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Cover Page Footnote

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THE BALD EAGLE, THE FLORIDA PANTHER AND THE NATION'S WORD: AN ESSAY ON THE "QUIET" ABROGATION OF INDIAN TREATIES AND THE PROPER READING OF *UNITED STATES V. DION*

ROBERT LAURENCE*

When animals become endangered, the nation, we have come to believe, should rally to their defense. Sadly enough, but not uncommonly, those protective statutes are in conflict, either directly or indirectly, with old promises made by the nation to Indian tribes in exchange for their land and sovereignty. When such a conflict arises, which wins out: the endangered species or the nation's word? This essay explores that question in the context of the Endangered Species Act, the Bald Eagle Protection Act and treaty promises to the Sioux and Seminole tribes. Professor Laurence argues for a very careful and restrictive reading of United States v. Dion *and concludes with an unflattering critique of the cases in which Chief Billie of the Florida Seminoles was prosecuted for shooting a Florida panther.*

Caught in a "sting" operation mounted by the United States Fish and Wildlife Service, four Indian men, residents of the Yankton Indian reservation in South Dakota, were arrested, prosecuted and convicted of criminal violations in the killing and trading of parts of bald and golden eagles and scissor-tailed flycatchers, all protected birds under federal environmental laws. The men appealed on several grounds. Of salient interest to this article, Dwight Dion, Sr. claimed his right to

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hunt and sell the birds was protected by an old Indian treaty between his tribe and the United States. Two long Eighth Circuit opinions resulted: a panel decision on the entrapment issue[1] and an *en banc* decision on the treaty issue,[2] affirming the convictions on some of the counts and reversing on others. Certiorari was sought and obtained by the United States on the treaty issue alone. The circuit court was reversed and the conviction was partially reinstated.[3] The purpose of this essay is to discuss the Supreme Court's opinion in *Dion* and to put forward what I think to be the correct reading of the test for treaty abrogation obtained therein.

First, a little background on Indian treaties and the law that governs them. The domestic law of the United States recognizes that Indian tribes are unique aggregations of people who governed themselves long before the ratification of our Constitution[4] and retain, even today, some of these important rights of self-governance.[5]

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1. United States v. Dion, 752 F.2d 674 (8th Cir. 1985). Lyle Dion, Jr., and others claimed they had been entrapped by federal officers, who represented themselves as dealers in bird parts and quietly offered some fairly substantial sums of money to persons willing to deliver. In *Dion* a panel of the Eighth Circuit reversed the convictions and wrote an opinion that might be characterized as very friendly to the notion of entrapment. *See id.* While the federal prosecutor sought a rehearing before the Eighth Circuit on the entrapment issue, the Solicitor General informed the Supreme Court that no appeal on that issue would be taken, nor would the government seek to try Lyle Dion, Jr. again. *See* United States v. Dion, 476 U.S. 734 (1986), Petition by the United States for Writ of Certiorari at II. The entrapment issue was apparently never reheard by the Eighth Circuit and, in any case, is well beyond the scope of this article.

2. United States v. Dion, 752 F.2d 1261 (8th Cir. 1985). The *en banc* decision preceded the panel decision cited in the previous note. The full court, in fact, remanded to the panel on many non-treaty issues, including entrapment.

3. United States v. Dion, 476 U.S. 734, *on remand*, 800 F.2d 771 (8th Cir. 1986).

4. McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 172 (1973): "[I]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."

5. Cases upholding the principle of self-determination include Kerr-McGee, Inc. v. Navajo Tribe, 471 U.S. 195 (1985) (tribes have the power to tax non-members); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (sovereignty includes the power to tax); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (tribes have sovereign immunity); United States v. Wheeler, 435 U.S. 313 (1978) (tribes have the power to punish members independently of a federal prosecution for the same acts, with no double jeopardy difficulties); and United States v. Mazurie, 419 U.S. 544 (1975) (tribes have sufficient sovereignty to accept congressional delegation). *Cf.* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980) (tribal sovereignty leads to special rules of treaty and statutory construction); *McClanahan*, 411 U.S. 164, 172 (1973) (tribal sovereignty is a "backdrop" against which federal statutes are to be read). The origins of the doctrine of federal recognition of self-determination are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) where Chief Justice Marshall, in dicta, called the Cherokee tribe a "domestic, dependent nation." *Id.* at 17. As is implicit in Chief Justice Marshall's characterization, the recognition of tribal sovereignty is not without its limits. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (tribes do not have the power to restrict non-Indians'rights to hunt and fish on their own fee simple land on the reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribes do not have the power to criminally punish a non-Indian). Congress

Federal law has recognized various aspects of tribal sovereignty from the earliest days, although there has been considerable give and take over the years in government policy toward the tribes.[6] Early on, the state-to-state model of United States relations with the tribes included treaty-making; while this practice ended in 1871,[7] the treaties remain the supreme law of the land[8] and are a kind of protection rarely available to non-Indian groups of American citizens.

In the past quarter-century, the Supreme Court of the United States has spent an extraordinary amount of time laboring over the meaning of Indian treaties.[9] While the field of Indian law contains a remarkable variety of fascinating issues, there are few cases that make no mention at all of treaty rights, and many put the construction of a treaty at the center of the analysis. In those cases in which a treaty plays a central role, a common problem involves the suspected abrogation of Indian treaty rights by the government. Notwithstanding Justice Black's admonition that "[g]reat nations, like great men, should keep their word,"[10] the United States has, with some regularity, sought to go back on its word and restructure the government-tribe relationship.

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and the Executive, also, continue to recognize Indian tribal sovereignty. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-50n, 455-58e (1982); President Nixon's Special Message to Congress on Indian Affairs, 6 WEEKLY COMP. OF PRES. DOC. 894 (July 8, 1970).

6. It is fair to say that support for Indian self-determination from each of the three branches of government has varied from time to time over the years, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 47-206 (1982), and that the courts have not always been synchronized with the more political branches. For example, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), were quite respectful of Indian rights, even while the Jackson administration was fulfilling its pledge to remove the Indians from east of the Mississippi. *See* COHEN, *supra*, at 78-91. Likewise Williams v. Lee, 358 U.S. 217 (1959), held an on-reservation transaction could not be heard in state court, at the same time that the Eisenhower administration was pursuing a policy of terminating the tribes and giving all jurisdiction to the states. *See* COHEN, *supra*, at 152-179. In the other direction, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), was grudging in its acceptance of tribal power during a time when the Carter administration, following the lead of President Nixon, was advancing the interests of tribal self-determination. *See* COHEN, *supra*, at 180-206.

7. Act of Mar. 3, 1871, Ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. §71 (1982). *See also* COHEN, *supra* note 6, at 105-07.

