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Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States

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Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States¹

Greg Boos,[†] Greg McLawsen[‡] & Heather Fathali^{*}

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Certain American Indians born in Canada² (ABCs) enjoy access to the United States unrestricted by the Immigration and Nationality Act

2. "American Indians born in Canada" (ABC) is a term of art arising from statute. See *infra* Part II. For consistency with this term of art, this article will continue to use the term "Indian" rather than "American Indian," "Native American," "Native," "Alaskan Native," "First Nations," or other alternatives except within the context of direct quotes or where otherwise indicated.

(INA), a right stemming from the Jay Treaty (1794).³ An examination of this right, reflected by codification as § 289 of the INA, reveals qualifying ABCs are entitled to privileges unparalleled by all but United States citizens to enter and remain in the U.S. “for the purpose of employment, study, retirement, investing, and/or immigration”⁴ or any other reason.

Jay Treaty rights⁵ have substantial implications for Canadians desiring to access the U.S. The 2011 Canadian census recorded roughly 1.4 million individuals who self-identified as aboriginal.⁶ With Canada’s current population at about 33.5 million people,⁷ roughly one out of every thirty Canadians has a lineage to which Jay Treaty eligibility may attach.⁸

Part I of this article outlines the legal roots of Jay Treaty rights, their development over time, and different theories regarding the basis for these rights as they exist today. Part II explores the statutory definition of “American Indians born in Canada” and relevant regulations, and evaluates the applicability of Jay Treaty rights to the aboriginal populations of Canada. Part III analyzes the extension of similar rights to the Texas Band of Kickapoo Indians, and suggests an extension of similar benefits to other indigenous borderlands peoples is past due. Part IV explores the practical effects of holding ABC status, including exemption from most U.S. immigration restrictions, reciprocity (or lack thereof) by Canada, and implications for traditional forms of cross-border commerce. Part V includes an overview of the procedures for documenting legal status as an ABC, then explores the erosion of Jay Treaty rights due to the Western Hemisphere Travel Initiative (WHTI)

3. Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116, 130 [hereinafter “Jay Treaty” after John Jay, its chief U.S. negotiator]. A reproduction of John Jay’s diplomatic credential as presented to British authorities is attached as Exhibit I.

4. *First Nations and Native Americans*, EMBASSY OF THE UNITED STATES, OTTAWA, CANADA, available at <http://tinyurl.com/k7jy5rp>.

5. Throughout this article we use the term “Jay Treaty rights” to describe the bundle of rights conferred on ABCs that began with the Jay Treaty; however we are cognizant that the legal source of the rights as they exist today is disputed. See *infra* Part I.A.

6. Kristy Kirkup, *2011 Census: Aboriginal Population Grows to 1.4M*, *Reports Statistics Canada*, TORONTO SUN (May 8, 2013), <http://tinyurl.com/lbatdwc>.

7. *Population and dwelling counts, for Canada, provinces and territories, 2011 and 2006 censuses*, STAT. CAN., available at <http://tinyurl.com/n6levvp> (last visited Sept. 14, 2013).

8. The number of ABCs applying to document their status in the U.S. appears to be small. In fiscal year 2011, only 231 ABCs obtained recognition of their status. *2011 Yearbook of Immigration Statistics*, U.S. DEP’T OF HOMELAND SEC., p. 24, Table 7 (2012), available at <http://tinyurl.com/bra3nj8> (last visited Sept. 14, 2013). No statistics are available for how many individuals may ultimately be eligible for recognition of Jay Treaty rights, but have chosen not to apply or do not understand their entitlement. See *infra* Part V.A.

and other post-9/11 security enhancements, and suggests responses to this trend. In conclusion, Part VI submits that inclusion of aboriginal border crossing rights in the ongoing Beyond the Border process is an integral first step to ensuring ABCs the full scope of Jay Treaty rights.

I. HISTORY

Long before European contact, travel across what is now the U.S./Canada border was an element of daily life for numerous North American Indian tribes. The international boundary was established by Great Britain and the U.S. in the Peace of Paris,⁹ dividing the North American lands claimed by the two countries. This boundary also ran through the center of Indian-occupied lands. The Indians not only resented a boundary passing through territory they had traditionally occupied or traversed, but also viewed the newly established border as an infringement on their sovereign rights.

In 1794, to address issues unresolved by the Peace of Paris or arising thereafter, Great Britain and the U.S. negotiated the Jay Treaty. As part of this treaty, the parties sought to relieve tribal tensions arising from imposition of the new boundary.¹⁰ In relevant part, Article III of the Treaty provides:

It is agreed that it shall at all times be free to his majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson Bay Company only excepted) . . .

The Treaty also provided Indians with relief from import duties, at least regarding personal items.¹¹ The Jay Treaty did not create a new right for the continent's Indian population; it simply recognized the Indians' pre-

9. The Definitive Treaty Between Great Britain and the United States of America (Treaty of Paris), Gr. Brit.-U.S., Sept. 3, 1783, available at <http://tinyurl.com/mzv4nh5> (last visited Sept. 14, 2013). A reproduction of an announcement summarizing the conclusion of the Jay Treaty is attached as Exhibit II.

10. In his analysis of Article III of the Jay Treaty, George Washington noted, "The instructions do not mention this, but I thought it might prevent disputes in future & would have an immediate good effect with the Indians." *George Washington Papers at the Library of Congress, 1741-1799*: Series 4, General Correspondence. 1697-1799, Treaty of Amity and Commerce with Great Britain, October 1795, Analysis of Articles, available at <http://tinyurl.com/k6mszwq> (last visited Sept. 14, 2013). A reproduction of Washington's analysis is attached as Exhibit III.

11. *Id.* ("nor shall Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever.")

existing right to move freely across the U.S./Canada border.¹² In 1796, an explanatory provision was added to the treaty providing that no further treaties should derogate from the rights guaranteed by Article III.¹³ During the War of 1812, Jay Treaty rights were suspended. The Supreme Court of the United States has held the War of 1812 abrogated the Jay Treaty, and that following the war, the Treaty of Ghent¹⁴ revived the rights of native tribes predating that conflict.¹⁵ However, several alternative views on this point are discussed below.

A. The War of 1812 and continuing validity of Jay Treaty rights

Despite a U.S. Supreme Court opinion holding that the War of 1812 abrogated the Jay Treaty and that the Treaty of Ghent revived Jay Treaty rights,¹⁶ a wide range of theories dispute these points. Some argue the rights were indeed abrogated by the War of 1812 and revived by the Treaty of Ghent, later to be reaffirmed by statute.¹⁷ Others argue the Treaty of Ghent did not revive the Jay Treaty, and Jay Treaty rights exist now only by virtue of statute.¹⁸ Still others maintain the Jay Treaty rights were permanent in character and could not be abrogated by war, with the Treaty of Ghent reaffirming rights already in place.¹⁹

12. *McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 72 (3d Cir. 1928) *aff'd* 25 F.2d 71 (3d Cir. 1928); *Akins v. Saxbe*, 380 F. Supp. 1210, 1219 (D. Me. 1974).

13. *McCandless*, 25 F.2d at 74; Jay Treaty, *supra* note 3, at 130–31 (Explanatory Article added May 4, 1796).

14. Treaty of Peace and Amity between His Britannic Majesty and the United States of America (Treaty of Ghent), Gr. Brit.-U.S., Art. 9, December 24, 1814, 8 Stat. 218, 22–23, *available at* <http://tinyurl.com/cggc3cw> (last visited Sept. 14, 2013).

15. *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929) (holding the War of 1812 abrogated the Jay Treaty passage right).

16. *Id.*

17. *See, e.g., Dan Lewerenz, Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug*, 27 ARIZ. J. INT'L & COMP. L. 193 (2010) (arguing the treaty right survives after having been restored by the Treaty of Ghent, and that it also exists in statute).

18. *See, e.g., Marcia Yablon-Zug, Gone but not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEENS L.J. 565 (2008) (arguing the right is exclusively statutory). United States Customs courts have held that within the scope of their jurisdiction no Jay Treaty rights survive; they maintain that the Jay Treaty was abrogated by the War of 1812, and that the Treaty of Ghent was non-executing and never enacted by legislation. *See infra* text accompanying notes 209–211.

19. *McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 73 (3d Cir. 1928) *aff'd* 25 F.2d 71 (3d Cir. 1928) (“We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.”); *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 662 (W.D.N.Y. 1947); *infra* text accompanying note 27. Additionally, there is the presumption

The Supreme Court of Canada's (SCC) decisions regarding the validity of Jay Treaty rights²⁰ have been informed by the fact that the Canadian Parliament has never enacted enabling legislation required for the Jay Treaty to have force of law in Canada.²¹ Canada's Department of External Affairs once concluded the Jay Treaty might be in force in Canada (implying the War of 1812 did not abrogate the Jay Treaty), except for the fact that enabling legislation was never enacted to make it effective.²² Canada's Treaty Information webpage lists the Jay Treaty as a bilateral treaty with the U.S. that has been only "partially terminated,"²³ begging the question of which articles of the Jay Treaty Canada considers viable.

The U.S. Department of State (DOS) lists both Article III of the Jay Treaty and the Treaty of Ghent as "in force." An entry for the Jay Treaty appears under DOS listings of treaties in force with both Canada and the United Kingdom (with the U.K. entry indicating the treaty is in force

regarding unilateral treaty abrogation under domestic law that "clear evidence is required that Congress actually considered and acted to abrogate the treaty in question. Thus, in the absence of a clear statement of congressional intent to abrogate a treaty, courts have held that action that appears to be inconsistent with a treaty does not necessarily provide evidence of a clear congressional intent to abrogate the treaty." Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 WM. MITCHELL L. REV. 538, 561 (2013).

