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COURT OF APPEALS
STATE OF NEW YORK

CAYUGA NATION,

Respondent,

-against-

No. 70

CAMPBELL, et al.,

Appellants.

20 Eagle Street
Albany, New York
September 5, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 70, Cayuga Nation v.
3 Campbell.

4 Good afternoon, counsel.

5 MS. MURPHY: May it please the court. I'd like
6 to reserve three minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Of course.

8 MS. MURPHY: My name is Margaret Murphy. I'm
9 here representing the appellants who are defendants in this
10 action.

11 This action was commenced by five individuals who
12 claim to be the lawful governing body of the Cayuga Nation.
13 I'm going to refer to that group as the Halftown group, and
14 I'm going to refer to my clients as the Jacobs group.

15 Now, the Halftown group, I think it's notable and
16 important for the record, that none of these individuals
17 are chiefs, condoled chiefs. It is also important to note
18 that, by the Halftown group's own admission, two of its
19 members do not qualify to serve on the Nation's Council
20 because they have not been selected - - -

21 JUDGE RIVERA: So that's a continued dispute.

22 MS. MURPHY: Yes.

23 JUDGE RIVERA: So it seems to me the question is
24 whether or not the decision below to defer to what appears
25 to be a federal determination of who represents the Nation



1 is the question before us, not - - - not anything about
2 your dispute. There's obviously a dispute.

3 MS. MURPHY: Right.

4 JUDGE RIVERA: So why - - - why, in your opinion,
5 right, are the - - - are the courts wrong to have deferred
6 to that federal determination?

7 MS. MURPHY: Well, I think to refer to the BIA
8 decision is you have to recognize the BI - - - the BIA is
9 not given the right, by their own admission, to arbitrate
10 those types of dispute. Within - - -

11 JUDGE STEIN: Well, for certain purposes, they
12 are allowed to make a determination as to who to recognize,
13 correct?

14 MS. MURPHY: Absolutely.

15 JUDGE STEIN: And how - - - and how, for example,
16 would you distinguish this case from the determination in
17 Tanner and in the Timbisha case. What's the difference?

18 MS. MURPHY: Well, in Tanner you had a situation
19 where someone - - - in fact, the Halftown Group - - -
20 brought an action but not against its own members or not by
21 members of its own Council. They brought it against a
22 village, challenging whether that village had the right to
23 impose an ordinance regarding bingo in that village. So
24 there you don't have a dispute between the leadership
25 within the Council.



1 JUDGE STEIN: So what you're saying is is that
2 the court didn't have to determine whether one party had
3 the right to bring the action. That wasn't used to
4 determine the merits of the action itself.

5 MS. MURPHY: That's right.

6 JUDGE STEIN: Is that - - - is that what you're
7 saying?

8 MS. MURPHY: It did not determine the merits,
9 only the standing of the party to bring the issue to the
10 court.

11 JUDGE RIVERA: Yeah, but deciding standing is
12 deciding who gets to make choices in that litigation which
13 may very well implicate who represents the Nation.

14 MS. MURPHY: Well, I think you should - - - in
15 Tanner, the Second Circuit made it very, very clear that
16 they knew of the dispute and - - - and said by allowing the
17 Halftown Group to bring the action was not in any way their
18 view of whether or not they are the governing body to
19 support it or even to dispute it.

20 JUDGE RIVERA: No, I understand. I'm asking you
21 about the - - - getting behind that characterization,
22 getting to the logic, when one decides that someone has
23 standing they can proceed, they're going to make decisions
24 about how that litigation is going to move forward, and
25 isn't that, on some level, implicating whether or not



1 you're representing the Nation - - -

2 MS. MURPHY: Well - - -

3 JUDGE RIVERA: - - - as you make those decisions

4 - - -

5 MS. MURPHY: Well - - -

6 JUDGE RIVERA: - - - because only the Nation can

7 do that, or is your position that was wholly external to

8 the Nation, that action?

9 MS. MURPHY: Well, the whole thing is whether or
10 not a village in the State of New York has any jurisdiction
11 to pass laws against a tribal nation is a more neutral
12 question.

13 Now, what could have happened is the - - -

14 JUDGE RIVERA: But the outcome may very well
15 impact the Nation, right?

16 MS. MURPHY: Not necessarily, Your Honor. It may
17 be that - - - and even our clients would contend that the
18 village did not have the right to pass laws that could be
19 imposed against them. The question of whether to have
20 bingo operation at a facility operated by the Nation,
21 that's an internal governance matter that still needs to be
22 - - - which can be resolved within the Nation and is not
23 subject to a state court or even the federal government's
24 decision as to how they render their power.

25 JUDGE GARCIA: But to go back to, I think, Judge



1 Rivera's point, I read Tanner to say somebody has to be
2 able to come in and represent the Nation here. Judiciary,
3 we're not going to do it; we're going to defer to the
4 executive branch. We'll look at the record. Best evidence
5 of the record here is this BIA decision, which now has been
6 confirmed right in D.C., but - - - and that gets you not so
7 much standing, they said, but you can initiate the lawsuit,
8 because standing is the Nation itself.

9 MS. MURPHY: Um-hum.

10 JUDGE GARCIA: And so here we have a property
11 dispute, and the initial question under Tanner is can this
12 group bring the action as the representative of the Nation
13 because it's a property dispute where there's no dispute
14 over the owner. The owner's the Nation.