8. U.S. CONST. art. VI, cl. 2.

9. C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY at 2, 125-32 (1987). Charles F. Wilkinson lists sixty-five United States Supreme Court Indian law cases decided since 1970, most, but not all of which have some treaty implicated directly or indirectly in the decision. Professor Wilkinson notes "the Court has become more active in Indian law than in fields such as securities, bankruptcy, pollution control and international law." *Id.* at 125.

10. Federal Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960). *Tuscarora* was a treaty abrogation case and Justice Black's stirring quotation came in dissent.

Often this restructuring was done with forethought. Many times in the latter part of last century and early in this one, the United States, having decided that a treaty promise had been improvidently made, went back to the tribe concerned and renegotiated the deal.[11] In many treaty construction and abrogation cases, a court must interpret these renegotiations to determine exactly which promises remained intact.[12]

Not uncommonly, however, the government chose to abrogate a treaty unilaterally. Both with respect to Indian and non-Indian treaties, the law is established that governments have the *power* to change their minds; treaties may be abrogated by one side acting alone.[13]

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11. One common occasion for renegotiation was called for by the allotment acts late in the nineteenth century. Those acts, whose purpose was to place land in the hands of individual Indians in hopes of "civilizing" them, and not incidently to transfer ownership of much so-called surplus lands to white hands, usually required restructuring of treaty rights. *See* COHEN, *supra* note 6, at 127-44. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), made it clear that consent of the Indians was not required in order to abrogate the treaty, but nevertheless in many cases the government did attempt to reach new agreements with the Indians. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 420 U.S. 584 (1977).

12. *See, for example*, Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). *See generally* Hanna & Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797, 802-29 (1987).

13. Fong Yue Ting v. United States, 149 U.S. 698, 720-21 (1893); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). That is not to say that abrogation of treaty rights, and in particular Indian treaty rights, imposes no liability on the government. It took many more years to establish the obligation to compensate than it did the power to abrogate, but it is now equally well settled. The power to abrogate was affirmed in *Lone Wolf*. The obligation to compensate for a bad faith abrogation was finally established in United States v. Sioux Nation, 448 U.S. 371 (1980). *Lone Wolf* had rather expressly suggested that all abrogations, even bad faith abrogations, would be political questions and complaints should be addressed to the Congress. 187 U.S. at 568. An unflattering appraisal of *Sioux Nation* is found in Newton, *The Judicial Role in Fifth Amendment Takings of Indian Lands: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1982).

Sioux Nation held that the question of whether the government owes the Indians money for the abrogation turns on the government's intent at the time of the abrogation. If a good faith attempt to compensate was made at the time of the abrogation, then the presumption is that the government was acting in its trustee capacity and was not taking the Indians' property. No compensation is due in such cases, unless the government violated a fiduciary obligation. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942). If good faith was lacking then the abrogation was a taking and the government owes the Indians money, plus interest from the time of the abrogation. The largest judgment ever entered by the Court of Claims is one for a treaty abrogation where there had been no good faith attempt to compensate. The judgment was for $17.1 million plus simple interest at 5% from 1877, and 4% post-judgment interest for the period of Supreme Court review. The total was well in excess of $100 million and was nearly four times the previous largest judgment of the Court of Claims. No case on the present docket of the court, now called the United States Claims Court, threatens to reach more than half of the *Sioux Nation* judgment. All of this information, and more, came to me in a fascinating telephone conversation of March 30, 1988 with Frank Peartree, the present and longtime clerk of the Claims Court. With respect to treaty abrogation, see the colloquy between Professors Henkin

Hence, there is little litigation any more over the question of whether the power to walk away from a treaty is within Congress's power.

Goldwater v. Carter[14] is an interesting case in this regard. Late in 1978 President Carter announced to the nation that, as of January 1, 1979, the United States would recognize the People's Republic of China as the sole legitimate government of China and that the Mutual Defense Treaty with the Republic of China (Taiwan) would be terminated unilaterally on that day.[15] The treaty contained a provision for unilateral abrogation, but required one year's notice. Senator Goldwater and other legislators brought suit in federal court challenging the termination unless it was supported by congressional action. The district court granted the relief,[16] but the circuit court reversed,[17] finding the President's abrogation of the treaty effective. A widely divided Supreme Court granted certiorari and vacated the judgment.[18] Chief Justice Burger and Justices Rehnquist, Stewart and Stevens, in an

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and Westen in the *Harvard Law Review* over the question of the status of international treaties before federal courts: Henkin, *The Constitution and United State Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Westen, *The Place of Foreign Treaties in the Courts of the United States:A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987); Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987). Professor Westen addresses the question of the abrogation of Indian treaties at some length. His conclusion is that treaties are "lexically superior" to, that is to say "unabrogated" by, subsequent inconsistent statutes, but are nonetheless treated by the nation's courts as "constitutionally nonjusticiable." WESTEN, *supra* at 517-21. That this distinction is a fine one is shown by his discussion of the *Sioux Nation* case:

> If the United States truly had the "prerogative" under the Constitution to "abrogate" its treaty obligations, the Sioux would have been forced to seek relief from Congress as a supplicant, basing their plea on something that, legally, was a "nonquestion." Their claim would have had the same status under American law as that of a claimant who seeks relief under statute *A* after it has been repealed by statute *B*. Instead, the Sioux based their claim on the continuing validity of the Fort Laramie Treaty—a treaty that, although judicially unenforceable, was still perceived as imposing legal obligations on the United States. [Footnote omitted].

Id. at 520-21. In the omitted footnote, Professor Westen notes the procedural history behind the *Sioux Nation* case that required the Indians to turn to Congress at least three times to gain permission to sue under the treaty in question. *Id.* at 520 n.32.

Cf. Harbour Cold Stores, Ltd. v. Ramson, Ltd., L.R.C. (Commercial) 308, 316 (Ct. App. Jamaica 1982):

> The effect of a fundamental breach (of contract) is that it relieves the other party of any further obligation to perform what he . . . for his part . . . has undertaken. And perhaps more precisely, the contract is not put out of existence though all further performance of certain obligations undertaken by each party in favor of the other may cease. It survives for the purpose of measuring the claim arising out of the breach.

(Carey, J.A., quoting Viscount Simon in Heyman v. Darwin's, Ltd. A.E.R. 337, 341 (1942).