20. See, e.g., *Francis v. The Queen*, [1956] S.C.R. 618 (Can.).

21. In order for a treaty to have force in Canada, implementing legislation is required. Canada's status as a dualist state and the effect that status has on the Jay Treaty was made clear in *Francis v. The Queen*. See *id.* The terms "monism" and "dualism" have been used to describe different types of domestic legal systems. OXFORD UNIVERSITY, *THE OXFORD GUIDE TO TREATIES*, 368 (Duncan B. Hollis ed., Oxford Univ. Press 2012). In dualist States, which include Canada and almost all other British Commonwealth States, "no treaties have the status of law in the domestic legal system; . . . all treaties require implementing legislation to have domestic legal force. In fact, "courts in dualist States have no authority to apply treaties directly as law. If the legislature has enacted a statute to incorporate a particular treaty provision into national law, courts apply the statute as law; and they frequently consult the underlying treaty to help construe the meaning of the statute," therefore applying the treaty only indirectly. *Id.* at 370–71. By contrast, the U.S. is a monist State. *Id.* at 370. "[In] [m]onist States . . . some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation." *Id.* at 369. The Supremacy Clause of the U.S. Constitution establishes the Constitution, federal statutes, and U.S. Treaties as "the supreme law of the land." U.S. Const. art. VI, cl. 2.

22. Letter from *W.H. Montgomery, Director, Legal Advisory Division to Joyce A. Green, Researcher, Native American Studies, University of Lethbridge Alberta* (September 7, 1978) ("Our conclusion is that the following articles of the Jay Treaty . . . may still be in force for Canada: Article 3 (so far as it relates to the rights of Indians to pass the border), Article 9 and Article 10.") (on file with the authors).

23. *Canada Treaty Information*, GOV'T OF CANADA (last modified Mar. 3, 2011), available at <http://tinyurl.com/ngvtlvy> (last visited Sept. 14, 2013).

with Canada), while the Treaty of Ghent only appears under its listing of treaties in force with Canada.²⁴

Unlike the U.S. and Canada, the United Kingdom does not maintain a list of treaties in force. However in 1815, Britain's Earl Bathurst, His Majesty's Principal Secretary of State for War and the Colonies, asserted the Government of Great Britain "knows of no exception to the rule that all Treaties are put an end to by a subsequent War between the same Parties."²⁵ A handwritten volume produced by the British Foreign Office in 1823 briefly characterizes the Jay Treaty as "[n]ull, not revised at last peace, nor since."²⁶ Thus, it appears that the U.K. considers the Jay Treaty to have been abrogated by the War of 1812.

Whether or not the Jay Treaty was abrogated by the War of 1812 and revived by the Treaty of Ghent, the U.S. continued to recognize the Indians' right to pass across the border freely until enactment of the Immigration Act of 1924 (Act of 1924), which provided only those

24. As such, it remains unclear as to whether the DOS considers the Jay Treaty to have been entirely abrogated by the War of 1812, with Jay Treaty rights having been revived by the Treaty of Ghent, or whether it considers the right of free passage to have been permanent in character and not abrogated by war, with the Treaty of Ghent serving to reaffirm rights already in place. U.S. DEPT OF STATE, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2012*, 37, 288 (Jan. 1, 2012), available at <http://tinyurl.com/c533ys3> (last visited Sept. 14, 2013). DOS highlights the invalidity of Jay Treaty rights with regard to customs and duties with a citation to *Akins v. United States*, 551 F.2d 1222 (C.C.P.A. 1977).

25. E-mail from Robert Chapman, *Treaty Information Manager, Foreign Commonwealth Office, United Kingdom* to Greg Boos (Aug. 1, 2013) (on file with the authors) (noting the Government of Canada's Department of External Affairs 1927 compilation, TREATIES AND AGREEMENTS AFFECTING CANADA IN FORCE BETWEEN HIS MAJESTY AND THE UNITED STATES OF AMERICA WITH SUBSIDIARY DOCUMENTS 1814–1925, which states in a note on page viii:

Attention may be drawn to the view of the British Government as to the affect [sic] of the war with the United States of 1812–14 upon previously existing treaties between the two countries, declared by Earl Bathurst, His Majesty's Principle [sic] Secretary of State for Foreign Affairs, in a note addressed to Mr. John Quincy Adams, the United States Minister in London, on the 30th October, 1815. The United States in that year having supported a pretension for their citizens to continue the enjoyment of fishing privileges within British sovereignty conferred by the Treaty of 1783 on the ground that the Treaty was of a peculiar character and could not be abrogated by a subsequent war between the parties, Lord Bathurst in repudiating the pretension employed the following language: "To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule that all Treaties are put an end to by a subsequent War between the same Parties. (See British and Foreign State Papers, Vol. 7, p. 94)).

26. *Id.* The Jay Treaty is not included in the volume's index as being either wholly or partly in force, and Mr. Chapman could find no records to show any further action with respect to this agreement.

eligible for citizenship could enter the U.S.²⁷ Since Indians were ineligible for citizenship as a result of race-restricted naturalization laws dating back to 1790,²⁸ the Act of 1924 barred their entry to the U.S.²⁹ Shortly thereafter, the Bureau of Immigration³⁰ began deporting ABCs who had not registered as aliens or obtained immigrant visas, based on its determination these Indians were inadmissible.³¹

In the 1927 *McCandless* case, an ABC, arrested and ordered deported for entering without complying with U.S. immigration laws, asserted a Jay Treaty rights defense in a federal court challenge to the Department of Labor's policy.³² In defense of its position, the

27. Immigration Act of 1924 ch. 190, § 13(c), Pub. L. No. 68-139, 43 Stat. 153 [hereinafter Act of 1924]. The Immigration Act of 1917 had exempted Indians from tariffs applicable to "aliens," but had not provided for free passage. 39 Stat. 874.

28. Act of March 26, 1790, ch. III, § 1, Stat. 103 (restricting citizenship to "free white person[s]"); Act of 1924, *supra* note 27 ("No alien ineligible to citizenship shall be admitted to the United States . . ."). Although the Act of 1790 was repealed by subsequent naturalization acts in 1795 and 1798, no relevant change was made regarding this restriction until the Fourteenth Amendment in 1868. *See* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the state wherein they reside") (emphasis added). However, "[t]he specific meaning of the language of the clause was not immediately obvious. In 1884 the United States Supreme Court in *Elk v. Wilkins* held that children born to members of Indian tribes governed by tribal legal systems were not U.S. citizens." 112 U.S. 94, 102 (1884) ("Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."). It wasn't until "1924 [that] Congress extended citizenship to all Indians by passing the Indian Citizenship Act, 43 Stat. 253, ch. 233." *See Fourteenth Amendment and Citizenship*, LIBRARY OF CONGRESS <http://tinyurl.com/2wzs24f> (last visited Sept. 14, 2013); *see also* 1924 INDIAN CITIZENSHIP ACT, *available at* <http://tinyurl.com/bq9nb> (last visited Sept. 14, 2013). Of course, the Indian Citizenship Act only applied to "noncitizen Indians born within the territorial limits of the United States." Indian Citizenship Act, 43 Stat. 253, ch. 233. Therefore, American Indian tribal members born in Canada were still excludable as being ineligible to naturalize under the Act of 1924.

29. Act of 1924, *supra* note 27, at ch. 190, § 13(c) ("No alien ineligible to citizenship shall be admitted to the United States. . .").

30. Both the Bureau of Immigration and the Bureau of Naturalization were governed by the Department of Labor from 1913-1933. *See* OUR HISTORY, U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *available at* <http://tinyurl.com/yzeb8bp> (last visited Sept. 14, 2013).

31. *Akins v. Saxbe*, 380 F. Supp. 1210, 1214 (D. Me. 1974).

32. *See* United States *ex rel. Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927) *aff'd* 25 F.2d 71 (3d Cir. 1928). The defendant in *McCandless*, Paul Diabo, was a full-blooded Iroquois born on a reservation of that tribe in the dominion of Canada. Diabo first entered the U.S. in 1912, and subsequently thereafter until 1925. In 1925 he was arrested on a warrant submitted by the Commissioner of Immigration for the Port of Philadelphia for allegedly entering the U.S. without complying with its immigration laws. It is unclear from the record what the charge of

Department of Labor argued that the War of 1812 had abrogated the Jay Treaty.³³ It relied on the general principle that war between nations ends all prior treaty rights, and those rights are only reborn if a new treaty provides them.³⁴

On appeal, the Court found for the Indians.³⁵ It reasoned that treaties stipulating permanent rights, professing to aim at perpetuity, do not end upon occurrence of war, but are merely suspended until the war ends and subsequently revived when peace returns.³⁶ Because Article III of the Jay Treaty grants the right to freely cross the border in perpetuity, the right is permanent in character; thus, the War of 1812 did not abrogate the Jay Treaty.³⁷ Further, in 1815, the U.S. and Great Britain entered into the Treaty of Ghent, which again recognized the Indians' prerogative to move freely across the border, removing any doubt as to the existence of that right.³⁸

B. A determination based on racial considerations

Shortly after the *McCandless* decision, Congress codified the Indians' right of free passage across the border with the Act of April 2, 1928 (Act of 1928):

[T]he Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: Provided, that this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.³⁹

inadmissibility was; however, based on the timing of his case, it is not unlikely that it was because he was found excludable as being ineligible to naturalize. He was ordered deported but later successfully challenged the order as contrary to the Jay Treaty.

33. *United States ex rel Diabo v. McCandless*, 18 F.2d 282, 283 (E.D. Pa. 1927); *McCandless v. United States ex rel Diabo*, 25 F.2d 71, 72 (3d Cir. 1928).

