup> are collectively known as the "Marshall Trilogy."

The Constitution does not speak of Native American tribes as being either states or foreign nations, but instead as a separate *sui generis*,<sup>57</sup> or "unique"<sup>58</sup> entity.<sup>59</sup> As such, it was not clear whether the Federal government alone or the several states could conduct treaty negotiations, land transactions, or other government-to-government relations with Native American tribes. These cases collectively answered this question in favor of the Federal Government.<sup>60</sup> Having then determined which level and branch of government held power over Native American rights, the Supreme Court proceeded to define the limitations of this power over the next eighty years.

In 1886, the Supreme Court was called upon to determine whether Congress could extend the jurisdiction of the Federal Courts for crimes committed under the Indian Major Crimes Act.<sup>61</sup> Only three years earlier, Congress had passed a similar act that the Court had struck down.<sup>62</sup> In *United States v. Kagama*, however, the Supreme Court held that such jurisdiction did exist, and in dicta, extended the power of Congress over Native Americans to include the unilateral abrogation of treaties.<sup>63</sup> The Court relied on the holdings of the Marshall Trilogy, particularly the language in *Cherokee Nation* referring to tribes as "dependent nations."<sup>64</sup> It is arguable that this case, in and of itself, would extend to Congress nearly complete authority over tribal nations within the United States. All treaties between the United States and

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54. *Id.*

55. 30 U.S. 1 (1831).

56. 31 U.S. 515 (1832).

57. *Morton v. Mancari*, 417 U.S. 535, 551-554 (1974).

58. OXFORD DICTIONARY OF LAW 520 (Elizabeth A Martin ed., 6th ed. 2003).

59. *See, e.g.*, U.S. CONST. art I, § 8, cl. 3.

60. A thorough examination of the holdings and implications of the Marshall Trilogy are beyond the scope of this article. For the purposes of this Note, it is most important to understand that the power to negotiate treaties and land transactions with Native American tribes was held by the Federal Government as the dominant sovereign. *Johnson v. McIntosh*, 21 U.S. 543, 568 (1823). Further, the nature of Native Americans under U.S. law was defined in *Cherokee Nation*, as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

61. *United States v. Kagama* 118 U.S. 375, 376 (1886).

62. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

63. *Kagama*, 118 U.S. at 384-85.

64. *Id.* at 382-84.



2006] **Border Security and the Rights of Indigenous Peoples** 229

Native American tribes that had not been violated or nullified by this time, though still good law,<sup>65</sup> could now be amended or repealed at the whim of Congress and the tribes left without legal redress. This includes several treaties guaranteeing rights of passage.

Though the Supreme Court's decision in *Kagama* would seem to extend Congressional power over Native Americans to the limits of the Constitution, fifteen years later, the Court took it one step further. Citing all of the above cases, the Supreme Court in *Lone Wolf v. Hitchcock*,<sup>66</sup> held that the power of Congress to regulate affairs with Native Americans was "plenary" or absolute.<sup>67</sup> Additionally, the Court decided that this power was "a political one, not subject to be controlled by the judicial department of the government," which essentially took whatever Constitutional controls that the Supreme Court may have over an act of Congress, and left it to universal Congressional discretion.<sup>68</sup> The rights of Native Americans under treaties or United States law were thus left entirely in the hands of Congress.<sup>69</sup>

### C. *Acts of Congress and Judicial Interpretation*

Having determined the source of Congressional authority over Native American treaty rights, one may find the final piece of the puzzle in determining what rights of passage still exist under American law by analyzing a series of acts relating to nationality and the citizenship of Native Americans.

During the first hundred years of United States law, Native Americans were not considered to be U.S. citizens, reflecting the Supreme Court's decision that tribes were neither states nor foreign nations, but "domestic dependent nations."<sup>70</sup> As part of a general policy to eliminate tribal existence and assimilate the Native American population into the United States, Congress passed the General

65. See U.S. CONST., art. VI.

66. 187 U.S. 553 (1903).

67. *Id.* at 565.

68. See *id.* at 565, 568 ("We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.").

69. It should be noted that these decisions are still good law, and the plenary power of Congress over Native Americans (whether legitimate to begin with) is still recognized. Additionally, not every act of Congress subsequent to these decisions has stripped Native Americans of rights and privileges. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

70. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

Allotment Act.<sup>71</sup> The Dawes Act, as it is more commonly known, provided that by Act of Congress or Executive Order, reservations that had been set aside for tribes would be divided up into parcels and given to individual Native Americans, to be held for a twenty-five year period by the United States in trust, and then in fee simple absolute by these individuals.<sup>72</sup> Beyond this, section six of the Act declared that all tribal members participating in the allotment program and their children, as well as those who voluntarily gave up traditional Native American life, were granted citizenship of the state in which their property was located.<sup>73</sup>

Though this was the first step towards the conferral of citizenship on all Native Americans, it did not affect the free passage rights of certain Native Americans guaranteed in earlier treaties.<sup>74</sup> Other acts would follow through the years, granting citizenship to specific tribes, or providing that Native Americans could obtain citizenship through marriage and birth or as a veteran of World War I.<sup>75</sup>

Finally, in 1924, Congress extended citizenship to all Native Americans "born within the territorial limits of the United States."<sup>76</sup> The statute contained provisions protecting individual property rights as tribal members.<sup>77</sup> However, one could argue that the rights of free passage, though guaranteed in the Jay Treaty and Treaty of Ghent, are not in fact property rights, and would be abrogated by the Citizenship Act. In fact, in *Akins v. Saxbe*, the Federal Court for the District of Maine held that though the designations in the Jay Treaty and Treaty of Ghent were intended "to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by [Native Americans] on either side of the American and Canadian

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71. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) [hereinafter Dawes Act].

72. *Id.* It should be noted that this Act was disastrous for tribal governments, which in many cases ceased to exist, and for the individual Native Americans who were not used to nor prepared for individual land ownership.

73. *Id.* § 6.

74. *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974). This is due to the interpretation that the Jay Treaty and Treaty of Ghent's terms applied only to those Native Americans living along the United States border with Canada in 1811. See generally *id.*

75. *Indian Citizenship*, 4 INDIAN AFFAIRS: LAWS AND TREATIES 1166 (Charles J. Kappler ed., 1929) available at [http://digital.library.okstate.edu/kappler/vol4/html\\_files/v4p1165.html](http://digital.library.okstate.edu/kappler/vol4/html_files/v4p1165.html) (last visited Nov. 16, 2006) [hereinafter *Indian Citizenship*].

76. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924).

77. *Id.*

2006] **Border Security and the Rights of Indigenous Peoples** 231

border,"<sup>78</sup> subsequent acts of Congress have led to an interpretation that this right now belongs only to Canadian born Native Americans.<sup>79</sup>

Similarly, the *Akins* court relied upon *McCandless v. United States ex. rel. Diabo*, the leading case on the effects of Congressional Acts upon Native American free passage rights.<sup>80</sup> *McCandless* involved an individual named Paul Diabo. A member of the Mohawk tribe, Diabo was born on Kahnawake, a reservation located in Southern Quebec.<sup>81</sup> Diabo, like many *Haudenosaunee*<sup>82</sup> people, was an iron worker and traveled frequently between his home at Kahnawake and the cities in the Northeast United States.<sup>83</sup> In 1925, Diabo was arrested in Philadelphia as an illegal immigrant because he failed to obtain immigration papers from the United States government.<sup>84</sup> In response to his May, 1926 deportation, his attorneys petitioned for a writ of habeas corpus, arguing that Diabo had a right as a Canadian born Native American to pass freely between the United States and Canada under the Jay Treaty and Treaty of Ghent, and that the immigration laws under which he was arrested did not apply to him.<sup>85</sup> The Third Circuit Court of Appeals agreed.<sup>86</sup>

While *McCandless* may be a leading decision regarding Native American border passage rights, it failed to address two key issues. First, although *McCandless* and *Akins* dealt directly with the issue of the contemporary applicability of 19th Century Treaty rights, both decided that the rights of free passage are held *only* by Canadian born Native Americans.<sup>87</sup> These decisions fail to address rights of American born Native Americans to cross freely into Canada and do not at all address the rights of Native Americans not covered by the Jay Treaty or Treaty

78. 380 F. Supp. at 1219. *See also* Immigration and Nationality Act of 1952, 8 U.S.C. § 1359 (1952) ("Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.").

79. *Akins*, 380 F. Supp. at 1219.

80. *McCandless v. United States*, 25 F.2d 71 (3d Cir. 1928). It should be noted that the issue of passage rights has never reached the United States Supreme Court for a definitive explanation. The cases that do address the issue rarely reach the Circuit Courts of Appeals, and even then, are few and far between.

81. REID, *supra* note 29, at xi, 149.

82. *Haudenosaunee* is the name for the "Six Nations" or Iroquois Confederacy made up of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tuscarora.