14. 617 F.2d 697 (D.C. 1979), *vacated*, 444 U.S. 996 (1979).
15. *Id.* at 700.
16. 481 F. Supp. 949 (D.D.C. 1979).
17. 617 F.2d 697 (D.C. Cir. 1979).
18. *Id.*

opinion by Rehnquist, thought the case presented political questions not fit to be addressed by the Court.[19] Justice Powell would have dismissed the case as moot,[20] but did not agree it was political.[21] Justices Blackmun and White would have set the case for argument,[22] and Justice Brennan would have affirmed the circuit court dismissal.[23] Justice Marshall concurred in the vacation and remand, without opinion.[24] The plurality opinion, then, is Justice Rehnquist's, finding that the dispute between the President and the Congress over the *mechanics* of the abrogation is a political one. However, the Justices did not question the *power* of the United States to abrogate the treaty with Taiwan.

It is not always so clear that an abrogation has, in fact, taken place. In some cases, and especially it seems with respect to Indian treaties, Congress may merely enact a statute of broad national application with little or no awareness of its impact on treaty rights. These are the "quiet" abrogations of this article's title. In these cases, before determining the extent of the abrogation, the court has to determine whether the later statute works a treaty abrogation at all. The Indians, in other words, will still claim their treaty rights are intact and represent an exception to the otherwise broad application of the statute.

For example, in *United States v. Dion*,[25] Dwight Dion, Sr. attempted to shield himself from federal prosecution, using a treaty between his tribe and the United States ratified in 1858, and the Court was asked to decide whether the treaty survived enactment of the statutes under which Dion was being prosecuted. The first step in the analysis might be to determine whether Dion, in fact, had a treaty right to hunt and sell eagles. However, the Supreme Court, looking ahead and foreseeing the full abrogation of any such right, was able to assume this first step away.[26] The Eighth Circuit expressly discussed the question,[27] and that exploration merits a mention here.

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19. Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979).
20. *Id.* at 997-98.
21. *Id.* at 998-1002.
22. *Id.* at 1006.
23. *Id.* at 1006-07.
24. *Id.* at 996.
25. Treaty with the Yankton Sioux, April 19, 1858, 11 Stat. 743. It is clear that individual members of a tribe may clothe themselves in the treaty rights reserved by their tribe. United States v. Winans, 198 U.S. 371 (1905). *See also Dion*, 476 U.S. at 738, n.4 and cases cited therein. Two of the *Dion* defendants, Terry Fool Bull and Asa Primeaux, Sr., were not able to raise a treaty defense because they were not members of the tribe on whose reservation the eagles were killed. *See Dion*, 752 F.2d at 1262, n.4.
26. 476 U.S. at 738.
27. 752 F.2d 1261, 1263-65.

Whether Dion was possessed of a treaty right to hunt bald eagles and the other birds might be seen as an especially difficult question. The treaty with the Yankton Sioux does not mention either hunting or eagles. However, the rules of Indian treaty construction require treaties to be construed as the Indians would have understood them and should be liberally construed to the advantage of the Indians.[28] The Eighth Circuit was certainly correct in concluding the treaty's silence was no bar.[29] The Yankton had reserved land for themselves under the treaty and the Indians very likely assumed hunting rights were appurtenant to the land.[30]

The government raised several objections before the Eighth Circuit against the asserted treaty right. First, it argued, the treaty should be interpreted in the light of legitimate conservation policies.[31] This notion flows from Justice Douglas's famous dictum: "[a] treaty does not give the Indians a federal right to pursue the last living steelhead [trout] until it enters their nets."[32]

As a broad general proposition, the "conservation-as-limiting-factor" argument is specious. The Indian parties to a treaty are just as capable of applying conservation principles as are the federal and state governments[33] and, in any case, it is their treaty-recognized resource to conserve. Of course, there are obvious limitations to this response. There are mitigating factors favoring a narrower proposition respecting conservation policies as treaty construction aids. For

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28. *See* COHEN, *supra* note 6, at 221-28.

29. United States v. Dion, 752 F.2d at 1264.

30. *See* Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 747-56 (1984). *See also* Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985). In *Klamath*, the tribe was claiming a treaty-protected right to hunt and fish on land off their present reservation but once included in a treaty reservation. It was clear in that case the tribe's 1864 treaty had been abrogated and the reservation reduced in size. The Indians had, in fact, been paid for the abrogation. The tribe argued, however, there had been no intent to abrogate the treaty to the extent of the now off-reservation fishing rights, and that those federal rights preempted state law. *See* Solem v. Bartlett, 465 U.S. 463 (1984). The State of Oregon prevailed before the Supreme Court. One question was whether the right to fish is appurtenant to or independent of the land on which the fishing is to be done. The Court conceded that the separation of the right from the land is possible. 473 U.S. at 765-66. Citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 675-76 *modified*, 444 U.S. 816 (1979) and Carpenter v. Shaw, 280 U.S. 363 (1930), the Ninth Circuit had decided the case on this basis. *See* Klamath Indian Tribe v. Oregon Dep't of Fish and Wildlife, 729 F.2d 609, 612 (9th Cir. 1984). However, the Supreme Court determined that in the *Klamath* case, the right to fish was appurtenant to the land and was relinquished by the Indians when they surrendered the land for a cash payment. Justice Marshall, who wrote *Dion*, dissented along with Justice Brennan. 473 U.S. at 775.

31. 752 F.2d at 1267-69.

32. Department of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

33. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); discussed *infra* note 36.

example, if the hunting right was not reserved exclusively to the Indians but was shared between the Indians and others, the rights of those others, reflected in their government's conservation policies, should be a factor in the treaty's interpretation. The same analysis is appropriate if the right was protected off-reservation as well as on. Supreme Court cases reflect this limitation.[34]

If the species is a migratory one, but the treaty right is exclusive and on-reservation, then the outcome from the non-Indian population's viewpoint is just as clear. "Those are our eagles (or salmon, elk, or, maybe, oil, gas or groundwater), too. We should have a say in how you hunt them." The problem is, of course, that the non-Indians *did* have a say—in their government's negotiation and ratification of the treaty—and they, through their representatives, agreed to the retention by the Indians of exclusive on-reservation rights. How can the treaty now be construed otherwise?

The answer lies in the "as the Indians understood the treaty" rule of construction. It would have been beyond the expectations of all the parties in the nineteenth century to anticipate the destruction of the resource and hence the treaty should not protect the right to that extent. This argument gains force in relation to the Indian control of an off-reservation resource by their on-reservation activities. When the reservation sits astride a stream where a species migrates every year, the entire off-reservation population could be decimated in one season by exploitative on-reservation fishing. Such is the case of the steelhead, and explains Justice Douglas's dictum.[35] When the species roams freely across the country, including Indian reservations, the argument has less strength.[36] The eagle's is a case between two extremes.

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34. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), *modified*, 444 U.S. 816 (1979); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Antoine v. Washington, 420 U.S. 194 (1975); Department of Game v. Puyallup Tribe, Inc. 414 U.S. 44 (1973); Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392 (1968). *See also* Reynolds, *supra* note 30, at 767-73. Professor Reynolds' focus in her article is on state, not federal, conservation and sports regulation. The issue is the same however, for the legitimacy of the state regulation depends first on its not being preempted by federal law. *See id.* at 771-81.

