COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. WAREHAM DISTRICT COURT
NO. [REDACTED]

COMMONWEALTH OF MASSACHUSETTS	)
v.	)
[PLYMOUTH 25]	)

MOTION TO DISMISS FOR LACK OF JURISDICTION

Now come all the defendants in the above-named action and move, pursuant to Mass. R. Crim. P. 13(c) that this Court dismiss each of the above cases as the Court lacks jurisdiction to try the defendants.

Statement of Facts

The above-named defendants were all participants in a "Day of Mourning" in Plymouth on November 27, 1997 the same day traditionally known in the United States as Thanksgiving Day. The purpose of the event is for Indians[1] and their supporters to remember the Indians who perished as a result of European colonization of the North, South and Central American continents.

After several speeches were given on Coles Hill the group of approximately 200 participants proceeded up Lyden Street, a public thoroughfare. According to Plymouth Police Department reports, the participants were urged to "take back the streets of Plymouth." The participants held at least one banner which read, "You are on Indian land." A police line was set up along Lyden Street immediately after a bend in the road. When the participants reached this police line, they were ordered to disperse. Some participants moved onto the sidewalk

[1] The First Nations and their members shall be referred to as Indians for the sake of consistency and clarity despite the fact that the term is obviously an historical misnomer.

while others remained in the street, insisting that they had a right to do what they were doing. One participant, [defendant #1], approached the Plymouth Police in order to negotiate. He was arrested almost immediately. All the remaining arrests occurred shortly thereafter.

Summary of Argument

Plymouth is Indian land and therefore the offenses charged were not committed within this Court's jurisdiction. The Royal Charters of the Plymouth governments did not vest title to the land of Plymouth in the Crown or the colonists. The Wampanoag Federation has never ceded their right to the land nor their sovereignty over Plymouth by treaty. The Wampanoag never sold the land of Plymouth to the colonists nor did they ever validly cede jurisdiction over the land. Plymouth Colony did not acquire title to or sovereignty over the land in King Philips' War. At the end of the American Revolution, the United States had a duty to return the Wampanoag's land under international law rather than substitute one conqueror for another. If the Wampanoag were conquered, the United States and not the Commonwealth retains jurisdiction over the land. The Commonwealth cannot acquire and has not acquired title to Plymouth by adverse possession. Finally, the United States has not extinguished the title or sovereignty of the Wampanoag over Plymouth.

I. The title to the land of Plymouth or Patuxet was not vested in the colonial government by the Royal Charters or by the doctrine of discovery.

It must be very clearly stated that the patents granted to the Plymouth Company by King James were merely in the nature of a quitclaim. *See* William T. Davis, *History of the Judiciary of Massachusetts* 329 (1974) (charter reciting that no Christian king was in possession of the lands). The charter recites the law of nations at that time which held that European nations were entitled to exclusive settlement and trading rights in areas not already settled by other

Europeans. *Id.* The Charter itself is fortunately clear in stating this principle.

> And forasmuch as we have been certainly given to understand . . . that there is no other the subjects of any of the said lands or precincts, whereby any right claim, interest or title may, might or ought by that means accrue, belong or appertain unto then or any of them,
> And also for that we have been further given certainty to know, that within these late years there hath, by God's visitation, reigned a wonderful plague . . . so as there is not left for many leagues together, in a manner, any that do claim or challenge any kind of interest therein, nor any other superior lord or sovereign to make claim thereunto . . . laying open and revealing the same unto us before any other Christian prince or state.[2]

Davis, *supra* at 331-32 (Patent of the Council to govern New England in Eighteenth Year of James' Reign). King James did not presume to grant title to lands possessed by the Wampanoag; he only granted title as against other Europeans under the doctrine of discovery.[3] "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). Indeed, the most convincing evidence that the English recognized Indian sovereignty and title to the land is the fact that the charter gave the colonists the authority to purchase lands from the Indians. Davis, *supra* at 333.

From the very beginning, however, profound doubt has been expressed about the validity of this doctrine.

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the

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[2] The pretension that the land was void of anyone claiming sovereignty over it is gainsaid by the Pilgrims' recognition of and treating with Massasoit.

[3] "Provided always that . . . any of the premises herein before mentioned . . . be not actually possessed or inhabited by any other Christian prince or state." Davis, *supra* at 338.

> discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors.

Worcester v. Georgia, 31 U.S. (6 Pet.) 405, 426 (1832).[4] Indeed, the founding theorists of modern international law, Francisco de Vitoria (1480-1546) and Hugo Grotius (a.k.a. DeGroot) (1583-1635) strongly disapproved of the doctrine of discovery. S. James Anaya, "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective," in *1989 Harvard Indian Law Symposium* 191, 193-97 (1990). As such,

> the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.

