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THE REPEAL OF ARTICLE 8: LAW, GOVERNMENT, AND CULTURAL POLITICS AT AKWESASNE

William A. Starna*

In early May 1990, a conflict at Akwesasne¹ that originated essentially from disputes over gambling and internal politics, one that had been escalating for many months, resulted in the shooting deaths of two Mohawk men.² In response, New York State Assemblyman Steven Sanders, chair of the Assembly Committee on Governmental Operations, together with the Assembly Committee on Environmental Conservation and the New York State Black and Puerto Rican Legislative Caucus, initiated hearings on the crisis.³

A report issued by Assemblyman Sanders following the hearings contained five recommendations. One of these, "to repeal Article 8 of the New York State Indian Law," is the subject of this article.⁴

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Due to the inability of the law review staff to obtain copies of the author's field notes, which are considered privileged materials in his profession, the *Review* has relied on the author's own research and expertise to verify those notes. — *Ed.*

1. "Akwesasne" is the Mohawk name applied to the area formed by the St. Regis Indian Reservation in New York State and the St. Regis Indian Reserve located directly across the international border in Quebec and Ontario, Canada. It is the home of the St. Regis Mohawk Tribe and the Canadian St. Regis Band. The Mohawk Council of Akwesasne is the officially recognized government of the Canadian reserve, while the United States and New York State recognize the St. Regis Mohawk Tribal Council on the so-called "American side." The Mohawk Nation Council of Chiefs is a traditional form of government at Akwesasne that neither Canada, the United States, nor New York State officially recognize. It alleges to represent the Mohawk Nation, i.e., the people of Akwesasne.

2. See Sam H. Verhovek, *2 Mohawks Killed in Feud Over Reservation Gambling*, N.Y. TIMES, May 2, 1990, at B5; Thomas Fine & Tom Foster, *2 Killed in St. Regis Gunfire*, POST STANDARD (Syracuse, N.Y.), May 2, 1990, at 1.

3. See *New York State Assembly Standing Comm. on Governmental Operations, Standing Comm. on Envtl. Conservation & the New York State Black & Puerto Rican Legislative Caucus, In the Matter of a Public Hearing into the Crisis at Akwesasne* (July 24, 1990) [hereinafter *Hearing, Part I*]; *New York State Assembly, Public Hearing on the Crisis at Akwesasne (Day II)* (Aug. 2, 1990) [hereinafter *Hearing, Part II*].

4. NEW YORK STATE ASSEMBLY, THE CRISIS AT AKWESASNE, 1990: HEARING BEFORE THE NEW YORK STATE ASSEMBLY 342-46 (1990). The other recommendations were: "the Legislature should refuse to enact the authorization requested by the Governor to conclude a compact regarding gaming at Akwesasne, and New York State should refuse to enter into further

Article 8 of the New York State Indian Law describes the form and functions of the elective system of government for the St. Regis Mohawk Tribe. It stems from statutes that were enacted in the nineteenth century, the first in 1802.⁵ It is this government, the St. Regis Mohawk Tribal Council, that is recognized by the United States and the state of New York.

The New York State Assembly memorandum supporting the proposed legislation offered a number of justifications for the repeal of Article 8: That the tensions at Akwesasne, characterized as "rampant lawlessness,"⁶ required the implementation of a "historic change in the relations between New York State and the Mohawk Nation";⁷ that the need for this "historic change" had been compelled, in part, by the absence of a "federally-recognized constitution or bylaws" in the present elective government; that state law, "as interpreted

negotiations until the volatile situation on the reservation quiets," *id.* at 345, that "New York State should initiate discussions with the Haudenosaunee and relevant Indian Nations regarding the establishment of a State Division of Native American Indian Affairs," *id.* at 347, that "efforts underway in the New York State Executive branch should be intensified to help bring about employment opportunities and economic development at Akwesasne and other reservations," *id.*, and that the state should maintain a significant police presence "on the reservation," and, among other things, appoint a "special prosecutor to handle special classes of criminal activity, such as illegal gambling and smuggling," *id.* at 346.

"Haudenosaunee" is commonly understood to be a political term that applies to the Iroquois Confederacy, an alliance form of governance that has asserted its hegemony over the six Iroquois tribes resident in New York State. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*; in 15 HANDBOOK OF NORTH AMERICAN INDIANS, NORTHEAST 418-41 (Bruce G. Trigger ed., 1978) [hereinafter HANDBOOK, NORTHEAST INDIANS]; William N. Fenton, *The Iroquois Confederacy in the Twentieth Century: A Case Study in the Theory of Lewis H. Morgan in "Ancient Society,"* 4 ETHNOLOGY 251-65 (1965) [hereinafter Fenton, *Iroquois Confederacy*]. The Confederacy is not officially recognized by the federal government or the state. Thus, the other "relevant Indian Nations" are the St. Regis Mohawk Tribe, the Oneida Nation of New York, the Onondaga Nation, the Cayuga Nation, the Tonawanda Band of Seneca Indians, the Seneca Nation, and the Tuscarora Nation, all federally and state recognized tribes. Also included are the state recognized Shinnecock and Unkechaug (Poosapatuck) tribes on Long Island.