See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1435 (W.D. Wisc. 1987), which distinguished *Dion* on the basis suggested by this text.

35. Department of Game v. Puyallup Tribe, Inc. 414 U.S. 44 (1973). In case it does not go without saying, there is not and never has been the slightest indication that the Puyallup Tribe had any intention of pursuing the last steelhead into its nets.

36. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) in which the Court held the state's ability to control the hunting of elk on the reservation to be preempted by the tribe's legitimate and federally-sanctioned control of the same resource. Although the tribe's regulations were unclear as to whether conservation or economic purpose dominated, they were

The eagle migrates in large numbers across the reservation to a sanctuary bordering the reservation. The sanctuary is necessary because most of the off-reservation eagle habitat has been destroyed by non-Indians. The Eighth Circuit answered by finding hunting by Indians did not in fact threaten the eagle with extinction, and so the "conservation as limiting factor" argument lost on the facts.[37] The Supreme Court found any treaty right that did exist had been abrogated. The court did not reach this other issue.[38]

The government also argued before the Eighth Circuit that while the treaty might protect the right to shoot an eagle, it did not protect any right to sell the carcass or otherwise engage in commercial activity in the feathers.[39] Once again under the traditional notions of Indian treaty interpretation, the question is whether the Indian parties to the treaty would have understood that the latter right was protected. The question can be stated to make the answer appear easy. Did the Yankton chiefs imagine in 1858 that the treaty-protected activities would include the wholesaling of eagle feathers to non-Indians for shipment to New Mexico to be made into *objets d'art*, ultimately destined to grace the offices of East Coast accountants? No, they did not.

On the other hand, were eagles hunted in the nineteenth century only for individual consumption? Was there trade in eagle feathers? Between Indians? Between Indians and others? Such matters should be open for proof at trial; it is not unlikely that some trade in eagle parts took place[40] and is treaty-protected activity. *Dion*, as addressed by the Eighth Circuit, and other cases accept the legitimacy of the

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somewhat more generous to hunters than were the state's. One suspects both purposes dominated. The Supreme Court, in ratifying the tribe's ability to control the on-reservation hunting of a resource that roamed freely across reservation boundaries, implicitly rejected the standard set by a panel of the Ninth Circuit: "As to such hunting and fishing [by non-tribal members on the reservation] *the more severe restrictions, whether originating with the State or Tribe, control.*" United States v. Montana, 604 F.2d 1162, 1171 (9th Cir. 1979), *reversed on other grounds*, 450 U.S. 544 (1981) (emphasis added). *See also* Confederated Tribes of Colville Indian Reservation v. Washington, 591 F.2d 89, 92 (9th Cir. 1979), *Rev. denied*, 452 U.S. 911 (1981). The passage of the Ninth Circuit's "the more severe restrictions win" rule from Indian law jurisprudence is unlamented. It appeared to have been premised on the notion that "conservation" in all cases means "conservative" and that a government could not legitimately determine that conservation interests required the harvesting of a resource to reduce numbers but improve the health of the resource as a whole.

37. 752 F.2d at 1268, n.14.

38. 476 U.S. at 738, n.5.

39. 752 F.2d at 1264-65.

40. A fictional account of such a trade in sacred or quasi-sacred medicine bundles between Indians is found in J. WELCH, FOOLS CROW (1986) at 109. While Mr. Welch is a Blackfeet and Gros Ventre Indian and has assured me that he understands that such transactions indeed took place in the old days, I am unable to cite to any particular non-fiction source.

inquiry,[41] and before the Supreme Court, at least with respect to Northwest Coast fishing, the argument has carried the day.[42]

It is interesting to note that the issue of the protection *vel non* of commercial trading in eagles can become closely related to the issue of first amendment protection of the activity. On one hand, the religious use of eagle parts may be protected, both by treaty and by the Constitution. On the other hand, the crass commercial dealings in our endangered national bird (endangered, it is admitted, almost entirely by past and present non-Indian activity) are not "religious" nor, as has been shown, treaty-protected. Between these cases lies the harder case where an eagle is felled by one Indian and traded or sold to another for use in a religious ceremony. The resolution of the treaty issues in such a case would require historical evidence to determine what the Indians understood the treaty to mean; mere conclusions concerning "commercial" or "non-commercial" activity will not do.[43] The Supreme Court avoided resolving the first ammendment issues in *Dion*, therefore they will not be addressed here.[44]

The conclusion to here, then, is the 1858 treaty with the Yankton should be construed—as the Eighth Circuit did expressly and the Supreme Court did by implication—to protect at least some hunting of eagles, even though the birds have become symbolic and, to a lesser but still important extent, endangered.[45] Furthermore, a court should be hesitant to proclaim only "non-commercial" activity is protected.

As has already been noted, all of the foregoing was assumed away by the Supreme Court, leaving the abrogation issue directly presented.[46] Given that the Yankton were once promised the right to hunt on the reservation, including the right to hunt eagles and other now-

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41. *See* the discussion in *Dion*, 752 F.2d at 1264. *See also* United States v. Top Sky, 547 F.2d 486 (9th Cir. 1976).

42. *See Dion*, 752 F.2d at 1265 and cases cited *supra* n. 11.

43. The Eighth Circuit in *Dion* concluded that "the Yankton Sioux would not have understood the treaty as reserving in them a right to sell eagles . . . ." 752 F.2d at 1264. As the text indicates, I think this statement is much too broad and must be read in the context of the facts of *Dion*, where the feathers from the Yankton reservation appeared to be ending up in New Mexico craft shops. The Supreme Court assumed that the case before it concerned non-commercial dealings in eagles. 476 U.S. at 736, n.3.

44. The Eighth Circuit had rejected the religion claim, 752 F.2d at 1264-65, and it was abandoned by the defendants before the Supreme Court, 476 U.S. at 736, n. 2. *See* United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) and *Dion*, 476 U.S. at 746. *See also* United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) and State v. Billie, 497 So. 2d 889 (Fla. 2d DCA 1986), cases concerning the shooting of an endangered Florida panther, which are discussed in detail *infra* text and notes 63-90 and accompanying text.

45. The golden eagle, though protected under the Bald Eagle Protection Act, 16 U.S.C. § 668 (1982), is not endangered. *See Dion*, 476 U.S. at 740-41 and United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986).

46. 476 U.S. at 738.

protected birds, was that promise put aside when Congress passed the laws to protect the birds?