83. REID, *supra* note 29, at 149.

84. *Id.*

85. *Id.* at 149-50; *McCandless*, 25 F.2d at 71-73.

86. *McCandless*, 25 F.2d at 73.

87. *See Akins*, 380 F. Supp. at 1219; *McCandless*, 25 F.2d at 73.

of Ghent, regardless of whether they live on the U.S.-Canada or U.S.-Mexico border.<sup>88</sup> Second, as *McCandless* is a decision of the Third Circuit Court of Appeals, it is not binding in any other Federal Circuit. Until the Supreme Court squarely addresses which passage rights are guaranteed by international treaties, inconsistent decisions and a lack of national clarity on this issue will remain the status quo.<sup>89</sup>

#### D. Conclusion

The issue of Native American passage rights would seem to be settled if treaties alone were the only law concerning this issue.<sup>90</sup> However, due in large part to the Supreme Court's recognition of Congress's plenary power over Native American affairs,<sup>91</sup> the rights contained in these treaties could be altered or abrogated at any moment. Acts of Congress and subsequent court decisions have proven this to be the case. So the question remains: what is the current state of United States law regarding Native American passage rights? There is no definite answer because the application of U.S. law differs from tribe to tribe. Many tribes have no rights of passage, as they were not covered by any of the treaties made between the United States and Great Britain or Mexico. Some who were guaranteed rights under these treaties are generally allowed to pass freely, though this will likely change with the implementation of the Western Hemisphere Travel Initiative.<sup>92</sup> Still others, whose rights have never been questioned, affirmed, nor rejected

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88. In fact, to the author's knowledge, no case has been brought in Federal Court to challenge United States border policy along the Mexico border alleging violations of Native American free passage rights contained in the Treaty of Guadalupe-Hidalgo, the Gadsden Purchase, or those not abrogated by Congressional act. Tribes along the U.S.-Mexico border have taken a different path in securing passage. See *infra* Part IV.

89. Though the *McCandless* decision is often cited when free passage and immigration issues arise regarding tribes along the U.S.-Canadian border, courts have followed it, limited its precedential value only to factually similar cases, or disregarded it entirely. For an excellent examination of the conflicting holdings on this issue, as well as the inconsistencies in United States border policy regarding Native Americans, see Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 475-480 (1999/2000) (citing *United States v. Garrow*, 88 F.2d 318 (C.C.P.A. 1937), *United States ex rel. Goodwin v. Karmuth*, 74 F. Supp. 660 (W.D.N.Y. 1947), *Akins*, 380 F. Supp. at 1210, *Akins v. United States*, 551 F.2d 1222 (C.C.P.A. 1977), *Matter of Yellowquill*, 16 I. & N. Dec. 576 (BIA 1978).

90. See U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States. . . and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land. . ."); but see *Foster v. Neilson*, 27 U.S. 253 (1829) (regarding the supremacy of treaties and "execution").

91. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

92. WHTI, *supra* note 1. See *infra* Part IV (for example, the Mohawk people of New York and southern Canada).

2006] **Border Security and the Rights of Indigenous Peoples** 233

in a United States court, were allowed to pass freely for decades before these rights were disregarded during the latter half of the 20th Century.<sup>93</sup> Finally, other tribes have guaranteed their rights through lobbying efforts and the passage of tribe-specific border passage laws.<sup>94</sup>

The absence of clarity and confusion resulting from a lack of a uniform policy needs resolution, particularly with border security currently a hot-button political issue. However, since the question of passage rights across international boundaries concerns not just the United States, a uniform policy between the U.S. and its neighbors will be required to balance issues of national security and the rights of indigenous peoples. As such, passage rights under Canadian and Mexican law require further examination.

## II. FIRST PEOPLES BORDER PASSAGE RIGHTS UNDER CANADIAN LAW

Having examined Native American free passage rights under United States law, a first look at these same rights for First Peoples<sup>95</sup> under Canadian Law seems relatively simple, at least on the surface. This is not the case. Though Canadian law and United States law both rely on the same foundations regarding passage rights, divergences under the Canadian constitution and the recognition and enforcement of tribal rights differentiate the laws of the two nations.<sup>96</sup>

### A. *The Jay Treaty and Marshall Trilogy*

An examination of First Peoples passage rights under Canadian Law must also begin with the Jay Treaty<sup>97</sup> and Treaty of Ghent.<sup>98</sup> Though Canada was not a signatory to either treaty, it was part of the British Empire at the time, and both treaties relate directly to the land that would become modern day Canada.<sup>99</sup> When independence first

93. See Tohono O'odham, *supra* note 51.

94. See, e.g., *id.*; Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983) (guaranteeing tribal members the right to pass freely through the U.S.-Mexico border during certain times of year).

95. "First Peoples" is a term used by the Canadian government to refer to its indigenous peoples, including the Inuit and Métis peoples.

96. For a more thorough examination of these differences, see Bryan Nickels, Note, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313 (2001).

97. Jay Treaty, *supra* note 16.

98. Treaty of Ghent, *supra* note 16.

99. See *supra* Part I(A).

came in 1867,<sup>100</sup> Canada, as successor to Great Britain, became bound by the rights and obligations of the prior colonial power, including those rights under the Jay Treaty and Treaty of Ghent.<sup>101</sup>

Another similarity remains between U.S. and Canadian law regarding free passage rights: the Marshall Trilogy.<sup>102</sup> These three cases were not binding upon the Canadian government or its courts. However, by virtue of their subject matter and because they were decided prior to the Constitution Act of 1867, they have been recognized as creating the foundation of Canada's relations with its First Peoples.<sup>103</sup> The classification of Native Americans by Marshall in *Cherokee Nation* as "domestic dependent nations"<sup>104</sup> and not as a fully sovereign nation would be reflected in their treatment under Canadian law:

This relationship required the Aboriginal nations to treat exclusively with the sovereign power in whose sphere of influence they found themselves. Although the relationship impaired the full sovereignty of the Aboriginal nations, it did not extinguish their self governing rights, nor did it affect their other rights as the original inhabitants of the lands they occupied.<sup>105</sup>

However, the extent of these rights would be extremely limited for many years, after the passage of the Constitution Act of 1867.<sup>106</sup>

### B. *The Divergence of U.S. and Canadian Law*

The Constitution Act of 1867 "established Canada as a nation."<sup>107</sup> The Act established the Canadian government, and that nation's relationship with the First Peoples.<sup>108</sup> Section 91(24) of the Act conferred jurisdiction over the First Peoples and their lands to Canada's Federal Government.<sup>109</sup> It provided, in part, that "Parliament has

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100. Fred Plain, *A Treatise on the Rights of Aboriginal Peoples of the Continent of North America*, in *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 31 (Menno Boldt & J. Anthony Long eds., 1985) (discussing the Constitution Act of 1867).

101. See *supra* Part I(A).

102. See ROBERT MAINVILLE, *AN OVERVIEW OF ABORIGINAL AND TREATY RIGHTS AND COMPENSATION FOR THEIR BREACH* 10-15 (Purich Publishing Ltd. 2001) (1953).

103. *Id.* at 15 ("These three decision of the Marshall Court have been very influential in defining and giving content to the normative order that resulted from the contact between Aboriginal nations and the Crown.").

104. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

105. MAINVILLE, *supra* note 102, at 15.

106. See Plain, *supra* note 100, at 35.

107. *Id.* at 34.

108. *Id.*

109. *Id.*

2006] **Border Security and the Rights of Indigenous Peoples** 235

exclusive jurisdiction over 'Indians, and Lands reserved for the Indians.'<sup>110</sup> In many ways, this provision gave the same powers to the Canadian government that the United States Congress now enjoys as a result of our Supreme Court's decisions.<sup>111</sup> Relying upon the language of Section 91(24), the Canadian government passed the Indian Acts, beginning in 1868, which defined "Indians" and their rights under Canadian Law.<sup>112</sup>

The effect of these acts, which were quite repressive, finally came to an end when the Canadian Constitution was amended in 1982.<sup>113</sup> The Constitution Act of 1982 contained a provision pertaining specifically to First Peoples. The Act "recognized and affirmed" the existing aboriginal and treaty rights of Canada's aboriginal people.<sup>114</sup> The meaning of this language, particularly the question of which treaty rights would be "recognized and affirmed,"<sup>115</sup> has been the subject of much debate and litigation in Canada.<sup>116</sup> These rights include border passage under the Jay Treaty.

Unlike the United States, which has adopted the terms of the Jay Treaty relating to Native American free passage rights,<sup>117</sup> the nation of Canada, its law, and its courts have taken a more restrictive approach.<sup>118</sup> This has served as a detriment to the well-being and rights of tribes on both sides of the border.<sup>119</sup> Similar to the United States courts, however, Canadian courts have never provided a clear, focused answer to the question of passage rights.<sup>120</sup> At best, one can only gather from these decisions that "Canadian courts restrict the right of entry by U.S. Indians to those groups that can demonstrate a historical right and practice to do so."<sup>121</sup> To further exacerbate the problem, this right only extends to areas where First Peoples were traditionally able to exercise it.<sup>122</sup> This is a far narrower interpretation than that taken by the United

110. MAINVILLE, *supra* note 102, at 18.

111. *See supra* Part I(B).