The ideas of establishing a state office of Indian affairs along with assisting Indian communities with economic development are not new ones, but date from at least 1971. See WILLIAM A. STARNA, INDIAN LAND CLAIMS IN NEW YORK STATE: A POLICY ANALYSIS 31-37 (Rockefeller Institute Special Report No. 21, 1987); LAURENCE M. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970-1986, at 30-41, 58-61 (1988). Suggestions to coordinate state services and programs affecting Indians and to form a state Indian office were also outlined in the Governor's state of the state addresses in 1986, 1990, and 1991. It was not until the summer of 1991, however, that the Executive Department created its Office of Indian Relations.

5. Act of Mar. 26, 1802, ch. 50, 1802 N.Y. Laws 62; Act of Apr. 30, 1875, ch. 226, 1875 N.Y. Laws 215; Act of May 18, 1892, ch. 679, [1892] 2 N.Y. Laws 1573; N.Y. INDIAN LAW §§ 100-112 (McKinney 1950 & Supp. 1992).

6. Memorandum in Support of Legislation, Submitted in Accordance with Assembly Rule III, 1(e), N.Y. State Assembly Bill Number 4740, An Act to Repeal Article 8 of the Indian Law, Relating to the Saint Regis Tribe, New York State Assembly (n.d.) [hereinafter Memorandum, Repeal Article 8] (on file with author).

7. *Id.*

by state courts, even controls the electoral process on the reservation";⁸ that the "government established by this law [Article 8] is one of three governments existent on the reservation";⁹ that Article 8 "clearly intervenes, inappropriately, in the internal affairs of the Mohawk Nation";¹⁰ and that the enactment of the repeal legislation "will encourage the people of Akwesasne to form their own governmental structure before the effective date of July 1, 1993."¹¹

The tribal population and its various supporters are split over the repeal issue. Mohawks from Akwesasne who back the repeal of Article 8 argue generally that the present elective government does not adequately represent their political, cultural, or ideological points of view, especially regarding gambling and other alleged illegal activities said to be commonplace in the community. They also argue that the elective government has the color of New York State law and therefore violates the sovereign status of the Mohawk Nation; and, no matter its present standing, the elective form of government was imposed unilaterally by the state of New York and is thus not of the people and illegitimate.¹²

Members and staffers in the legislature involved in the effort to repeal Article 8 restate these reasons almost verbatim. Interviews of individuals in this branch of state government revealed no support whatsoever for the St. Regis Tribal Council.¹³ Indeed, the legitimacy of the Tribe's federally and state recognized government and its duly elected representatives was openly challenged by Assemblyman Maurice Hinchey at one point in the hearings.¹⁴

8. *Id.*

9. *Id.* The statement that there are "three governments existent on the reservation" requires qualification. There are two reservations/reserves, one in Canada and the other in the United States. Each has a single government that is recognized by its respective federal, province, and state governments. There is also a traditional government at Akwesasne, which is not officially recognized by outside, non-Indian governments. *See supra* notes 1, 4.

10. Memorandum, Repeal Article 8, *supra* note 6.

11. *Id.* To propose that the repeal legislation "will encourage the people of Akwesasne to form their own governmental structure" is at once paternalistic and meaningless. There are already recognized governments in place both in Canada and on the American side. *Id. See supra* note 1.

12. *See, e.g., Letter to the Editor From Mohawk Nation Council of Chiefs, INDIAN TIME* (Akwesasne), Apr. 26, 1991, at 2.; *see also Hearing, Part I, supra* note 3 (testimonies of Chief Tom Porter, Salli Benedict, and Chief Angie Barnes); *Hearing, Part II, supra* note 3 (statements of Chief Ron LaFrance and Subchief James Ransom); Memorandum from Barb Barnes, Mohawk Nation Secretary, to Angie Barnes, Legislative Committee, "Mohawk Council of Akwesasne" (June 22, 1990), in St. Regis Mohawk Tribal Council, News Release (Aug. 19, 1991) (on file with author). *See infra* note 14.

13. The author interviewed individuals representing all of the parties involved in the repeal effort during 1991 and 1992. As is the practice in anthropology, persons interviewed remain unidentified. William A. Starna, Field Interview Notes (Apr. 1991-Jan. 1992) [hereinafter Author's Field Notes] (on file with author).

14. *Hearing, Part II, supra* note 3, at 157-58. Persons interviewed who supported or were

Mohawk people who support the present elective form of government offer their own arguments to justify or maintain the political status quo. Some contend that the 1802 statute was enacted at the request of the Mohawks at Akwesasne.¹⁵ Others hedge about whether the 1802 act was actually a request by the people to form an elective government; instead, they insist that, whatever its source, it incorporated and used elements of the traditional system, including sitting some of the life chiefs or sachems as "trustees."¹⁶ Still others maintain that there was an elected form of government already in place at Akwesasne, much before the enactment of the 1802 law.¹⁷ Finally, the fact that the elected government is recognized by both the federal and state governments is cited as proof enough of its legitimacy.¹⁸

There is yet another view on the repeal of Article 8 at the federal level. Officials at the Bureau of Indian Affairs (BIA) assert flatly that a repeal would have no bearing on the federal recognition of the present elective

sympathetic to the St. Regis Tribal Council expressed feelings that several of the legislators were hostile to the elective government and its views regarding gambling and the Warrior Society, and were also predisposed in their conduct at the hearings. Author's Field Notes, *supra* note 13. Compare questions and responses of the various Assemblymen in *Hearing, Part I, supra* note 3, and *Hearing, Part II, supra* note 3. See *Tribe Takes the Heat as Special Hearings in Albany Continue*, INDIAN TIME (Akwesasne), Aug. 10, 1990, at 1.