34. *Supra* note 33.

35. *McCandless v. United States ex rel Diabo*, 25 F.2d 71, 73 (3d Cir. 1928).

36. *Id.*

37. *Id.*

38. *Id.* at 72–73.

39. Act of April 2, 1928, ch. 308, 45 Stat. 401, 8 U.S.C. § 226a (2006) [hereinafter Act of 1928]. Notably, this is the first time the phrase “American Indians born in Canada” appears in the immigration statutes. See also *Akins*, 380 F. Supp. at 1220 (“The Congressional debates, 69 Cong.Rec. 5581-82, 70th Cong., 1st Sess. (March 29, 1928), indicate that the purpose of the 1928 legislation was to correct by statute the Department of Labor's erroneous application of the 1924 Act to American Indians and to reaffirm the right of these Indians to free mobility into and within the United States, a right which had been acknowledged by the Department prior to the 1924 Act and had been recently recognized by the decision of the District Court in *McCandless*.”). Cf. Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in the United States Immigration Law*, 85 N.D. L. Rev. 301, 309 (2009) (noting that

This provision remained in effect until 1952, when Congress enacted the Immigration and Nationality Act (INA). INA § 289, modified the language of the Act of 1928 by replacing the adoption provision with a bloodline requirement:

Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.⁴⁰

Although there was no statutory bloodline requirement prior to the 1952 enactment of the INA, a 1942 Board of Immigration Appeals (BIA) case makes evident the government had been moving in that direction for at least a decade. *Matter of S*⁴¹ involved a white Canadian woman married to an Indian who wished to be considered an Indian under Canada's Indian Act,⁴² making her eligible for free passage into the U.S. The BIA considered whether an alien within the terms of the Act of 1928 should be determined by blood, or alternatively, legal membership in an Indian tribe.⁴³ Ultimately, it reached the conclusion that the determination should be based on political (i.e., tribal membership) rather than ethnological considerations,⁴⁴ despite government assertions that only persons of American Indian blood should be beneficiaries of the Act of 1928.⁴⁵

In the 1947 opinion *U.S. ex rel. Goodwin v. Karnuth*, a Federal District Court analyzed the term "Indian."⁴⁶ After noting the term was not defined in United States Code (U.S.C.) sections dealing with immigration, the court looked to other sections of the Code defining the term. It noted the definition of "Indian" used in 25 United States Code, Chapter 14, which governs an array of issues pertaining to Indian peoples and land: "The term 'Indian' as used in [this Act] shall include all persons of Indian descent who are members of any recognized Indian

Congress had never intended the nationality restrictions of 1924 to impede the passage rights of Canadian Indians).

40. Immigration and Nationality Act of 1952, ch. 477, § 289, 66 Stat. 234, 8 U.S.C. § 1359 (2006) [hereinafter INA].

41. *Matter of S*, 1 I. & N. Dec. 309 (BIA 1942).

42. *Indian Act*, R.S.C. 1927, c. 98 (defining "Indian" to include "[a]ny woman who is or was lawfully married to [any male person of Indian blood reputed to belong to a particular band].").

43. *Matter of S*, 1 I. & N. Dec. at 310.

44. *Id.* at 311.

45. *Id.* See also *supra* note 39.

46. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 661 (W.D.N.Y. 1947).

tribe now under Federal jurisdiction . . . and *shall further include all other persons of one-half or more Indian blood.*⁴⁷

The court then cited the canon of statutory interpretation that “Congress may well be supposed to have used language in accordance with the common understanding,”⁴⁸ and that “[t]he popular or received import of words furnishes the general rule for the interpretation of public laws.”⁴⁹

Applying this canon, the court determined that “the words ‘American Indians born in Canada,’ found in [the Act of 1928] must be given a racial [rather than political] connotation.”⁵⁰ It then addressed the second clause of that Act, which read: “Provided, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.”⁵¹ The court reasoned that inclusion of the second clause “means that such adoption does not make the adoptee an American Indian by ‘blood’, entitling him to free entry under the first clause. One whom nature has not made an American Indian cannot be made one by adoption in some Indian tribe or family.”⁵²

In *Matter of M*, the BIA in 1951 concluded only individuals with *greater* than 50% Indian blood are entitled to the benefits of the Act of 1928; the respondent, who the court conceded was exactly 50% Indian blood, was therefore deportable.⁵³ The court cited *Goodwin* for the proposition that a racial, rather than political, test should apply.⁵⁴ It then relied on the racial restrictions of the naturalization laws—and a line of court decisions holding that “a person, one of whose parents is white and the other of a race ineligible for naturalization is not eligible for naturalization”—to support its conclusion that the respondent was not an ABC within the meaning of the Act of 1928.⁵⁵

47. *Id.* (emphasis added) (citing 25 U.S.C. § 479). The court further quoted the definition: “For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.” *Id.* The court also looked to 48 U.S.C. § 206, dealing with territories and insular possessions, which provided a short and simple definition: “Indians: Natives with one-half or more Indian blood.” *Id.* Although there is no definitive legislative or regulatory history on the matter, it is reasonable to assume that the drafters of § 289 relied on this definition.

48. *Id.* at 663 (quoting *Union Pacific R. Co. v. Hall*, 91 U.S. 343, 347 (1875), citing *United States v. Wurts*, 303 U.S. 414, 417 (1938)).

49. *Id.* (quoting *Maillard v. Lawrence*, 57 U.S. 251 (1853), citing *Woolford Realty Co. v. Rose*, 286 U.S. 319, 327 (1932), and *Old Colony Railroad Co. v. Commissioner*, 284 U.S. 552, 560 (1932)).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Matter of M*, 4 I. & N. Dec. 458, 460 (BIA 1951).

54. *Id.* at 458.

55. *Id.* at 460.

These opinions, and the statutory definition of “Indian” interpreted in *Goodwin*, were published after the Act of 1928 (which did not contain a blood quantum requirement) and prior to the 1952 enactment of the INA (which did). Although there is no definitive legislative history on the matter, the drafters of INA § 289 were likely cognizant of this reasoning when they removed the adoption language from the Act of 1928 and expressly replaced it with the blood quantum requirement. Beyond this, Congressional reasoning for retaining the racial basis for ABC classification remains unclear.⁵⁶

C. No reciprocal right to enter Canada

The Canadian government holds the Jay Treaty does not affect the admissibility of U.S.-born Indians to Canada.⁵⁷ Rather, admissibility of all non-citizens to Canada is governed by the Immigration and Refugee Protection Act,⁵⁸ which does not incorporate Jay Treaty rights. Although the Canadian Immigration Act does not contain a counterpart to INA § 289, it states that “every person registered as an Indian under the *Indian Act* has the right to enter and remain in Canada in accordance with this act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a . . . registered Indian.” Despite this broad language, the registration requirements of the Indian Act have proven difficult, and Canadian courts have declined to broaden its applicability; thus U.S.-born Indians are not extended a reciprocal right of entry to Canada under the Jay Treaty.

There have been several important cases regarding the continuing viability of Article III of the Jay Treaty in Canada. In 1956, the Supreme Court of Canada in *Francis v. The Queen*⁵⁹ unanimously held that a

56. Spruhan, *supra* note 39, at 314–15 (noting that general counsel for the INS at the time had “no idea” why the blood quantum requirement was added). One possibility for retention of the bloodline requirement may be the then national policy of Indian termination, which began in the 1940s and was embraced by the Eisenhower administration from 1953–60. See Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 662 (1991). “The United States identified assimilation and integration as the official rationale for the termination policy, but there is evidence that the desire to reduce federal expenditures for Indian nations was a major motivation for the termination acts.” Robert T. Coulter, *Termination, Native Land Law* § 8:2 (2012 ed.) (citation omitted). The bloodline requirement serves to disqualify many from status as ABCs.

57. See *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.).

58. Immigration and Refugee Protection Act, 2001 S.C. ch. 27, (Division 3, *Entering and Remaining*, § 19(1) (Can.)).

59. *Francis v. The Queen*, [1956] S.C.R. 618 (Can.). While the case involved customs issues rather than the right of U.S.-born Indians to cross in to Canada, both issues fall under the Jay Treaty;

treaty such as the Jay Treaty is not enforceable in Canada without enabling legislation:⁶⁰

[T]reaty provisions affecting matters . . . which purport to change existing law or restrict the future action of the legislature . . . in the absence of a constitutional provision declaring the treaty itself to be the law of the state, as in the United States, must be supplemented by statutory action . . .⁶¹

Although Parliament has not enacted enabling legislation to incorporate Jay Treaty provisions into Canadian law, *Francis* suggests despite the passage of time, it may not be too late to do so.⁶² If Parliament should at some future date enact the appropriate provision of the treaty, the right enjoyed by ABCs to enter freely into the U.S. would arguably be reciprocated to U.S.-born Indians.

While Canada does not recognize a reciprocal right of entry for U.S.-born Indians to that which ABCs enjoy when entering the U.S., Canadian courts have recognized and protected an *aboriginal* right to freely pass the border.⁶³ Despite a striking similarity to the rights in force in the U.S. under the Jay Treaty, these rights are not rooted in any treaty, but are rather protected by Canada's constitution⁶⁴ in Part II of the Constitution Act, 1982 (Constitution Act).⁶⁵

therefore, its language is important and relevant to the admissibility of U.S.-born Indians into Canada.