112. MICHAEL ASCH, *HOME AND NATIVE LAND* 3 (1984).

113. MAINVILLE, *supra* note 102, at 24.

114. *Id.* (citing Constitution Act, 1982, Schedule B, R.S.C., ch. 25 (1985)).

115. *Id.*

116. *See generally* MAINVILLE, *supra* note 102; SHIN IMAI, *ABORIGINAL LAW HANDBOOK* (2d. ed. 1999).

117. *See* Immigration and Nationality Act of 1952, *supra* note 78.

118. Nickels, *supra* note 96, at 315.

119. *Id.*

120. *Id.* at 327-332 (examining Canadian case law producing different interpretations of aboriginal rights under the Jay Treaty).

121. *Id.* at 331 (citing *Watt v. Liebelt*, 1998 CRR LEXIS 458 at \*23).

122. *Id.* at 315 (citing *Liebelt*, 1998 CRR LEXIS 345, at 26-27 (discussing the so-

States.<sup>123</sup> Nevertheless, at a minimum, the Canadian Constitution expressly recognizes these rights and the body of Canada's judicial interpretive law bears this out. The breadth and scope of these rights remain undefined and are continually tested and challenged in litigation, stemming from allegations that Canada has often abrogated them.<sup>124</sup>

### C. Conflict in Canadian Law

Some commentators and courts seem to believe that Canadian law regarding First Peoples and Native American border passage rights, though restrictive, is relatively settled, especially when compared to United States law. However, lawsuits brought by some Canadian border tribes challenge this notion.<sup>125</sup> For example, Canadian border tribes have brought legal challenges that raise questions about whether Canada's recognition of First Peoples treaty rights should supersede those contained in the Constitution Act of 1867.

As discussed earlier, the Constitution Act of 1867 gave the Canadian government control and jurisdiction over tribal lands.<sup>126</sup> The Canadian government has relied upon the Act's provisions to establish customs stations along the U.S.-Canada border within the territorial boundaries of tribal reservations, including sizable Mohawk reservation lands that stretch through southern Ontario and Quebec.<sup>127</sup> These lands, bisected by the border, include widely used crossing points that lie between the United States and Canada,<sup>128</sup> as well as a substantial portion of the St. Lawrence River. The establishment of these customs stations, and their interference with the transportation and passage of nation members through Mohawk territory has given rise to disputes between the Mohawk people and the Canadian government.<sup>129</sup> The Mohawks have challenged the jurisdiction of the Canadian government and its customs officers on a number of grounds. First, they contend that the lands on which the stations are placed were confiscated through

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called "nexus test").

123. Nickels, *supra* note 96, at 315.

124. See Angie Barnes, Grand Chief, Mohawk Council of Akwesasne, Address to the Haudenosaunee Under Siege Conference at Syracuse University College of Law (Nov. 19, 2005) (notes on file with the author) [hereinafter Angie Barnes].

125. See *id.*

126. Plain, *supra* note 100, at 35.

127. Angie Barnes, *supra* note 124.

128. *Id.*; John F. Burns, *Canada Proposes Settlement in Mohawk Standoff*, N.Y. TIMES, July 29, 1990, at A6.

129. Angie Barnes, *supra* note 124.



illegal land takings by the Canadian government.<sup>130</sup> Second, they argue that the Jay Treaty<sup>131</sup> and Canada's express recognition of First Peoples' tribal rights under the Constitution Act of 1982,<sup>132</sup> guarantee the right of free passage of tribal members and their goods without interference.<sup>133</sup>

Because both sides may have a valid claim under the current body of Canadian law, a paradox exists. Absent a final determination by the Canadian courts or a change to the Constitution, Canadian jurisdiction over tribal territory<sup>134</sup> and recognition of tribal treaty rights<sup>135</sup> conflict, and the placement of customs stations and the activities of customs officials on tribal lands remain a point of heated contention. Grand Chief Angie Barnes of Akwasasne has stated that so far, the challenges raised in court by her tribe have been successful, but only at the lower levels of the Canadian judicial system.<sup>136</sup> However, she recognizes that the decisions of the Canadian Supreme Court<sup>137</sup> and their reliance on the Marshall Trilogy, as precedent in Canadian law,<sup>138</sup> cast a long shadow over any tribal assertion of free trade and passage rights under the Jay Treaty.<sup>139</sup>

#### D. Conclusion

Native American and First Peoples rights of passage through the border between the United States and Canada are founded upon the same legal principles.<sup>140</sup> However, Canadian constitutional law and court interpretation of First Peoples' treaty rights remain far more restrictive than those recognized under United States law.<sup>141</sup> As a result, under certain circumstances, certain aboriginal people of Canada enjoy a right to free passage through the U.S.-Canada border, similar to that enjoyed by Native Americans in the United States. However, this right cannot be viewed as either absolute or universal in either country. Finally, without clarification from the Canadian courts on conflicting

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130. *Id.*

131. Jay Treaty, *supra* note 16, at art. III; Treaty of Ghent, *supra* note 16, at art. IX.

132. MAINVILLE, *supra* note 102, at 24 (citing Constitution Act, 1982, Schedule B, R.S.C., ch. 25 (1985)).

133. Angie Barnes, *supra* note 124.

134. *See Plain*, *supra* note 100, at 35.

135. *See Constitution Act, 1982, Schedule B, R.S.C., ch. 25 (1985).*

136. Angie Barnes, *supra* note 124.

137. *See Nickels*, *supra* note 96, at 327-32.

138. MAINVILLE, *supra* note 102, at 15.

139. Angie Barnes, *supra* note 124.

140. *See supra* Part II(A).

141. Nickels, *supra* note 96, at 315.

constitutional provisions relating to Canadian sovereignty over tribal lands and the rights of First Peoples guaranteed by treaties, the law of border passage rights will remain on shaky ground, and will lead to further legal challenges.

### III. INDIGENOUS PEOPLES BORDER PASSAGE RIGHTS UNDER MEXICAN LAW

Similar to the United States and Canada, Mexican law regarding indigenous peoples' border passage rights is largely a function of international treaties. However, border passage rights under Mexican law have been characterized by legal extremes when compared to the recognition and slow refinement of these rights, as has been the case under United States law,<sup>142</sup> or, with little recognition and restrictive exceptions, under Canadian law.<sup>143</sup> For nearly 100 years after the Mexican-American War, Mexico's enforcement of its borders was largely non-existent.<sup>144</sup> But, during the latter half of the 20th Century, particularly during the 1980s and 1990s, Mexico has acted at the behest of the United States government to strictly enforce border passage rights; as a result, the rights secured by indigenous peoples along the border through treaties with the United States have gone completely unrecognized.<sup>145</sup>

#### A. *Treaties and 100 Years of Border Policy*

Mexico's border with the United States was the product of the Treaty of Guadalupe-Hidalgo<sup>146</sup> (which ended the Mexican-American War) and the subsequent Gadsden Purchase.<sup>147</sup> As discussed in Part I of this note, Article XI of the Treaty of Guadalupe-Hidalgo recognized that the newly established border would have the effect of bisecting the traditional lands of the indigenous peoples of modern-day northern Mexico and the American desert-southwest.<sup>148</sup> However, the provision stated only that the United States was obligated to respect the rights of those tribes and to "refrain" from removing them, presumably causing them to flee across the Mexican border.<sup>149</sup> Neither of these agreements

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142. See *supra* Part I.

143. See *supra* Part II.

144. Tohono O'odham, *supra* note 51.

145. See *id.*; THOMAS TORRANS, FORGING THE TORTILLA CURTAIN 283, 325-26 (2000).

146. Treaty of Guadalupe-Hidalgo, *supra* note 17, at art. V.

147. Gadsden Purchase, *supra* note 17, at art. XI.

148. Treaty of Guadalupe-Hidalgo, *supra* note 17, at art. XI.

149. *Id.*

contain any provision relating to Mexico's rights or its obligations regarding its indigenous border populations.<sup>150</sup> At the time, such a provision was unnecessary because the land upon which the tribes had traditionally lived remained part of Mexico. Similarly, when Mexico released the United States from its obligations under Article XI of the Treaty, a change in Mexico's responsibility for the passage rights of indigenous populations had yet to occur.<sup>151</sup>

As a result, for nearly 100 years following the signing of the Gadsden Purchase, the passage rights of Mexico's indigenous populations along the border remained static.<sup>152</sup> Border enforcement and immigration restrictions were non-existent in either country until 1918, when the Bureau of Narcotics was created from within the U.S. Treasury Department, followed by the formation of the United States Border Patrol in 1924.<sup>153</sup> These agencies, however, were responsible for enforcement of the United States side of the border, and Mexico would not take an active role until the latter half of the 20<sup>th</sup> Century.<sup>154</sup> As a result, tribes which had lived and traveled for hundreds of years through their traditional lands, continued to do so across the international border.<sup>155</sup>

### *B. Illegal Immigration and the War on Drugs*

While Mexican enforcement of its northern border was non-existent for many years, a radical policy shift, brought on in large part by changes in United States immigration and drug trafficking laws, has resulted in a crackdown on unauthorized passage between the two countries.<sup>156</sup> Though illegal immigration and the illegal drug trade are no doubt serious problems for both countries, the lack of specific exceptions or policies for many indigenous people has had disastrous effects on the border tribes and their members.<sup>157</sup>

Even before President Nixon's declaration of the "War on Drugs"

150. *Id.*; Gadsden Purchase, *supra* note 17.

