No. .....

IN THE
# Supreme Court of the United States

Edward VanGuilder,
*Petitioner*

v.

United States of America,
*Respondent*

Edward VanGuilder,
*Petitioner*

v.

State of New York,
*Respondent*

## Petition for Complementary Writs of Certiorari Relative to Two Inextricably Related Constitutional Cases

**To the U.S. Court of Appeals, District of Columbia**
**And to the New York State Court of Appeals**

Edward VanGuilder, *pro se*
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# The Question Presented

I repeat the question presented by Thomas, J., in *Lara v. US*, 541 US__(2004):

**In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously....**

**...In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g.*, *United States v. Pink*, 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.**

**To be sure, this does not quite suffice to demonstrate that .**

**...Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.**

(note 4)...this is precisely the confusion that I have identified and that I hope the Court begins to resolve....

**I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully follow-**

**ing our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty....**

**I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty...and I would be willing to revisit the question....**

**The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty."**

**The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.**



## Opinions Below

Not applicable. This is an appeal against the neglect below to provide timely remedies that give legal force and effect to Indian constitutional jurisdiction.

## Jurisdiction

Art. III, §2 enacts:

**The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...**

This confirms the hierarchy of law that constitutes the rule of law in this constitutional democracy:—"this Constitution">"the Laws of the United States">"Treaties">all other laws.

The neglect below concerning remedies *de facto* leaves "the Laws of the United States">"this Constitution" and, correspondingly, it unconstitutionally allows "Federal Indian rights" to preempt "Indian constitutional jurisdiction."

This Court's jurisdiction exists, above all, to guard the people's sovereignty against usurpation. *Scott v. Sandford*, 19 How. 393 (1857).

## Statement of the Case

The constitution precludes Federal and/or State jurisdiction on territory whose root of title is not traced to a duly registered Presidential territorial purchase. *Constitution*, Art. II, §2, cl. 2, *per* Thomas, J., in *Lara v. US*, 541 US__(2004), *supra*, pp. **(i)** and **(ii)**; Appendix of Constitutional Legislation and Precedents, *infra*, pp. **6a-21a**.

The continuity of the line of constitutional legislation and precedents 1633-1871 confirming this stopped abruptly in 1871 with the advent of Federal domestic law statute 16 Stat. 566, codified at 25 USC §71, until, on April 19, 2004, Thomas, J., identified the constitutional conflict informing the era 1871-2004.

Procedural delay now blocks the addressing of that conflict and thereby preempts the constitutional law:—

The Federal court system proceeds (pp. **22a, 23a, 30a**) as if the previously vested Indian constitutional jurisdiction is no longer arguable as against the USA because preempted by the Federal domestic law *Quieting of Titles Act.*



The State court system with original, residual, general and inherent jurisdiction decides by not ruling. It simply does not respond in writing to my show cause application raising the same constitutional question, and then rests upon the state appeal court clerk's procedural ruling (p. **39b**) there is no appealable paper capable of being appealed.

The combined effect is the subversion of the constitution. *Contra, Scott v. Sandford*, 19 How. 393 (1857).

**Relief Requested:**

Therefore I respectfully ask this Court to address the constitutional question being neglected below and, having done so, then to remit both cases to the courts below for application of the constitutional answer so obtained to the contingent questions of mixed fact and law as they may appear from time to time in each respective case.

## Reasons for Allowing the Writs

I repeat the reasons of Thomas, J., *supra*, pp. **(i)** and **(ii)** and I purport, in response, "**to demonstrate that the tribes lost their sovereignty,**" pursuant to the rule of law. Appendix, *infra*, pp. **6a-21a**.

My submission is that the preemption jurisdiction was saved by the word "**Treaties**" in Art. II, §2, cl. 2 and, by operation of constitutional law alone, that necessarily implies a corresponding restriction on Indian alienation.

Since sovereignty is unrestricted therefore the said restriction converts the former Indian sovereignty into the constitutional jurisdiction upon which I rely.

No post-1871 Federal Indian law legislation or precedent can have repealed the previously established Indian constitutional jurisdiction by subordinating it to Federal domestic jurisdiction, such as was legislatively attempted by 16 Stat. 566, codified at 25 USC §71. See, *e.g., Oneida Indian Nation v. County of Oneida,* 44 US 661 (1974) (Oneida I); *contra, Scott v. Sandford,* 19



How. 393 (1857); *c.f.*, E.V. Dicey, (Harvard Faculty of Law) *Lectures on the Relationship between Law and Public Opinion in England in the Nineteenth Century*, London, Macmillan, 1920, p. 483:

> **Judge–made law is subject to certain limitations. It can not openly declare a new principle of law: it must always take the form of a deduction from some legal principle whereof the validity is admitted, or the application or interpretation of some statutory enactment. It can not override statutory law. The courts may, by a process of interpretation, indirectly limit or possibly extend the operation of a statute, but they can not set a statute aside. Nor have they in England ever adopted the doctrine which exists, one is told, in Scotland, that a statute may be obsolete from disuse. It can not by nature override any established principle of law.**

The rule of law's constitutive doctrine of *stare decisis* signifies the earlier preempts the later rather than the other way round.