One approach to this question would be to require that Congress place its intent to abrogate an Indian treaty on the face of the abrogating statute; to make it so there could be no "quiet" abrogations.[47] It has for some time been clear that the test is not that demanding. Prior to *Dion*, the Eighth Circuit had established its *White* test that "statutory abrogation of treaty rights can only be accomplished by an express reference to treaty rights in the statute *or in the statute's legislative history.*"[48] The Ninth Circuit's test was a less stringent one which looked to surrounding circumstances as well as the statute itself and its express legislative history.[49] The United States, before the Eighth Circuit in *Dion*, urged the abandonment of the *White* test, but the Eighth Circuit stuck to its guns, preferring the "greater clarity and more consistent results" of the *White* test.[50]

The government next suggested that the *White* test be modified in the case of natural resource conservation, citing *New York ex rel. Kennedy v. Becker*[51] and the *Puyallup* cases.[52] The court was unpersuaded, however, and read the cited cases narrowly: *Kennedy* as an off-reservation fishing case,[53] and the *Puyallup* cases as ones involving fishing rights held by the Indians in common with non-Indians.[54]

The Supreme Court reversed the Eighth Circuit, reformulating the *White* test.

> What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.[55]

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47. *See, e.g.*, Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601 (1975). *See also* Wilkinson, *supra* note 9, at 52 and n.97.

48. *Dion*, 752 F.2d at 1265 (emphasis in original). The test originated in the case of United States v. White, 508 F.2d 453 (8th Cir. 1974).

49. *See* United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), *cert. denied* 449 U.S. 1004 (1980).

50. *Dion*, 752 F.2d at 1267. The court suggested rather strongly that this might be the test only for criminal cases such as *Dion*. *Id.*

51. 241 U.S. 556 (1916).

52. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Department of Game v. Puyallup Tribe, Inc. 414 U.S. 44 (1973); and Puyallup Tribe, Inc. v. Department of Game, 391 U.S. 392 (1968).

53. *Dion*, 752 F.2d at 1267-68.

54. *Id.* at 1268-69.

55. 476 U.S. at 740.

The Supreme Court in *Dion* found such an "actual consideration" and the resulting "choice" to abrogate.[56]

The *Dion* "actual consideration and choice" test should be read to be strong and demanding and has much to recommend it. The word "actual" has a special place in the law, reserved for those occasions where a court seeks evidence that something *in fact* occurred, not that something "constructively" occurred. The "actual consideration and choice" test makes it clear that the question is not merely whether Congress would have been adverse to the notion that it was abrogating an Indian treaty, had it been brought to its attention.

Where will a court turn for evidence of Congress's "actual consideration and choice"? Justice Thurgood Marshall was careful to begin his opinion for the Court with a consideration of the language of the Bald Eagle Protection Act, a signal to lower courts that the first place to look is always to the statute itself.[57] Next, the legislative history must be inspected, for direct evidence of congressional choice often is found there.

The Eighth Circuit's *White* test stopped here, demanding express and direct evidence in the legislative history of Congress's intent to abrogate the treaty.[58] To some extent that test was preferable to *Dion*'s. It is satisfying when one is sure that Congress knew that the proposed legislation would have the effect of going back, unilaterally, on the national word.

The applicable legislative history in *Dion* contained nothing that express, and the Supreme Court's reversal shows nothing that express is required. It would be a mistake, however, to read *Dion* as establishing a tremendously different standard for "quiet" abrogations than had been contained in the *White* test. It is true enough the *Dion* "actual consideration and choice" test does not require *direct* evidence of the

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56. *Id.* at 774-77. The Eighth Circuit had found no intent to abrogate expressed in either the statute or its legislative history, and further:

> even if we ignore the express reference test and, instead, look for congressional intent to abrogate or modify treaty rights in less reliable sources, we reach the same conclusion. . . . [T]he fact that the acts are broadly worded conservation measures is inconclusive as to intent to abrogate Indian treaty rights. The plaudible purpose behind conservation statutes gives rise to strong emotions, especially where bald eagles are concerned, but does not necessarily reveal a congressional intent to eliminate rights protected by federal treaties.

Dion, 752 F.2d at 1269-70.

57. *Dion*, 476 U.S. at 740: "[C]ongressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act." *See generally* WILKINSON, *supra* note 9, at 52 and cases cited therein. "But the modern cases have generally hewed to the standard of express language as a benchmark and have rarely dispensed with the requirement." WILKINSON, *supra* note 9, at 52.

58. *Dion*, 752 F.2d at 1269.

consideration and choice; Justice Marshall's opinion indicates that circumstantial evidence will do. But, by way of emphasis, Justice Marshall for the unanimous Court made the point that it is "*essential*" any such circumstantial evidence "clear[ly]" indicate congressional consideration and choice to abrogate before an abrogation will be found.[59]

With respect to the Bald Eagle Protection Act the circumstantial evidence was strong. The hunting of eagles by Indians was directly discussed by the legislators, showing actual consideration of the impact of the proposed legislation on Indians. While direct mention of Indian treaties and their abrogation is not found, it is clear some members of Congress were concerned with the rights of Indians.[60] Furthermore, the talk of Indians hunting eagles was not abstract discussion, far removed from the details of the proposed legislation. Congress recognized some Indian eagle hunting is legitimate and a protected activity, even if it was thinking of the first amendment and no one precisely brought to its attention that such legitimacy and protection also flows from treaties.[61] More important, Congress took action following this discussion and established a permit scheme to

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59. *Dion*, 476 U.S. at 739.

60. Before the Eighth Circuit in *Dion* there had been no need to inspect the legislative history of the Bald Eagle Protection Act. *White* was a case interpreting the terms of that Act and, as the Act had not been amended, that case was stare decisis. *Dion*, 752 F.2d at 1269. With respect to the Endangered Species Act, the Eighth Circuit wrote: "[W]e cannot find an express reference to Indian treaty hunting rights showing congressional intent to abrogate or modify such rights in either the statutory language or legislative history of this Act." *Id.*

The Supreme Court appeared to agree with the Eighth Circuit that the intent to abrogate is much less clear under the Endangered Species Act than it is under the Eagle Protection Act: "[T]he Endangered Species Act and its legislative history, [*Dion*] points out, are to a great extent silent regarding Indian hunting rights." *Dion*, 476 U.S. at 745. Nevertheless, the Court held that the prosecution under the Endangered Species Act was proper: "[W]e have held, however, that Congress in passing and amending the Eagle Protection Act divested Dion of his treaty right to hunt bald eagles. He therefore has no treaty right to hunt bald eagles that he can assert as a defense to an Endangered Species Act charge." *Id.* Thus the Court made clear that its test in *Dion* was something more than the determination that when a treaty and a statute conflict the statute controls. Rather, the statute represents an abrogation of the treaty in the true sense of the word and the treaty right is gone.