151. See Gadsden Purchase, *supra* note 17, at art. II. It should be noted, however, that the Gadsden Purchase did have a similar effect on tribes living along the modern-day Arizona-Mexico border, as the acquisition of Arizona extended the border established in the Treaty of Guadalupe-Hidalgo from western Texas to California. See *Mexican-American War*, *supra* note 38; Tohono O'odham, *supra* note 51.

152. Tohono O'odham, *supra* note 51; see, e.g., TORRANS, *supra* note 145, at 259-82.

153. TORRANS, *supra* note 145, at 282-83.

154. *Id.*

155. Tohono O'odham, *supra* note 51.

156. TORRANS, *supra* note 145, at 325-26.

157. Tohono O'odham, *supra* note 51.

and the restrictive immigration policies of the 1980s and 1990s, unauthorized border passage and drug trafficking were commonplace along the U.S.-Mexico border.<sup>158</sup> The earliest border laws and agencies were created by the United States, first as a means to limit Chinese and Mexican immigration into the country,<sup>159</sup> then to combat the import of cocaine and marijuana from South America.<sup>160</sup> There was, however, an ebb and flow in terms of enforcement, primarily because of economic conditions within the United States. Enforcement was less necessary during times of high poverty and unemployment, for example during the Great Depression.<sup>161</sup> However, during the latter half of the 20th century, as economic growth in the United States accelerated and the Mexican economy failed to keep pace, illegal immigration increased and more restrictive border policies resulted.<sup>162</sup>

Enforcement of drug trafficking laws, on the other hand, saw a progressive increase throughout the 20th Century, reaching its peak in the 1980s.<sup>163</sup> The first drug laws were passed in the early 1900s to combat the influx of drugs from Mexico and Latin America.<sup>164</sup> Criminal penalties for drug trafficking grew more severe as time went on, yet more drugs were entering the United States and the drug trade became increasingly more violent.<sup>165</sup> By the 1980s, illegal drugs were "pouring" into the United States from Mexico, and a more coordinated effort to combat trafficking was undertaken, within the U.S. and in cooperation with the Mexican government.<sup>166</sup>

During this period, as American border policy became more restrictive, so too did enforcement in Mexico.<sup>167</sup> Whether caused by economic disparity and/or an imbalance in international political power, the fact remains that the United States has dictated changes under Mexican law.<sup>168</sup> As a result, the U.S.-Mexico border is one of the most

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158. TORRANS, *supra* note 145, at 282-83, 291-94.

159. *Id.* at 259-82.

160. *Id.* at 291-93.

161. The effects of a market downturn would be felt on both sides of the border, though more severely in the more impoverished border areas of Northern Mexico. Illegal immigration and border enforcement would spike at first, but then taper off as jobs could not be found on either side. *See id.* at 282.

162. *Id.* at 325-26.

163. It is arguable that given the present concerns over terrorism and illegal immigration, border enforcement has not yet peaked. *See supra* Introduction.

164. TORRANS, *supra* note 145, at 291-93.

165. *Id.* at 294, 306-07.

166. *See id.* at 310-16.

167. *Id.* at 325-26.

168. *Id.* This is not to say that Mexico has not suffered equally as a result of drug

2006] **Border Security and the Rights of Indigenous Peoples** 241

heavily watched and regulated borders in the world, at least at major crossing points.<sup>169</sup> In other areas, particularly those targeted as smuggling points by traffickers, enforcement is sporadic but still more proactive and restrictive than in earlier years.<sup>170</sup>

Unfortunately, indigenous border communities have been caught in the middle of shifting border policies and heavy enforcement. The results for the tribes have proven disastrous.<sup>171</sup> Tribes such as the Tohono O'odham and Pascua Yaqui of Arizona, Kickapoo of Texas, and Kumeyaay of California, whose traditional homelands are bisected by the U.S.-Mexico border, have suffered on both a tribal and individual level.<sup>172</sup> For many of the border tribes, it was common practice to migrate from one village to another during the year or to visit sacred places away from their village.<sup>173</sup> The more heavily enforced border has either completely prevented tribal members from doing this, or made it far too difficult.<sup>174</sup> At the same time, the border, and blanket enforcement restrictions associated with it, has separated family members from each other.<sup>175</sup> This situation poses a grave threat to the survival of the tribes as distinct cultural entities because traditional religious and cultural practices and native languages are not being shared and passed on to younger generations.<sup>176</sup>

### C. *Slow Progress Towards Free Passage*

Though restrictive border policies remain a major problem for border tribes, the Mexican government has taken steps in recent years to ease restrictions for its indigenous peoples, albeit on an individualized and very limited basis. These changes are, however, steps in the right direction, and may provide a blueprint for expanded border passage rights in the future. In 2002, the Mexican government agreed to help

trafficking through the U.S.-Mexico border. See, e.g., *id.* at 314.

169. See generally LOREY, *supra* note 1.

170. Tohono O'odham, *supra* note 51; *CNN Insight: Someone Else's Border* (CNN television broadcast Mar. 26, 2001) (transcript available at [http://transcripts.cnn.com/TRANSCRIPTS/0103/26/i\\_ins.00.html](http://transcripts.cnn.com/TRANSCRIPTS/0103/26/i_ins.00.html)) (last visited Nov. 21, 2006)) [hereinafter *CNN Insight*].

171. Tohono O'odham, *supra* note 51.

172. David LaGessee, *U.S. Hopes New Border Policy with Mexico Eases Tribes' Passage; Indian Leaders Cite Threat to Culture*, DALLAS MORNING NEWS, Mar. 12, 2000, at A23.

173. See *id.*; Tohono O'odham, *supra* note 51.

174. Tohono O'odham, *supra* note 51; Chet Barfield, *Baja Indians Seek Help with Border Documents*, SAN DIEGO UNION-TRIB., Jan. 17, 2002, at B8; LaGessee, *supra* note 172.

175. Tohono O'odham, *supra* note 51.

176. *Id.*

tribal members of Kumeyaay obtain documents to pass through the U.S.-Mexico border in California and reunite with tribal members living in the United States.<sup>177</sup> The Mexican government provided tribal members with identification cards, which were then used to obtain Mexican passports and border-crossing cards.<sup>178</sup> These border-crossing cards allow for temporary passage into the U.S.<sup>179</sup> Although this was done for only fifty members of the Kumeyaay tribe, the experiment was successful and without incident.<sup>180</sup> As a result, other test programs have been created jointly between the Mexican government and the U.S. Immigration and Nationalization Service (USCIS) to assist members of the Tohono O'odham nation across the border.<sup>181</sup>

Through these successes, as well as larger indigenous peoples' rights movements within Mexico,<sup>182</sup> greater recognition of indigenous autonomy and rights has occurred in the country. However, this has not yet resulted in recognition of the rights of free passage of indigenous peoples through the U.S.-Mexico border. The Mexican government and the United States Citizenship and Immigration Services still require any person attempting to cross the border to have documentation.<sup>183</sup> In order to get these documents, indigenous peoples must register as Indians with the government, as the Tohono O'odham and Kumeyaay people were required to do.<sup>184</sup> While registration affords tribal members the special rights given to the indigenous peoples of Mexico, certain burdens accompany these rights, including registration for military service for individuals and high administrative costs for the tribes.<sup>185</sup> Additionally, many members, particularly tribal elders, lack any of the required documentation because they were born in isolated villages.<sup>186</sup>

While the efforts of the Mexican government are commendable, that government has not recognized indigenous free passage rights, and Mexican law remains a stumbling block that impedes border crossing for many indigenous people. Given the increasing emphasis on border

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177. Barfield, *supra* note 174.

178. *Id.*

179. *Id.*

180. *Id.*

181. LaGesse, *supra* note 172.

182. *See generally* INDIGENOUS AUTONOMY IN MEXICO (Aracely Burguete Cal y Mayor ed., 2000) (discussing the Zapatista Revolution in the Chiapas region of southern Mexico).