**November 5, 2004.** **Respectfully submitted,**

/s/
**Edward VanGuilder**

# Appendix

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*VanGuilder v. NY*

(*pro se*)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

| | |
|---|---|
| | ) CASE NUMBER: |
| | ) 1:03CV01934 |
| Between: | ) |
| | ) JUDGE: |
| Edward VanGuilder, | ) James Robertson |
| Plaintiff, | ) |
| | ) DECK TYPE: Civil |
| v. | ) Rights (non- |
| | ) employment) |
| United States of America, | ) |
| | ) DATE STAMP: |
| Defendant. | ) 09/15/2003 |
| | ) |
| | ) C O M P L A I N T |

(1) Court jurisdiction is confirmed by 28 USC §§1331, 1343(3), 1343(4), 1345, 1362, 1391(b), 2201 and 2202.

(2) Plaintiff inherited the Mahican aboriginal title to the reservation in the Indian treaty of April 25, 1724, and to Governor's Island. 25 USC §194. *An Act concerning purchases of lands from the Indians*, Stat. Prov. NY 1684, c. 9. *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11.

(3) The defendant usurps the Indian sovereignty (the constitutional common law right of occupancy and jurisdiction of self-government) sheltering under the said title, by applying the defendant's own domestic law, by condoning the said state's application of the state's domestic law and by clothing the defendant's constituents including the state of New York with an unconstitutional domestic law color of right in relation to adverse possession. *Constitution*, Art. I, §10. *Scott v. Sandford*, 19 How. 393 (1857).



September 9, 2003.

/s/
Edward VanGuilder
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North Granville, N.Y. 12854

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

| | |
|---|---|
| Between: | |
| Edward VanGuilder, Plaintiff, | Judge James Robertson |
| v. | |
| | Case No. 1:03cv01934 |
| United States of America, Defendant. | |

## MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves for summary judgment as a matter of law alone based upon the "intervening change of controlling law" constituted by the April 19th ruling of Thomas, J., in *United States v. Lara*, 541 US __ (2004). 25 USC §71 is ***prima facie*** unconstitutional.

Since the plaintiff is not a citizen or subject of a "Foreign State" within the meaning of the 11th Amendment but rather is a "Indian" within the meaning of 25 USC §194 confirming *Clark v. Williams,* 36 Mass. R. 499, 500,501 (1837), THEREFORE, THE NECESSARY IMPLICATION IS, plaintiff is entitled to summary judgment unless and until defendant pleads and proves a Treaty of purchase within the meaning of Article 1, §10, cl. 1 relative to the lands in question.

Plaintiff does not know the reason the Court acted on May 14th upon the defendant's opposition dated May



12th before the plaintiff, who is not on the electronic filing system, had even received notice of the opposition. Annexed hereto as Exhibits "A" and "B" respectively are, the (superseded) Amended [per note 1 page 4] Plaintiff's Motion to Reconsider the Dismissal of the Plaintiff's Motion to Strike dated May 12, 2004, and his Reply to Opposition to Reconsideration of Motion to Strike the Reply to Opposition to Motion to Dismiss the Complaint, dated May 18, 2004.

Plaintiff submits it would be contrary to the public interest not to respond in a timely fashion, or to respond in a *per incuriam* fashion to the constitutionally critical invitation extended by Thomas, J., on April 19th. The jurisprudentially critical aspect of the confusion Thomas, J., identified as the consequence of the oxymoronic and unconstitutional Federal law is, reasonableness has replaced truth as the paramount jurisprudential value in practice in breach of the principle of constitutional democracy identified and settled by *Scott v. Sandford,* 19 How. 393 (1857). Correspondingly resolving the confusion appropriately entails reasons for judgment that not only address the 10th Amendment to the *Constitution* but explain its jurisprudential import in relation to the existence of justice under the rule of law.

**AMENDMENT X.**
**The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.**

May 19, 2004. Respectfully submitted,

/s/
Edward VanGuilder

## APPENDIX OF CONSTITUTIONAL LAW

*An Act concerning purchases of lands from the Indians*, Stat. Prov. NY 1684, c. 9. Bee itt Enacted by this Gen'll Assembly and by the authority of the same that from henceforward noe Purchase of Lands from the Indians shall be deemed a good Title without Leave first had and obtaineid from the Governor signified by a Warrant under his hand and Seale and entered on Record in the Secretaries office att New Yorke and Satisfaction for the said Purchase acknowlidged by the Indians from whome the Purchase was made is to bee Recorded likewise which Purchase soe made and prosecuted and entered on Record in the office aforesaid shall from that time be Vallid to all intents and purposes.