15 MS. MURPHY: That's right.

16 JUDGE GARCIA: So going back to Judge Rivera's
17 point, once you get in the courthouse door and you are the
18 representative of the Nation, the court doesn't have to, I
19 think, in the perspective of what we're looking at in the
20 appeal, say who wins that internal fight. All they're
21 saying is, okay, you, as representing the Nation, are
22 saying these people don't belong on this land, they're
23 trespassing. I'm saying that on behalf of the Nation or,
24 in one count here, these people who are operating the
25 businesses, leaders, not leaders, whoever they are, are



1 misappropriating funds - - - and this is a count - - - for
2 their own personal use. Why do they have to get into who
3 wins the internal dispute to resolve that count?

4 MS. MURPHY: Well, Your Honor, you're really
5 going beyond the record, but more importantly - - -

6 JUDGE GARCIA: That's a count in your - - - in
7 the complaint.

8 MS. MURPHY: No.

9 JUDGE GARCIA: What's not in the record?

10 MS. MURPHY: We didn't bring the complaint. The
11 complaint is brought. And going to the merits of the
12 complaint, you have to look to the claims. That's why I
13 think you need to look at what the dissent said.

14 JUDGE GARCIA: But one charge here in their
15 complaint, on behalf of the Nation - - -

16 MS. MURPHY: Right.

17 JUDGE GARCIA: - - - is that the people who are
18 operating these businesses are diverting the money for
19 their own personal use. Why do you have to get into who is
20 the natural leader of the Nation to determine that count?

21 MS. MURPHY: Well, and the Jacobs Council, in the
22 reverse, believes that the Halftown Group is doing the same
23 thing. The question becomes - - - and I see I have just -
24 - -

25 JUDGE GARCIA: But even if these people have some



1 claim on leadership, if they're diverting the money from
2 this and putting it in an account in Switzerland, let's say
3 in this hypothetical, of course, why can't the court
4 determine that - - -

5 MS. MURPHY: That's - - -

6 JUDGE GARCIA: - - - on behalf of the Nation?

7 MS. MURPHY: Except that's not the claims that
8 they brought in their complaint. They brought claims of
9 trespass and ejection. They bring it against old chiefs
10 and clan mothers and - - - and clan representatives who
11 serve on the Council.

12 JUDGE GARCIA: So there's not a conversion claim
13 in there?

14 MS. MURPHY: There is a conversion claim. In
15 fact, it's right in their claim; they call it conversion,
16 trespass, interference with business opportunities.

17 JUDGE RIVERA: It's a conversion - - - your
18 argument is, well, yeah, they're arguing conversion because
19 they're saying that the Jacobs Council, using your term, is
20 not the appropriate representative, and therefore
21 everything that they do with this property is for
22 themselves not the Nation; is that what you're trying to
23 argue?

24 MS. MURPHY: Well, that's the claim of the
25 Halftown Group. We are - - - that's not our claim. The



1 bottom line is is - - - is - - -

2 JUDGE RIVERA: But I didn't say it was your
3 claim; I thought you were trying to explain why it still
4 requires that you look at who - - - at the - - - at the
5 underlying dispute, right? You're saying that, in essence,
6 what they're really arguing when they say conversion is
7 that it's because the Jacob Council doesn't have authority,
8 and that's why it's conversion.

9 MS. MURPHY: And that's exactly what the dissent
10 looked at in the Fourth Department. They said each of
11 these claims would require the individual defendants to - -
12 - to - - - to have - - - to have to explain where their
13 authority comes from, what their justification - - -

14 JUDGE FEINMAN: They would have to have a
15 superior right.

16 MS. MURPHY: Right. Right, but this is the
17 important thing that - - - that I think this court is
18 ignoring. What is the impact of this decision? The impact
19 of the decision is to tell members of - - - clan mothers,
20 chiefs, and certain citizens of the Nation that they
21 cannot, they're enjoined from entering a longhouse. The
22 longhouse is where they conduct business of the government,
23 where the clans meet to - - - to reach consensus during a
24 deliberative thing.

25 JUDGE WILSON: So let me ask you this.



1 MS. MURPHY: Um-hum.

2 JUDGE WILSON: If I myself moved an intervention,
3 filed a complaint intervention in this lawsuit - - -

4 MS. MURPHY: Um-hum.

5 JUDGE WILSON: - - - saying that I was the lawful
6 representative, could the court throw me out, find some
7 facts that I actually have no relation to the Cayuga Nation
8 and throw me out?

9 MS. MURPHY: No, the courts have no ability - - -

10 JUDGE WILSON: The court could not throw me out -
11 - - throw my complaint out?

12 MS. MURPHY: Not if there has been some
13 recognition, which the BIA has recognized and they have
14 admitted, that if you're a condoled chief, if you're a clan
15 mother, that is not in dispute. We know that two members
16 who I represent are condoled chiefs, are clan mothers.
17 That was recognized by the BIA. That has been recognized
18 by the Halftown.

19 The problem is is that this - - - this dispute,
20 that has been going on since 2004, they claim has now been
21 resolved because of what they call the statements signed by
22 citizens, citizens who, if I went out and took one of your
23 decisions, this court's decision, and got sixty percent of
24 the registered voters in New York State, they can't reverse
25 the decision of this court.



1 JUDGE STEIN: But you don't question the BIA's
2 authority to make that determination for purposes of
3 government-to-government transactions, do you?

4 MS. MURPHY: When there is a federal purpose, and
5 in this case the federal purpose is to give federal money -
6 - -

7 JUDGE STEIN: Okay. So - - -

8 MS. MURPHY: - - - they can flip a coin.

9 JUDGE STEIN: So the question is is whether - - -
10 when and whether - - - or whether and when that
11 determination is binding on the courts.