183. LaGesse, *supra* note 172.

184. *Id.*

185. *Id.*

186. *Id.*

security in combating terrorism, drug trafficking, and illegal immigration in the United States, this is unlikely to change in the near future.<sup>187</sup> Rather, so long as the power dynamic between the United States and Mexico remains as it is,<sup>188</sup> the border passage rights of the indigenous peoples living on or near the border will remain restricted.

#### IV. CASE STUDIES: COMPARING THE MOHAWK AND TOHONO O'ODHAM

The three nations of North America, though having similar legal foundations, have all taken divergent paths regarding the passage rights of their indigenous populations. Tribal rights that had been held and freely exercised and honored for centuries prior to Western discovery are now recognized only to a limited degree, as with the nations living along the United States-Canada border,<sup>189</sup> or recognized on a limited, ad hoc basis.<sup>190</sup> In no sense, however, are any tribes' rights of passage truly "free."

In order to better understand what effect these restrictions have on border tribes, one must look at both the tribes as they currently exist under the different legal systems and their history. Such an examination will show how different current border passage rights are when compared to earlier times, the manner in which the restrictions have had a negative impact on tribal society and culture, the extent to which tribal members have pressed for recognition of their rights, and how they have been forced to ignore or violate "the law" in order to observe these rights.<sup>191</sup> Additionally, close examination of the current state of affairs allows for a critical evaluation of the problems associated with each country's internal border policies, as well as those which arise where the laws of the three nations are inconsistent or conflicting. This section will focus on two border tribes,<sup>192</sup> the Mohawk and the Tohono O'odham, whose traditional homelands and contemporary reservations are bisected by the U.S.-Canada and U.S.-Mexico borders,

187. See *supra* Introduction.

188. See TORRANS, *supra* note 145, at 325-26.

189. See *supra* Part I-II.

190. See *supra* Part III.

191. It is important to keep in mind that many tribes see border passage rights, guaranteed by treaty, as the law. See Tohono O'odham, *supra* note 51. See also U.S. CONST. art. VI.

192. A complete examination of border passage rights for each tribe is beyond the scope of this article, as there are more than 500 federally recognized tribes in the United States, and many others in Canada and Mexico. Suzan Shown Harjo, *Truth Versus Accuracy in New York Times Articles*, INDIAN COUNTRY TODAY, Feb. 24, 2006.

respectively.<sup>193</sup>

### A. The Mohawk

The Mohawk are traditional members of the Haudenosaunee (Iroquois) Confederacy and guard its eastern border.<sup>194</sup> At one time, their lands stretched through much of the Mohawk Valley of Upstate New York to the St. Lawrence River, separating the United States and Canada.<sup>195</sup> Over time, the Mohawk formed three settlements along the St. Lawrence River at Oswegatchie, present day Ogdensburg, NY; St. Regis (Akwasasne), near Malone, NY; and Kahnawake, south of Montreal.<sup>196</sup> Though once a single tribal entity, by the time of the American Revolution, the Mohawk had broken into three settlements, distinct in culture, religion, and politics, largely a result of frequent interaction with French missionaries and traders.<sup>197</sup> Indeed during the Revolutionary War, the St. Regis and Kahnawake Mohawk broke with other nations and fought with the American colonies.<sup>198</sup>

At the end of the Revolutionary War, the border between the United States and Canada was set at the 45th Parallel; as a result, the St. Regis settlement was bisected by the new international boundary, with Oswegatchie falling entirely on the United States side and Kahnawake on the Canadian side.<sup>199</sup> The presence of the border, at least initially, went unnoticed by any of the settlements, and the right to pass freely through the border was not interfered with. Indeed, the right of free passage was recognized and reconfirmed in the Jay Treaty and Treaty of Ghent, respectively.<sup>200</sup> For many years, the rights to pass and conduct trade were not interfered with on either side of the border.<sup>201</sup>

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193. St. Regis Mohawk Tribe, Tribal History, <http://www.stmtnsn.gov/his.htm> (last visited Nov. 20, 2006) [hereinafter St. Regis Mohawk]; Tohono O'odham, *supra* note 51.

194. St. Regis Mohawk, *supra* note 193. The Mohawk were known as the "Keepers of the Eastern Door." *Id.*

195. *Id.*

196. *Id.*; REID, *supra* note 29, at 1-9.

197. St. Regis Mohawk, *supra* note 193.

198. *Id.* The St. Regis and Kahnawake Mohawk have traditionally been very close. Tribal members from Kahnawake were actually the first to go to St. Regis and begin the settlement there. Though now of different nationalities, as the Kahnawake Reservation is located entirely within Quebec with St. Regis straddling the St. Lawrence River between New York and Ontario, the ties between the two reservations seem to remain close. *See id.* *See also* REID, *supra* note 29, at xii fig.1.

199. St. Regis Mohawk, *supra* note 193.

200. Jay Treaty, *supra* note 16, arts. III, XXVIII, Explanatory Article; Treaty of Ghent, *supra* note 16, art. IX.

201. The right of free passage to conduct trade was also guaranteed by article III of the Jay Treaty. Jay Treaty, *supra* note 16, art. III.



As discussed in Part II and III above, this began to change toward the end of the 19<sup>th</sup> Century and first half of the 20<sup>th</sup> Century.<sup>202</sup> The changes under American law were predominantly a function of the granting of citizenship to Native Americans.<sup>203</sup> In Canada, the changes were the result of increased jurisdictional control undertaken by the Canadian government, as a function of powers recognized in the Constitution Act and subsequent Indian Acts.<sup>204</sup> While these changes have negatively impacted the degree to which the different Mohawk reservations have interacted, with an accompanying detriment to the cultural survival of the tribe, the largest issues concerning the Mohawk on both sides of the border are primarily commercial in nature.<sup>205</sup>

One of the major concerns for federal officials on both sides of the border has been, and remains illegal smuggling, particularly of drugs, and people, albeit to a lesser degree.<sup>206</sup> For American officials, the presence of reservations along the border has been particularly problematic.<sup>207</sup> Given that the Supreme Court has traditionally recognized that tribal governments still hold sovereignty and jurisdictional control over their lands,<sup>208</sup> the American government has taken a comparatively "hands-off" approach to border enforcement within the territorial boundaries of the reservations along the U.S.-Canada border.<sup>209</sup> As a result, smugglers from within the reservation, as well as those looking to exploit a perceived gap in border enforcement, have used the reservations as both, a smuggling route and dropping off point.<sup>210</sup> Recent drug related arrests on the St. Regis territory, as well as news reports in the *New York Times*, have brought heightened scrutiny upon the manner in which the border is enforced within the

202. See *supra* Parts II-III.

203. See generally *Indian Citizenship*, *supra* note 75; *Indian Citizenship Act*, *supra* note 76.

204. ASCH, *supra* note 112, at 3. See also Angie Barnes, *supra* note 124.

205. See generally Angie Barnes, *supra* note 124. These concerns, however, are not a recent development. As discussed in Part I, Mohawk members had traveled for years from Canada to the United States to find work, and the case of Paul Diabo is one of the few to discuss traditional treaty rights under American law. See *supra* Part II; REID, *supra* note 29, at 149-150; *McCandless v. United States ex rel. Diabo*, 25 F.2d 71 (3d Cir. 1928).

206. Sarah Kershaw, *Through Indian Lands, Drugs' Shadowy Trail*, N.Y. TIMES, Feb. 19, 2006, at 1.

207. *Id.*

208. See generally *Worcester v. Georgia*, 31 U.S. 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Lara*, 541 U.S. 193 (2004).

209. See Kershaw, *supra* note 206.

210. *Id.*

reservation.<sup>211</sup>

For the Mohawks living on the Canadian side of the border, a lack of border security is not the problem. Rather, people of the Kahnawake and Akwasasne tribes complained of the heavy-handed presence of the Royal Canadian Mounted Police and Canadian border agencies on their reservations and their resulting infringement of free passage rights.<sup>212</sup> As mentioned previously, the Canadian government has gone so far as to place regulated border crossings and customs stations within the territorial limits of the Canadian Mohawk reservations.<sup>213</sup> While their presence is, arguably, necessary considering the problems associated with illegal smuggling through the U.S.-Canada border, they have failed to stem the tide of smuggling and have been a source of conflict and litigation between the Mohawk and Canadian governments.<sup>214</sup>

For the Mohawks on the American border, their own enforcement of the border within the territory is a double-edged sword. The Mohawks have been able to regulate the international border crossing through their reservation without the same type of interference found in Canada because they were one of the few tribes to press their treaty rights in United States' courts.<sup>215</sup> This has allowed the Mohawk people to travel freely across the border, as has traditionally been their right. Yet they are forced to spend an increasingly large portion of tribal funds on border enforcement, in part because of growing concern over illegal smugglers using their lands and also the result of decreases in federal grants.<sup>216</sup> Increased scrutiny of border control in tribal reservations threatens to destroy this already fragile balance.