*An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11. WHEREAS the government of the late colonys of the Massachusetts Bay and New Plymouth, to the intent the native Indians might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands, and thereby deprive themselves of such places as were suitable for their settlement and improvements, did, by an act and law named in the said colonys respectively many years since, inhibit and forbid all persons purchasing any land of the Indians without the licence and approbation of the general court, notwithstanding which, sundry persons for private lucre have presumed to make purchases of lands from the Indians, not having any license or approbation as aforesaid for the same, to the injury of the natives, and great disquiet and disturbance of many of the inhabitants of this province in the peaceable possession of their lands and inheritances lawfully acquired; therefore, for the vacating of such illegal purchases, and preventing of the like for the future,—*Be it enacted and declared by the Lieutenant-Governor, Council and Representatives in General Court assembled, and by the authority of the same,*

[SECT. 1.] That all deeds of bargain, sale, lease, release or quitclaim, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, as well for term of years as forever, had, made, gotten, procured or obtained from any Indian or Indians by any person or persons whatsoever, at any time or times since the year of our Lord one thousand six hundred thirty-three, without the license or approbation of the respective general courts of the said late colonys in which such lands, tenements or hereditaments lay, and all deeds of bargain and sale, titles and conveyances whatsoever, of any lands,



tenements or hereditaments within this province, that since the establishment of the present government have been or shall hereafter be had, made, gotten, obtained or procured from any Indian or Indians, by any person or persons whatsoever, without the licence, approbation and allowance of the great and general court or assembly of this province for the same, shall be deemed and adjudged in the law to be null, void and of none effect: *provided, nevertheless,*—...

*And be it further enacted by the authority aforesaid,*

[SECT. 4.] That if any person or persons whatsoever shall, after the publication of this act, presume to make any purchase or obtain any title from any Indian or Indians for any lands, tenements or hereditaments within this province, contrary to the true intent and meaning of this act, such person or persons so offending, and being thereof duly convicted in any of his majestie's courts of record within this province, shall be punished by fine and imprisonment, at the discretion of the court where the conviction shall be, not exceeding double the value of the land so purchased, nor exceeding six months' imprisonment.

[SECT. 5] That all leases of land that shall at any time hereafter be made by any Indian or Indians for any term of years, shall be utterly void and of none effect, unless the same shall be made by and with licence first had and obtained from the court of general sessions of the peace in the county where such lands lye: *provided nevertheless*, that nothing in this act shall be taken, held or deemed in any wise to hinder, defeat or make void any bargain, sale or lease of land made by one Indian to another Indian or Indians.

*The Constitution of the United States of America, 1789*, Art. I, §8.3 Congress shall have Power To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; §9.3 No...ex post facto Law shall be passed; §10.1 No State shall enter any Treaty;

*Marshall v. Clark*, 1 Kentucky R. 77, 80-81 (1791). The old claim of the crown, by the treaty of 1763, extended to, and was limited by the Mississippi including the land in dispute, which gave a right to the crown as against other European nations, and fixed the limits of titles to be derived from that source to the citizens of Virginia. The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not authorize a new grant of the lands as waste and unappropriated. This being the case at the time of revolution, when the commonwealth

succeed[ed] to the royal rights...in the opinion of the court, the Indian title did not impede either the power of the legislature to grant the land to officers and soldiers, or to the location of the lands on treasury warrants, the grantee in either case must risk the event of the Indian claim, and yield to it if finally established, or have the benefit of a former or future extinction thereof.

*Weiser v. Moody*, 2 Yeat's 127, 127-8 (Penn. SC) (1796). The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for Conrad Weiser, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the grantee, when the lands came afterwards to be purchased from the Indians; and the proprietaries could not pass the title to a stranger....[But] it cannot be presumed that the proprietary officers knew the lands surveyed for Conrad Weiser to be without the limits of their purchases [from the Indians]....If the King is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by a *legatio falsi sive suppressio veri.*

*Sherer v. McFarland*, 2 Yeat's 124, 225, 226 (Penn. SCR) (1797). We are no enemies to *bona fide* improvements, restricted within rational limits. But these were never deemed to extend beyond land purchased from the Indians. Such as system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities....It must be admitted, that the lords of the soil had the exclusive right of disposing of their lands in their own mode.

*Fletcher v. Peck*, 6 Cranch's 87, 142-3 (1810). The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it has been legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

*Johnson v. McIntosh*, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823). [The different nations of Europe] claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion.... While the different nations of Europe



respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been well understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it....All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy....[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession their lands, but to be incapable of transferring the absolute fee to others....[T]he Indian title, which, although entitled to the respect of all Courts until it should be extinguished, was declared not to be absolutely repugnant to a seisin in fee on the part of the State. ...The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to that title. The lands, then, to which this proclamation referred, were lands which the king had had a right to grant, or to reserve for the Indians.