As Ms. Hanna and I discussed in the earlier article, this interpretation of Dion's rights under the Endangered Species Act makes the costs of a court's error in determining whether Congress intended a "quiet" abrogation greater. *See* Hanna & Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797, 833-35 (1986). This greater cost, in turn, argues in favor of the stricter, bright line rule of *White*.

61. Why would Congress be less concerned with treaty-protected hunting than with hunting for religious purposes? Given its acknowledged power to abrogate treaty rights unilaterally, *see* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) and United States v. Sioux Nation, 448 U.S. 371 (1980), and note 13 *supra*, and given its acknowledged lack of power to abrogate first amendment rights, *see* U.S. CONST. amend. 1 and the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1981), Congress might well spend more time avoiding the latter than the former.

protect Indian religious rights. It is impossible to read *Dion* without being impressed by the importance Justice Marshall placed on this permit scheme.[62] The presence of the permit scheme shows Congress actually considered Indian rights and made that consideration tangible. Admittedly, the link to Indian treaty rights is still circumstantial, but seems to be a distinction too legalistic for the Court.[63]

Thus, even though *Dion* found the treaty abrogated, it established a very stringent test for "quiet" abrogations. Under Justice Marshall's opinion, a court must keep in mind its "*essential*" task is to find "*clear*" evidence the Congress "*actually considered*" the Indians' treaty rights and "*chose*" to abrograte the treaty.[64] In seeking this evidence, the court should look first, as Justice Marshall did, to the face of the statute and the legislative history. While circumstantial evidence of the congressional consideration and choice may occasionally convince a court an abrogation was intended, the *Dion* case itself argues for a limited role for this part of the test. The importance to the Court of the permit scheme should guide lower courts, when they turn to

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62. The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate. 476 U.S. 742-43. And again, "Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted." *Id.* at 743.

63. Strictly speaking, before the statute in question was passed, Indian rights fell into two catagories. First, there were treaty-protected rights, usually geographically restricted to the reservation; these rights were raised by Dion as a defense. Second, there were the rights of Indians, in common with non-Indians, to engage in otherwise unregulated activity. It is not difficult to decide that Congress intended to ban the previously unregulated off-reservation activity of both Indians and non-Indians. But did it intend to ban the treaty-protected right? Here the inquiry becomes almost metaphysical, for recall that, with respect to the Yankton Sioux, there is no mention of the right to hunt in the treaty at all.

All of the legislative history cited by the Court is consistent with the notion that the eagle shooting being regulated was unprotected by treaty. The existence of the religious purposes permit scheme, for example, is explainable as an attempt to save the constitutionality of the system from attack by an Indian claiming the right to be free of federal regulation of the religious hunting of birds where no treaty protects the hunter. For example, some of Dion's co-defendants, charged with hunting eagles off their own reservations, might have raised this defense. This was the Eighth Circuit's approach. "[A]s the majority in *White* revealed, the religious purposes' exception is not limited to the taking of eagles by Indians or to the taking of eagles on Indian reservations." United States v. White, 508 F.2d at 458. "In other words, it could have been deemed necessary to permit non-Indians to hunt eagles, on or off a reservation, in order for the Indian tribes to obtain enough eagle parts for their religious needs." *Dion*, 752 F.2d at 1270. With respect to the hunting of eagles as protected religious activity, *see* United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986). The Supreme Court did not reach Dion's religious freedom argument. 476 U.S. at 736 n.3.

64. *Id.* at 740 (emphasis added).

inspect evidence that is not found expressly in the statute or legislative history, to seek the same kind of clarity and definiteness. With this sort of careful consideration, a court may be comfortable that it may avoid inadvertent upsets of carefully constructed tribal-federal relations and imposing liability for money damages on the United States, all in the name of a "quiet" abrogation.

The days are happily gone when the United States, with its divine arrogance of the last century, purposefully fails to keep its word to its Indian citizens as if there was something in the status of Indians that made promises to them meaningless.[65] More common these days is the choice of some otherwise worthy national goal—such as the protection of eagles—that runs afoul of a treaty-made promise to an Indian tribe. Congress's choice of whether to abrogate the treaty or not is one that should be done soberly, carefully and, one would hope, with some considerable disquietude regarding abrogation. Furthermore "quiet" abrogations raise all of the obvious problems of inadvertence and injustice. Similarly, when a court faces what is argued to be such a "quiet" abrogation, it ought to be hesitant, indeed reluctant, to reach the conclusion that the treaty right has been cast aside. The proper reading of the *Dion* opinion shows that the Supreme Court's approach is fully consistent with that hesitancy and reluctance.

The earliest receptions of *Dion* were inauspicious. In December of 1983, James E. Billie, Chief of the Seminole Tribe in Florida, killed a *felis concolor coryi*, or Florida panther, an endangered species, protected under both state and federal law. Dual prosecutions commenced. The state trial court dismissed the information against Billie, but the Florida District Court of Appeal reversed and remanded for trial.[66] In the federal prosecution, the federal district court denied Billie's motion to dismiss.[67] Both cases purported to use the Supreme

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65. Some will find this sentence in the text to be hopelessly optimistic, enough so to make me as arrogant as any nineteenth century Indian country missionary, calvary officer or federal law-maker. I confess to some optimism, not unlimited, in this field, and have done so publicly. *See* Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations, to be published at* 30 ARIZ. L. REV. (1988). Those less optimistic, and toward whom that essay was one volley in a so-far friendly debate, include Professor Robert A. Williams, Jr. of the University of Arizona and Professor Milner S. Ball of the University of Georgia. *See* Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1; Williams, *The Algebra of Federal Indian Law*, 1986 WIS. L. REV. 219.

66. State v. Billie, 497 So. 2d 889 (Fla. 2d DCA 1986). At trial, Billie was acquitted, N.Y. Times, October 9, 1987, at 29, col. 1.

67. United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987). Billie's first trial in federal court ended in a mistrial, the jury deadlocked at 7-5 in favor of acquittal. N. Y. Times, August 28, 1987, at 32, col. 1. Following the verdict of acquittal in the state prosecution, *see* note 66, *supra*, the Justice Department dropped the federal prosecution. N. Y. Times, October 11, 1987, at 28, col. 2.

Court's test for "quiet" abrogations from *Dion*; both used it superficially and rather off-handedly found a treaty abrogation.