12 MS. MURPHY: Right. It is binding in that you
13 have to give deference to it; that is the issue.

14 JUDGE STEIN: Right.

15 MS. MURPHY: And if you look at the BI - - -
16 BIA's decision, as they said, that it has a broader
17 implication that you need to give deference. But I would
18 say that is contrary to the bedrock principle that the BIA
19 itself, with the interior board of Indian appeals, that is
20 an adjudicatory agency within the BIA who basically said
21 that - - - would say that bedrock principle constrains what
22 the meaning of their decisions are.

23 JUDGE GARCIA: Didn't the circuit address this
24 issue on the limiting language of the BIA decision, same
25 one, and said: true, but we're not using it for that



1 purpose; all we're using that decision for is an evidence
2 of the executive branch's view of who represents the Nation
3 for - - - and they used that to say who could initiate the
4 lawsuit. That's all they did with the BIA decision in face
5 of the exact same argument that was it's only limited to
6 contract to contract - - - Nation to - - - you know,
7 federal government to - - - to Nation interaction.

8 So what they were using that for was the purpose
9 of saying: what is the executive branch's view of who
10 represents, in order to initiate a federal lawsuit, and
11 then they allowed them to represent the Nation in the
12 federal lawsuit in Tanner. That's how I read Tanner.

13 MS. MURPHY: Okay. Tanner, as I said, only went
14 to the issue of what rights the Nation has against a
15 village. It doesn't describe what is the rights that this
16 - - -

17 JUDGE GARCIA: But it's not couched - - -

18 MS. MURPHY: - - - group has - - -

19 JUDGE GARCIA: - - - in that language.

20 MS. MURPHY: - - - against other members of the
21 Council.

22 JUDGE GARCIA: It's not couched in that language.
23 It goes to who has the right to bring an action on behalf
24 of the Nation. It doesn't speak to who the respondent is
25 in that action. Certainly that would be the case where you



1 have, you know, a third-party trespasser here, where the
2 Nation would have an interest in coming in in an eviction
3 proceeding, but you also have a case where they're alleging
4 that funds are being diverted by their - - - from their
5 proper use on behalf of the Nation.

6 So the same types of concerns govern that there
7 may be waste, there may be fraud - - - and I'm not judging
8 the merits here. And there's no venue to do that; there's
9 no one to represent the Nation's interests, and that's what
10 they were looking for there, which seems to me very similar
11 to what we would be looking for here in a case involving
12 state property, right?

13 This is property outside the - - - the
14 reservation. It's land that's governed by the rules and
15 regulations of the State, which Tanner and City of Sherrill
16 have instructed. So I mean, in terms of zoning, in terms
17 of taxing - - - you don't agree in terms of zoning and in
18 terms of taxing? That hasn't already been decided in this
19 case?

20 MS. MURPHY: The bottom line is this is about
21 dominion and control of that land that is owned by the
22 Cayuga Nation. And - - - and in that regards, this land is
23 located in their ancestral land which the Congress has not
24 disestablished this reservation, has - - - in no way. And
25 this is - - - and this court, in Gould, recognized that.



1 More importantly, you are forgetting the footnote
2 in the Second Circuit like it has no meaning. The Second
3 Circuit made it very clear that the Halftown Group, they
4 did not support or did they oppose or feel it relevant
5 whether they are in fact the - - - the governing - - - the
6 lawful governing body of the Nation itself.

7 JUDGE RIVERA: Okay. So given the BIA decision,
8 saying that moving forward - - -

9 MS. MURPHY: Right.

10 JUDGE RIVERA: - - - if this dispute continues,
11 that's - - - that's for - - -

12 MS. MURPHY: Yeah.

13 JUDGE RIVERA: - - - the Nation to decide, what
14 if any, meaning the - - - the decision with respect to that
15 survey will have moving forward.

16 MS. MURPHY: Yes.

17 JUDGE RIVERA: So what - - - what is the Jacob
18 Council's view as to how they would resolve this dispute to
19 - - - to establish for the BIA that the Halftown Council is
20 not the appropriate representative of the Nation?

21 MS. MURPHY: The - - -

22 JUDGE RIVERA: How would you show that now?

23 MS. MURPHY: How do we show how the - - -

24 JUDGE RIVERA: Yes, because you've taken the - -
25 - Council's - - - Jacobs Council's taken the position that



1 what the BIA permitted is not permissible under - - - under
2 the law - - - under their law.

3 MS. MURPHY: That's right.

4 JUDGE RIVERA: Right? So what - - - what is the
5 position of the Jacobs Council, moving forward?

6 MS. MURPHY: In moving forward, the Jacob Council
7 says this has to be done on a consensual basis with all
8 clan representatives being present in the longhouse. It is
9 supposed to not be by a mail-in survey. It is supposed to
10 be by a process of listening, questioning, and debating the
11 issues. And then the - - -

12 JUDGE RIVERA: So if the impasse continues - - -

13 MS. MURPHY: Right.

14 JUDGE RIVERA: - - - does that mean that - - -
15 that the - - - it strikes me that what's - - - then you're
16 stuck with the prior BIA decision if your impasse
17 continues.