The St. Regis Tribal Council has charged that "some people in the New York State Assembly were conspiring with a small group of insurgents on the reservation to undermine and destroy the duly elected government which the Mohawk people chose for themselves nearly 190 years ago." News Release, *supra* note 12. It also implicated the Mohawk Council of Akwesasne in this alleged conspiracy. *Id.* Cited, for example, is the June 22, 1990 memorandum from Angie Barnes to Barb Barnes, which was said to set forth a

'Draft Strategy' to manipulate and control New York State Assembly hearings. Indicates [sic] strategy was laid out by a Mr. Leon Van Dyke [sic], an insider of the of the [sic] New York Assembly's Black and Puerto Rican Caucus. References are made to 'perjury' and 'facts that can be manipulated.'

Memorandum from Barb Barnes, *supra* note 12; see also *Tribal Council Holds Press Conference Charging Mohawk Council Involvement In Blockade*, INDIAN TIME (Akwesasne), Aug. 9, 1991, at 1; *MCA Spokesman: Tribal Accusations Are a Publicity Stunt*, INDIAN TIME (Akwesasne), Aug. 16, 1991, at 1; *MCA Receives Support of Mohawk Nation Council of Chiefs*, INDIAN TIME (Akwesasne), Aug. 16, 1991, at 1; Memorandum from Leon VanDyke to Assemblyman Sanders & Assemblyman Vann, in Joint Hearings on the Violence and Illegal Gambling Casinos at Akwesasne, St. Regis Reservation (June 1, 1990) (on file with N.Y. Assemblyman Steven Sanders, Albany, N.Y.).

15. *Hearing, Part II, supra* note 3, at 20.

16. In the traditional government of the Mohawks specifically, and the Iroquois generally, life chiefs or sachems are men who are chosen and appointed by the ranking women in a maternal household (matrilineage) or family. Their authority extends to civil matters in a community or tribe, and to the Confederacy. For a discussion on traditional Iroquois government, see Tooker, *supra* note 4, at 418-41; Fenton, *Iroquois Confederacy, supra* note 4, at 314-15; William N. Fenton, *Leadership in the Northeastern Woodlands of North America* 10 AM. INDIAN Q. 21-45 (1986) [hereinafter Fenton, *Leadership*].

17. *Tribe Responds to Sanders*, INDIAN TIME (Akwesasne), Mar. 29, 1991, at 2.

18. *Id.*

government on the American side. One BIA staff member explained that book 25 of McKinney's Consolidated Laws of New York, which contains Article 8 and other articles of Indian law, "is a useful document since it accurately reflects tribal law,"¹⁹ and "it is a good reference point for the state,"²⁰ but added that "New York State does not create tribal law."²¹

Neither the governor nor the state's Office of Indian Relations has taken a public position on the repeal measure. Interviews conducted there indicate, not surprisingly, that what the legislature does is its own affair, quite unrelated to the operations of the Executive Department.²²

These various and contrasting views concerning the history, legitimacy, and legal standing of the elective government of the St. Regis Mohawk Reservation bear examination. At issue are the historical record, the understanding, perceptions, and opinions of the parties involved, and the principles of federal Indian law.

It has been asserted that an elective form of government was in operation at St. Regis before the passage of the 1802 act. Officials of the present elective government point to a passage from *The Jesuit Relations* in making this claim.²³ Specifically, Jesuit priests reported that in 1671 at La Prairie, the predecessor mission village to Caughnawaga and later St. Regis, the Christian Indians elected two of their own to serve as leaders. One was to oversee issues of "government and war, the other to watch over the observance of Christianity and religion."²⁴ According to the priests, "This election took place by a majority of votes, as other transactions are settled among the [I]roquois — among whom the chiefs indeed speak, but they take the word from the elders of their village."²⁵ In 1673, as the population at this mission grew, the Jesuits gave each of the three different tribes present, the Mohawks, Hurons, and Onondagas, "its own chief."²⁶ Whatever the particulars, it is evident that this election took place under the influence and at the bidding of the Jesuits.

The St. Regis Tribal Council suggests that since there was an elected government at La Prairie, it was presumably carried to Caughnawaga, and later to St. Regis, once these mission villages were established. There is no documentary evidence to support this argument. In fact, it is unclear precisely what kind of political system was in operation at the founding of St. Regis about 1755.²⁷

19. Author's Field Notes, *supra* note 13.

20. *Id.*

21. *Id.*

22. *Id.*

23. St. Regis Mohawk Tribal Council, News Release (Aug. 19, 1991) (on file with author).

24. 63 THE JESUIT RELATIONS AND ALLIED DOCUMENTS 163 (Reuben G. Thwaites ed., 1896-1901).

25. *Id.*

26. *Id.* at 181.

27. Jack A. Frisch, *Revitalization, Nativism, and Tribalism Among the St. Regis Mohawks*

A second position held on the history of governance at Akwesasne concerns the circumstances surrounding the enactment of the 1802 statute, which, most agree, formally acknowledged an elective system; that is, was the elective government imposed unilaterally by New York State on the Indians at St. Regis, or was it inaugurated with their consent, if not their wishes?