The Paquete Habana, 175 U.S. 677, 701 (1899) (quoting Chancellor Kent). Therefore, the law of nations must be interpreted to grant "discoverers" only something like an option to purchase from the Indian nations.

To the extent that the doctrine of discovery has evolved to automatically confer fee simple on European-derived governments with merely a right of occupancy in the Indians, this evolution is unsupported by the caselaw and the classical understanding of discovery. *Worcester*, 31 U.S. at 427 (discovery gave Christian Europeans exclusive right to purchase, but did not deny Indian right

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[4] "Can, then, one nation [the United States] be said to be seised of a fee-simple in lands, the right of soil of which is in another [Indian] nation? . . . A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it." *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 147 (1810) (Johnson, J., dissenting).

and title). The Court's supposition in *M'Intosh* that actual fee title to Indian land vests in the European nation merely upon discovery was mere dicta. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941). Although the *Santa Fe* Court acquiesced in this supposed rule because of its long usage, such reliance is belied by the fact that Chief Justice Marshall's decision in *Worcester* superceded *M'Intosh*. *Worcester* denies that the fee title to Indian land vests in the discoverer until actual purchase. *Worcester*, 31 U.S. at 427. Therefore, *Worcester* overruled *M'Intosh sub silentio*.

Even under this most expansive interpretation no one has ever doubted that the title granted by discovery is subject to the Indian right of occupation. *M'Intosh*, 21 U.S. at 573-575, 603. The land of Plymouth had been occupied until about 1617 by the Patuxet tribe of the Wampanoag Federation.[5] Milton Travers, *The Wampanoag Indian Federation* 16, 63 (1957). However, they had been nearly all killed by an outbreak of smallpox.[6] *Id.*; James Thacher, *History of the Town of Plymouth* 17, 33 (1972). Squanto, the last living Patuxet, returned to the area in 1619 and returned to Plymouth proper on April 2, 1621, while the colonists were still living there illegally. *See* Thacher, *supra* at 34. Squanto was absent from about 1605 to 1619 because he had been captured

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[5] The Wampanoag's habitation in and cultivation of the land at Patuxet deprived the English of claiming title because the land was *vacuum domicilium*. *See* note 1, *supra*; Kawashima, *supra* at 47; *see* Ex. A.

[6] This was actually part of a plague, probably brought by white men; "[w]ithin three years the plague wiped out between 90 and 96 percent of the inhabitants of coastal New England. The Indian societies lay devestated. Only 'the twentieth person is scarce left alive,' wrote Robert Cushman, a British eyewitness, recording a death rate unknown in all previous human experience." James W. Loewen, *Lies My Teacher Told Me* (1995) 70-71. The second charter obtained by the Pilgrims stated "that within these late years there hath, by God's visitation, reigned a wonderful plague." Davis, *supra*, at 329.

and enslaved not once but twice by Europeans.[7] Squanto lived with the English at Plymouth until his death in 1622 when he was succeeded by Hobbamock, a panseis (warrior) and member of the Wampanoag Federation's tribal council. *Id.* at 160.

Finally, the doctrine of discovery is so fundamentally racist and religiously bigoted that this court should refuse to give such an abhorrent doctrine any effect. The doctrine as expanded by *M'Intosh* holds that Europeans gain title to Indian land simply by viewing it, presumably because Indians are so debased and heathenistic that they are incapable of forming a sovereign government or of possessing rights which Christian Europeans were bound to respect. This, even though the Court conceded that the operation of the discovery doctrine was "opposed to natural right, and to the usages of civilized nations." *M'Intosh*, 21 U.S. at 591. Just as the "separate but equal" doctrine expounded in *Plessy v. Ferguson*, 163 U.S. 537 (1896) was "wrong the day it was decided," *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992), *M'Intosh* was wrong the day it was decided and to give it continued effect is offensive and unjust.

II. Plymouth Colony's treaty with Massasoit did not transfer title to the land to the English.

A. The treaty is not valid.

When the English landed at "Plimoth" in 1620, they were not on the land afforded to them by a patent from the King of England. Thacher, *supra* at 17.

> The Pilgrim Company . . . landed at Plymouth outside of their grant and within the jurisdiction of the Northern Virginia Company; and thus occupying territory without

[7] Squanto was captured and enslaved by Captain George Weymouth in 1605. Travers, *supra*, at 60. He returned on Captain Ferdinando Gorges' ship sometime before 1614. Loewen, *supra* note 6, at 83. Squanto was again enslaved by a Captain Thomas Hunt in 1614 and sold in Malaga, Spain. Thacher, *supra*, at 33-34. Squanto returned with Captain Thomas Dermer in 1619. *Id.* at 34.

> right they sent an application by the Mayflower on her return for a patent or grant from the company. Before the application had reached its destination King James, on the 3d of November, 1620 issued a new charter to the Northern Virginia Company, under the name of 'The council established at Plymouth in the county of Devon, for the planting, ordering, ruling and governing of New England in America.' By this council a patent or grant was issued June 1, 1621 and sent over in the Fortune, which reached Plymouth in November, 1621.