18 MS. MURPHY: No, the - - - no, because, as the
19 BIA has said, going forward, the meaning of the statement
20 of support is a matter of Cayuga law and which the BIA said
21 previously in the matter of George v. Eastern - - -

22 JUDGE RIVERA: Yes, but you both dispute, and the
23 BIA held against you on that.

24 MS. MURPHY: For purposes of deciding who was
25 going to get this federal money. But the - - - the - - -



1 JUDGE RIVERA: And you mean it stops there?

2 MS. MURPHY: Excuse me?

3 JUDGE RIVERA: You mean it stops there?

4 MS. MURPHY: And it stops there. Only the - - -

5 JUDGE RIVERA: With - - - with those grants, now
6 it's done; you're back to your impasse.

7 MS. MURPHY: Back to the impasse because, as the
8 internal Bureau of Indian Affairs said in *George v. Eastern*
9 *Regional - - - v. the Eastern Regional Director*, the BIA
10 has no authority to serve as an arbitrator for tribal
11 disputes or for the convenience of agencies or third
12 parties.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. MURPHY: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. DEBRUIN: Thank you, Your Honor. May it
17 please the court. My name is David DeBruin. I'm counsel
18 for the plaintiff, the Cayuga Nation, which, as the court
19 recognizes, is the undisputed owner - - -

20 JUDGE STEIN: Counsel, has the BIA, or anybody
21 else in this process here, said anything about the property
22 rights at issue in this particular action?

23 MR. DEBRUIN: No, it has not, Your Honor, nor
24 would the BIA ever have reason or occasion to do that.

25 JUDGE STEIN: Well, that's a good question. I



1 mean, it seems - - - it seems to me that in Timbisha there
2 was a much broader statement of authority and - - - and
3 what - - - what about - - - you know, there's a pending
4 trust application. Could - - - could that lead to a
5 broader determination?

6 MR. DEBRUIN: Well, Your Honor, the BIA, in its
7 decision, recognized the pending trust application. It
8 recognized other government-to-government matters. And
9 what the BIA concluded, in unequivocal terms, is that we
10 recognize the Halftown Group as the proper government of
11 the Nation as determined by the Nation's citizens.

12 JUDGE STEIN: Well, but as I read it is is that
13 we have to make some determination for who to - - - to deal
14 with, on a government-to-government basis, and for that
15 purpose, we're looking to all these facts, and for that
16 limited purpose, that gives us something to rest our hat
17 on. We'll rest our hat on that, and at least now we know
18 who to send this money to.

19 I - - - I really read this as the BIA recognizing
20 its own limitations and - - - and exercising those
21 limitations explicitly in - - - in this - - - in this
22 action. And I - - - you know, I'm not saying that there
23 couldn't be situations in which they could make a broader
24 statement, but - - - but I - - - I just don't see how that
25 happened here.



1 MR. DEBRUIN: Your Honor, as the court in Tanner
2 recognized, the federal government, when it - - - the
3 federal government has the responsibility for resolving all
4 matters of Indian affairs, and in doing so, it has a
5 responsibility to recognize the government of a nation that
6 it will interact with on a government-to-government basis.

7 JUDGE STEIN: Yes, but in Tanner it had - - - it
8 had - - - again, it sort of looked to, okay, here is a - -
9 - an issue about gaming that involves a village. The
10 underlying issue was not about the leadership dispute. And
11 so the court said, okay, we have to, again, look to
12 something so that somebody can come in here and represent
13 the Nation as against a third party. And - - - and I think
14 those concerns are very legitimate. Somebody has to do it
15 for those - - - but it was limited to that. And that's not
16 this situation.

17 MR. DEBRUIN: Well, it is the situation here.
18 Tanner involved the Nation's right to assert its rights
19 over its property and how that property would be used. The
20 third party in that case happened to be the village.

21 JUDGE STEIN: But the question is is who's it?

22 MR. DEBRUIN: There are third parties in this
23 case, Your Honor, and their claim that they are the leaders
24 is a claim that - - - a dispute that existed for more than
25 a decade, and the BIA and the courts - - - Justice Bender,



1 the Supreme Court justice in this case, urged the Nation to
2 resolve that dispute. And after more than a decade, the
3 dispute was submitted to the Cayuga people because the
4 Nation lost all of its land until recently when it
5 reacquired it. Its people are scattered throughout the
6 United States.

7 JUDGE STEIN: But even here they expressed
8 concern about that process. And maybe I'm just - - -

9 MR. DEBRUIN: But Your Honor, ultimately - - -

10 JUDGE STEIN: - - - repeating myself, but I
11 think that they were very careful to say we need to do this
12 because we need to deal with them on this issue; we're not
13 going beyond that.

14 MR. DEBRUIN: But that - - -

15 JUDGE STEIN: And so - - -

16 MR. DEBRUIN: Your Honor, that is how the federal
17 government always acts, and I would - - - I would urge you
18 - - -

19 JUDGE RIVERA: But counsel, doesn't that mean
20 that if tomorrow there was a grant due, and there were two
21 competing grants, one from the Halftown faction, one from
22 the Jacobs Council faction, that - - - that the federal
23 government's going to have to go through this process again
24 and decide, okay, how do we figure out, because they've
25 already got a precedent where they don't necessarily accept



1 who in the past has been the recognized representative when
2 there is a - - - a dispute and a - - - I don't want to call
3 it a competitor, but a faction that argues that not only
4 are they the representative but that Halftown is not the
5 representative.

6 MR. DEBRUIN: But Your Honor, there is no
7 evidence in the record that - - -

8 JUDGE RIVERA: No, just answer that que - - -

9 MR. DEBRUIN: - - - anything has changed.

10 JUDGE RIVERA: No, no, no, but you - - - just
11 answer that question: would the BIA have to go through
12 that same process again - - -

13 MR. DEBRUIN: Well, it - - -

14 JUDGE RIVERA: - - - given what it has said in
15 these decisions?

16 MR. DEBRUIN: Not because of what it says in the
17 decisions. They always would - - - could be called upon to
18 make an assessment of whether there's been a change in the
19 Nation's government. The Nation has that right. The BIA
20 recognized that it could make a change. There's been no
21 allegations that anything has changed from the Nation's
22 resolution.