*Danforth v. Wear*, 9 Wheat. 673, 675, 677 (1824). As to lands surveyed within the Indian boundary, this Court has never, hesitated to consider all such surveys and grants as wholly void...[although it was argued that the State grant] was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed...the inviolability of the Indian territory is fully recognized.

*Cornet v.* Winton, 2 Yerger Tenn. CA 129, 149 (1826). ...the Indian nation was no party to this grant; its usufructory title was not thereby affected. North Carolina had no right to take it from the Indians for Stuart's benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail upon the weakness of his own title.

*Cherokee Nation v. State of Georgia*, 5 Pet. 1, 17, 49, 76 (1831). Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it

may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.... While the different nations of Europe respected the rights of the natives as occupants they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy....They have not stipulated to part with that right (of occupancy); and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of their territory.

*Worcester v. Georgia*, 6 Pet. 515, 542, 544, 545, 546, 552, 553, 559, 560, 583 (1832)....discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments....This principle...gave...the sole right of acquiring the soil and making settlements on it...It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them....So with respect to the word "hunting grounds." Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, an occasional corn field, interrupted and gave some variety to the scene. These terms had been used in their treaties with Great Britain



and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government...This was the exclusive right of the purchasing such lands as the natives were willing to sell....These grants asserted a title against Europeans only, and were considered as blank pieces of paper so far as the rights of the natives were concerned....The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians...the Indian nations possessed a full right to the lands they occupied...Except by compact we have not even claimed a right of way through the Indian lands.

*Mitchell v. United States*, 9 Peter's 711, 745, 746, 749, 755 (1835). We come now to consider the nature and extent of the Indian title...Indian possession or occupation was considered with the reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals...One uniform rule seems to have prevailed...by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or licence from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such licence, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the licence, the title of the purchaser became complete....The King waived all rights accruing by conquest or cession, and thus most sol-

emnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial rights should be such, and such only, as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by treaty of 1763, was binding on the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent.... [L]and were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right... This proclamation was also the law of all the North American colonies in relation to crown lands.

*New Orleans v. Armas*, 9 Pet. 224, 236 (1835). [I]t is a principle applicable to every grant, that it cannot affect pre-existing title.

*New Orleans v. United States*, 35 US 662, 730 (1836). It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee.

*United States v. Fernandez*, 35 US 303, 305 (1836). Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed upon the governors of Great Britain: both made grants without regard to the land being in the possession of the Indians: they were valid to pass the right of the crown, subject to their right of occupancy:...

*Clark v. Williams*, 36 Mass. R. 499, 500, 501 (1837). The object of this statute manifestly was, to secure the Indians from being deceived and imposed upon, and to enable the government to avail themselves of the full benefit of the crown grant of the lands to themselves and their grantees, by giving them the exclusive privilege of extinguishing and acquiring the Indians' right of occupancy...[W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and it is to be limited in its operation. It is to be used as a shield, not as a sword.

*Godfrey v. Beardsley*, 2 McLean 412, 416 (Ind.) (1841). The Indian right is that of occupancy; and, until this right shall be extinguished by



purchase, no possession can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within the described boundaries, leaves the right reserved, as it stood before the cession.

*Balliot v. Bauman*, 5 Penn. 150, 154, 155 (1843). A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than the one who obtained the patent and for that purpose may inquire into the prior title of the patentee....[and] show his own equitable title is better. The patent conveys the full legal title of the state.

*Brown v. Wenham*, 10 Metcalf 496, 498 (Mass. SC)(1843). The provincial St.13 Wm 3, (1701,) entitled "an act to prevent and make void clandestine and illegal purchases of lands from the Indians," rendered void, as the foundation of title, all deeds made by Indians, without the license or approbation of the legislature, after the year 1633. ["St.13 Wm 3, (1701,)" is an alternative citation for *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11.]

*Coleman v. Tish-Ho-Mah*, Smedes & M. 40, 48 (Miss. HCEA) (1844). Theirs was a right to retain possession, and to use it according to their own discretion, though not to dispose of the soil except to the government. That claimed the ultimate dominion, and the exclusive right to grant the soil, subject to the Indian right of occupancy.

*Ogden v. Lee*, 6 Hill's 546, 548, 549 (NYSC) (1844). The European governments whose people discovered and made settlements in North America, claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all lands within their respective limits. Upon the principle laid down by Vattel, (B. 1, & 81, 209,) they might have asserted a larger right; for the natives lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the of the vast tracts of the country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a right of preemption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in

fee. It was so of the grant made by Charles the second to his brother the duke of York in 1664, which included all the territory now constituting the states of New-York and New-Jersey. But these grants were not intended to convey, and the grantees never pretended that they has acquired an absolute fee in the land. They neither took nor claimed any thing more than the ultimate fee, or the right of dominion after the Indian title should be extinguished. And so far as the state of New-York is concerned, I am happy to say, that beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals.