The historical record on these issues is ambiguous. Nonetheless, circumstantial evidence suggests that the elective system was formed with the participation and sponsorship of a portion of the Indian community at St. Regis. The genesis of this community support appears tied to the 1796 federal treaty between the United States and the Seven Nations of Canada, which included the St. Regis Indians.²⁸ The two representatives from St. Regis who signed this quitclaim were appointed the tribe's first trustees by the 1802 act.²⁹

The 1802 statute was the last of three similar statutes that had been enacted to form elective governments for several Indian groups located in New York State. In 1791, New York installed elective governments at Brothertown and New Stockbridge, Indian communities in Oneida and Madison counties, and in 1792, the same was done for the Shinnecocks on Long Island.³⁰ Thus, the 1802 statute respecting St. Regis was part of a pattern of action taken by the New York State legislature to institute elective governments in certain Indian communities, apparently to formalize its jurisdiction and administrative control over the tribes and their lands. In 1813, the so-called "American" Mohawks at Akwesasne were further authorized to hold annual town meetings at which eligible members of the tribe could vote, choose trustees, and make rules regarding land use.³¹

A few surviving primary sources that date from after the end of the War of 1812 reveal that the community at St. Regis participated in the formation

76 (1970) (unpublished Ph.D. dissertation, Indiana University).

28. Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55.

29. The St. Regis Indians empowered Colonel Louis Cook (Oteatohatongwan or Atiatoharongwan) and William Gray to negotiate with the United States Commissioner and representatives of New York State regarding their claim to lands within the state. FRANKLIN B. HOUGH, A HISTORY OF ST. LAWRENCE AND FRANKLIN COUNTIES, NEW YORK, FROM THE EARLIEST PERIOD TO THE PRESENT TIME 135-36 (1853). The "chiefs," "chief warriors," and "warriors" at St. Regis made similar authorizations for representatives in 1799 and 1802. *Id.* at 149, 152-53; Assembly Papers, Series No. 143, Vol. 40, [Petition of the Chiefs and Warriors of the Village of St. Regis] to His Excellency John Jay Governor State [of] New York (n.d.) (available in New York State Archives, Albany, N.Y.). The author has found no contemporary evidence of opposition to the treaty or to the appointment of the trustees from within the St. Regis community, nor are there documents that describe the events surrounding the formation of the elective government.

30. Act of Feb. 21, 1791, ch. 13, 1791 N.Y. Laws 212; Act of Feb. 24, 1792, ch. 15, 1792 N.Y. Laws 280.

31. 1 N.Y. REV. STAT. at 272, 274-75 (1882) (§§ 13-14 of Act of Apr. 10, 1813, 1813 N.Y. Laws Rev. ch. 29).

of the elective form of government.³² In February 1818, the sole trustee who had survived the war petitioned Governor George Clinton about the trustees on the American side. He asked that appointments be made to fill the now-vacant positions in the government. He referred to the "old chiefs" who, with their adherents had been "steady in the cause and interest of the United States,"³³ and that he had taken "to his private council" two "old chiefs in whom the Tribe has put [their] faith."³⁴ He requested that these two men be appointed trustees.³⁵ An 1823 memorial to the legislature contains eleven signatures, not simply the names of the trustees, but also persons considered "chiefs."³⁶ Finally, an 1824 petition reads: "[T]he undersigned chiefs and Warriors of the St. Regis Tribe of Indians humbly Represent to your honorable Body that our old chiefs who were appointed as Trustees are all Dead Except one who is old and unable to Transact public business."³⁷ The petition requests that three men be appointed trustees "to over See [*sic*] and control the affairs of the St. Regis Indians."³⁸

The documents cited above suggest that the appointment of the trustees was at the request of the community and that some of them were selected from the ranks of the "old chiefs." Whether this means that these were life chiefs or sachems, or chiefs in the sense of community leaders, or simply part of the old government is uncertain. There is, however, no doubt that there were chiefs functioning before the 1802 act. For example, in 1800, the chiefs in council had refused to allow a state survey of their St. Regis land.³⁹ If the

32. The international boundary between British Canada and the United States, which divides the St. Regis tribal lands, was established after the Revolutionary War by the Treaty of Paris. It was, however, of no consequence to the Indians at St. Regis and was generally ignored by British and American authorities insofar as their administration of Indians was concerned. The Treaty of Ghent ending the War of 1812 provided for a survey of the boundary. It was reset in 1822, shifting several islands owned by the St. Regis Indians from British to American jurisdiction, and it left essentially two separate political entities at Akwesasne. 1 MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, at 347, 708-09 (Fred L. Israel ed., 1967); Frisch, *supra* note 27, at 71.

Although the formal establishment of the international boundary physically divided the Indian community at St. Regis, it was conflicting allegiances during the War of 1812 that left it politically divided. Frisch, *supra* note 27, at 79-81; ALLAN S. EVEREST, THE WAR OF 1812 IN THE CHAMPLAIN VALLEY 70-71 (1981).

33. Assembly Papers, Series No. 143, Vol. 41, Petition of St. Regis Chief on Part of the Tribe for the Appointment of Trustees (Feb. 16, 1818) (available in New York State Archives, Albany, N.Y.).

34. *Id.*

35. *Id.*

36. Assembly Papers, Series No. 143, Vol. 41, Petition of the St. Regis Indians (Jan. 20, 1823) (available in New York State Archives, Albany, N.Y.).