60. In an interesting side-note, the U.S./Canada border itself was never codified by legislation in Canada. See Phil Bellfy, *The Anishnaabeg of Bawating: Indigenous People Look at the Canada-US Border*, in *BEYOND THE BORDER: TENSIONS ACROSS THE FORTY-NINTH PARALLEL IN THE GREAT PLAINS AND PRAIRIES* 7 (Kyle Conway & Timothy Pasch eds., McGill-Queens Univ. Press 2013) (citing David T. McNab, *Borders of Water and Fire: Islands as Sacred Places and as Meeting Grounds*, in *ABORIGINAL CULTURAL LANDSCAPES* 33–34 (Jill Oakes and Rick Riewe eds., Winnipeg: Aboriginal Issues Press 2004)). Logically then, it is inconsistent for Canada to decline to recognize the Jay Treaty because of a lack of enabling legislation, but choose to recognize the U.S./Canada border, which was also created by treaty and also not enacted by legislation.

61 *Francis v. The Queen*, [1956] S.C.R. 618 (Can.). The *Francis* decision may be subject to attack. In *Sappier v. Canada*, [1989] 15 A.C.W.S. (3d) 315 (Can.), an Indian brought an action for duty-free carriage of personal goods into Canada from the United States pursuant to the Jay Treaty. The underlying theory of the case was that the recently adopted Canadian Charter of Rights and Freedoms guarantees previously negotiated treaty rights to Indians despite the absence of enabling legislation. In the *Sappier* case, the trial court declined to grant the government's motion for summary judgment because it could not find that the plaintiff's cause of action was "clearly specious."

62. *Francis v. The Queen*, [1956] S.C.R. 618 (Can.).

63. See, e.g., *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.).

64. Generally, the Canadian constitution is understood to comprise two statutes: the Constitution Act, 1867 (British North America Act or BNAA) and the Constitution Act, 1982. Additionally, Section 52 of the Constitution Act, 1982, incorporates into Canada's constitution

Section 35(1) of the Constitution Act recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.”⁶⁶ Subsection (2) defines “aboriginal peoples of Canada” to include the Indian, Inuit, and Métis peoples of Canada.⁶⁷ Because Canada has not enacted the provisions of the Jay Treaty, Canadian courts have declined to recognize Jay Treaty rights as existing treaty rights under Section 35; however, it is within Section 35 that Canadian courts find authority to recognize existing aboriginal rights.

In 1990 the SCC decided *R. v. Sparrow*,⁶⁸ one of the first cases following the enactment of the Constitution Act to discuss the rights of aboriginal peoples in light of Section 35. There, the Court held that Section 35(1) should be given a generous and liberal interpretation in favor of aboriginal peoples.⁶⁹ It declared that under Section 35(1), the government cannot extinguish an aboriginal right without a clear intention to do so,⁷⁰ and that the government may regulate or infringe on such rights only if the interference meets the test for justification laid out by the Court. With these considerations in mind, it held there are four determinations a court must make when analyzing a claim under Section 35(1): (1) “whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right”; (2) “whether that right was extinguished prior to the enactment of s. 35(1)”; (3) “whether that right has been infringed”; and (4) “whether that infringement was justified.”⁷¹ This test continues to be employed by the SCC when analyzing 35(1) claims.

In the 1996 case of *R. v. Van der Peet*, the SCC provided a detailed analysis of the substantive rights recognized and affirmed by Section

approximately 30 legislative texts and orders referred to in its schedule. Part II of the Constitution Act, 1982 sets out the rights of Aboriginal peoples. *The Third Schedule: Provincial Public Works and Property to be the Property of Canada*, GOVERNMENT OF CANADA: JUSTICE LAWS WEBSITE (last modified Aug. 30, 2013), available at <http://tinyurl.com/k7n2df8> (last visited Sept. 14, 2014).

65. Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.). Quebec has not yet consented to the adoption of the Constitution Act, 1982, but this is not a requirement for enactment. See *Re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 (Can.).

66. Rights of the Aboriginal Peoples of Canada, *supra* note 65.

67. *Id.*

68. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.).

69. *Id.* at 1106.

70. Note the similarity to the concept that Congress cannot abrogate a treaty without evidencing a clear intent to do so. See Vogel, *supra* note 19.

71. *R. v. Gladstone*, [1996] 2 S.C.R. 723, 742 (Can.) (providing a summary of the 4-part *Sparrow* analysis).

35(1).⁷² The Court described Section 35(1) as “the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown.”⁷³

The *Van der Peet* Court articulated a test for identifying aboriginal rights—the “integral to a distinctive culture test.” This test directs that “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”⁷⁴ Under the integral to a distinctive culture test, “a practice, custom or tradition must be of central significance to the aboriginal society in question—one of the things which made the culture of the society distinctive.”⁷⁵ The Court concluded that aboriginal rights must be based on those that existed prior to contact with European society.⁷⁶

72. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.). The Court’s approach to its analysis was based on “[t]he French version of the text, prior jurisprudence of this Court and the courts of Australia and the United States, academic commentators and legal literature.” *Id.* at 508–09. That same year, the Court in *R. v. Gladstone* reaffirmed the tests in *Sparrow* and *Van der Peet*, but held that *Sparrow* should not be dispositive on the question of priority, at least where the aboriginal right in question does not have the internal limitation which the right at issue in *Sparrow* did. *R. v. Gladstone*, [1996] 2 S.C.R. 723, 742 (Can.).

73. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 508 (Can.).

74. *Id.* at 527. The Court employed this test as the starting point for the tests laid out by the Court in *Sparrow*.

75. *Id.* at 509 (“A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society.”).

76. *Id.* at 550–62. The Court outlined ten factors to consider when applying the integral to a distinctive culture test:

Courts must take into account the perspective of aboriginal peoples themselves Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question [it was one of the things that truly made the society what it was] The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact [prior to the arrival of Europeans in North America] Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims Claims to aboriginal rights must be adjudicated on a specific rather than general basis [must be specific to the particular aboriginal community claiming the right] For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence Courts must

Under the current parameters of the integral to a distinctive culture test, a U.S.-born Indian may assert an aboriginal right to enter Canada. *Watt v. Liebelt*,⁷⁷ which involved the aboriginal rights of a U.S.-born Indian, raised this question. The specific issue there was whether “it could be contrary to an existing Aboriginal right of an Aboriginal people of Canada, as guaranteed in the Constitution, for an Aboriginal person who is [an American citizen], and neither a Canadian citizen nor registered under the Indian Act of Canada, to be ordered to depart from Canada for a crime committed [in Canada].”⁷⁸ While the Court of Appeals did not ultimately reach a decision on the issue, it quashed the order of deportation and remanded the case for further fact-finding on the tests previously established in *Sparrow* and *Van der Peet*.

Finally, in *Mitchell v. M.N.R.*,⁷⁹ the SCC heard an appeal which involved the appellant’s asserted rights under the Jay Treaty. The case involved the right of the Mohawks of Akwesasne to freely cross the U.S./Canada border without paying customs duties on their personal goods.⁸⁰ “The Mohawks asserted the same argument in the Canadian courts that proved so unsuccessful in the United States—namely that the Treaty of Ghent and the Jay Treaty are still in force guaranteeing the rights of Indians to freely cross the border and transport goods duty free.”⁸¹ The appellant argued that Section 35(1) “protects the treaty rights of Canada’s aboriginal people, including the rights preserved under the Jay Treaty.”⁸² “Although the Canadian Federal Court of Appeal held that the Treaty of Ghent was inapplicable to the Mohawks and the First Nations, it agreed that the Mohawks possessed a constitutionally protected aboriginal right to freely pass and re-pass the border and to transfer personal goods across the border duty free.”⁸³ Moreover, the Canadian Federal Court of Appeal upheld the lower court decision, affirming the Mohawk “right to cross the U.S./Canada border and transport personal goods duty free,”⁸⁴ subject to limitations based on

take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

77. *Watt v. Liebelt*, [1999] 2 F.C. 455 (Can.).

78. *Id.*

79. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.).

80. Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 211–12 (2000).

81. *Id.* See also *infra* Part IV.C.

82. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.).

83. *Id.*

84. *Id.*

evidence of the traditional range of Mohawk trading.⁸⁵ However, the SCC ultimately held that the asserted aboriginal right had not been established by the evidence presented in the lower courts, and ordered the respondent to pay duty on the goods imported into Canada.⁸⁶ Although this decision was disappointing to the Mohawk, it was specific to the facts, leaving the door open for future cases in which such an aboriginal right may be established by the evidence.

The rights of ABCs are firmly settled in the U.S. under INA § 289, rooted in the Jay Treaty. As the foregoing discussion suggests, while there is no specific right reciprocated by Canada for U.S.-born Indians, the rights of aboriginal peoples under Canadian law are still evolving, and may eventually extend to this population.

II. ELIGIBILITY

A. Scope

Bona fide ABC status turns on a racial metric—the single remaining example of such a standard in U.S. immigration law. Eligibility for Jay Treaty rights is a matter of ethnic lineage rather than political affiliation with a tribe.⁸⁷ Even prior to the INA, courts had held that the phrase “American Indians born in Canada” designated a racial, rather than political test.⁸⁸ To qualify as an ABC, an individual must possess “at least 50 per centum blood of the American Indian Race” (bloodline requirement).⁸⁹ Tribal membership alone is inadequate to demonstrate an

85. *Id.*

86. *Id.*

87. For a discussion of why such an eligibility criterion might be subject to constitutional challenge, see Spruhan, *supra* note 39, n. 324 (explaining how the race-based classification might fail a strict scrutiny analysis despite Congress’s plenary powers to regulate both Indian affairs and immigration).

88. United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660, 663 (W.D.N.Y. 1947). For a passionate argument against race-based focus on tribal sovereignty see John R. Snowden *et al.*, *American Indian Sovereignty and Naturalization: It’s a Race Thing*, 80 NEB. L. REV. 171, 175 (2001) (“If, in matters of American Indian sovereignty, federal Indian law refuses to recognize an adoption or naturalized member of a Native nation who is without some Indian blood or descent, then one should ask whether this disrespect of sovereign power is anything more than a mask for colonialism and racism.”).