Davis, *supra* at 1-2. On the same day that Squanto returned to Plymouth, the colonists agreed to a peace treaty with the Wampanoag, represented by Massasoit, sachem of the federation. Thacher, *supra*, at 35. The treaty is recounted by the colonists as follows:

> 1. That neither he nor any of his should injure or do hurt to any of the English.
> 2. And if any of his did hurt to any of ours, he should send the offender, that we might punish him.
> 3. That if any of our tools were taken away when our people were at work, he should cause them to be restored, and if ours did any harm to any of his, we would do the like to them.
> 4. If any did unjustly war against him, we would aid him; if any did war against us, he should aid us.
> 5. He should send to his neighboring confederates, to certify them of this, that they might not wrong us, but might be likewise comprised in the conditions of peace.
> 6. That when their men came to us, they should leave their bows and arrows behind them, as we should do our pieces when we went to them.
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> Lastly, that doing thus, King James would esteem of him as his friend and ally.

Thacher, *supra*, at 35. As shown above, the colonists had transgressed the terms of their Royal Charter and therefore they had no authority to negotiate treaties in the name of King James with sovereign nations.

Even if the colonists had authority to negotiate, the treaty was not signed but merely recounted by Governor Bradford. *Id.* Therefore, even if the treaty is somehow to be construed as intending to transfer title to the land the document would have violated the English Statute of Frauds. *See* M.G.L. c. 259 § 1.

Further undermining the validity of the treaty, the contemporaneous accounts note that the English gave Massasoit alcohol before the treaty was negotiated, and that Massasoit "drank a copious draught which made him sweat a long time after." Thacher, *supra*, at 35. The conclusion is inescapable that the colonists got Massasoit intoxicated before they negotiated their famous, unsigned treaty. This was a despicably familiar practice. Yasuhide Kawashima, *Puritan Justice and the Indian* 24, 27, 61 (1986). Massasoit, being a man of great honor, was undoubtedly reluctant to go back on his word even though he had been duped.

B. Even if the treaty is valid, it did not deprive the Wampanoag of the land at Plymouth.

Any analysis of this treaty must begin with the principle that treaties must be construed in the Indian tribes' favor and as the Indians would have understood them. *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Nowhere in this treaty do the Wampanoag give up their claim to the land. It is highly unlikely that the thought of "ceding title" would have occurred to the Wampanoag. Kawashima, *supra* at 42-45. Even if the treaty recited a grant of land, "[t]o the Indians, who did not recognize individual land ownership but *only* usage rights, *the granting of land was not a permanent alienation but rather the granting of residence and land use*." *Id.* at 14 (emphasis added); *accord Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D.Mass. 1982), *affirmed* 707 F.2d 23, *cert. den.* 464 U.S. 1020 (1983); *accord* Douglas E. Leach, *Flintlock and Tomahawk: New England in King Philip's War* 16 (1958). "Land was [and is] not regarded as property; it was like the air, it was something necessary to the life of the race, and therefore not to appropriated by any individual or group of individuals to the exclusion of all others." Mark Savage, "Native Americans and the Constitution: the Original

Understanding," 16 Amer. Ind. L. Rev. 57, 96 n.142 (1991) (citation omitted). Therefore, if the treaty is at all valid, it was more likely characterized as a permissive use of the land granted to the English which would (precluding any claim under the English law of adverse possession or laches). *See* 22 *post*. Indeed, when the treaty was reaffirmed on September 25, 1639, Governor Bradford recorded that, Massasoit (Ussamequin) and his son, Mooanum (Alexander), promised that

> he or they shall not give, sell or convey away any of his or their land, territories, or possessions whatsoever, to any person or persons, whomsoever, without the privity & consent of this government.

1 Plymouth Colony Records 133 (1639) (spellings modernized); *see* 5 Plymouth Colony Records 76-77 (1671) (same). This quote makes explicit the Plymouth government's acknowledgment that the land belonged to the Wampanoag; it was Massasoit's "land, territories, or possessions" to dispose of.

III. Plymouth Colony never purchased title to the land from the Wampanoag.

Even if the Wampanoag could have validly contracted for the sale of the land of Plymouth, they did not.

> The first and perhaps the most difficult question for the whites was to determine who possessed title and who could sell tribal land to white men. Individual members, holding the land only with the right of occupancy and use (although that has been regarded as worth more to them than lands held in fee simple), could not alienate land to white men, because they did not individually own the land. Only the sachem with the approval of the tribal members could alienate land belonging to the tribe. The tribe could sell its land *without jeopardizing its sovereignty* as long as it was a small portion.