37. Audit and Control, Indian Annuities, Series 832, Box 7, File 5, Petition to the Legislature (Mar. 9, 1824) (available in New York State Archives, Albany, N.Y.).

38. *Id.*

39. 2 MESSAGES FROM THE GOVERNORS 454-56 (Charles Z. Lincoln ed., 1909). This work, covering the years 1777-1822, is part of a multivolume series collecting New York executive

1802 statute was unilaterally "imposed" by New York State officials, it seems that many of the Indians at St. Regis accepted and were involved in its creation.⁴⁰

An alternative argument is that New York was working to establish "indirect rule" or "protective legislation" over Indians in the state through its "appointment" of native leaders it had, in fact, co-opted and promoted, and further, would support for its own purposes. Thus, the native political system would be transformed to accommodate the political and economic agendas of the state.⁴¹ Nonetheless, it remains that there is no internal evidence or documentation that demonstrates any opposition to the formation of the elective government from within the St. Regis community. This suggests that either the state had done its job very well or that a considerable number of the Indians in the community were more than passive recipients of this form of government.

There are hints, however, that all was not well politically in the community. For example, in 1816 there was a dispute over who had the authority to lease lands between Indians who characterized themselves as loyal subjects of the Crown and the "American Chiefs of the Village of St. Regis."⁴² In 1822, the Canadian chiefs complained that they had been treated badly by the "American" Mohawks at what was a public demonstration of fealty to the United States in the community.⁴³

Finally, an 1824 resolution, signed by forty-two of the "Chief Head Men and Warriors of that part of the St. Regis Nation or Tribe of Indians which claims the protection and countenance of the State of New York,"⁴⁴ affirmed that "in order to put an end to all quarrels for power and authority which lately have disturbed our peace, We will not henceforth recognize any other Individual to be Chief or Trustee except Thomas Williams, Michel Cook, Lewis Doublehouse, Peter Tarbell, and Charles Cook."⁴⁵ This resolution may

papers relating to legislation from 1683-1906.

40. The system of government acknowledged by the 1802 act was apparently strong enough and accepted by a sufficient portion of the community so that it could order the banishment of one of its members. File 3650, Wm. Gray, Proclamation by Chiefs [and Warriors] of St. Regis Village Sent to Judge Wm. Bailey [Baley] (Oct. 17, 1804) (available in New York State Archives, Albany, N.Y.).

41. See JOHN H. BODLEY, VICTIMS OF PROGRESS 71-74 (1990).

42. Record Group 10, Vol. 628 (Jan. 27, 1816) (available in Public Archives of Canada, Ottawa, Ont.).

43. Record Group 10, Vol. 625, To His Excellency George Earl of Dalhousie . . . [from] . . . the Undersigned Chiefs of the St. Regis Tribe of Indians (Nov. 28, 1822) (available in Public Archives of Canada, Ottawa, Ont.).

44. Audit and Control, Indian Annuities, Box 7, File 5, St. Regis Indians Appointment of Deputies (May 31, 1824) (copy) (available in New York State Archives, Albany, N.Y.).

45. *Id.* It was Hough in 1853 who first reported that "about sixty" members of the tribe had signed this resolution, an error that has been repeated by a number of writers who never examined the original document. HOUGH, *supra* note 29, at 164; see Memorandum, History of

not have been the last word on the political situation at St. Regis, but evidently the elected officials had asserted themselves and were able to maintain their control on the American side.

In 1835, the New York State Comptroller received a complaint that British Indians were casting votes in and sometimes controlling elections on the American side. No action was taken by the comptroller, who saw no reason to interfere in the process.⁴⁶ About 1858, New York stopped making its treaty annuity payments to Indians who were not members of the American tribe.⁴⁷ After a census in 1859, the state established an annuity list containing the names of Mohawks affiliated with the "American side." This became, for all intents and purposes, a tribal roll.⁴⁸ It was undoubtedly this list that had the effect of limiting political participation in the elective government to those enrolled in the American tribe, thereby thwarting one source of interference in its affairs.

There have been several disputes at Akwesasne, beyond the current one, regarding its elective government and opposition to it. The most notable took place in the 1880s and the 1940s. The first arose in response to the Kansas claims.⁴⁹ In 1888, the St. Regis Indians were "adopted" by the Iroquois Confederacy to succeed the Mohawks, who were considered to have abdicated their membership by moving to Canada following the American Revolution.⁵⁰ Confederacy members apparently believed that "if there were less than six tribes it would work against them in their efforts to uphold their perceived rights under treaties entered into with the United States,"⁵¹ thereby weakening

the Government of the St. Regis Indian Tribe, from Michael T. Smith, Tribal Services Specialist, Leslie N. Gay, Assistant to the Chief, James Thomas, Tribal Relations Specialist, United States Department of the Interior, Bureau of Indian Affairs, to John V. Meyers, Eastern Area Office, Bureau of Indian Affairs 4 (Feb. 1980) [hereinafter Memorandum, History of Government] (on file with author); Salli Benedict, Akwesasne Evolution of Government: Charts (n.d.) (unpublished charts submitted to N.Y. Assemblyman Steven Sanders, Albany N.Y.) (on file with author).

46. NEW YORK STATE LEGISLATURE, ASSEMBLY, 318 REPORT OF THE COMPTROLLER ON THE MEMORIAL OF THE ST. REGIS MOHAWK INDIANS 8 (1835) (available in New York State Library, Albany, N.Y.).