23 JUDGE RIVERA: Here's my question then. How
24 could, given the impasse, which is - - - it's reflecting a
25 philosophical difference in the way you view governance - -



1 - given this impasse, how could the Jacobs Council ever
2 satisfy the BIA on this issue? Their position is: you
3 simply cannot proceed through majoritarian elections;
4 that's not how we function. How - - -

5 MR. DEBRUIN: Your Honor, that issue - - -

6 JUDGE RIVERA: How do you get past that is what
7 I'm asking you.

8 MR. DEBRUIN: That issue was submitted - - - it's
9 not to the BIA; that issue is submitted to the Cayuga
10 people. The very arguments that Ms. Murphy made today - -
11 -

12 JUDGE RIVERA: Yes, but this is my problem with
13 your argument. They continue - - - Jacobs Council
14 continues to dispute it, but I'm having the same challenge,
15 I think, that Judge Stein is having, perhaps for a
16 different reason, regarding what the BIA is saying related
17 to that process.

18 They - - - they have made clear that they're not
19 wedded to this process in the future. They've made clear
20 that there could be an alternative process by which the
21 Nation speaks. The Council - - - Jacobs Council has said
22 this is what we propose is the way we speak. Obviously
23 your side is proposing a different way.

24 MR. DEBRUIN: But of course. What you are
25 suggesting is gridlock, that there is no way a Nation can



1 ever - - -

2 JUDGE RIVERA: Yes, I am.

3 MR. DEBRUIN: Well, and so what gridlock means is
4 what you're saying is if the courts of New York - - -

5 JUDGE RIVERA: Yes.

6 MR. DEBRUIN: Halftown Council has come to the
7 courts of New York, repeatedly, to try to enforce the
8 rights of the Nation. These are the Nation properties that
9 are currently being processed by who knows who is operating
10 that store that generated five million dollars of revenue,
11 that the Nation distributed to its people and lost in 2014
12 - - -

13 JUDGE STEIN: But you're not suggesting that
14 they're not members of the Nation, are you?

15 MR. DEBRUIN: I'm suggesting we don't know who
16 they are, who is in possession - - -

17 JUDGE STEIN: But you don't have any reason to
18 believe that they're not members of the Nation - - -

19 JUDGE RIVERA: There's nothing in the record - -
20 -

21 JUDGE STEIN: - - - that this is not an internal
22 dispute?

23 MR. DEBRUIN: That - - - yes, we do dispute who
24 currently is in possession of the store. That is a factual
25 issue. All I'm saying is the Nation has the right to



1 possession. It is the Nation that is the plaintiff.

2 JUDGE WILSON: What is it - - -

3 MR. DEBRUIN: The point is how do the people
4 resolve this? This - - -

5 JUDGE STEIN: The issue is that - - - the whole
6 point is that is the underlying merits issue of the action
7 is: who is the Nation? I don't think it's disputed that -
8 - -

9 MR. DEBRUIN: But the point, Your Honor - - -

10 JUDGE STEIN: - - -the Nation owns the property.

11 MR. DEBRUIN: I appreciate that. If you're
12 saying the courts are closed, the Cayuga Nation must
13 resolve this for itself, law and order is gone, and whoever
14 has the bigger stick will take the property.

15 JUDGE RIVERA: But that's not law and order,
16 that's - - -

17 MR. DEBRUIN: That is what you're saying.

18 JUDGE RIVERA: That's the relationship - - -
19 excuse me. That's the relationship between the sovereign
20 people and the federal government and the state government.

21 MR. DEBRUIN: I submit - - -

22 JUDGE RIVERA: We have said - - - excuse me - - -
23 that bedrock principle - - - that's the language in the
24 cases - - - that the courts cannot resolve these disputes.
25 You may - - - you may argue that this is actually not a



1 dispute that the courts would resolve, but if - - - if we
2 think it is a dispute, that's the precedent.

3 MR. DEBRUIN: That is not. I direct you to the
4 Russian Socialist case of this court involving foreign
5 sovereigns. And it's no different for foreign sovereigns
6 than for Indian sovereigns. And in that case, the dispute
7 was: who had the right to possession of the Russian
8 consulate or embassy in New York, property in New York,
9 following the Russian takeover.

10 JUDGE WILSON: May I - - -

11 MR. DEBRUIN: This is in - - -

12 JUDGE WILSON: May I ask you about - - -

13 MR. DEBRUIN: - - - 1923.

14 JUDGE WILSON: - - - Section 233?

15 MR. DEBRUIN: Yes.

16 JUDGE WILSON: What, if anything, does Section
17 233 authorize the New York courts to do that, for example,
18 the New York - - - the New Jersey courts are not able to
19 do?

20 MR. DEBRUIN: Clearly, Section 233, along with
21 New York Indian Law, Section 5 and Section 11-A, all were
22 designed to expand and make clear that New York courts have
23 jurisdiction to hear claims involving Indians, involving
24 Indian nations, and even to apply Indian law.

25 Cleary, it is an expansion, but I submit you



1 don't need even to rely on those statutes to reach the
2 fundamental question. Again, I ask the court who had asked
3 me questions: how do the people - - - how do the Cayuga
4 people ever resolve anything? Here the Jacobs group
5 doesn't like the campaign that was used to reach out to all
6 members.