*Stockton v. Williams,* 1 Mich. R. 546, 560 (SC) (1845). The power of the government to grant the soil while in the possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of authority.

*Fellows v. Lee,* 5 Denio 628 (NYCE) (1846)....the Indian title to lands is an absolute fee, and that the pre-emption right conceded to Massachusetts, was simply a right to acquire by purchase from the Indians their ownership of the soil, whenever they should chose to sell it.

*Montgomery v. Ives,* 13 Smedes & M. 161, 174-5 (Miss. HCEA) (1849). Let us refer to the proclamation of George III... "that it is just, and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our dominions and territories, as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds." It then goes on to declare, that no governor, in any of the said provinces, shall presume, "upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective governments, as described by their commissions." It farther declares, "that, for the present, all the lands not included within the limits of said new governments, shall be reserved to under the sovereignty, protection and dominion of the crown, and forbids all purchases and settlements beyond those limits without special leave and license first obtained." It goes on still farther to declare a principle which seems to have been adhered to ever since,



"that no private person do make purchase of any land from any Indians, but that the same shall be purchased only for the government, in the name of the sovereign, at some public meeting of the Indians." This principle, the offspring of a just and enlightened policy, became incorporated into the intercourse of England, with the Indian tribes, and has been adopted and pursued by our own government, in all its transactions with them....On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." *Fletcher v. Peck,* 6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. *Danforth v. Wear,* 9 Wheat. 676.

*Breaux v. Johns,* 4 Louisiana R. 141, 143 (1849). These grants convey a title to the grantees, subject only to the Indian right of occupancy.

*Gaines v. Nicholson,* 9 How. 356, 365 (1850). No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction. [The reservation] was so much carved out of the Territory ceded, and remained to the Indian occupant, as he never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

*Marsh v. Brooks,* 49 US 223, 232 (1850)....Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.

*People v. Dibble,* 18 Barbour's NYSCR 412, 418 (1854). The object of the law, with various other laws of the state, was to protect the indians to quiet them and render them secure.

*Scott v. Sandford,* 19 How. 393, 403, 404, 405, 407, 420, 426, 432, 435, 449, 450, 452, 460, 483, 484, 485, 501, 506, 508, 509, 513, 520 (1857). The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the

political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?...The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be [404] subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other. Treaties have been negotiated with them, and these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under the subjection of the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over the territory they occupy. But they may, without doubt, like the subjects of any foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up abode among the white population, he would be entitled to all the rights and privileges which would belong to any emigrant from any other foreign people...[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed this sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted....[407] It is difficult at this day to



realize the state of public opinion in relation to that unfortunate race [Africans], which prevailed in the civilized and enlightened portions or the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nations displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect:...[420] Congress might...have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they have recently committed, when they were allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even guarding themselves against the threatened renewal of Indian hostilities. No one would have supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore no there was no necessity for using particular words to exclude them....[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [African slaves], in the civilized nations of Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called upon to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption....Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty....And upon a careful consideration of the subject, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;...[432] The act of Congress, upon which the plaintiff relies,

declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana,...and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under any one of the United States...[435]...this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish;...[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it...[450]...and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved...And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. [452] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void;...[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it...And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it....[480]...to change or to abolish a fundamental principle of the society, must be the act of the society itself——of the *sovereignty*; and that none other can admit to the participation of that high attribute. [483]...each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature...power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom...[484]and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. [485] Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly



they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. [501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated....[506] This [the inflation of federal plenary jurisdiction] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if not amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution. [508] In Pollard's Lessee v. Hagan, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact." [513]...a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. [520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use of the Indians." This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

*Fellows v. Denniston,* 23 NY 420, 423, 428, 431 (CA)(1861). The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the

right of preemption....If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.... Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

*United States v. Foster*, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870). It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

*Minter v. Shirley*, 3 Miss. 376, 381, 382 (1871). The right to acquire and extinguish their title pertained exclusively to the United States, therefore purchases, made from them separately, or as tribes, were null and void....The several acts of congress, in reference to the survey and sale of the public lands, distinctly keep in view the fact "that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vested."

*Holden v. Joy*, 84 US 211, 244 (1872). Obviously this principle regulated the right conceded by discovery among the discoverers, but it did not affect the rights of those already in possession, either as aboriginal



occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell....Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.