47. Act of Apr. 19, 1858, ch. 368, 1858 N.Y. Laws 634.

48. Act of Apr. 15, 1859, ch. 364, 1859 N.Y. Laws 873.

49. The fraudulent Treaty of Buffalo Creek, Jan. 15 1838, U.S.-N.Y. Indians, 7 Stat. 550, made provisions for the removal of all the Iroquois in New York State to a new homeland in the Kansas territory. These lands were never occupied by the New York Indians and were soon lost to white settlement. The Kansas claims represent an attempt by the individual Iroquois tribes, coordinated by the Confederacy, to sue the United States for compensation for the loss of the Kansas lands. See Thomas S. Abler, *The Kansas Connection: The Seneca Nations and the Iroquois Confederacy Council*, in *EXTENDING THE RAFTERS: INTERDISCIPLINARY APPROACHES TO IROQUOIAN STUDIES* 81 (Michael K. Foster et al. eds., 1984).

50. NEW YORK STATE LEGISLATURE, ASSEMBLY, 51 REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, APPOINTED BY THE ASSEMBLY OF 1888, at 12 (1889) (available in New York State Library, Albany, N.Y.).

51. Memorandum, History of Government, *supra* note 45, at 5-6.

their claim. At the same time, nine chiefs and nine subchiefs were installed by those opposing the elective system, although they were said to be "practically and legally" without power. Two were trustees under the 1802 act.⁵² Although confronted by what appears to have been a reconstituted or possibly rejuvenated traditional form of government, the Tribe's elective system remained intact.⁵³

Strong opposition to the elective government appeared again in the 1940s. This stemmed from two sources: the introduction of the "Longhouse Religion" at St. Regis in the early 1930s,⁵⁴ which provided support for the life chiefs, and the aftermath of the rejection of the Indian Reorganization Act in 1935.⁵⁵ This challenge to the elective government was seen by one court as little more than a failed "coup d'etat."⁵⁶

52. *Id.*; THOMAS DONALDSON, ELEVENTH CENSUS OF THE UNITED STATES, EXTRA CENSUS BULLETIN, INDIANS: THE SIX NATIONS OF NEW YORK 40 (1892).

53. There is little evidence that a traditional or life chiefs form of government was active to any significant degree on the American side in the decades before about 1885. However, a traditional government of twelve life chiefs continued to function on the Canadian reserve until 1888, when Canada took steps to impose its policies on the St. Regis Mohawks living in Quebec and Ontario. In that year, an Order in Council was passed replacing the life chiefs with twelve elected councillors under the pretext of charges of malfeasance on the part of the chiefs. As with the elective government on the American side, this too was challenged by supporters of the life chiefs form of government, many of whom were said to be "from the American side of the line." Indian Affairs Branch, Dept't of Citizenship & Immigration (June 15, 1904) (available in Public Archives of Canada, Ottawa, Ont.).

The opposition to elective governments in many Iroquois communities at this time grew from a nativistic movement that had arisen, in part, as a response to the Kansas claims and also to the loss of political and social autonomy resulting from actions by the Canadian government. Frisch, *supra* note 27, at 102-12; Abler, *supra* note 49.

54. The "Longhouse Religion" is derived from the teachings of the Seneca sachem Handsome Lake, who in 1799 experienced a series of visions that called upon the Iroquois to return to their former ways. Today, most of the members of the traditional governments or life chiefs councils in Iroquois communities are followers of the "Longhouse Religion," thereby providing an ideological and political link to all of the reservation communities. Anthony F.C. Wallace, *Origins of the Longhouse Religion*, in HANDBOOK, NORTHEAST INDIANS, *supra* note 4, at 442-48; Frisch, *supra* note 27, at 112-17.

55. Memorandum, History of Government, *supra* note 45, at 6-7; LAURENCE M. HAUPTMAN, THE IROQUOIS AND THE NEW DEAL, 56-69 (1981). In 1935, William N. Fenton had noted: "At present, about twenty-five percent of the people [on the American side of Akwesasne] elect the chiefs. The others do not recognize the legal government, insist on the old life chiefs, and refuse to come to the polls." *Id.* at 69. (citing Fenton); *cf.* Report of Archie Phinney, A Study of Tribal Government of the St. Regis (Mohawk) Indians of New York, #36450, Bureau of Indian Affairs, N.Y., RG75 (Aug. 7, 1942) (available in National Archives, Washington, D.C.); EDMUND WILSON, APOLOGIES TO THE IROQUOIS, WITH A STUDY OF THE MOHAWKS IN HIGH STEEL BY JOSEPH MITCHELL 82-89, 92 (1960).

56. *In re Terrance's Estate*, 32 N.Y.S.2d 540, 547 (1942).

According to a 1980 BIA memorandum that addressed this issue:

In 1958 during a meeting with the Commissioner of Indian Affairs, a St. Regis delegation revealed that a referendum was held in 1948 where only a small number of the St. Regis people supported the elective chiefs. A subsequent referendum the following year reversing this result and upholding the authority of the elective chiefs was also mention [sic]. These referenda did not appear to have had any bearing on the federal relationship with the elected St. Regis leadership.⁵⁷

Despite past and present challenges to its authority and standing, the elective system remains the federally and state recognized government of the St. Regis Tribe. It also has at least the implicit support of tribal members.