The first concern for both courts, of course, had to be whether Billie's right to hunt the Florida panther was treaty-protected. Both equivocated, citing to the "conservation as a limiting factor" rule,[68] discussed above.[69] Both courts even went so far as to paraphrase Justice Douglas's steelhead trout dicta: "[Congress] could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers," said the federal court.[70] "The Seminoles do not have the right to hunt the very last living Florida panther," the state judge offered.[71]

It is difficult for me to believe that Justice Douglas, even the conservationist that he was, would have entirely approved of such glib and casual restatements of his thoughts from the *Puyallup* litigation. South Florida has surely become an inhospitable range for an animal as wild and predatory as the panther, but it is self-evident that circumstance follows white, not Indian, greed, exploitation and shortsightedness. Panthers are truly in short supply. But to suggest in such an easy fashion that the Seminoles in general or Chief Billie in particular are out to exterminate the species, or indeed that the Chief's taking of one panther for religious purposes represents such a threat, either by itself or in some unstated aggregation, is certainly more phrase-making than legal analysis.

The state court's analysis of whether Billie's right to hunt on the Big Cypress Reservation[72] is limited by conservation concerns does not go much beyond this phrase-making. It seems entirely contained in the conclusion: ". . . however, the United States Supreme Court has said that an Indian's right to hunt pursuant to executive order can be regulated by the need to conserve a species," citing the *Puyallup* cases.[73] As mentioned above,[74] the analysis is not that simple. Panthers are not steelhead trout. Steelhead trout are an anadromous species of fish that migrates along particular and exact routes, and is much more sensitive to Indian harvesting than a predatory mammal of the sub-tropics. The

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68. *See* United States v. Billie, 667 F. Supp. at 1489; State v. Billie, 497 So. 2d at 892.

69. *See supra* notes 31-38 and accompanying text.

70. United States v. Billie, 667 F. Supp. at 1492.

71. State v. Billie, 497 So. 2d at 895.

72. While there were many treaties between the United States and the Seminole Tribe, the Big Cypress Reservation, the main home of the Tribe in Florida, was established by executive order, not treaty. *See* United States v. Billie, 667 F. Supp. at 1488 n.2. The fact that the reservation is not a treaty reservation should have no impact on the case. *See Dion*, 476 U.S. at 745 n.8.

73. State v. Billie, 497 So. 2d at 892.

74. *See* United States v. Billie, 667 F. Supp. at 1496.

panther is apt to roam over a fifty to three hundred square mile area, only part of which is on the reservation. On the other hand, a fish that lays thousands of eggs may be less vulnerable than a mammal that bears only a few offspring each year. The District Court of Appeal's discussion falls far short of the Eighth Circuit's analysis in *Dion*, which rightly assigns the government the task of proving Indian eagle hunting threatened the animal with extinction.[75]

The federal district court's analysis of the question of treaty abrogation is more careful. That court also recognized that when a federal prosecution is involved, the question of the interpretation of the treaty right and the question of the right's abrogation merge. In other words, once we know that the Congress has the power to abrogate treaty rights to hunt, the issue is whether the federal conservation statute did so—the *Dion* issue. Only if it is found that the federal statute left the treaty intact would it be necessary to determine whether the treaty protects the right and then only for the purposes of prosecution under state law. The structure of *Dion* itself supports this approach. Hence, the federal court reached the conclusion that

> where conservation measures are necessary to protect endangered wildlife, the Government can intervene on behalf of other federal interests. The migratory nature of the Florida panther gives Indians, the states, and the federal Government a common interest in the preservation of the species. Where the actions of one group can frustrate the others' efforts at conservation . . . reasonable, nondiscriminatory measures may be required to ensure the species' continued existence.[76]

The key words in that passage are "necessary" and "can frustrate", and the district court should have devoted some time to the factual question of whether Seminole hunting of panthers for religious purposes *necessarily frustrates* legitimate conservation aims. Nevertheless, the court was correct in turning immediately to the Endangered Species Act, to determine if it was written by Congress to abrogate any treaty hunting right that existed. The evidence is not great that it did.

Both courts noted that the Supreme Court in *Dion* was able to leave open the question of whether the Endangered Species Act is a treaty-abrogating act of Congress.[77] That is technically correct, but it is difficult not to read some approval into the Court's language when it

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75. *See Dion*, 752 F.2d at 1268.

76. United States v. Billie, 667 F. Supp. at 1490 (citations omitted).

77. *Dion*, 476 U.S. at 745. *See* State v. Billie, 497 So. 2d at 893; United States v. Billie, 667 F. Supp. at 1487. *See also* note 45, *supra*.

noted that "[t]he Endangered Species Act and its legislative history, [Dion] points out, are to a great extent silent regarding Indian hunting rights."[78]

The federal district court in *Billie* made all it could of the legislative history, but in the end was able to point to precious little indication in the Endangered Species Act that hints of an intent to abrogate Indian treaties:

> [The Endangered Species Act's] general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives . . . demonstrate that Congress considered Indian interests, balanced them against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife.[79]

The Alaskan natives the court referred to, it should be noted, are not protected by any treaty and would need federal statutory protection to have any rights at all, other than their rights in common with other Alaskan citizens.[80]

The federal district court did not really object to Dion's observation, with the apparent approval of the Supreme Court, that the legislative history of the Endangered Species Act is mostly silent on the subject of Indian hunting rights. The court, instead, based much of its holding on some legislative history of a bill before the House of Representatives in a previous Congress—a bill that never passed—the relevance of which is not entirely clear.[81] All in all, when compared with *Dion*, the congressional "demonstration" found by the federal court falls well short of *Dion*'s mark.

The most telling bit of the federal court's "evidence" of Congress's intent to abrogate is its continued reference to "the Act's general comprehensiveness,"[82] for it is at this exact point that *Dion* requires more. In *all* cases of "quiet" treaty abrogations, a generally comprehensive statute will be weighed against the terms of an Indian treaty.

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78. *Dion*, 476 U.S. at 745.

79. United States v. Billie, 667 F. Supp. at 1490.

80. *See generally*, COHEN, *supra* note 6, at 739-46.

81. United States v. Billie, 667 F. Supp. at 1490-91. As described in *Billie*, the House bill was H.R. 13081, 92d Cong. 2d Sess. A companion bill in the Senate was S. 3199, 92d Cong. 2d Sess., which also failed to pass. It seems that ever since then Justice Rehnquist's creative use of unpassed legislation in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the use of such non-statutes in Indian law cases has been on the rise.

82. United States v. Billie, 667 F. Supp. at 1491. *See also id.* at 1488 and 1492. The Florida state court was impressed, too, by the comprehensiveness of the federal statute. *See* State v. Billie, 497 So. 2d at 893 and 895. Neither court seems daunted by the commitment of the United States to keep its word to the Indian parties to a treaty.