*United States v. Washington*, 384 F. Supp. 312, 327, 328, 339, 379, 405, 406, 414 (1974), aff'd 520 F. 2nd 676 (9th Cir.)(1975), cert. denied 423 US 1086 (1976). Plaintiffs seek a declaratory judgment pursuant to 28 USC §§2201 and 2202 concerning off reservation treaty fishing rights...Venue is properly laid before this court under 28 USC §1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 USC §§ 1345, 1331, 1343(3) and (4), and 1362.... This Court has previously held and hereby affirms that both of these contentions are without merit and denied. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic and personal misgivings, to enforce and apply every principle of law as it is directly stated in a decision of the United States Supreme Court...The membership of the Stillaguamish Tribe is determined in accordance with the tribal Constitution and Bylaws which have been approved by the tribe but have not been approved by a representative of the Secretary of the Interior. The Stillaguamish Tribe is not recognized as an Indian governmental entity by the federal government. Its enrollment has not been approved by the Secretary of the Interior or his representative and the tribe does not have a reservation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Edward Vanguilder, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action No. 03-1934(JR) |
| | : | |
| United States of America, | : | |
| | : | |
| Defendant. | : | |

**ORDER**

For the reasons set out in the accompanying memorandum, defendant's motion to dismiss [6] will be **GRANTED**, and plaintiff's motion for summary judgment will be **DENIED AS MOOT**.

It is **SO ORDERED**.

/s/
JAMES ROBERTSON
United States District Judge



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Edward Vanguilder, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action No. 03-1934(JR) |
| | : | |
| United States of America, | : | |
| | : | |
| Defendant. | : | |

**MEMORANDUM**

Plaintiff *pro se* Edward VanGuilder claims "aboriginal title" to certain lands, including Governor's Island in New York State. VanGuilder names the United States as the sole defendant in a suit that appears to seek the return of those lands. The United States has moved to dismiss on various jurisdictional grounds. Plaintiff opposes dismissal and has moved for summary judgment.

In analyzing whether this Court has jurisdiction to adjudicate plaintiff's claims, it is important to keep in mind that federal district courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute." Kokkonen v. Guardian Life Ins. Co. of Am., 511 US 375, 377 (1994); see also Sheldon v. Sill, 49 US 441, 449 (1850) ("Courts created by statute can have no jurisdiction but what the statute confers."). A related principle is

that the United States, because of its status as a sovereign nation, is immune from suit unless Congress has clearly and unequivocally consented to a court's exercise of jurisdiction. United States v. Mitchell, 445 US 535, 538 (1980). Therefore, this Court does not have jurisdiction to hear a suit against the United States unless Congress has expressly waived sovereignty immunity. Any such waiver is to be strictly construed. Dept. of Army v. Blue Fox, 525 US 255, 261 (1999).

Plaintiff has the burden of establishing that this Court can exercise jurisdiction over his claim. Gibb v. Buck, 307 US 66, 72 (1939). Even construing his *pro se* complaint as broadly as possible, as I must under Hanes v. Kerner, 404 US 519, 520 (1972), I find that plaintiff has failed to satisfy this burden. Plaintiff suggests the jurisdiction of this court may be grounded in 28 USC §§1331, 1343, 1345, 1362, 1391, 2201, or 2202, but not one of these provisions constitutes a valid waiver of sovereignty immunity. Plaintiff must be able to point to a separate statute that waives immunity with respect to the subject matter of h is suit. (For example, a federal employee may bring suit against an agency of United States for gender discrimination under Title VII of the Civil Rights Act of 1964, because that statute expressly waives sovereignty immunity for such claims. 42 USC §2000e-16.) In this case, the Quiet Title Act ("QTA"), 28 USC §2409a, provides the only plausible means of access to federal court. See Block v. N. D.ex rel. Bd. of Univ. & Sch. Lands, 461 us 273, 286 (1983). But to make



out a valid claim under the QTA, plaintiff must state with particularity "the right, title, or interest claimed by the United States." 28 USC §2409a(d). VanGuilder does not, and apparently cannot allege that the United States claims and title or interest in the "disputed" lands. The QTA also has a twelve-year statue of limitations. §2409a(g). Plaintiff does not allege any circumstances that would support a finding that his claims, apparently stemming from treaties signed by various sovereigns during the 17th and 18th Centuries is not time-barred. Nor does plaintiff account for his filing his claim in the District of Columbia: the appropriate venue for a QTA claim is the district in which the property is located. 28 USC §1402(d).

Thus, if this Court has subject matter jurisdiction, it is only by application of the QTA and 28 USC §1331. But, since the QTA manifestly does not apply to this case, plaintiff has failed to state a claim upon which relief may be granted.

An appropriate order accompanies this memorandum.

/s/
JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Between: | ) | |
| Edward VanGuilder, Plaintiff, | ) | |
| v. | ) | 1:03CV01934 |
| United States of America, | ) | |
| Defendant. | ) | |

NOTICE OF APPEAL

Plaintiff appeals the order dated June 4, 2004, on the ground of the unaddressed constitutional law waiving sovereign immunity.