89. INA, *supra* note 40, at § 289, 8 U.S.C. § 1359. See also 8 C.F.R. § 289.1 (“The term ‘American Indian born in Canada’ as used in section 289 of the [Immigration and Nationality] Act includes only persons possessing 50 per centum or more of the blood of the American Indian race.”). According to one commentator, blood quantum was first introduced by colonialists in the early 18th Century as a means of restricting the rights of anyone deemed to be more than 50% Indian. As Indians began to assimilate more thoroughly into Western society, the metric became a mechanism through which tribes could identify other members. A byproduct of assimilation has been the gradual decline of blood quantum in Indian groups. If this decline continues as projected, fewer and fewer

individual's qualification as an ABC because membership does not require a 50% blood quantum.⁹⁰ Likewise, an individual's self-identification or recognition in the community as an Indian is inadequate.⁹¹ Conversely, an individual could lack self-identity—or political standing in a tribe—as an Indian, yet qualify as an ABC in light of blood lineage.⁹²

Further, even when a Canadian-born woman's Indian status in Canada was lost upon marriage to a white man under § 14 of the Indian Act of Canada,⁹³ she did not lose status as an ABC.⁹⁴ A derivative spouse or child does not qualify for Jay Treaty rights unless the derivative independently meets the definition of an ABC.⁹⁵

To add to the confusion, physical appearance may play an inappropriate role in the adjudication of ABC claims at the border—individuals who do not “look Indian” may be more heavily scrutinized than individuals who do “look Indian.”⁹⁶ Finally, it is important to note that some who qualify for ABC status might not even be aware of their eligibility under this racial metric. They may not consider themselves Indian, or they may not be even aware of their native bloodline—this is

Canadian-born Indians will possess the requisite blood quantum to benefit from INA § 289. See Paul Adams, *Blood Quantum Influences Native American Identity*, BBC News, July 10, 2011, <http://tinyurl.com/6ypue9s> (last visited Sept. 14, 2013).

90. U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *Adjudicator's Field Manual*, 393 § 23.8(a) (2013) [hereinafter AFM].

91. See *United States v. Curnew*, 788 F.2d 1335, 1337 (8th Cir. 1985) (“whether Canadian-born alien who has been arrested and deported from the United States identifies himself as or is viewed by others as “Indian” is not determinative of whether he possesses at least 50 per centum American Indian blood so as to be able to reenter United States without consent of the Attorney General.”).

92. See *infra* Part II.B.

93. *Indian Act*, R.S.C. 1927, c. 98.

94. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 663 (W.D.N.Y. 1947). In present day Canada, marriage to a non-Indian no longer operates to divest an individual of Indian status. The 1985 Amendment to the Indian Act, R.S.C. 1985, c. I-5, eliminated disenfranchisement by marriage; individuals who lost their Indian status in that manner became entitled to reinstatement. See *Indian Status and Band Membership Issues*, PARLIAMENT OF CANADA (Feb. 1996, rev. Feb. 2003), available at <http://tinyurl.com/llh3kbr> (section B.1) (last visited Sept. 14, 2013). Furthermore, in 2011, the Gender Equity in Indian Registration Act came into force. It ensures that “eligible grand-children of women who lost status as a result of marrying non-Indian men will become entitled to registration (Indian status). As a result of this legislation approximately 45,000 persons will become newly entitled to registration.” *Gender Equity in Indian Registration Act*, GOV'T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV. (last modified Feb. 11, 2013), available at <http://tinyurl.com/n8go386> (last visited Sept. 14, 2013).

95. See *infra* Part II.B.

96. See, e.g., *Border Crossing Rights Between the United States and Canada for Aboriginal People*, AMERICAN INDIAN LAW ALLIANCE (2003), available at <http://tinyurl.com/nx983e3> (last visited Apr. 10, 2014) (“Appearance can make a difference: our research shows that if you “look Indian,” the [immigration] officer may require less documentation.”) (emphasis added).

especially so in the case of Indian children adopted into non-Indian families, or individuals born to parents or grandparents who lost their Indian status under the Indian Act of Canada's now-obsolete disenfranchisement provisions.⁹⁷ These considerations underline the need for education and awareness on the part of those adjudicating ABC status, those enforcing U.S. immigration law, as well as a broader understanding by the native communities and general public with regard to who is eligible.

1. Dependents

Jay Treaty rights are not available to the spouse or child (derivatives) of an ABC unless the individual meets the bloodline requirement.⁹⁸ However, an ABC who resides in the U.S. is regarded as lawfully admitted for permanent residence⁹⁹ and can therefore file an I-130 petition for a derivative.¹⁰⁰ Before filing the I-130 the ABC petitioner should establish status as an ABC, following the procedures described below in Part V. Unless already present in the U.S. in a bona fide non-immigrant status, the derivative probably cannot pursue adjustment of status.¹⁰¹ Hence, the derivative will need to pursue an immigrant visa by way of consular processing. Strict annual numerical limitations apply to family-based visas. The second preference category—spouses and children, and unmarried sons and daughters of permanent residents—are currently backlogged over seven years.¹⁰²

2. Bloodline exemption for pre-INA entrants

The regulations recognize a grandfathering exemption from the bloodline requirement, though the exemption may be without practical application. An ABC is said to be exempt from the bloodline

97. See *supra* note 94.

98. 8 C.F.R. § 289.1 (“term ‘American Indian born in Canada’ . . . does not include a person who is the spouse or child of such an Indian or a person whose membership in an Indian tribe or family is created by adoption, unless such person possesses at least 50 per centum or more of such blood”).

99. 8 C.F.R. § 289.2.

100. *Green Card for an American Indian Born in Canada*, U.S. DEP’T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS. (rev’d Feb. 28, 2011), available at <http://tinyurl.com/23kax4p> (last visited Sept. 14, 2013) (advising that an ABC may file an I-130, Petition for Alien Relative, after obtaining proof that the individual is a permanent resident of the U.S.).

101. *Cf.* INA, *supra* note 40, at § 245(a) (setting forth general eligibility rules for adjustment of status).

102. U.S. Dep’t of State Bureau of Consular Affairs, Visa Bulletin, Vol. IX, No. 60, at 5 (Sept. 2013).

requirement if the ABC entered the U.S. between April 2, 1928 and December 24, 1952, and has maintained residence in the U.S. during that period.¹⁰³ The person must have qualified for entry as an ABC under the statute enacted on April 2, 1928.¹⁰⁴ Yet while the 1928 statute contained no express bloodline requirement, the statute has been construed by courts to contain such a requirement.¹⁰⁵ It therefore seems unlikely the bloodline requirement exemption will be a practical avenue for relief.

B. Indian, Inuit, Métis, and métis

The Canadian constitution recognizes three separate cultural groups as aboriginal peoples: Indian,¹⁰⁶ Inuit, and Métis.¹⁰⁷ Therefore, the term “Indian” as used in Canada does not include Inuit or Métis.¹⁰⁸ The question then remains whether Inuit or Métis are eligible for ABC status.

While the Inuit do not self-identify as Indians¹⁰⁹ and Canada expressly distinguishes Inuit from Indians, as far as the U.S. is concerned, Inuit in Canada are eligible for rights under INA § 289 upon

103. 8 C.F.R. § 289.2.

104. *Id.* See 45 Stat. 401 § 308, 8 U.S.C § 226a (1928).

105. United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660, 663 (W.D.N.Y. 1947).

106. While “Indian” is the term used in the Canadian constitution, it is now wide practice in Canada when referring to Indians to use the more the contemporary term “First Nation(s).” *A Note on Terminology: Inuit, Métis, First Nations, and Aboriginal*, INUIT TAPIIRIT KANATAMI, <http://tinyurl.com/k79jezy> (last visited Sept. 14, 2013). For consistency with the statutory term of art “American Indians born in Canada,” this article will continue to use the term “Indian” except within the context of direct quotes. See also *supra* note 2.

107. Rights of the Aboriginal Peoples of Canada, *supra* note 65, at § 35(2); see *Frequently Asked Questions About Inuit Relations*, GOV’T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV., <http://tinyurl.com/kxsoylq> (last visited Sept. 14, 2013). See *Terminology*, GOV’T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV., <http://tinyurl.com/ld5hwxx> (“These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs.”).

108. See *supra* note 107. The question of who should be included as an “Indian” within the meaning of the Canadian constitution is an ongoing legal debate. In 2013, a Federal Court ruled that both Métis and non-status Indians are included as Indians “within the meaning of the expression ‘Indians and Lands reserved for the Indians’ contained in s 91(24) of the *Constitution Act, 1867*.” *Daniels v. Canada*, 2013 FC 6, [2013] F.C.R. 268 (Can.). On April 17, 2014, the Federal Court of Appeal upheld that decision in part: it ruled that only Métis—and not non-status Indians—are included as Indians within the meaning of the Canadian constitution. *R. v. Daniels*, 2014 FCA 101 (Can.). An appeal of *Daniels* to the Supreme Court of Canada is expected.