7 JUDGE RIVERA: But let's take your example of - -
8 -

9 MR. DEBRUIN: There could be an election.

10 JUDGE RIVERA: Or let's take your example of a
11 foreign nation. Let's say France can't figure out its
12 government. Let's just say that for one moment. The
13 United States can't - - - can't make a decision about - - -

14 MR. DEBRUIN: No, but - - -

15 JUDGE RIVERA: - - - who that - - - who controls,
16 right - - -

17 MR. DEBRUIN: But this court - - -

18 JUDGE RIVERA: - - - unless it's got a particular
19 limited issue that our law permits us to decide.

20 MR. DEBRUIN: What this court said in Russian
21 Socialist - - - this is in 1923, quote: "It is not for the
22 courts to say whether the present governments of Russia or
23 Mexico or Great Britain should or should not be recognized.
24 They are or they are not. That is as far as we may
25 inquire." It is not for this court to decide whether the



1 BIA properly or mistakenly recognized the Halftown Council
2 as the government of the Nation chosen by the Cayuga
3 people.

4 JUDGE RIVERA: No, no, no, but the question is
5 whether - - -

6 MR. DEBRUIN: The point is they've done that.

7 JUDGE RIVERA: The question is whether or not
8 that BIA decision was limited to the purposes before it,
9 i.e., resolving the competing grants presented.

10 MR. DEBRUIN: I would direct you to respondent's
11 appendix 34, R.A. 34, where the BIA concludes - - - this is
12 the decision of the Assistant Secretary, the final decision
13 of the federal government, quote: "I therefore affirm the
14 regional director's decision to recognize the Halftown
15 Council as the legitimate Cayuga Nation government and to
16 reject appellant's 638 proposal as unauthorized."

17 The point is the BIA, called upon by the 638
18 contract to recognize a government, has recognized a
19 government. That hasn't changed. That was affirmed - - -

20 JUDGE GARCIA: Counsel - - -

21 MR. DEBRUIN: - - - by the D.C. courts in 2019.

22 JUDGE GARCIA: Counsel, I think that that may be
23 an argument, and I don't think it's your strongest
24 argument. I read Tanner, again, to say the only reason
25 we're going to look to that BIA decision is to see who can



1 come into this courthouse. We need somebody to vindicate
2 the rights of the Nation. Who can come into this
3 courthouse and represent the Nation in this litigation?
4 They looked to that as the best evidence of the executive
5 branch's recognition of somebody to be able to do that.
6 They said it's you. And you got through the courthouse
7 door. You could initiate the litigation there, not
8 standing because it's the Nation that really is the primary
9 party and the Nation is vindicating here its rights.

10 So I think there's two questions. I think on
11 question one, it seems to me, if you adopt the Tanner
12 approach, that's over, BIA recognition, executive branch,
13 you get to initiate litigation. The next question becomes,
14 and I think what Judge Stein was getting at is: okay, but
15 in order to determine the subject matter of this
16 litigation, do we have to resolve your internal dispute
17 over who the leadership is?

18 And my question would be: what if a member of
19 your Council was on this land and was taking the money and
20 sending it over to a Swiss bank account, and the Council
21 came in and said, you're stealing the money, this is a
22 conversion count, we're representing the Nation, would the
23 court have to throw up its hands and say, well, hey, that
24 may be a legitimate part of your leadership, and that
25 defendant says, no, I'm part of the leadership, wouldn't



1 the Council, as the representative of the Nation, have the
2 right to enforce the property rights related to the
3 property in the Nation's name?

4 And that's what the first part gets you. And it
5 almost gets you the answer. And I think what the courts
6 below did, it gets you the answer to the substantive
7 question here because of the nature of the rights that are
8 being enforced on behalf of the property.

9 MR. DEBRUIN: I agree fully. These are
10 properties of the Nation. What is at issue - - - and the
11 only - - - we're here on a preliminary injunction that
12 simply ordered possession of the properties to the Nation
13 that - - -

14 JUDGE STEIN: I thought you were here on a motion
15 to dismiss.

16 MR. DEBRUIN: No, we are here because Justice
17 Bender issued a preliminary injunction simply ordering that
18 the Nation, through the recognized government is - - -

19 JUDGE FEINMAN: But I thought the same order also
20 denied the motion to dismiss.

21 JUDGE STEIN: Yeah.

22 MR. DEBRUIN: Well, yes, that - - - but - - -

23 JUDGE STEIN: And if the motion to dismiss - - -

24 JUDGE FEINMAN: Is what they appealed - - -

25 JUDGE STEIN: Right, yeah.



1 MR. DEBRUIN: Well, yes, they - - - they said he
2 - - - the court - - - the court had no jurisdiction to
3 issue the injunction. But the - - - all I'm saying is the
4 court has not adjudicated all of the claims, and so I agree
5 with you - - -

6 JUDGE STEIN: The question before us is: can the
7 court adjudicate the claims, and if so - - -

8 MR. DEBRUIN: It clearly can adjudicate - - - as
9 Justice Bender found, they can adjudicate some of the
10 claims, including the basic right: does the Nation have
11 the right to possess its own property to the government its
12 people have chosen in a process that the BIA has
13 recognized? Nobody disputes that.

14 The second question is, he recognized there are
15 certain claims, going back to 2014, before the people made
16 the choice of government, before the BIA recognized that
17 choice by the people. Would there be, potentially,
18 sovereign immunity for some claims at some time by some
19 persons? And Justice Bender said that's not before me yet;
20 all I'm deciding is (A), I have subject-matter
21 jurisdiction, I can hear this case, I can recognize the
22 plaintiff, as the Cayuga Nation, is represented in this
23 case, the claim is brought by the rightful government that
24 the BIA recognizes. I don't have to decide that
25 recognition. That's what the BIA decided.