Kawashima, *supra* at 44 (emphasis). The records recount numerous land sales from the Wampanoag to colonists. *See* 1-12 *Records of Plymouth Colony* (1868) (hereafter a parenthetical date citation to this source shall be used to indicate the date of the record cited, rather than publication date). Clearly, the Wampanoag knew how to sell land if they

desired to do so. *See* Travers, *supra*, at 118-119 (recounting numerous sales of land by Philip to colonists); 2 *Records of the Colony of New Plymouth* 157 (1650); *see also* 3 *Records of the Colony of New Plymouth* 84 (1655). Yet, there is no purchase on record for the land constituting the town of Plymouth.[8] From the very beginning of the colony until the present day, any such sale of land was required to be recorded and approved by the Plymouth government[9] or, later, the United States. *City of Lynn v. Inhabitants of Wenham*, 113 Mass. 443, 449 (1873); *Brown v. Inhabitants of Wenham*, 51 Mass. 495, 498 (1845); 25 U.S.C. §177 (Indian Nonintercourse Act); Kawashima, *supra*, at 48-53. Indeed, after 1655, the colonists' right to settle land was explicitly contingent on Indian approval. To wit,

> The liberty formerly granted to the freemen for seeking out of lands for accommodation of them and their posterities, the tearm of time is enlarged until June, 1656, provided it . . . that it doe not cause or breed any disturbance amongst the Indians.

3 *Records of the Colony of New Plymouth* 84 (1655) (spellings modernized). Finally, any claim that Plymouth was validly purchased from the Wampanoag would require proof that the town was seized of the land in its corporate capacity. *Brown*, 51 Mass. at 500.

The simple conclusion is that Plymouth remains Indian land. It is not necessary for the Wampanoag Federation's title or sovereignty to be recognized by treaty, act of Congress, or executive order. *Cramer v. United States*, 261 U.S. 219 (1923). At most, the colonists were granted a right to use the land of Plymouth which the Wampanoag Federation impliedly revoked at the outbreak of King Philips' War: Philip plainly

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[8] Counsel has diligently searched all existing land sale records until 1690 and has failed to find such a sale. *See* 1-12 *Records of the Colony of New Plymouth* (1868).

[9] Plymouth prohibited any trade with the Indians whatsoever without the sanction of the Colony government. *See* 1 *Records of the Colony of New Plymouth* 50 (1636) (colonists punished for trading corn with Indians).

stated "I am determined not to live until I have no country." Travers, *supra*, at 138.

IV. The Wampanoag Federation never ceded sovereignty over Plymouth to the English.

The Wampanoag never accepted the English claim to absolute sovereignty and jurisdiction. The treaty of 1621 did not entail a cession of Wampanoag sovereignty.[10] Like the concept of title to land, the Indian concept of sovereignty was simply incompatible with European concepts: "When Native Americans shared with colonists the land they used, they had no sense that they were conveying a property right within a property system under one political or territorial sovereign." Savage, 16 Amer. Ind. L. Rev. at 96 n.142.

The English, and later the United States, clearly treated the Indian nations as independent, sovereign nations. *See* Treaty with the Delaware Nation, Sept. 17, 1778, art. 6, 7 Stat. 13, 14. (Delawares invited to form a state and be admitted to the new confederation with representation in Congress); *Worcester*, 31 U.S. at 432 (same). Great Britain "considered [Indian nations] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." *Worcester*, 31 U.S. at 430.

The Wampanoag and other tribes "insisted that their allegiance to the Crown did not automatically mean their subjection to the colony." Kawashima, *supra*, at 96. "Those who have the Supream Power of making Law in *England, France* or *Holland*, are to and *Indian*, but like the rest of the World, Men without Authority." Savage, 16 Amer. Ind. L. Rev. at

[10] Even if the land at Patuxet is considered to have been *terra nullius* in 1621, this would not suffice to give the colonists sovereignty over the area under the law of nations at the time; it could only give a qualified right to the land. Savage, 16 Amer. Ind. L. Rev. at 93 n.132 (quoting H. De Groot (Grotius), *De Jure Belli ac Pacis Libri Tres*, bk. 2., ch. 2 §II, XVII (rev. ed. 1646)).

91 n.128 (quoting John Locke, *Two Treatises of Government* (rev. 3d ed. 1698)). Indeed, Philip was called "King" because "when he was leader of the Wampanoags [he] refused to deal with the governor of Plymouth because Philip learned that the Pilgrim leader was subject to the King of England; and Philip felt that he, being a King, should deal with none less than the English King." Travers, *supra*, at 117. Philip's various protestations of fidelity[11] to the English do not amount to a surrender of sovereignty.

> Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe . . . so long as their actual independence was untouched and their right to self-government acknowledged, they were willing to profess dependence . . . and this was probably the sense in which the term was understood by them.