June 8, 2004. /s/

Edward VanGuilder, *pro se*
241 Fox Road, P.O. Box 139
North Granville, NY 12854
(518) 642-2448



[submitted *pro se* without oral argument]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| Between: | ) | |
| Edward VanGuilder, | ) | |
| | ) | USCA No. 04–5520 |
| Appellant, | ) | |
| and: | ) | |
| | ) | USDC No. 1:03CV01934(R) |
| United States of America, | ) | |
| Appellee. | ) | |

APPELLANT'S PETITION FOR EN BANC DETERMINATION [FRAP 35(a)(2)]

ON THE ORIGINAL RECORD WITHOUT AN APPENDIX [FRAP 29(f)]

ON AN EXPEDITED BASIS [FRAP 31(a)(2)]

NOTICED TO MASS. & NY [FRAP 44(b)]

The docket in the court below concisely yet fully is responsive to the critical and urgent constitutional question of law alone specifically identified and invited by Thomas, J., in *U.S. v. Lara*, 541 __ (2004).

VanGuilder asks that the Court of Appeals treat the docket in the court below as the appellant's brief and, corre-

spondingly, he waives the right to submit further argument whether written as a brief or delivered orally.

The court below erred by declining jurisdiction to address any of the constitutional legislation and precedents governing both procedure and substance on the ground that the constitutional law is inoperative unless expressly and explicitly implemented by congressional statute.[18]

The appeal consists in a request that the constitutional law be addressed en banc lest the United States cease being a constitutional democracy abiding the rule of law constituted by the doctrine of *stare decisis* and the principle that a constitutional right necessarily implies a judicial remedy. Appendix: Related Case.

The final order or judgment under appeal [19] is dated June 4, 2004, and the notice of appeal was delivered June 10, 2004 [20].

For the purposes of this appeal the fact pleaded in the complaint is taken to be true, namely that VanGuilder holds Mahican title to the Hudson River drainage basin except to the extent such title formally has been purchased and registered in accordance with the constitutional legislation and precedents.

The point of the appeal is to ascertain the law governing the relevance of the facts. If it is the constitutional law identified by VanGuilder and ignored by the USA and the court below VanGuilder alleges he can not lose in the result. If it is the federal law identified by the USA and the court below VanGuilder acknowledges he can not win in the result.

Since the issue is constitutional the standard of review is truth, as the constitutional law is written, rather than reasonableness.



The conclusion is that both the federal and state court systems will best serve the public interest by undertaking the fresh and rigorous analysis invited by Thomas, J.

VanGuilder certifies this petition in lieu of brief and oral argument complies with FRAP 32(a).

June 21, 2004.

/s/
Edward VanGuilder

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 04-5220** **September Term, 2003**
**03cv01934**

**Filed on:**
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Filed August 25 2004
CLERK

Edward VanGuilder,
Appellant

v.

United States of America,
Appellee

**BEFORE:** Ginsberg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers. Tatel, Garland, and Roberts, Circuit Judges

**ORDER**

Upon consideration of appellant's petition for initial hearing en banc, and in the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark K. Langer, Clerk
BY: /s/
Elizabeth V. Scott
Deputy Clerk/LD



(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

CLAIM

(1) Mahican title to the Hudson River drainage basin vests in the plaintiff.

THEREFORE plaintiff seeks a declaration that as a matter of constitutional law alone the defendant's constitutional interest therein *prima facie* is "subject to" that title.

June 16, 2004. Respectfully submitted,

/s/
Edward VanGuilder
241 Fox Road
P.O. Box 139
North Granville, N.Y. 12854
(518) 642-2448

TO: CLERK OF THE COURT
AND TO: GOVERNOR OF NEW YORK
AND TO: ATTORNEY GENERAL OF NEW YORK

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

APPLICATION FOR AN ORDER TO SHOW CAUSE

(1) The Supreme Court of New York exercises original and inherent jurisdiction in relation to the plaintiff's title identified in the appended complaint in relation to which the United States District Court for the District of Columbia has declined jurisdiction on the ground of incompetence as a merely statutory court. Appendix "A."

(2) Plaintiff is appealing the said District Court on the ground of the unaddressed constitutional law waiving sovereign immunity. Appendix "B."

(3) By recognizing the right the constitutional law by necessary implication constitutes one or the other or both of the two remedies.



(4) Thomas, J., in *United States v. Lara*, 541 US (2004), on April 19, 2004, invited this critical constitutional question of law alone.

THEREFORE plaintiff seeks the expedited declaratory relief that the defendant's constitutional interest is subject to the plaintiff's title.

June 16, 2004.

Respectfully submitted,

/s/
Edward VanGuilder

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

AFFIDAVIT IN SUPPORT OF SHOW CAUSE APPLICATION

I, Edward VanGuilder, of North Granville, New York MAKE OATH AND SAY:

1. The fact pleaded is true and in consequence I am entitled by operation of constitutional law alone to the declaratory relief claimed.