1 JUDGE RIVERA: I'm just a little confused in this
2 because as I - - - and you'll help me understand this. As
3 I understand it, the federal government can only make these
4 determinations for the immediate purpose before it. It
5 sounds like you're arguing that the federal government was
6 not merely deciding, okay, who of these competing factions
7 for these grants is the representative of the Nation, but
8 rather decided the larger question, which is at the heart
9 of the impasse, who represents the Nation writ large. I'm
10 - - - I'm just not sure that that is the kind of decision
11 the BIA can make, right - - -

12 MR. DEBRUIN: Your Honor, I just - - -

13 JUDGE RIVERA: - - - when it's presented with
14 competing grant requests. That's all that's before it.

15 MR. DEBRUIN: When presented with competing grant
16 requests, it had to make a decision - - -

17 JUDGE RIVERA: It's got to decide for that
18 purpose.

19 MR. DEBRUIN: Well, that's what triggered the
20 decision, but the question before the - - -

21 JUDGE RIVERA: But for that purpose. You want to
22 say - - -

23 MR. DEBRUIN: Yes.

24 JUDGE RIVERA: - - - yes, and when they did that,
25 oh, that meant they're deciding, for all the future - - -



1 MR. DEBRUIN: Your Honor, I direct you to what -
2 - -

3 JUDGE RIVERA: - - - who represents the Nation
4 for other purposes. And that's - - - that's where I'm
5 having a little difficulty.

6 MR. DEBRUIN: I direct you to what the BIA
7 concluded and what the assistant secretary concluded, that
8 the dispute that had existed for more than a decade had
9 been resolved by the tribe through a tribal mechanism that
10 was consistent with Cayuga law and that the federal
11 government would recognize that resolution. Nothing has
12 changed since the tribe resolved that dispute.

13 JUDGE RIVERA: Well, let me ask you this. If
14 there weren't these competing grant proposals that trigger
15 this, could you just have said, you know, we're at impasse;
16 just decide this. We - - - we can't. You've been trying
17 to help us negotiate it for over - - - we can't. Just
18 decide it. Could the BIA have done it at that point?

19 MR. DEBRUIN: No, of course, no. We don't
20 contend that they could, and that's certainly not what they
21 did. They looked - - -

22 JUDGE RIVERA: So then how could they, if the
23 only trigger is a limited one?

24 MR. DEBRUIN: Well, the federal government has a
25 general responsibility, as the guardian of Indian nations,



1 to identify who it will recognize for government-to-
2 government interactions.

3 JUDGE RIVERA: Right, for its purpose.

4 MR. DEBRUIN: There is virtually always some
5 entity, some federal representative that the federal
6 government recognizes, because there are myriad federal
7 grant programs, other interactions that go on all the time,
8 just like with foreign governments.

9 JUDGE STEIN: So where's the government-to-
10 government purpose in the action that has been brought with
11 regard to this property?

12 MR. DEBRUIN: Well, the government-to-government
13 is the Cayuga Nation has come to the - - - to the
14 government of New York, the State of New York, the court
15 system of New York to protect its property rights like any
16 other property owner.

17 JUDGE STEIN: I think that's begging the
18 question, but okay.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. DEBRUIN: The federal government is not
21 involved in this dispute; I don't claim that it is, but the
22 point that matters is the federal government has recognized
23 the Halftown Council is the rightful government chosen by
24 the people. Just as when the federal government refused to
25 recognize Russia, it had nothing to do with the property

1 dispute in New York; it had to do with trade and treaties.
2 That's what the federal government caused them to recognize
3 or not recognize Russia.

4 But then this court, in resolving a property
5 dispute that had nothing to do with the federal government,
6 said, our sole job is to ask the question: who does the
7 federal executive recognize vis-a-vis this foreign
8 sovereign? And that's exactly what we have here. We have
9 - - -

10 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
11 you.

12 Counsel?

13 MS. MURPHY: I want to address the issue about
14 Section 233. It gave jurisdiction to the state court to
15 resolve private disputes, not disputes that would involve
16 members who are condoled chiefs or clan mothers.

17 I also would like to point out what the BIA
18 decision and - - - and - - -

19 JUDGE WILSON: But why do you say that? The
20 words of the statute don't say that.

21 MS. MURPHY: No, but the decisions of this court
22 has found that, and the decision of other state courts have
23 found that. I've cited a whole list of - - -

24 JUDGE WILSON: But there can't be decisions of
25 other state courts about Section 233.



1 MS. MURPHY: No, no. Courts in New York have
 2 determined that. The Fourth Department determined that in
 3 Seneca v. Seneca. This court determined it in the St.
 4 Regis Mohawk case v. - - - in a footnote. It has been
 5 decided by the Third Department and the Fourth Department,
 6 and I've cited those cases in my brief, where the purposes
 7 of 233 is limited to private disputes - - - private
 8 disputes and not disputes that would involve members of a
 9 tribal government, including condoled chiefs and clan
 10 mothers.

11 JUDGE GARCIA: Wasn't part of - - - and I'm not
 12 saying it applies here, but wasn't part of the genesis of
 13 233 - - - the impetus for it was that there were no tribal
 14 courts, in certain circumstances, to resolve some of these
 15 disputes?