Worcester v. Georgia, 31 U.S. (6 Pet.) 405, 429 (1832). Even if the Wampanoag were under the "protection" of the English, their assertion of sovereignty is firmly grounded in 17th century international law; a nation under the "protection" of another nation does not thereby cede its sovereignty. *Worcester*, 31 U.S. at 433, 439; Savage, 16 Amer. Ind. L. Rev. at 108 n.194 (citing Grotius, bk. 1, ch.3, § XXI); Anaya, *supra*, at 200.

Like Indian concepts of sovereignty and title, the Indian concept of jurisdiction is simply incompatible with English notions. "[T]he Indian legal system was based upon personality - the principle that the law of the individual's country's rules - instead of territoriality - the principle that the law of the place of action rules." Kawashima, *supra* at 6, 230.

> As far as the Massachusetts government was concerned, then, European international law and conflict of law did not

[11] Indians "owe no allegiance to the [several] States, and receive from them no protection." *United States v. Kagama*, 118 U.S. 375, 383 (1886). Indeed, Indians were only made citizens of the Commonwealth by statute in 1869. *Pells v. Webquish*, 120 Mass. 469, 471 (1880).

> apply to problems dealing with the Indians in North America.[12] Extension of jurisdiction over the Indians was taken for granted by colonial authorities. . . .
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> Upon what basis did the Massachusetts authorities justify placing the Indians living beyond the bounds of white settlement under colonial jurisdiction? English common law, which was based on territoriality, did not provide any ready answer.

Id. at 40. Both Massachusetts and Plymouth sought to extend their jurisdiction into Indian country but the Indians resisted this bitterly. *Id.* at 228-9. The colonists' "aggressive extension of their jurisdiction carried out quickly and without consultation with the Indians, led directly to King Philip's War, which marked the end of legal coexistence between Indians and whites." *Id.* at 233.

> Despite the fact that Indian land may be geographically within the United States, Indians and Indian nations "are no more 'born in the United States and subject to the jurisdiction thereof,' . . . than the subjects of any foreign government.

Elk v. Wilkins, 112 U.S. 94, 102 (1884). Finally, the historical significance of the jurisdictional question decided in *Worcester* should not be lost on the Court. Once Chief Justice Marshall held that the Cherokee Nation was sovereign, independent, and not subject to Georgia law, President Andrew Jackson's response was simply, "John Marshall has made his decision; now let him enforce it." Landman, 5 *Boston Univ. Int'l L. J.* at 67 n.67. The United States government deliberately defied the Supreme Court's decision, resulting in the shameful "Trail of Tears" forced march. *Id.*

Therefore, the current legal status of Indian Nations is not based on precedent but on the judiciary's acquiescence in genocidal policies of the executive branch. The defendants implore the Court to follow the courageous example of Chief Justice Marshall in *Worcester* by following principle rather than capitulating to the status quo. To that

[12] As shown above, this practice was clearly at odds with Royal policy which treated Indian nations as distinct and sovereign.

end, federal courts have recognized that in cases involving the rights of Indian nations there are prudential reasons for limiting the force of *res judicata*. *Mashpee Tribe v. Watt*, 542 F.Supp. 797, 802 (D.Mass. 1982).

VI. Plymouth Colony did not acquire title to or sovereignty over the land in King Philips' War.

A. The Wampanoag were not conquered.

As the term is used in the law of nations, title by conquest entails not only military control but also the assent of the conquered through a treaty of peace. Territory occupied by conquest can only be legally acquired through a peace treaty. *United States v. Castillero*, 67 U.S. 17, 358-59 (1862). Neither the British Empire[13] nor the United States has ever entered into a peace treaty with the Wampanoag Federation.

Until a peace treaty is entered into, the occupied peoples retain the right to attempt to retake their land and the conqueror is sovereign only in the sense that it has the brute force to require compliance. "The rights acquired by the conquest are temporary and precarious until the jus post liminii[14] is extinguished." *Castillero*, 67 U.S. at 360. Or more to the point, "[t]he sovereignty of the conquerer, is nothing more than a title by force, and endures no longer than the conquered people are in a state of incapacity to throw off the yoke." *United States v. The Nancy*, 27 F. Cas. 69, 71 (C.C.D. Pa. 1814)

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[13] Indeed, it may be inappropriate to even assume that if a conquest took place, it took place under the authority of the Crown; the efforts of the colonists were directed by an intergovernmental body styled the "United Colonies." Leach, *supra* at 88, 215. The Crown strongly disapproved of this body and eventually ordered it to be disbanded. *Id.* at 17, 215.

[14] "In International law, the right by which property taken by an enemy, and recaptured or rescued from him by the fellow-subjects or allies of the original owner, is restored to the latter upon certain terms." *Blacks Law Dictionary* 861 (6th ed. 1990).