109. *Inuit Are a Distinct Group*, TUNGASUVVINGAT INUIT, <http://tinyurl.com/kaf6ove> (last visited Sept. 14, 2013) (“Inuit are a distinct Aboriginal group. As early as 1932, ethnologist Diamond Jenness recognized that Inuit were, ‘a people distinct in physical appearance, in language and in customs from all the Indian tribes of America.’ The confusion about Inuit being Indians and Aboriginal peoples being all the same continues to reign among many members of the general public. For Inuit, to be recognized as an Indian rather than an Inuk is frustrating as it denies the unique culture of Inuit.”).

establishment of the requisite blood quantum.¹¹⁰ This is because the U.S. does not rely on Canadian definitions in determining which groups qualify for the benefits of INA § 289.¹¹¹ Within the U.S., the term “Indian” includes Inuit.¹¹² An examination of the statutory language introduced both prior to and in the INA indicates a clear intent to broaden the applicability of Jay Treaty rights beyond only those individuals who are members of Indian tribes.¹¹³ Because Inuit are Indians as far as the U.S. government is concerned, Inuit peoples born in Canada who possess the bloodline requirement may qualify for ABC status.

Like the Inuit, Métis do not self-identify as Indians and are distinguished from Indians in Canada’s constitution.¹¹⁴ The term “métis” originates from a French word meaning “mixed,” and was historically used in Canadian French for persons of mixed ancestry.¹¹⁵ While “métis” denotes only mixed Aboriginal-European ancestry, “Métis” carries a specific cultural, ethnological, and political meaning.¹¹⁶ When capitalized, the term refers to a specific population of Aboriginal and French-Canadian origin which emerged from the marriages which took place in the early 1800s between French-Canadian fur traders and local Indians.¹¹⁷

110. *See, e.g.*, *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (noting that the word “Indian” includes Aleut and Eskimos); 42 C.J.S. Indians § 1 (“The word ‘Indian’ includes Aleuts and Eskimos.”); *Karnuth*, 74 F. Supp. at 662 (“For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.”); *id.* (distinguishing the earlier treaty language of “tribes or nations of Indians” from the later-in-time and broader statutory language “American Indians born in Canada”); June I. Degnan, II, *Education: A Lifeline for the Inuit in Transition*, 10 ST. THOMAS L. REV. 109, n.1 (1997) (citing Jack Utter, AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS 67 (1993) (stating “[t]he Alaskan people who are still commonly referred to by Natives and non-Natives as ‘Eskimos’ are now also called ‘Inuit.’ In 1977, at the Inuit Circumpolar Conference held in Barrow, Alaska, the term Inuit (‘the people’) was officially adopted as a preferred designation when collectively referring to Eskimos . . . ‘Eskimo’ has long been considered to have come from an eastern Canadian Algonquian term which means ‘raw meat eaters.’ Some, but not all, Inuit would rather it not be used.”) (internal citation omitted).

111. *First Nations and Native Americans*, *supra* note 4 (“The INA does not distinguish between ‘treaty’ and ‘non-treaty’ or ‘status’ and ‘non-status’ Indians as determined by Canadian law. The only relevant factor is whether the individual has at least 50% American Indian blood.”).

112. *Supra* note 110.

113. *See Karnuth*, 74 F. Supp. 662 (distinguishing the earlier treaty language of “tribes or nations of Indians” from the later-in-time statutory language “American Indians born in Canada”).

114. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.).

115. *The Oxford Companion to Canadian History* 401 (Gerald Hallowell ed., Oxford Univ. Press 2004).

116. *Id.*

117. *Id.*

The Métis maintain a strong and unique identity, with specific criteria dictating membership within the community.¹¹⁸ “Since the 1960s, Métis political organizations have sprung up across Canada, accompanying renewed attention to culture, heritage, and notably, family history as Métis people recover ties and memories lost in displacements and racial discrimination experienced after 1885.”¹¹⁹

The 2013 book *Beyond the Border: Tensions Across the Forty-Ninth Parallel in the Great Plains and Prairies* provides an interesting dialogue on “mixedbloodedness,” and comments on Métis status: “[a]s a people of the Red River basin in Manitoba, North Dakota, and Minnesota, Métis people have different standing in U.S. and Canadian contexts. The Métis have legal status in Canada but not in the United States.”¹²⁰ However, the definition of ABC is contingent only upon a satisfaction of the bloodline requirement and *jus soli* Canadian citizenship.¹²¹ While Métis identification alone is insufficient to satisfy

118. The two major organizations representing Métis maintain different criteria for qualification:

The Congress of Aboriginal Peoples [www.abo-peoples.org] defines Métis as “individuals who have Aboriginal and non-Aboriginal ancestry, self-identify themselves as Métis and are accepted by a Métis community as Métis.” The Métis National Council [www.metisnation.ca] defines Métis as “a person who self-identifies as Métis, is of historic Métis Nation ancestry, is distinct from other Aboriginal peoples and is accepted by the Métis Nation.” *Genealogy and Family History: Métis*, LIBRARY AND ARCHIVES CANADA, <http://tinyurl.com/lcp3r8o> (last visited Sept. 14, 2013).

119. *Supra* note 115, at 403.

120. Joshua D. Miner, *Navigating the “Erotic Conversion”: Transgression and Sovereignty in Native Literatures of the Northern Plains*, in *BEYOND THE BORDER: TENSIONS ACROSS THE FORTY-NINTH PARALLEL IN THE GREAT PLAINS AND PRAIRIES* 15 (Kyle Conway & Timothy Pasch eds., McGill-Queens Univ. Press 2013).

121. *Jus soli*, “right of the land,” is a principle that “confers a nation’s citizenship on persons born within that nation’s territory.” STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1290 (5th ed. 2009). It is to be distinguished from the principle of *jus sanguinis*, “right of the blood,” which “generally bestows a nation’s citizenship on the children of its existing citizens, regardless of where the children were born.” *Id.* While the text of INA § 289 does not expressly mention a requirement of being born in Canada, a plain language reading of the term “American Indians born in Canada” seemingly includes the requirement on its face; however there is no case law to date clarifying this point. *See supra* note 40. Furthermore, USCIS is clear that eligibility for obtaining a green card as an ABC (which should be noted is independent from documenting one’s status as an ABC—*see infra* Part V) hinges on both the bloodline requirement and Canadian birth. *Green Card for an American Indian Born in Canada*, U.S. DEP’T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 100. A consideration of these points in the context of other limitations on the scope of the ABC population (the bloodline requirement and no derivative benefits), suggests that *jus sanguinis* Canadian citizenship would be insufficient for ABC status. Under this reasoning, a Canadian citizen born in Germany meeting the bloodline requirement would not be considered an ABC.

the bloodline requirement, Métis are certainly not excluded from ABC status; to qualify, an individual must satisfy the bloodline requirement, a matter independent from Métis identity. The same rule applies to Métis.

Thus, for the purpose of INA § 289, whether individuals are Indian, Inuit, Métis, or métis, they will be processed for ABC status at U.S. ports of entry so long as they were born in Canada and are able to satisfy the bloodline requirement.

III. CULTURAL CASE STUDIES BEYOND THE 49TH PARALLEL

The Jay Treaty provisions drafted to relieve tribal tensions originally arose from the establishment of an international boundary along what is now the mainland U.S./Canada border—the 49th Parallel.¹²² However, similar indigenous concerns extend to both the north and the south; a result of the borders between Alaska and Canada, and across the Arctic region; as well as the border between the U.S. and Mexico.¹²³

A. Arctic Peoples

The Arctic region is home to over 500,000 indigenous peoples¹²⁴ spanning 40 different ethnic groups.¹²⁵ The Arctic settlement area is divided between eight countries: Canada, the United States, Russia, Finland, Sweden, Norway, Iceland, and Denmark.¹²⁶

In 1996, the Arctic Council was created “with the purpose of advancing circumpolar cooperation. The mandate of the Council is to protect the arctic environment and promote the economies and the social

122. The term “49th Parallel” is a common synonym for the border between the mainland U.S. and Canada. The authors are cognizant of the fact that the border between the mainland U.S. and Canada deviates from the 49th parallel east of Lake of the Woods. *See, e.g.*, A&E Television Networks, *This Day in History: June 15*, HISTORY.COM, <http://tinyurl.com/7sbsf89> (last visited Apr. 10, 2014). Moreover, the United States and Great Britain did not sign a treaty specifically establishing the 49th Parallel as the boundary between their lands west of the Rocky Mountains until 1846. *Id.*

123. We focus our Part III discussion of Cultural Case Studies on the Arctic and Southern borderlands peoples not to diminish the importance of the Jay Treaty elsewhere; but because both are regions that are not immediately thought of in relation to the Jay Treaty, and both present unique and important issues. A 49th Parallel Cultural Case Study involving the Blackfeet (U.S.) and Bloods (Canada), in the cross-border commerce section of this paper, is but one example as to how Jay Treaty issues may arise on the border between the U.S. and Canada mainlands. *See infra* Part IV.C.

124. *Permanent Participants*, ARCTIC COUNCIL (Apr. 27, 2011), <http://tinyurl.com/mfxhllkt> (last visited Apr. 5, 2014).

125. *Arctic Indigenous Peoples*, ARCTIC CENTRE, <http://tinyurl.com/mv5y6ut> (last visited Apr. 8, 2014).

126. *Id.*

and cultural well-being of northern peoples.”¹²⁷ The Council consists of the eight above-mentioned Arctic States, along with six Indigenous Peoples Organizations representing indigenous interests; the intent being “to engage Arctic indigenous peoples in the cooperation in recognition of their right to be consulted in any issues concerning the stewardship of their ancestral homelands.”¹²⁸

Although their ancestral homelands are now divided by these international boundaries, “the indigenous peoples of the Arctic view themselves as having a historical existence and identity that is separate and independent of the states now enveloping them”¹²⁹—a claim to sovereignty at the heart of the Jay Treaty’s intent.

Within a narrower discussion of ABC status, the indigenous peoples of the Canadian Arctic are without question eligible under § 289 upon a showing of the requisite bloodline.¹³⁰ The Inuit and the Gwich’in are the two most northerly of these Arctic cultures,¹³¹ both of which continue to maintain cross-border traditional practices and cultural ties with their U.S. counterparts.