16 MS. MURPHY: Disputes that would arise - - -

17 JUDGE GARCIA: Whatever types of disputes, but
 18 there were no tribal courts to resolve them.

19 MS. MURPHY: That would allow non-Indians to get
 20 - - - to - - -

21 JUDGE GARCIA: But they - - -

22 MS. MURPHY: - - - resolve their disputes.

23 JUDGE GARCIA: Actually, I thought the statute
 24 covers Indians and Indians, not Indians and non.

25 MS. MURPHY: No, Indians and non-Indians.

1 JUDGE GARCIA: Only Indians and non-Indians?

2 MS. MURPHY: No, Indians and Indians and Indians
3 and non-Indians.

4 JUDGE GARCIA: Right, both.

5 MS. MURPHY: Right.

6 JUDGE GARCIA: Okay.

7 MS. MURPHY: And that - - - so that they can have

8 - - -

9 JUDGE GARCIA: And there are no tribal courts
10 here that are going to resolve this dispute?

11 MS. MURPHY: To resolve private disputes.

12 JUDGE GARCIA: But there's no tribal court in
13 this case that is going to resolve your leadership dispute,
14 right?

15 MS. MURPHY: No, it's going to be resolved - - -
16 what it should be is a government disp - - -

17 JUDGE GARCIA: So now you have a piece of
18 property that could be in downtown Manhattan, that's owned
19 by a nation, and there may be people - - - it couldn't be?
20 This is just purchased on the open market; it's an
21 investment. And it could be that one group controls it, it
22 may get somewhat violent. And I'm not saying this is this
23 case; it's a hypothetical. Another group comes in, spills
24 into court, who's the rightful possessor of this case. And
25 New York's going to throw up its hands and say, you know



1 what, that's a dispute over leadership; shoot it out, you
2 know, fight it out over there.

3 MS. MURPHY: The distinction, Your Honor, is the
4 difference between on-reservation property and off-
5 reservation property. And this - - -

6 JUDGE GARCIA: But this is not reservation
7 property.

8 MS. MURPHY: Well, then you - - -

9 JUDGE GARCIA: This was purchased on the open
10 market.

11 MS. MURPHY: Then I will indicate to you that
12 this - - - then, in all due respect, this court needs to go
13 back and reread the Gould decision which was rendered by
14 this court. This property is located in the ancestral
15 lands of the Cayuga Nation.

16 JUDGE WILSON: So I just want to be sure. So
17 your position is if this land is not reservation land, you
18 lose?

19 MS. MURPHY: Well - - - and the only person who
20 can decide this is not reservation land is Congress because
21 this is part of the original treaties that pre-date the
22 Constitution.

23 JUDGE WILSON: I didn't ask you that.

24 MS. MURPHY: Well, I guess the question becomes:
25 who decides whether this is reservation - - -



1 JUDGE WILSON: I didn't ask you that; I said
2 "if". Assume it is. If - - -

3 MS. MURPHY: Okay.

4 JUDGE WILSON: - - - then what? You lose?

5 MS. MURPHY: Yes. If this was off-reservation
6 land, we'd have a whole different argument here.

7 JUDGE WILSON: Well, I didn't ask you that
8 either.

9 MS. MURPHY: Huh? Excuse me?

10 JUDGE WILSON: Do you lose if it's
11 off-reservation land, if it's in the middle of Manhattan?

12 MS. MURPHY: Yes, absolutely - - -

13 JUDGE WILSON: Okay.

14 MS. MURPHY: - - - we lose.

15 JUDGE WILSON: That's all - - - yep.

16 MS. MURPHY: That's all we - - -

17 JUDGE GARCIA: But how do you square that
18 position with the Town of Sherrill, the Supreme Court
19 decision where they were buying ancestral lands and seeking
20 to make kind of a patchwork nation, and the Supreme Court
21 said you can't do that; this land has been on the public -
22 - - you know, in the market in part of a town for a hundred
23 years.

24 MS. MURPHY: That - - - that is still reservation
25 land, but because there's an abandonment period, the court



1 in Sherrill indicated - - - the Supreme Court said that
2 that does not displace the rights for a long time that - -
3 - that local counties and towns had in regulating that
4 land.

5 JUDGE GARCIA: Well, essentially, it said you
6 can't - - -

7 MS. MURPHY: However - - -

8 JUDGE GARCIA: - - - repatriate that land.

9 MS. MURPHY: That's not what it said. It didn't
10 say repatriate that land. It basically - - -

11 JUDGE GARCIA: It's not considered part of the
12 reservation in Sherrill.

13 MS. MURPHY: Once again, those things are still
14 being disputed because that is still - - - Congress has not
15 disestablished the lands here in Cayuga or the lands that's
16 represented by the Oneida Nation.

17 But Your Honor, I see my time's up, but I have
18 been desperately trying to hit a couple of points that I
19 have not been able to reach, so if you could just give me
20 indulgence so I could just hit - - -

21 CHIEF JUDGE DIFIIORE: I will indulge you; you
22 have another two minutes. Go ahead.

23 MS. MURPHY: Thank you very much. The BIA
24 decision was for a limited purpose, but if you read that
25 BIA decision, it did not say anything about ousting



1 condoled chiefs or clan mothers. It did not prevent them
2 from going into a - - - a building which is used for
3 longhouse purposes so they can participate in the
4 government, or any citizen, for that matter.

5 It did not - - - it did not say that my client,
6 condoled chiefs, clans, and clan representative had no
7 colorable claim to claim that they could manage the affair
8 of the Nation or individually had unlawfully acted on
9 behalf of the Nation in overseeing what they saw as their
10 obligation.

11 Most importantly, as I've indicated, the Internal
12 Bureau of Indian Appeals has - - - as they keep talking
13 about the Russian government. There is no Bureau of
14 Russian Affairs in the United States. There is a Bureau of
15 Indian Affairs, and part of that Bureau contains the
16 Internal Bureau of Indian Appeals, an adjudicatory body
17 that has made it very, very clear, on multiple occasions,
18 that the principle of tribal sovereignty and self-
19 determination serves to - - - to constrain the BIA's
20 intrusion into internal government matters, and therefore,
21 unless it's truly necessary to satisfy some separate
22 federal obligation, they are not to be the arbitrators of
23 who is in this Council and who is not. And that is
24 precisely what the Halftown Council is asking you to do.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MS. MURPHY: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Cayuga Nation v. Campbell, et al., No. 70, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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