For the Mohawk, articles such as one recently published in the *New York Times* create a negative public perception of security at the St. Regis Reservation.<sup>217</sup> The Mohawk feel that the article gives the false impression that they are a lawless people, and that money from their legal gambling operations in New York and political influence within the tribal government have been used to fund multi-million dollar drug

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211. *Id.*

212. Angie Barnes, *supra* note 124.

213. *Id.*

214. Kershaw, *supra* note 206; Angie Barnes, *supra* note 124. At the same time, the Mohawk have complained that the presence of the border stations and agents within the reservation has led to increased harassment of the Mohawk people in violation of their treaty rights. See Angie Barnes, *supra* note 124.

215. See *McCandless v. United State ex rel. Diabo*, 25 F.2d 71 (3d Cir. 1928).

216. Tribal Council of St. Regis Mohawk, *St. Regis Mohawk Tribal Council: An Apology is due from the New York Times*, INDIAN COUNTRY TODAY, Feb. 24, 2006.

217. *Id.*

smuggling operations with connections throughout the Northeast.<sup>218</sup> While the Mohawk government refutes that either is the case, the negative perception that the article has fed will cause two potentially devastating problems for the tribe.<sup>219</sup> First, the tribal government will be forced to divert even more funds away from essential programs to pay for an increase of border patrols.<sup>220</sup> The second, and potentially more harmful effect, is that the federal government may come to believe that the Mohawk are incapable or unwilling to patrol the border, and that this key area of national security must be turned over to the Customs and Border Patrol completely.<sup>221</sup> Were this to happen, the Mohawk in New York would face obstacles and restrictions similar to that of their Canadian counterparts, and with them, the potential for a greater erosion of their traditional passage rights increases.

Although the difference in treatment by the United States and Canadian governments of border rights is of great concern for the Mohawk, they still enjoy a comparatively greater degree of autonomy and freedom than other tribes along the same border,<sup>222</sup> and far more than tribes living along the U.S.-Mexico border. An examination of the Tohono O'odham, the negative effects that more restrictive border policies have had on the tribal government and their people, and the steps they have taken to secure and protect their border rights indicate why a more unified approach to border rights is necessary.<sup>223</sup>

### B. *Tohono O'odham*

Like the Mohawk, the Tohono O'odham lived in their traditional lands for hundreds of years prior to European discovery.<sup>224</sup> Their lands included a large portion of the Sonoran Desert, located in modern day Arizona and northern Mexico.<sup>225</sup> When the Treaty of Guadalupe-Hidalgo was signed, the lands of the Tohono O'odham remained part of Mexico, as the Treaty only gave the United States title to California and portions of Texas and New Mexico.<sup>226</sup> The subsequent Gadsden Purchase extended the border from New Mexico to California and

218. *Id.*; Kershaw, *supra* note 206.

219. Tribal Council of St. Regis Mohawk, *supra* note 216.

220. *See id.*

221. *See id.*

222. This is due in large part to these rights having come by way of treaty and having been recognized to a degree in both United States and Canadian law. *See supra* Part I-II.

223. *See infra* Part IV(B).

224. Tohono O'odham, *supra* note 51.

225. *Id.*

226. Treaty of Guadalupe-Hidalgo, *supra* note 17.

created the border separating Arizona and Mexico.<sup>227</sup> This extension effectively bisected the lands of the Tohono O'odham.<sup>228</sup>

For more than 100 years, however, the border shift and the change in sovereign title had little effect on the Tohono O'odham, who passed between their homelands in Arizona to other villages and sacred places in Mexico without restriction.<sup>229</sup> The lack of enforcement is attributable to the location of the tribe's homelands.<sup>230</sup> Due to the great distance between their reservation and any major cities and its isolated location in the Sonoran Desert, the lands of the Tohono O'odham were not used as a crossing point between the United States and Mexico.<sup>231</sup> However, during the second half of the 20th Century this isolation made their reservation a convenient crossing point for smugglers and illegal immigrants.<sup>232</sup> With a heavier emphasis being placed on enforcement of immigration and drug laws on both sides of the border,<sup>233</sup> the rights of free passage enjoyed by the Tohono O'odham for hundreds of years have very recently disappeared.<sup>234</sup>

In order to better understand the full impact of the change in border enforcement on the Tohono O'odham, one must know their unique status under American law. When the border between the United States and Mexico was extended through Arizona, the tribe's lands and people were split between the two countries.<sup>235</sup> The Tohono O'odham in Mexico effectively became Mexican citizens, while those on the American side remained tribal citizens until United States citizenship was granted in 1924.<sup>236</sup> In 1934, under the Indian Reorganization Act, the Tohono O'odham became federally recognized and formed a tribal constitutional government.<sup>237</sup> This constitution "define[d] tribal

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227. Gadsden Purchase, *supra* note 17.

228. Tohono O'odham, *supra* note 51.

229. *Id.*

230. *See id.*

231. *See, e.g.,* LOREY, *supra* note 1, at 126 (listing a number of major U.S.-Mexican border crossing points).

232. *See CNN Insight, supra* note 170.

233. *See supra* Part III.

234. It should be noted that the Tohono O'odham have never attempted to assert free passage rights under the Treaty of Guadalupe-Hidalgo or Gadsden Purchase in federal court, either as a criminal defense or to obtain an injunction against the Customs and Border Patrol. As discussed in Part I, it is unclear whether such rights are indeed protected by these treaties. The Tohono O'odham, however, assert that these rights are protected by the treaties and have not been abrogated by an act of Congress. Tohono O'odham, *supra* note 51.

235. *Id.*

236. Indian Citizenship Act, *supra* note 76.

237. Tohono O'odham, *supra* note 51.

2006] **Border Security and the Rights of Indigenous Peoples** 249

membership based on blood, and not country of citizenship."<sup>238</sup> As a result, tribal members living in Mexico who were not United States citizens were still tribal citizens.<sup>239</sup> Because of this, the Tohono O'odham are "the sole U.S. recognized tribe that enrolls Mexican members."<sup>240</sup> This unique status grants tribal citizens who are also not United States citizens the same rights as American tribal members to health care and other benefits.<sup>241</sup> The restricted exercise of these rights and benefits and the impairment of the general right of free border passage have created difficulties for tribe members on both sides of the border.

Although the Tohono O'odham is a federally recognized tribe with members enrolled on both sides of the border, the increased presence of both Mexican and United States border patrol and narcotics agents has led to an erosion of tribal rights.<sup>242</sup> In effect, the desire to prevent illegal immigration and drug trafficking has caused the United States and Mexican governments to violate or abrogate these rights.<sup>243</sup> Tohono O'odham members must bear the burden of presenting valid documentation in order to cross the border.<sup>244</sup> This is problematic because many of the tribe's members were born in rural desert communities, do not have documents such as birth certificates, passports, and social security cards, and tribal recording of births have been a relatively recent development.<sup>245</sup> As a result, tribal members who wish to cross the border face a difficult decision: (1) cross the border legally through an authorized checkpoint (the closest of which are between 90 and 150 miles away from the reservation),<sup>246</sup> (2) cross the border "illegally" through the portion of the border that lies within the reservation (which brings with it the risk of deportation if caught),<sup>247</sup>

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238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Tohono O'odham, *supra* note 51.

243. *Id.* It should be noted that abrogation of Native American treaty rights under United States law is a power held only by Congress, unless delegated to another body. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). It is unclear whether abrogation by implication, particularly in the manner used here, would work the same way legally.

244. Tohono O'odham, *supra* note 51; Ken Ellingwood, *Tribes are Caught on the Border*, L.A. TIMES, May 8, 2000, at A1.

245. Tohono O'odham, *supra* note 51; LaGesse, *supra* note 172; Ellingwood, *supra* note 244.

246. Tohono O'odham, *supra* note 51. This choice assumes that the member attempting to cross has the proper documentation. See LaGesse, *supra* note 172.

247. Ellingwood, *supra* note 244.

or (3) not cross the border at all.

This Hobson's choice has significant, harmful effects upon the Tohono O'odham. For example, the tribe's only health care facility is located on the United States side of the border.<sup>248</sup> Mexican tribal members, though granted the right to health care under both the tribal constitution and United States law, cannot cross the border without obtaining proper documentation and going 90 to 150 miles out of their way to cross at an authorized check point.<sup>249</sup> As a result, many tribal members do not receive the adequate health care that they need and are entitled to.<sup>250</sup>

In addition, the Tohono O'odham face cultural consequences. Traditionally, tribal members have crossed the U.S.-Mexico border to visit family members and attend cultural and religious gatherings.<sup>251</sup> These gatherings play a vital role in maintaining the tribe's language and culture because they enable tribe members to pass their practices on to future generations.<sup>252</sup> The restrictive border policies of the United States and Mexican governments have prevented the Tohono O'odham from doing this, and their cultural connections have suffered as a result.<sup>253</sup>

The Tohono O'odham also face a second negative consequence of increased enforcement of the U.S.-Mexico border, which parallels the problems faced by the Mohawk at St. Regis.<sup>254</sup> The increase in border security, particularly at major crossing points, has caused those seeking to illegally immigrate to the United States, as well as those seeking to import or export drugs across the border, to target the Tohono O'odham reservation as an ideal location to cross the border without drawing the attention of American or Mexican border patrol agents.<sup>255</sup>

An estimated 1,500 illegal immigrants attempt to cross the border at the Tohono O'odham reservation every day.<sup>256</sup> Regardless of their motivations, their presence strains the monetary resources and

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248. Tohono O'odham, *supra* note 51.