(quoting Grotius). The Supreme Court has further held that conquest confers no rights on the conqueror because,

> [t]he rights derived from conquest are derived from force alone. They are recognized because there is no one to dispute them, not because they are, in a moral sense, rightful and just. . . . The term 'title by conquest' expresses therefore, a fact and not a right.

Castillero, 67 U.S. at 359-60. Because conquest confers no rights on the conqueror, the rights of the dispossessed nation continue intact.

> The title of the original owner is wholly unaffected by the temporary dispossession; and even during his dispossession; *and even during his dispossession, it is treated as valid and subsisting until the jus post limini is extinguished*. The extinction of the post liminii is necessary to ripen the temporary and merely possessory right of the conqueror into such an ownership of the territory as neutrals can recognize.

Castillero, 67 U.S. at 364-65 (emphasis added). Because the Wampanoag Federation never entered into a peace treaty with the English or the United States, they remain a sovereign state in a state of war.

> But the object of a just war does not require of itself, that one should acquire over the vanquished, an absolute and perpetual sovereignty. It is only a favourable opportunity of gaining dominion; and it requires always, beyond this, a consent either express, or tacit, of the conquered; otherwise a state of war always continues.

United States v. The Nancy, 27 F. Cas. 69, 71 (C.C.D. Pa. 1814) (quoting Grotius). Therefore, the only nation with legitimate jurisdiction over Plymouth is that of the Wampanoag Federation and the Commonwealth had no authority to impose its laws upon the defendants other than brute force.

It has been argued that the courts of the conqueror cannot properly question the title obtained by conquest or the legality of such conquest. *See M'Intosh*, 21 U.S. at 588-89. This proposition is simply not true under United States law and the law of nations. *See The Paquete Habana*, 175 U.S. at 700-01 (duty of American courts to apply international law).

> The legality of territory acquired by conquest has been seriously challenged in recent years. By some writers the League [of Nations] Covenant and the Kellogg Pact were thought to have rendered conquest illegal and therefore to have invalidated a title to territory so acquired. Others based their arguments on . . . the series of Pan American agreements culminating in the *Lima Declaration on Non-Recognition of the Acquisition of Territory by Force*, approved on December 22, 1938, which provided, in part: "The Eighth International Conference of American States DECLARES: That it reiterates, as a fundamental principle of the Public Law of America, that the occupation or acquisition of territory or any other modification or territorial or boundary arrangement obtained through conquest by force or by non-pacific means shall not be valid or have legal effect. The pledge of non-recognition of situations arising from the foregoing conditions is an obligation which cannot be avoided either unilaterally or collectively."

Herbert W. Briggs, *The Law of Nations* 251-52 (1952) (quoting *Report of U.S. Delegation*, Department of State Conference Series 50, pp. 132-33). One should note that the wording of the above declaration comprehends retroactive invalidation of title gained by conquest. Indeed, in *United States v. Castillero*, 67 U.S. 17, 355 (1862) the Supreme Court analyzed and denied the United States' claim to certain property interests by reason of conquest.

B. The Wampanoag were not conquered in a just war.

The way Plymouth Colony conducted the war was not just. Under the law of nations, a conquering nation can only obtain sovereignty and title from a just war. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796). This Court has a duty to apply international law which encompasses treaties as well as the customary "law of nations." *The Paquete Habana*, 175 U.S. at 700-701; *Commonwealth v. Jerez*, 390 Mass. 456 (1983).

Plymouth Colony's charter of 1629 appears to grant only the right to wage defensive war, not wars of conquest. Davis, *supra*, at 361; *Worcester*, 31 U.S. at 427.

> The power of war is given [in Colonial Charters] is given only for defence, not conquest. The charters contain passages showing one of their objects to be the civilization [sic] of the Indians, and their conversion to Christianity - objects to be accomplished by conciliatory conduct and good example; not by extermination.

Id. at 428. Despite this, Plymouth Colony and its successors clearly sought the extermination of the Wampanoag.[15] Even Massachusetts Colony viewed Plymouth Colony as behaving in a dangerously aggressive manner toward the Wampanoag. Travers, *supra*, at 121; Leach, *supra* at 47 (public opinion of other colonies was against Plymouth).

It should not be lightly presumed that the war against the Wampanoag was just. "[A]s nations can readily cloak a spirit of rapacity and aggression under professions of justice and moderation, it is at all times easy . . . to declare an aggressive war to be undertaken in self-defense." *United States v. Castillero*, 67 U.S. 17, 355 (1862). Let there be no illusion as to the European governments' intentions toward Native peoples. From the very first days of the war, the Colonial governments offered to pay its soldiers in seized Indian land. Leach, *supra* at 124.

The seminal international law scholar Emmerich de Vattel (1714-1769) clearly believed that the behavior of European states toward Indians violated international law. To wit,

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[15] Indeed, the "last straw" in the events that led up to King Philip's War is another telling example of Plymouth's bad faith conduct towards the Wampanoag.