/s/
Edward VanGuilder

State of New York
County of Washington
17th June 2004

/s/
Jenny Linda Martelle – 01MA6068020
Notary Public, State of New York
Qualified in Washington County
My Commission Expires 12/24/2005



NEW YORK COURT OF APPEALS
From the Supreme Court of New York

| | |
|---|---|
| | ) *Pro Se & Sua Sponte* |
| Edward VanGuilder, | ) |
| Plaintiff, | ) Notice of |
| APPLICANT, | ) & Case on Appeal |
| v. | ) to the Court of Appeals |
| | ) |
| State of New York, | ) Index No. 6079/2004 |
| Defendant, | ) County: Washington |
| RESPONDENT. | ) |
| | ) |

(i) This Appeal to the Court of Appeals is being made by Edward VanGuilder, as of right pursuant to Rules of Court of Appeal's practise.

The return date is to be assigned.

(ii) The questions presented to the Court of Appeals for review are:

The court below willfully is being blind to the critical and urgent constitutional question so identified and answered by Mr Justice Thomas in *United States v. Lara*, 541 US _____ (2004) and further justified herein. *Appendices "A", "B", "C" and "D".*

The determinative event is judicial delay tantamount to final disposition.

(iii) The said determinative event is apparent on the face of the record below. *Appendix "E" and Appendix "F".*

(iv) The Court of Appeals has jurisdiction to review this order because of CPLR 5061(b)(2). Furthermore, notice is hereby given to the Solicitor General pursuant to Rule 500.2(d) in view of the fact that 100% of all state statutes are (by operation of the constitutional answer to the constitutional question herein) territorially *ultra vires*.

(v) The Court of Appeals should accept this case for review because Judge Thomas has asked it to (*Appendix "A"*). And because the answer to his constitutional question is obvious and irrebuttable (*Appendix "B"*). And because that answer disposes of the particular case at bar. (*Appendices "C" to "F"*).

(vi) Please expedite pursuant to Rule 500.5(d).

(vii) Please Clerk to requisition originals of Appendices "E" & "F" pursuant to Rule 500.5(a)(1).

(viii) This notice of appeal constitutes the entirety of the case on appeal inclusive of the brief on appeal. Correspondingly oral argument is waived pursuant to Rule 500.5(d)(3).

(ix) Leave from further involvement is requested by me.

The names and addresses of those upon whom these papers were served are:

Solicitor General
State of New York
Department of Law
The Capitol
Albany, NY 12224

Hon. David B. Krogmann
Supreme Court of New York Judge's Chambers
1340 State Route 9
Lake George, NY 12845



Attorney General
State of New York
The Capitol
Albany, NY 12224-0341

Mark R. Haag
U.S. Department of Justice
Environmental and Natural Resources
General Litigation Section
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026-3795

IMPORTANT

YOU MUST ATTACH THE FOLLOWING DOCUMENTS TO THESE PAPERS:

1. THE ORDER AND OPINION SOUGHT TO BE APPEALED;

2. THE ORDER, JUDGMENT OR DETERMINATION OF THE COURT OR AGENCY WHICH WAS APPEALED TO THE APPELLATE DIVISION;

3. YOU MUST SERVE THREE (3) COPIES OF THESE PAPERS ON OPPOSING COUNSEL AND ATTACH PROOF OF SERVICE TO THE PAPERS YOU ARE FILING WITH THE COURT OF APPEALS;

4. ONE COPY OF THE APPELLATE DIVISION RECORD ONM APPEAL OR APPENDIX AND ONE COMPLETE SET OF ALL APPELLATE DIVISION BRIEFS SHOULD BE FILED WITH THESE MOTION PAPERS, BUT NEED NOT BE SERVED ON OPPOSING COUNSEL.

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You may attach additional documentation which would be of assistance to the Court.*

*Thank you. I have attached the entire case on appeal in Appendices "A" to "F".

## THE STIPULATED ATTACHMENTS

1. There is no order and opinion. This is an appeal against delay that is determinative of rights.

2. CPLR 5061(2)(b) precludes Appellate Division relevance by providing for direct access in the constitutional question situation.

3. One (1) copy hereof has been served by ordinary receipted U.S. mail dispatched this day to the recipients identified above.

4. The record below is reproduced at Appendices "E" & "F". Appendix "F" is the docketed claim, show cause application and supporting affidavit. "E" is the rest of the record.

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## CONCLUSION

**The above Notice & Case on Appeal is hereby Certified Complete and Submitted for Final Disposition this 17th day of September, 2004.**

/s/
**Edward VanGuilder**



*State of New York*
# *Court of Appeals*

*Stuart M. Cohen*
*Clerk of the Court*

*Clerk's Office*
*Albany, New York 122071095*

September 20, 2004

Mr. Edward VanGuilder
P.O. Box 139
North Granville, New York 12854

Dear Mr. VanGuilder:

Your "Notice of Appeal & Case on Appeal" cannot be accepted for filing.

Your papers do not include an appealable paper within the meaning of CPLR 5512(a). Therefore, your papers cannot be treated as initiating an appeal in this Court.

Very truly yours,
/s/
Stuart M. Cohen

JAC/ml
cc: Mark R. Haag, Esq.
Hon. David B. Krogmann
Hon. Eliot Spitzer