249. *Id.*; Ellingwood, *supra* note 244.

250. Tohono O'odham, *supra* note 51; Ellingwood, *supra* note 244.

251. Tohono O'odham, *supra* note 51.

252. *Id.*

253. *Id.*

254. See Tribal Council of St. Regis Mohawk, *supra* note 216.

255. Maria Armental, *Border Crossings Test Will, Ingenuity*, DAILY RECORD (Morristown, NJ), Mar. 22, 2005, at A1; Angie Wagner, *Money Scarce, Indian Reservation Struggles Amid Wave of Illegal Immigrants*, TRIBUNE-REVIEW (Greensburg, PA), July 31, 2005; CNN *Insight*, *supra* note 170.

256. Armental, *supra* note 255.

2006] **Border Security and the Rights of Indigenous Peoples** 251

manpower of the tribal police.<sup>257</sup> The increase of traffic through the reservation brings with it greater pollution, vandalism, thefts, burglaries, and other criminal activity.<sup>258</sup> Tribal police and health care workers face the additional strain of caring for those too weak to cross the Sonora Desert and recovering the remains of those who perish while attempting to make the trek.<sup>259</sup> In addition, tribal police receive inadequate assistance from the Arizona state police or federal law enforcement agencies and face the daunting task of attempting to address these problems and bring them to a halt, while short on funds and personnel.<sup>260</sup> Like the Mohawk, the Tohono O'odham receive funds for border security, but these grants are running out<sup>261</sup> and comprise only a fraction of the ever-increasing annual tribal expenditures on border enforcement.<sup>262</sup> Additionally, there is no indication that the tribe receives similar funding from the Mexican government.

Also, like the Mohawk, this loss of funding, coupled with increased problems of border security, leave the Tohono O'odham with more fundamental problems. Border crackdowns have forced tribe members to, in effect, relinquish the right to cross their own territory freely.<sup>263</sup> Ironically, at the same time, the Tohono O'odham must cooperate with the United States government to patrol what they view as an artificial boundary that runs through their territory.<sup>264</sup> The ever-increasing importance placed on border security imposes heightened scrutiny upon the Tohono O'odham from the media and the federal government. If there is a perception that the Tohono O'odham are unable to patrol the border that extends through their territory, United States and Mexican border patrol agents may become a fixture on the reservation,<sup>265</sup> something the tribal members do not welcome and vehemently oppose.<sup>266</sup>

257. Wagner, *supra* note 255.

258. *Id.*

259. *Id.* In 2004 alone, 51 people died on reservation land attempting to cross the U.S.-Mexico border. *Id.*

260. *Id.*

261. Tribal Council of St. Regis Mohawk, *supra* note 216; Wagner, *supra* note 255.

262. Wagner, *supra* note 255.

263. Tohono O'odham, *supra* note 51; Brenda Norrell, *Civil Rights Commission Hears Indigenous Peoples at Border*, INDIAN COUNTRY TODAY, Sep. 24, 2004.

264. See Tohono O'odham, *supra* note 51; Wagner, *supra* note 255.

265. See Tribal Council of St. Regis Mohawk, *supra* note 216.

266. Tohono O'odham, *supra* note 51; Norrell, *supra* note 263.

### C. Conclusion

The Mohawk and Tohono O'odham, and indeed all border tribes, face a number of similar problems. The growing emphasis on border security by the governments of the United States, Canada, and Mexico have eroded (if not eliminated) recognition of free passage rights for tribal members, while subjecting them to increased peril and economic hardships, and forcing them to protect these international borders with limited funding and manpower.<sup>267</sup>

For the Mohawk, public perception of inept border enforcement and corruption sparked by a series of articles in the *New York Times* and local publications<sup>268</sup> threatens their rights of free passage, recognized in treaties more than 200 years old.<sup>269</sup> As a result, the Mohawk may be stripped of rights won in hard-fought court battles in both the United States and Canada<sup>270</sup> and protected for almost eighty years.<sup>271</sup>

For the Tohono O'odham, these rights, though not recognized, were practiced freely for 100 years.<sup>272</sup> The Tohono O'odham have faced a similar struggle to gain legal recognition of the right to free passage. However, while the Mohawk chose a judicial approach, the Tohono O'odham pressed their case with Congress. In 2003, United States Representative Paul Grijalva proposed the Tohono O'odham Citizenship Act.<sup>273</sup> If passed by Congress, the Act would grant United States citizenship to the enrolled tribal members who are Mexican citizens, which would ease the current restrictions requiring documentation of the tribal members at the border.<sup>274</sup> In recent years, other tribes, most notably the Kickapoo of Texas, have enjoyed some success by pursuing a legislative approach.<sup>275</sup> Ironically, these tribes now seek to benefit from the same Congressional plenary powers over Native American affairs that had formed the underpinnings of their disenfranchisement.<sup>276</sup>

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267. See Tribal Council of St. Regis Mohawk, *supra* note 216; Wagner, *supra* note 255. See generally, *supra* Parts I-III.

268. See Kershaw, *supra* note 206; Tribal Council of St. Regis Mohawk, *supra* note 216.

269. See Jay Treaty, *supra* note 16; Treaty of Ghent, *supra* note 16.

270. See *McCandless v. United States*, 25 F.2d 71 (3rd Cir. 1928); Angie Barnes, *supra* note 124.

271. See *McCandless*, 25 F.2d 71.

272. Tohono O'odham, *supra* note 51.

273. *Id.*

274. *Id.*

275. Texas Band of Kickapoo Act, *supra* note 94. See LaGesse, *supra* note 172.

276. See *Lone Wolf v. Hitchcock*, 187 US 553 (1903).



Regardless of either tribe's approach, the powers of the federal government can, as in the past, serve to impede or foster progress. In earlier times, indigenous peoples suffered at the hands of the congressional and judicial authority of the United States because they were viewed as a threat to the nation's security and economic interests. The Age of Terrorism now threatens to halt, or even reverse, nearly a century of progress Native Americans have made in securing rights promised to them over 200 years. Public perception that the tribes are incapable or unwilling to patrol the international borders that fall within their territories, coupled with an increased emphasis on national security could result in the tribes' loss of the authority to patrol these borders and the right to pass through them freely.<sup>277</sup> These tribes face relegation to a status similar to that of the Mohawks on the Canadian side of the border, where the border patrol of a centralized, federal government assumes jurisdiction within the reservation territory, and where harassment of tribal members is a constant concern.<sup>278</sup>

National security concerns, together with increased drug trafficking, illegal immigration, and the collateral problems associated with them preclude a return to unfettered free passage reminiscent of the first 100 years of enforcement by Mexico of their northern border.<sup>279</sup> Nevertheless, a just and fair balance must be struck between public perceptions and concerns about national security and law enforcement on the one hand, and the rights of indigenous peoples to safeguard their heritage on the other. What form these changes will take and the consequences they will have for the border tribes and the nations of North America are impossible to tell.

#### V. BORDER RIGHTS IN THE FUTURE: THREE POSSIBLE APPROACHES

A very delicate balance has been struck between border enforcement and the recognition of indigenous border passage rights, and the risk that this balance may be upset is an ever-present concern for the tribes along the international borders of North America. The attacks of September 11, 2001, in particular, may have put the traditional tribal rights of free passage on an inevitable collision course with the national security powers of the United States, Canadian, and Mexican governments.<sup>280</sup> In their rush to further restrict their borders,

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277. See Tribal Council of St. Regis Mohawk, *supra* note 216.

278. Angie Barnes, *supra* note 124.

279. See Tohono O'odham, *supra* note 51.

280. Ambassador Francis X. Taylor, Assistant Secretary for Diplomatic Security and Director, Office of Foreign Missions, Remarks to the Homeland Security Forum, National

these countries will further degenerate the already restricted rights of North America's indigenous peoples.<sup>281</sup> National security concerns may make these changes inevitable, but they need not eclipse the importance of Native American passage rights in the process. Rather, these countries can and should adopt carefully tailored policies so as to have a minimum impact upon the cultural heritage and rights of indigenous peoples along the borders.