Most of the justifications for repealing Article 8 enumerated in the Assembly's "Memorandum in Support of Legislation,"⁵⁸ cannot be sustained in law any more than in history. For example, it is irrelevant whether the present federally recognized government of the St. Regis Mohawk Tribe has a "constitution or bylaws." A fundamental axiom of sovereignty is the inherent right of an Indian tribe to develop whatever form of government it chooses.⁵⁹ Thus, the assertions that state law "controls the electoral process on the reservation," or that Article 8 "intervenes, inappropriately in the internal affairs of the Mohawk Nation," an undefined entity, are inaccurate.⁶⁰

In addition, the New York State legislature has overlooked the most basic principle of federal Indian law. All federally recognized tribes began their relationship with the United States as sovereigns whose powers were limited only by the actions of Congress. "What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, 'powers vested in any Indian tribe or tribal council by existing law.'"⁶¹ The St. Regis Tribe, like all other federally recognized tribes, continues to exercise its unextinguished powers of sovereignty. These powers do not flow from statutes enacted by New York State, or, for that matter, Congress.⁶²

57. Memorandum, History of Government, *supra* note 45, at 8; WILSON, *supra* note 55, at 116.

58. For the text of this memorandum, *see supra* note 6.

59. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-63 (1978); Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927); Worcester v. Georgia, 31 U.S. 515 (1832); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 126 (1942).

60. See Patterson v. Council of Seneca Nation, 157 N.E. 734, 737-38 (N.Y. 1927), for a discussion on the status and authority of New York's Indian law.

61. 1 U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, at 447 (1979) (opinion dated Oct. 25, 1934) (citing 55 Interior Dec. 14 (1934)) (Powers of Indian Tribes).

62. United States v. Wheeler, 435 U.S. 313, 322-23 (1978); *cf.* FELIX S. COHEN'S

Finally, there is the federal view regarding the repeal of Article 8. Here it is maintained that any such repeal by the state legislature will have no effect, legally or practically, on the federal relationship, which is the controlling relationship between the St. Regis Mohawk Tribe and non-Indian governments. That is, the federal recognition of a tribe and its government is a matter of federal law and solely the province of the federal government. The state has no standing in the issue.⁶³ Legislative representatives who met with officials of the BIA, only after the repeal legislation was introduced, have chosen to ignore this critical legal point, as have Mohawk Indian opponents of the elective government at St. Regis.

The bill to repeal Article 8 passed in the Assembly, with only four dissenting votes, but is stalled in the Senate. The repeal attempt, however, has implications beyond its apparent political death. Despite its denials, the legislature has chosen to inject itself into the political business of the Akwesasne Indian community, violating Mohawk sovereignty. Moreover, it has taken sides in a dispute between Mohawk people, coming down in favor of unseating the federally recognized government. Thus, apart from the legitimacy of historical and legal arguments made by proponents and those opposing the repeal of Article 8, it is undeniable that the repeal effort is gross interference in internal, tribal politics.

The cultural dynamics, politics, and interactions between the parties that marked all stages of the repeal effort are relevant to its understanding.⁶⁴ For example, there is little evidence that members of the Assembly and their staffers who prepared the repeal legislation sought to familiarize themselves with the historical or legal background of Article 8 beyond what was provided to them by Indian lobbyists who opposed the elective government. The same can be said about a draft proposal to sit an Indian delegate observer in the Assembly, a document that is filled with avoidable historical and legal errors.⁶⁵ Staffers did not conduct any material historical research or seek impartial, expert legal advice or guidance from inside or outside of state government during the writing of the bill.⁶⁶ When asked why no historical research had been done, one senior staffer answered that the Assembly did not

HANDBOOK OF FEDERAL INDIAN LAW 229-32, 247-48 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN, 1982 ED.]

63. See U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. COHEN, 1982 ED., *supra* note 62, at 116-17, 271.

64. Portions of the following discussion are derived from interviews conducted by the author. Author's Field Notes, *supra* note 13.

65. Proposed Rule Change, Draft Number Two, Rules of the Assembly, Providing that the Sovereign Nations of the Iroquois Confederacy Shall Be Represented in the Legislature by a Delegate Observer to the Assembly (unpublished document, authored by Bud Mahoney) (July 8, 1991) (on file with author).

66. Author's Field Notes, *supra* note 13.

have sufficient resources, adding that, in any case, "all history is biased." Two staffers claimed that legal advice had been sought, but neither could name the lawyer(s) contacted or provide any details of the consultations or advice received.⁶⁷ Both staffers, however, admitted that the repeal measure was little more than a "political initiative" taken by the Assembly. An assemblyman involved in the repeal attempt stated that he had "no view" on reservation governments, that he was "neutral." Nonetheless, he had "been persuaded" by the Indian opponents of the elective government that Article 8 should be repealed. Such a repeal would be a "signal of the state's intentions," yet, he concluded, "the state has no business telling the government of an Indian nation how to govern."⁶⁸

Indian proponents of the repeal legislation were very effective in lobbying and educating members of the Assembly and their staffers about their particular views on the elective government. Much of this effort reflects the current political strategy of traditional people at Akwesasne and in the Confederacy generally. They are determined to "keep disputes out of the courts and in the political arena,"⁶⁹ where it is believed that through the successful solicitation of support from sympathetic legislators, negotiation and legislation favorable to attaining their objectives can be effected. This strategy has evolved partly due to the failure of traditional people to advance their agenda through the governor's office, and now the Office of Indian Relations, along with their inability to influence in any significant way the settling of the pivotal land claims through the courts.⁷⁰