The fact that Congress has sought to regulate an area of national concern is not enough, however, to conclude that Congress at the same time means to go back on an old and important promise:

> What is *essential* is *clear evidence* that Congress *actually considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and *chose* to resolve that conflict by abrogating the treaty.[83]

The Florida state court picked out of *Dion* a weaker "sufficiently compelling evidence" test.[84] It then appeared to use an even weaker test: "[t]he Endangered Species Act abrogates any inherent rights the Seminole Indians may have for hunting the Florida panther, *since only Alaskan native Indians are specifically exempt from the Act.* In expressly exempting only Alaskan Indians, *we must presume* Congress did not intend to exempt any other Indian tribes."[85] Then a non-Indian case was cited.[86]

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83. *Dion*, 476 U.S. at 739-40 (emphasis added).

84. "The Supreme Court concluded that while an express statement of Congress may be preferable, it would not rigidly interpret that preference as a per se rule where the evidence of congressional intent to abrogate was sufficiently compelling." State v. Billie, 497 So. 2d at 893. In *Dion*, the "sufficiently compelling" language occurs just before the "[W]hat is essential . . ." passage quoted immediately above in the text, which I have characterized as the case's test. *See Dion*, 476 U.S. at 739-40.

85. State v. Billie, 497 So. 2d at 894 (emphasis added and citations omitted). The Florida court has made a technical mistake here by equating Alaskan natives with Alaskan Indians, to the possible offense of Inuits and Aleuts. *See* COHEN, *supra* note 6, at 739. The error is probably forgivable, though, for a court so far from Alaska.

86. 497 So. 2d at 894, citing Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), a leading case on the Endangered Species Act. It is reasonably clear that both the state and federal judges saw *Billie* as first involving panthers and only secondarily concerning Indians. For example, the federal court in *Hill* began its analysis by noting that the Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." United States v. Billie, 667 F. Supp. at 1488 (quoting *Hill*, 437 U.S. at 180). Then, for good measure, the court quoted the same passage again at the close of its analysis. United States v. Billie, 667 F. Supp. at 1492. The cases might have been decided differently if the courts had been made to see them first as cases involving the nation's solemn word, which has, unhappily, come into conflict with the future of a proud and endangered beast. Imagine if the federal district court's first quotation had been not from *Hill*, but from *Tuscarora*: Justice Black on word-keeping, quoted *supra* at note 10. From this vantage point, it becomes much clearer that the first question must be the extent of the conflict between the treaty and the environment: just exactly how much will the panther be harmed by a decision that keeps the government's word? If the answer is "substantially" then the result in *Billie* might be justified. But the government should be put to the proof, or, alternatively, must prove that Congress has already *actually* considered the question and made the choice to abrogate.

This conflict between first viewing the case as a panther case or an Indian case is seen most clearly in one part of the state court opinion. Turning at the end to an "additional aspect" of the case, the court briefly studied Florida Statute § 380.055(8) which permits the Seminole Tribe, under state law, to hunt in its usual and customary way on the Big Cypress Reservation. This

Any "sufficiently compelling" test collapses upon itself and ultimately begs the question. And a presumption that treaty-protected Seminoles are covered merely because certain non-treaty Alaskan natives are not turns *Dion* on its head. However, my real complaint with the state court decision is not that it substituted one black-letter statement of the law for another. The mistake is in black-letterizing the *Dion* case in the first place. Divorcing *Dion* from its facts and leaving the test quoted above floating in a vacuum does not do justice to the Court's opinion.

The federal district court did little better in this regard. It paid lip service to the correct test from *Dion*,[87] but it, too, treated the test as if it were a black-letter statement, divorced from the facts of the case that gave rise to the test. In particular, the court failed to consider the importance of the permit scheme Congress put into place under the Bald Eagle Protection Act and left off the Endangered Species Act.[88] The importance of that scheme, remember, was that it made the circumstantial evidence of congressional consideration and choice *clear* rather than presumed. It decreased markedly the chances that the Court was guessing wrong in finding that the nation's word was being recanted.

Instead, the federal district court found circumstantial evidence in the exemption for Alaskan natives. But note how much weaker this evidence is than that in *Dion* itself. As I noted above,[89] the permit scheme under the Bald Eagle Protection Act did not directly address treaty rights, but at least Congress knew, or should have known, that it was dealing with Indians who had substantial treaty rights covering, in most cases, hunting and fishing. However, the exemption in the Endangered Species Act applies to Indians *without* treaty rights, as Congress knew or should have known. The exemption in the latter act is more consistent, much more consistent, with the continued recogni-

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would appear to be a good defense to the state prosecution, but the court held that the state endangered species act governed, as the more specific statute, "because it specifically addresses the subject of an endangered species, i.e., the Florida panther." *Id.* It is not at all clear to me why a statute mentioning panthers but not Seminoles is more specific than one that mentions Seminoles but not panthers. In fact, § 380.055(8) specifically mentions both hunting and "traditional tribal ceremonials."

87. 667 F. Supp. at 1489, 1491-92.

88. Billie had argued in the federal prosecution that a permit scheme such as Congress placed in the Bald Eagle Protection Act was necessary to save the Endangered Species Act from an attack under the first amendment free exercise clause for overbreadth on its face and as applied. United States v. Billie, 667 F. Supp. at 1494. The court rejected the argument, though with little discussion of the permitting scheme. *Id.* at 1494-97. I will leave discussion of the religious freedom issue for another day.

89. *See supra* at notes 60-63 and accompanying text.

tion of treaty rights than the permit scheme for the taking of eagles.

All of this shows, perhaps, that the Eighth Circuit was correct in *White* and in *Dion*.[90] The Supreme Court's test as stated and applied in *Dion* is stringent, but it lacks the bright line clarity of the *White* test. Bright lines, perhaps, should be avoided for their inflexibility.[91] But when the slope is as slippery as legislative history and treaty construction tend to be, and when the costs are as dear as those involved when treaty rights and endangered animals are at stake, then there is much to be said for certainty. And, as the *Billie* cases show, a little Supreme Court flexibility can go a long way in the hands of lower court judges. Is a mention in the legislative history that a treaty is at stake too much to ask? Surely not. But the Supreme Court unanimously chose otherwise. There lies ahead, I fear, ample litigation where effective advocates will have to urge that the line be held against further quiet degradation of the nation's word. "Indian treaty rights are too fundamental to be easily cast aside."[92]

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90. The federal district court in *Billie* noted that the Eighth Circuit in *Dion* had found that the Endangered Species Act did not abrogate Indian treaties, United States v. Billie, 667 F. Supp. at 1487, but held that it was not bound by that out-of-circuit opinion. True enough, but the court later gave considerable deference to a Tenth Circuit opinion of much less relevance. *See id.* at 1490, discussing Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987).

91. "Our entire profession is trained to attack 'bright lines' the way hounds attack foxes." Robbins v. California, 453 U.S. 420, 443 (1981) (Rehnquist, J. dissenting).

92. Dion, 476 U.S. at 739.