> In 1675 . . . the Plymouth justice was severely challenged by King Phillip, three of his men having been convicted of murdering the Indian John Sassamon and sentenced to death, 'at a time when public feeling against the Wampanoags was running high,' on the testimony of one Indian by the name of Patuckson, who claimed to have seen the murder committed. This practice was quite contrary to the principle established by the Bay Colony: as early as 1641 the Massachusetts Body of Liberties had clearly set forth the rule that a minimum of two witnesses was required for conviction in capital cases.

Kawashima, *supra*, at 131.

> [t]hose ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion -- those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous.

Anaya, *supra* at 200 (quoting E. de Vattel, *The Law of Nations or the Principles of Natural Law* (III Classics of International Law ed. 1916)). Nearly two centuries after King Philips War, the United States still were not satisfied. The famous General Sherman put it succinctly: "[w]e must act with vindictive earnestness against the Sioux, even to their extermination, men, women, and children." Lawrence B. Landman, "International Protection for American Indian Land Rights?" 5 *Boston Univ. Int'l L. J.* 59, 68 (1987) (quoting Letter of the Secretary of War, S. Doc. No. 15, 39th Cong., 2d Sess. 4 (1867)). After an examination of the facts it is apparent that the English and their American successors committed severe injustices in their conduct of the war, depriving them of the right to claim legal recognition of their conquest.

1. The English enslaved the Wampanoag.

From the very beginning of the war, the English enslaved or executed not only warriors but women and children, including Philip's own wife and nine year old son.[16] Travers, *supra*, at 115-116; Kawashima, *supra*, at 207; Leach, *supra* at 231. Plymouth authorities normally sold captured Indians away from their tribes and families to work in the brutally harsh conditions of the Caribbean sugar plantations.[17] Leach, *supra* at 225-26; *see* Mary Prince, "The History of Mary Prince: A West Indian Slave," *Classic Slave Narratives* (1987). This despite the fact

[16] There was serious consideration given to executing Philip's son, but he was eventually sold into slavery. Leach, *supra* at 231.

[17] Compare this policy of Plymouth and Massachusetts with that of Connecticut which forbade the enslavement of any Indians except those convicted of murder. Leach, *supra* at 227.

that as early as 1537, Pope Paul III proclaimed in the Bull Sublimis Deus,

> Indians . . . are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it should be null and of no effect.

Felix S. Cohen, "Original Indian Title," 32 *Minn. L. Rev.* 28, 45 (1947). Indeed, many of the colonists objected that the practice was unjust, caused dangerous resentment among neutral Indians, and forced warriors to die fighting rather than surrender, but these protestations were ignored as well. Leach, *supra* at 148, 226.

Magnifying the criminality and injustice of such actions, was the Colonies' placing of a bounty on Indian prisoners and allowing soldiers to keep prisoners as their own personal property to be sold into slavery. Leach, *supra* at 197. This practice continued even when the war was effectively over. Because of the ghoulish financial stake soldiers had in the enslavement of prisoners, "[e]verywhere the roundup of starving and bewildered Indians continued with a vengeance. *Hunting* redskins [sic] became for the time being a *popular sport* in New England, especially since prisoners were worth good money, and the personal danger to the hunters was now very slight." Leach, *supra* at 237 (emphasis added). "These expeditions must be classified either as business ventures or as sport, but certainly not war." *Id.* at 240. Therefore, it is eminently clear that the English could not claim title by a just war.

2. The English dispossessed the Wampanoag and confined them to prison camps.

The Plymouth government violated the European rules of war which stipulated that conquered people were to be left on their land.

Kawashima, *supra* at 45. Instead, even "loyal" Indians were forcibly removed to barren island internment or "relocation" camps. Kawashima, *supra* at 233; Leach, *supra* at 161. "Those Indians found outside these reservations were to be sent to the 'House of Correction or Prison, until he or they engage to comply with this Order." Kawashima, *supra*, at 29.

3. Innocent non-combatants were regularly murdered by the English.

The English regularly violated the laws of war by murdering non-combatant women, children, and elderly Indians. For example, the lowest estimate of casualties in the so-called "Great Swamp Fight" recites the killing of "three hundred [Indian] warriors and three hundred women and children." Leach, *supra* at 133; *see also id.* at 203, 211.[18] "Apparently, men who themselves had loving wives and children waiting for them at home could stain their swords with the blood of Indian women and children almost without a qualm." *Id.* at 212.

Even granting that the Wampanoags were conquered in Philips' war "Generous justice . . . should animate a great and conquering nation in dealing with the rights of the vanquished." *United States v. Castillero*, 67 U.S. 17, 352 (1862). The British Empire and the Plymouth colony government certainly did not live up to this principle of international law.