Among the many possible courses of action, three stand out. The first possibility is that the tribes will become more proactive in border control policy and enforcement, either on their own behalf or as agents of the federal governments of the United States, Canada, and Mexico. As stated earlier, a number of tribes in the United States, including the Tohono O'odham and Mohawk, receive federal funds to assist in patrolling and enforcing the border.<sup>282</sup> This seems to be the policy endorsed by the U.S. government.<sup>283</sup> Its funding policies serve to acknowledge the fact that tribal governments lack the sufficient funds, resources, and manpower to effectively handle border enforcement on their own.<sup>284</sup> In addition, the federal government's policy of offering financial assistance acknowledges, at least to a limited degree, the sovereign status of Native American tribes as a separate governmental entity with its own jurisdictional control.<sup>285</sup> Applying this rationale, one could foresee an expansion in federal funding to both help and allow the tribes to enforce the international borders.<sup>286</sup>

While such a policy may be most desirable for the three North American governments, its blanket acceptance by the tribes would infringe upon their financial independence and, ultimately, their sovereignty. Government funding for border enforcement, accompanied by conditions and mandates, may effectively turn tribes into either an agency of the federal government, charged with carrying out orders, or into an entity similar to a federal state. The erosion of distinctly tribal and governmental traits might well eclipse the problems

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Native American Law Enforcement Association: Homeland Security is a Global Issue (Nov. 5, 2003) [hereinafter Taylor].

281. *Id.*

282. Wagner, *supra* note 255; Tribal Council of St. Regis Mohawk, *supra* note 216.

283. Taylor, *supra* note 280. See also Senator Ben Nighthorse Campbell, Former Vice-Chairman, Senate Committee on Indian Affairs, Prepared Remarks to the National Tribal Summit on Homeland Security (Oct. 23, 2002).

284. Wagner, *supra* note 255.

285. See *Worcester v. Georgia*, 31 U.S. 515 (1832).

286. It should be noted, however, that neither Canada nor Mexico provides the same type of funding to their own border tribes. Both countries undertake enforcement of the borders running through reservations upon themselves.

2006] **Border Security and the Rights of Indigenous Peoples** 255

raised by current restrictions on free passage rights.<sup>287</sup> Yet, for some tribes, particularly those along the United States-Mexico border, this may be the best possible solution, as problems associated with border security have become overwhelming.<sup>288</sup> Further, by placing border security back into the hands of the tribes, they will be able to regulate who passes through their traditional lands without restriction,<sup>289</sup> and either relax their standards for tribal members who wish to exercise their rights of passage, or secure the federal government's cooperation in permitting them to do so.

With proper funding, training, and personnel, the border tribes would shoulder some of the burden being bourn by the border agencies, which are already having great difficulty in maintaining border restrictions.<sup>290</sup> Additionally, this approach would allow for greater segments of the border to be patrolled, eliminating the gaps in enforcement that occur in and around reservations.<sup>291</sup> At the same time, the financial burdens assumed by the tribes will be alleviated to a substantial degree, as insufficient grants will no longer have to be supplemented by tribal funds, which are necessary to fund other essential programs.<sup>292</sup> The governments of the United States, Canada, and Mexico should adopt this approach or a variant of it when they consider making changes to their own enforcement methods.

The second possible course of action involves full federal border agency control over enforcement within the border reservations. This approach has already been taken by both the Canadian and Mexican governments,<sup>293</sup> whose agencies exercise exclusive jurisdiction over their border.<sup>294</sup> To a certain degree, this is already occurring in the United States on a de facto basis, as some tribes have been completely unable to combat the problems associated with illegal immigration and drug trafficking.<sup>295</sup> While such an approach would allow the federal governments to ensure that their border enforcement policies are carried

287. See Tohono O'odham, *supra* note 51.

288. Wagner, *supra* note 255.

289. This assumes that the national governments will allow the tribes a certain degree of autonomy in how the border will be enforced.

290. See generally TORRANS, *supra* note 145; LOREY, *supra* note 1.

291. See Wagner, *supra* note 255; Kershaw, *supra* note 206.

292. See Wagner, *supra* note 255; Tribal Council St. Regis Mohawk, *supra* note 216.

293. See Angie Barnes, *supra* note 124. See generally TORRANS, *supra* note 145; LOREY, *supra* note 1.

294. See Angie Barnes, *supra* note 124. See generally TORRANS, *supra* note 145; LOREY, *supra* note 1.

295. See Wagner, *supra* note 255.

out, it carries with it the disadvantages of increasing costs and likely legal challenges from the affected tribes.

Under the current American system, tribes are given a certain amount of funding through grant programs which help the United States enforce border laws.<sup>296</sup> The tribes have long criticized these programs, arguing that they are under-funded. Tribes dedicate their own monies to fill the gaps left by these deficiencies and end up paying for the extra personnel and other resources necessary to implement the mandates associated with the federal grants.<sup>297</sup> Were the United States to assume complete responsibility, it would incur additional costs such as these to increase its presence on the reservations. Additionally, as the tribes have stated that even the combined funding is insufficient,<sup>298</sup> the United States would be faced with an even higher cost to build a presence on both their borders that is sufficient to stop illegal immigration and drug trafficking at a level greater than that being done by tribal police today. This burden is already being shouldered by the Canadian and Mexican governments, and judging by the number of illegal immigrants and the amount of drugs coming into the United States from either country, these policies have been met with only limited success.<sup>299</sup>

In addition to funding problems, this approach also raises the problem of potential tribal challenges to a federal government's jurisdiction, particularly under American law, on grounds of tribal sovereignty.<sup>300</sup> In the United States, these challenges would likely prove unsuccessful, as the Supreme Court has held that Congressional Power over Native Americans is plenary, especially when the government is attempting to enforce federal criminal laws.<sup>301</sup> Even if these challenges do not materialize, there are potential civil rights issues that may give rise to litigation. Tribes, particularly those along the U.S.-Mexico border, have complained of abuse and harassment at the hands of USCIS and Customs and Border Patrol agents.<sup>302</sup> Similar complaints have been lodged for years by Canadian Mohawks and other

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296. *Id.*; Tribal Council of St. Regis Mohawk, *supra* note 216.

297. Both the Tohono O'odham and the Mohawk complain that even with the federal funds and the use of the tribes' money, they are still not able to adequately enforce the border restrictions against illegal immigrants and drug traffickers. Wagner, *supra* note 255; Tribal Council of St. Regis Mohawk, *supra* note 216.

298. Wagner, *supra* note 255; Council of St. Regis Mohawk, *supra* note 216.

299. See generally Angie Barnes, *supra* note 124; Tribal Council of St. Regis Mohawk, *supra* note 216; LOREY, *supra* note 1; TORRANS, *supra* note 145.

300. See *Worcester v. Georgia*, 31 U.S. 515 (1832).

301. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

302. Norrell, *supra* note 263.

tribes against border patrol agents and the Royal Canadian Mounted Police.<sup>303</sup> More importantly, however, it is unlikely that any program bringing federal agents on to border reservations would allow for greater respect or assertion of free passage rights, and legal challenges would likely ensue to gain recognition of these rights, as the Mohawk have done in the past.<sup>304</sup>

While such a holistic approach has been used for some time in the other North American countries, a change in United States law to allow for exclusive federal border enforcement within the reservations would represent a dramatic policy shift, and one fraught with increased costs and a high probability of conflict, animosity, and protracted litigation. Additionally, this approach has arguably proved ineffective in Mexico and Canada.<sup>305</sup> For these reasons, it is unlikely that the United States will adopt this approach, and given its drawbacks, the other countries of North America should strongly consider abandoning it.

The final possibility is that there will be no change to the ways in which the North American borders are enforced or to the recognition of the rights of indigenous people to cross them freely. Although governmental policies in all three countries have been fraught with inconsistencies, double standards, and radical policy shifts through the years, Native American border rights have not traditionally been a hot button issue on a nation-wide level, and it is possible that, despite recent publicity,<sup>306</sup> the governments may see no reason to change the systems now in place. However, when one looks at the current state of the law, the difference in recognition of rights from tribe to tribe, where and how border security money is spent, and the effectiveness (or lack thereof) of current policies, one can see that the current system does not work, and that things will only get worse without a substantial policy change.

Ultimately, the best possible solution to the current problems regarding rights of free passage would involve delegating greater responsibility over border security to tribal governments who, in turn, would work with the aid and cooperation of their respective federal governments. Under this scheme, border tribes would serve as equal partners in border enforcement, and would share equal responsibilities. This approach would allow national governments to preserve the safety

303. Angie Barnes, *supra* note 124.

304. See generally *McCandless v. United States ex. rel. Diabo*, 25 F.2d 71 (3rd Cir. 1928).

305. See generally Angie Barnes, *supra* note 124; Tribal Council of St. Regis Mohawk, *supra* note 216; LOREY, *supra* note 1; TORRANS, *supra* note 145.

306. See Kershaw, *supra* note 206.

of their citizens while, at the same time, protect rights of free passage and migration, which the indigenous peoples of North America enjoyed for centuries prior to Western discovery.