Adherents of the elective government and its officers have essentially ignored the legislative process to repeal Article 8, opting instead to seek counsel and backing from the BIA.⁷¹ The Tribe's elected chiefs hesitated to participate in the hearings, believing they were "fixed."⁷² When they did appear, they often reacted to questions from the assemblymen with considerable suspicion, defensiveness, and, at times, disdain. Their attitude was characterized as "arrogant" by one Assembly staffer, which, he believed, led to the admittedly brusque and contentious questioning by some of the Assemblymen. The chiefs, in turn, believed that the conduct of the legislators was disrespectful and antagonistic.⁷³

67. *Id.*

68. *Id.*

69. *Id.*

70. See HAUPTMAN, *supra* note 4; STARNA, *supra* note 4; CHRISTOPHER VECSEY & WILLIAM A. STARNA, *IROQUOIS LAND CLAIMS* (1988).

71. *Tribe Seeks Support From Federal Government to Stop Sanders Bill*, INDIAN TIME (Akwesasne), May 3, 1991, at 1.

72. *Tribe Takes the Heat as Special Hearings in Albany Continue*, INDIAN TIME (Akwesasne), Aug. 10, 1990, at 1.

73. *Id.*

The tribal government did not respond during the comment period following the announcement of the recommendations stemming from the hearings. On the other hand, there was no consultation with the tribal government by Assembly members and staffers until after the repeal legislation was written.

Staffers and a key assemblyman interviewed were markedly sympathetic to what they identified as "traditional" Indian people, the "Haudenosaunee," and the "life chiefs" form of government. At the same time, they were openly antagonistic to the elective government and its advocates. One senior staffer observed that he would like to see the Confederacy return to lead all Iroquois people. Such strongly partisan feelings can be explained, in part, by the lack of experience of legislators and their staffs with Indian issues, along with the skilled lobbying effort by Indians opposing the elective government.

That the Assembly Committee on Governmental Operations and its newly reconstituted Subcommittee on Indian Affairs has an agenda in opposition to Indian elective governments in the state is demonstrated by yet a second proposal. It wants to sit what it calls a "delegate observer" in the Assembly, an Indian person to represent all of the federally and state recognized tribes in New York, in addition to the state's urban Indian population. This individual would be appointed by the Confederacy. Neither the elective governments of the Seneca Nation or the St. Regis Mohawk Tribe, nor those of the Shinnecocks or the Unkechaugs, were consulted before or during the drafting of this proposal.⁷⁴

Official opposition to the federally recognized elected Indian governments in New York State continues. In September 1993, the assistant speaker of the State Assembly presented a four-point program to President Bill Clinton requesting, in part, that the Grand Council of the Iroquois Confederacy be granted "full diplomatic recognition" by the federal government, and, moreover, that an executive order be issued to the State Department and the Department of the Interior "to provide for full participation of the Grand Council . . . in government-to-government relations between the United States and *all representatives of the Iroquois people*."⁷⁵ Beyond its obvious intrusion into tribal matters, this proposal is a direct assault on the sovereignty of not only the Seneca Nation of Indians and the St. Regis Mohawk Tribe, where there are elected governments, but also that of the other federally recognized tribes in the state that are governed by traditional councils and chiefs. Like the proposal for the delegate observer, this too is based on erroneous historical and legal information.

The strong moves by a cadre of individuals in the legislature to involve themselves in Indian issues are seen by some in government as a response to

74. See *supra* note 65 and accompanying text.

75. Letter from Edward Griffith, Assistant Speaker, New York State Assembly, to President Bill Clinton (Sept. 16, 1993) (emphasis added) (on file with author).

dissatisfaction with the administration of Governor Mario Cuomo.⁷⁶ One legislative staffer was outspoken in his opposition to the governor's Indian policy and what he believed to be Cuomo's lack of sympathy for traditional people and his apparent connection to certain members of "the warrior faction" at Akwesasne.⁷⁷ An official in the Executive Department, however, suggested that there were members of the Assembly, including Democrats, who were angry with the governor because of his manhandling of the legislature during the 1991 budget crisis and before.⁷⁸ Whatever the case, the hostility that exists between the state legislature and the governor is obvious.⁷⁹

Although the Executive Department has finally established its long-promised Office of Indian Relations, it will nonetheless be operating at cross-purposes with efforts by the legislature to advance its own agenda on state-Indian relations. Thus, as it has been true all too often in the past, it will be the Indians who will be disadvantaged. The observation by the United States Supreme Court that the people in the states where Indians live "are often their deadliest enemies" will remain true.⁸⁰ History appears bound to repeat itself.

76. Author's Field Notes, *supra* note 13.

77. *Id.*

78. *Id.*

79. See, e.g., Sam H. Verhovek, *Cuomo Offers Plan to Stimulate Recovery in New York Economy*, N.Y. TIMES, Jan. 9, 1992, at A1; Kevin Sack, *Presidential Wars Behind Him, Cuomo, Attacks His Legislative Foes*, N.Y. TIMES, Jan. 9, 1992, at B9; Calvin Sims, *At Feel-Good Event, Most Felt Rotten*, N.Y. TIMES, Jan. 9, 1992, at B9.

80. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