IV. The United States has a duty to return the land at Plymouth to the Wampanoag.

Even if the Wampanoag were conquered by the English in King Philip's War, the United States had a duty to return the land to the Wampanoag after the defeat of the English in the American Revolution.

[18] This is not to say that Indians did not engage in executions of non-combatants, but English people taken prisoner were more likely to be eventually released without significant harm than were Indians taken prisoner by the colonists. Leach, *supra* at 178.

"The law of nations imposed an obligation upon the conqueror to restore the [land] to the people, and not to bring it under subjection to a new master." *United States v. The Nancy*, 27 F. Cas. 69, 71 (C.C.D. Pa. 1814) (citing Vattel) (the French had a duty under the law of nations to return Malta to the Maltese after the French conquered the English who held Malta only by military force). As such, the continued possession of Plymouth by the Commonwealth is in violation of international law and the Court should not give effect to such usurpation.

VII. Even if the Wampanoag were conquered by the English in a just war and the jus post liminii was extinguished, Massachusetts has no jurisdiction.

As conquered territory without a treaty of peace, the land at Plymouth would have been under the military government of the Crown, not the civil government of New Plymouth. *See DeLima v. Bidwell*, 182 U.S. 244, 264 (1901) (conquered territory reverts only to the federal government, not state governments). When the United States acceded to the treaties, sovereignty and possessions of Great Britain after the American Revolutionary War, Wampanoag possessions would then be under the administration of the United States. *See* Treaty of Paris, Sept. 3, 1783, United States-Great Britain, arts. 1-2, 8 Stat. 80, 81-82. The Constitution and laws of the United States do not apply to territories except as they are specifically extended by federal legislation. *DeLima*, 182 U.S. at 278-81. Congress has not done so. The "Indian Major Crimes Act" does not apply to the offenses charged.[19] Therefore,

[19] The Indian Major Crimes Act, 18 U.S.C. @ 1153 provides for jurisdiction over only the following crimes: "murder, manslaughter, kidnapping, maiming, [aggravated sexual assault], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury . . . , an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a[n] [embezzlement or theft]." *Id.*

Massachusetts does not have jurisdiction and the defendants have committed no crime cognizable under federal jurisdiction.

IX. Plymouth Colony did not obtain title to the land by adverse possession.

"[S]tate law time bars, *e.g.*, adverse possession and laches, do not apply of their own force to Indian land title claims." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 n.13 (1984) (Oneida II); Clark *v. Williams*, 36 Mass. (19 Pick.) 499 (1837) (colonists cannot acquire title to Indian land by adverse possession). In addition, laches and adverse possession are equitable defenses not applicable in an action at law such as a criminal prosecution.

Further, Squanto's return to Patuxet abrogates any claim to adverse possession by the colonists. Indeed, a Wampanoag concept of adverse possession probably did not exist; they were a migratory people with few permanent villages. Kawashima, *supra* at 42-45. They probably expected the English to simply move on as the numerous other Europeans had. *See* Loewen, *supra* note 6, at 70 (noting European visits had begun "decades" before). Travers, *supra,* at 64. Finally, the Royal government never gave legal sanction to the unauthorized possession of Indian land by its subjects. As late as 1763, the Crown "strictly enjoin[ed] and requir[ed] all persons whatsoever who have, either willfully or inadvertently, seated themselves upon any lands [west of the Appalachians], *or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians*, as aforesaid, forthwith to remove themselves from such settlements." *Worcester*, 31 U.S. at 430 (quoting Royal Proclamation of 1763, emphasis added).

X. Events subsequent to 1677 have not extinguished Wampanoag title to the land.

The Commonwealth is not entitled to abrogate the Wampanoag's title. The United States, not the government of Massachusetts, is the successor to the Wampanoag's treaty with the English. *Oneida II*, 470 U.S. at 234. As such, "extinguishment of Indian title requires a sovereign act" of the United States. *Id.* at 244 n.16. Where aboriginal (distinguised from treaty-reserved or statutory) Indian land rights are concerned "the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous,' . . . and will not be 'lightly implied.'" *Id.* at 247-48 (*quoting Santa Fe*, 314 U.S. at 346, 354). For example, in *Oneida II* the Supreme Court refused to hold that aboriginal title was extinguished, despite the fact the United States Senate ratified two treaties with the Oneida which specifically referenced the disputed purchases. *Id.* at 247-48. Finally, "Congress has enacted legislation to extinguish Indian title and claims related to thereto in other Eastern States, . . . and it could be expected to do the same in New York [or Massachusetts] should the occasion arise." *Id.* at 253. Nor is it necessary for the Wampanoag Federation to have official "recognition" from either the United States government or the Commonwealth of Massachusetts for them to assert title. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 50 (1946); *Santa Fe*, 314 U.S. at 347.

Conclusion

For all the foregoing reasons, all charges against all the above-named defendants should be dismissed.

Respectfully submitted on behalf of all the defendants,

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