1. The Inuit

*“We Eskimo are an international community sharing common language, culture, and a common land along the Arctic coast of Siberia, Alaska, Canada and Greenland. Although not a nation-state, as a people, we do constitute a nation.”*¹³²

As introduced in Part II.B *supra*, the Inuit are not Indians; however they may qualify for ABC status upon establishment of the requisite

127. Board of Directors, GWICH’IN COUNCIL INT’L (2009), <http://tinyurl.com/lmq6yoo> (last visited Apr. 5, 2014).

128. *History of the Arctic Council Permanent Participants*, ARCTIC COUNCIL (Jul. 10, 2012), <http://tinyurl.com/n3rcb2e> (last visited Apr. 5, 2014).

129. *Definition of Indigenous Peoples*, ARCTIC CENTRE <http://tinyurl.com/lepqqnm> (last visited Apr. 5, 2014).

130. See *supra* Part II.B.

131. See *The Gwich’in*, GWICH’IN SOCIAL & CULTURAL INST., <http://tinyurl.com/lz3m5h6> (last visited Apr. 5, 2014).

132. *Request for Lilly Endowment Grant Support (Sept. 9, 1975)*, EBEN HOPSON: AN AMERICAN STORY, <http://www.ebenhopson.com/icc/ICCBoklet.html> (last visited Apr. 5, 2014) (continuing with, “For thousands of years we were people without national boundaries. Rather, we were people of our land, cold and dark most of the time, and other people did not covet our land. But the world grew more crowded. The people in Europe developed large populations and began to make their living as farmers, and traders in search of the things they needed but could no longer provide for themselves. Furs, for instance. We Eskimo survive out in the cold. But the people of Europe and Russia killed off all of their game about two hundred years ago, and the international fur trade began. It brought Russian trappers to Siberia and Alaska, and it brought European trappers to Greenland and to Canada, and they lived among us and we shared our land with them.”).

bloodline. In Canada, there are nearly 60,000 individuals who identify as Inuit,¹³³ and there are approximately 15,700 Inuit living in Alaska.¹³⁴

It is important to note that a discussion regarding the right of free passage for Inuit is not confined by the borders of the U.S. and Canada. Inuit traditional lands span across the circumpolar region in the U.S., Canada, Denmark, Greenland, and Russia.¹³⁵ In 1977, the Inuit Circumpolar Council (ICC) was founded with the vision that the Inuit should “speak with a united voice on issues of common concern and combine their energies and talents towards protecting and promoting their way of life.”¹³⁶

In its first conference that same year, Inuit from Canada, Greenland, and the U.S. (Alaska) discussed this common vision,¹³⁷ proposing the right of free travel across traditional Inuit lands of the circumpolar region. The conference presented Resolution 77-13, which “call[ed] upon Canada, the United States and Denmark to provide for free and unrestricted movement for all Inuit across their Arctic homeland.”¹³⁸ Resolution 77-13 was rooted in the rights bestowed by the Jay Treaty, and also referenced the concept of aboriginal rights, yet to be recognized by the Supreme Court of Canada:

WHEREAS, a treaty negotiated between the United States and England provides intercourse and commerce across the U.S./Canadian border; and

WHEREAS, we Inuit are the indigenous people of the Arctic and have freely visited and traded back and forth across our homeland for thousands of years, thus establishing our aboriginal rights to free and unrestricted travel and trading all across the Arctic; and

133. *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, STATISTICS CANADA (last modified Mar. 28, 2014), available at <http://tinyurl.com/dy82btv> (last visited Apr. 5, 2014) (“In 2011, 59,445 people identified as Inuit. They represented 4.2% of the total Aboriginal population and 0.2% of the total Canadian population.”).

134. LOUIS-JACQUES DORAIS, *LANGUAGE OF THE INUIT: SYNTAX, SEMANTICS, AND SOCIETY IN THE ARCTIC* 235–36 (McGill-Queen’s Univ. Press 2010) (citation omitted).

135. *Inuit Circumpolar Council*, ARCTIC COUNCIL (Apr. 15, 2011), <http://tinyurl.com/kno8nhd> (last visited Apr. 5, 2014).

136. *Id.*

137. *ICC’s Beginning*, INUIT CIRCUMPOLAR COUNCIL (CANADA), <http://tinyurl.com/mgr9x6c> (last visited Apr. 5, 2014).

138. *Inuit Circumpolar Conference (June 1977)*, EBEN HOPSON: AN AMERICAN STORY, <http://www.ebenhopson.com/icc/ICCBooklet.html> (last visited Apr. 5, 2014). Presumably, due to political reasons at the time, USSR-born Inuit could not participate in the conference; and Greenland is not mentioned because Denmark controls its foreign affairs.

WHEREAS, the Jay Treaty between the United States and England clearly recognizes and protects our rights to unrestricted intercourse and trade across the U.S./Canadian border; and

WHEREAS, these guarantees have never been negotiated with Denmark, and have not been properly established in Canada, resulting in the fact that our circumpolar Inuit community does not enjoy the right of free travel and trade across the Canadian/Greenlandic border; and

WHEREAS, our aboriginal rights to travel and trade freely along the Arctic coast will be an important factor in the economic growth of our circumpolar community;

NOW, THEREFORE, BE IT RESOLVED that the delegates assembled at the first Inuit Circumpolar Conference call upon the Governments of Canada, the United States and Denmark to negotiate an agreement that will protect for all Inuit the right to unrestricted trade and travel as envisaged between Canada and the United States by the Jay Treaty.¹³⁹

While the Jay Treaty originally envisaged unrestricted trade and travel across the border, the provision relating to trade was never codified in § 289—an array of customs and environmental laws govern the transport of goods across the border.¹⁴⁰ The regulations and restrictions imposed by these laws often provide exceptions for the traditions of indigenous communities; however these exceptions typically do not contemplate cross-border cultures, and may only be asserted by communities on one side of the border.¹⁴¹ Without Jay Treaty protection in this regard, cross-border indigenous cultures need a strong proponent in international policy and legislative development; the ICC is perfectly situated for such advocacy.

The ICC remains active on the international stage: it is not only a Permanent Participant of the Arctic Council,¹⁴² but it also holds Special Consultative Status with the United Nations, and has been involved with the World Summit on Sustainable Development, the Convention on the Trade of Endangered Species, the World Intellectual Property Organization, the Organization of American States, the International

139. *Id.* (emphasis added).

140. *See supra* Part IV.C.

141. An exploration of such issues appears in our cross-border commerce discussion at Part IV.C, *infra*.

142. See description of the Arctic Council in Part III.A, *supra*.

Whaling Commission, the Convention on Biological Diversity, and the World Conservation Union IUCN.¹⁴³

These global connections make the organization a strong player in the international development of the Arctic, and a voice for not only the Inuit but all indigenous Arctic peoples. As the Arctic continues to develop, the ICC is an ideal advocate for cross-border policies that recognize and respect the traditional practices of cross-border cultures.

2. The Gwich'in

*"We are caribou people. Caribou are not just what we eat; they are who we are. They are in our stories and songs and the whole way we see the world. Caribou are our life. Without caribou we wouldn't exist."*¹⁴⁴

The Gwich'in tribe exists at the northwestern limits of the North American boreal forest, or *taiga*.¹⁴⁵ The tribe inhabited the region long before the U.S. and Canada existed, and continues to maintain settlements on either side of the border;¹⁴⁶ spanning what is now interior Alaska, through the Yukon, and into the Mackenzie Valley in the Northwest Territories.¹⁴⁷

Also known as "the people of the caribou," the Gwich'in are subsistence hunters, and "have depended on caribou for their subsistence way of life for thousands of years."¹⁴⁸ Gwich'in livelihood has "traditionally been based on the Porcupine Caribou herd Fish and

143. *Activities and Initiatives*, INUIT CIRCUMPOLAR COUNCIL (CANADA), <http://tinyurl.com/pmgkgvq> (last visited Apr. 5, 2014). See also *Inuit Circumpolar Council*, NGO BRANCH UNITED NATIONS DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, <http://tinyurl.com/kzn95e3> (last visited Apr. 6, 2014).

144. *About the Gwich'in*, GWICH'IN STEERING COMMITTEE (2014) <http://tinyurl.com/k5lve2v> (last visited Apr. 5, 2014) (quoting Sarah James).

145. *The Gwich'in*, GWICH'IN SOCIAL & CULTURAL INST., <http://tinyurl.com/lz3m5h6> (last visited Apr. 5, 2014); *The Boreal Forest: Earth's Green Crown*, NATIONAL RESOURCES DEFENSE COUNCIL (last revised Jul. 20, 2004), <http://www.nrdc.org/land/forests/boreal/intro.asp> (last visited Apr. 5, 2014). The boreal forest is the largest intact terrestrial ecosystem in the world, and is also known as the "Earth's green crown" because of the way it circles the Arctic region. *Id.* See also Dep't of Geospatial Science, *Biomes of the World: Boreal Forest (Taiga)*, RADFORD UNIVERSITY (last updated 2012), <http://tinyurl.com/aqacopg> (last visited Apr. 8, 2014).

146. See *About the Gwich'in*, GWICH'IN STEERING COMMITTEE (2014) <http://tinyurl.com/k5lve2v> (last visited Apr. 5, 2014).

147. *The Gwich'in*, GWICH'IN SOCIAL & CULTURAL INST., <http://tinyurl.com/lz3m5h6> (last visited Apr. 5, 2014).

148. *About the Gwich'in*, GWICH'IN STEERING COMMITTEE (2014) <http://tinyurl.com/k5lve2v> (last visited Apr. 5, 2014) ("Oral tradition indicates that the Gwich'in have occupied this area since time immemorial or, according to conventional belief, for as long as 20,000 years.").

other animals supplement their diet.”¹⁴⁹ Their settlements today continue to track the migratory range of the Porcupine Caribou Herd,¹⁵⁰ and “[t]oday, as in the days of their ancestors, the caribou [are] still vital for food, clothing, tools, and are a source of respect and spiritual guidance for the Gwich’in.”¹⁵¹

With the migratory range of the Porcupine Caribou Herd nearly perfectly bisected by the Alaska/Canada boundary line,¹⁵² the Gwich’in are a fitting example of a tribe whose traditional lands and cultural practices are directly impeded by the imposition of the international border. Indeed, their economic, social, and spiritual culture is based in large part on an entity to which the border is irrelevant: a caribou herd.¹⁵³ The caribou continue to roam their traditional habitat as they have for millennia; the Gwich’in no longer can, at least not in the way they once did.

As such, one might expect Canadian Gwich’in members to be among the major asserters of Jay Treaty benefits. With this assumption in mind, the authors conducted an interview with Grant Sullivan, Executive Director of the Gwich’in Council International, hoping to identify and explore any issues the Gwich’in have encountered in asserting their § 289 benefits.

As it turns out, Canadian Gwich’in members have not reported many issues in this regard, largely because members are generally unaware of the Jay Treaty and their eligibility for the unique rights which stem from it.¹⁵⁴ While the Gwich’in strive to maintain a strong cross-border presence through close cultural and family ties with relatives and community members on either side of the border,¹⁵⁵ they typically utilize “regular” immigration procedures: Gwich’in traveling to the U.S. usually do so as visitors carrying Canadian passports; those who work in the U.S. typically do so on employment visas; and the only free access that appears to occur is a result of hunting journeys into unpatrolled tundra,

149. *The Gwich’in*, GWICH’IN COUNCIL INT’L (2009), <http://tinyurl.com/kkx7yeu> (last visited Apr. 5, 2014).

150. *Caribou People*, GWICH’IN STEERING COMMITTEE (2014), <http://tinyurl.com/mldky2d> (last visited Apr. 5, 2014) (“Nine thousand Gwich’in people make their home on or near the migratory route of the Porcupine Caribou Herd.”).

151. *Id.*

152. *Id.*

153. *See id.*

154. Telephone interview with Grant Sullivan, Executive Director, Gwich’in Council International (Feb. 4, 2014).

155. *Id.* *See also The Gwich’in*, GWICH’IN SOCIAL & CULTURAL INST., <http://tinyurl.com/lz3m5h6> (last visited Apr. 5, 2014).

with only the end-of-day review of one's snowmobile GPS coordinates revealing an inadvertent trip across the border and back.¹⁵⁶

To be clear, the Gwich'in are not uninformed about indigenous rights—quite the opposite; the tribe is highly active in the development of Arctic policy, and is a vocal advocate for indigenous interests. In fact, the Gwich'in Council International (GCI) is a Permanent Participant to the Arctic Council, representing the Gwich'in communities of both Canada and Alaska.¹⁵⁷ “[T]he GCI receives funding from the Department of Foreign Affairs and International Trade Canada. This funding provides Canadian GCI members with the opportunity to participate effectively in the Arctic Council and its working groups.”¹⁵⁸ Additionally, “[t]he US State Department in Alaska provides funding through the Indigenous Peoples' Secretariat (IPS) to support GCI Board members who are U.S. citizens with the means to attend the Arctic Council meetings.”¹⁵⁹

One problem Mr. Sullivan did identify with regard to Gwich'in border crossing is the difficulty the GCI has encountered in trying to bring U.S. citizen tribal members to Canada for the Arctic Council meetings.¹⁶⁰ The tribal elders attending these meetings do not necessarily hold U.S. passports.¹⁶¹ If the Canadian government recognized the continued validity of the Jay Treaty and extended a reciprocal right of free passage to U.S.-born Indians, these tribal members could cross with tribal identification rather than a U.S. passport.¹⁶² However, even without Jay Treaty recognition on the part of Canada, U.S.-born Gwich'in members should be able to assert their *aboriginal* right to freely pass the border as recognized by the Supreme Court of Canada.¹⁶³

The Canadian Gwich'in, like the Inuit, are undoubtedly eligible for ABC benefits; yet until they learn the extent of the special rights they hold, they cannot begin to assert or protect them. As a Permanent Participant of the Arctic Council, the GCI is in an excellent position to reach both local communities and an international audience—educating

156. *Id.*

157. *Board of Directors, GWICH'IN COUNCIL INT'L* (2009), <http://tinyurl.com/lmq6yoo> (last visited Apr. 5, 2014).

158. *Id.*

159. *Id.*

160. Telephone interview with Grant Sullivan, Executive Director, Gwich'in Council International (Feb. 4, 2014).

161. *Id.*

162. For a discussion of the unique issues surrounding tribal identification as a means of border documentation, *see supra* Part V.D.

163. *Infra* Part II.B.

leaders of Canadian Gwich'in communities on the benefits of ABC status, educating leaders of U.S. Gwich'in communities on the current potential for aboriginal rights in Canada, and urging the Canadian government to recognize the validity of Jay Treaty and reciprocate its benefits to U.S.-born tribal members.

A. Kickapoo and other southern borderlands peoples

The Texas band of the Kickapoo Indians is one example of an indigenous tribe which does not meet the requirements of § 289, yet enjoys a special right of travel across the U.S. border from Canada or Mexico.

The Kickapoo Indians originated in the Great Lakes region of the U.S.¹⁶⁴ In 1852, after treaty agreements, relocations, and land exchanges, a substantial number settled in Nacimiento, Mexico.¹⁶⁵ Thirty years later, the government established a reservation in Oklahoma for those Kickapoo who had remained in the U.S. As a result, two distinct but closely related bands of Kickapoo were created—one in Oklahoma and one in Mexico. Because the two bands shared cultural traditions and marital ties, band members from each side made frequent trips across the border.¹⁶⁶

Throughout the early 1900s the ties between the two bands remained strong, and many Kickapoo began living in Mexico year-round.¹⁶⁷ However, summer droughts¹⁶⁸ eventually caused Kickapoo farm laborers residing in Mexico to move temporarily to Eagle Pass, Texas, between the months of April and October.¹⁶⁹ These workers returned to Mexico when the agricultural season ended.¹⁷⁰ This migratory pattern continued, prompting what was then the Immigration and Naturalization Service (INS) to issue the Kickapoo immigration cards valid for one-year increments, granting the tribal members the right to cross the border freely. In 1983, Congress passed the Texas Band of Kickapoo Act (TBKA), making their migratory right a permanent one.¹⁷¹

164. One wonders whether Canada might today recognize an aboriginal right on the part of the Kickapoo to pass the border. This may be possible if, at the time the tribe was located in the Great Lakes region, it maintained any culturally-significant practices prior to European contact which involved crossing what is now the U.S./Canada border. See *supra* Part I.C.

165. R. Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 480 (1999–2000) (citing S. Rep. No. 97-684, at 3 (1982)).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983).

Unlike INA § 289, the TBKA does not derive its force from past treaty agreements between the U.S. and another power, but rather its origins are based on migratory, social, and cultural ties existing between one common tribe separated by an international border.¹⁷² This is the type of relationship INA § 289 seeks to protect.¹⁷³ While the TBKA restricts membership in the Band to those possessing Kickapoo blood, the Act itself requires no specific percentage of Kickapoo blood, with “consultation with the tribe”—presumably to include some corroboration of an individual’s bloodline—being the only prerequisite.¹⁷⁴

The TBKA ensures “[n]otwithstanding the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.*), all members of the Band shall be entitled to freely pass and repass the borders of the United States and to live and work in the United States.”¹⁷⁵

Under current regulations, Mexican nationals who possess an I-872 American Indian Card and are members of either the Texas Band of Kickapoo Indians or the Kickapoo Tribe of Oklahoma are exempt from visa and passport requirements when crossing at land borders.¹⁷⁶ Such individuals are exempt from the Form I-94 Arrival Departure Record requirement when admitted at certain locations to visit the U.S. within certain distances set out by regulation, for thirty days or less.¹⁷⁷

Besides the Kickapoo, there are at least three other Indian tribes whose communities straddle the U.S./Mexico border, and seven Indian

172. See 25 U.S.C. § 1300b-11 (2006); Pub. L. No. 97-429, § 2, Jan. 8, 1983; 96 Stat. 2269 (“Congress finds that the Texas Band of Kickapoo Indians is a subgroup of the Kickapoo Tribe of Oklahoma; that many years ago, the Band was forced to migrate from its ancestral lands to what is now the State of Texas and the nation of Mexico. . .”).

173. Another possibility regarding the source of Jay Treaty rights is that they might be based on custom. In the 1974 decision *Saxbe v. Bustos*, the United States Supreme Court upheld a grant of “daily commuter” immigration status, which was based not on statute but on longstanding administrative practice and acquiescence by Congress. 419 U.S. 65, 74 (1974). Meanwhile, customary international law could also play a role. Customary international law exists where two elements are present: “(1) there must be a general and consistent practice of States, which does not mean that the practice must be universally followed, but, rather, it should reflect wide acceptance among the States particularly involved in the relevant activity; and (2), there must be a sense of legal obligation.” 44B Am. Jur. 2d International Law § 3 (citing *U.S. v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012)). Both are present here: there has been a general and consistent practice on the part of the United States to recognize the Jay Treaty rights of ABCs, and there has clearly been a sense of legal obligation (with the only dispute being whether the obligation stems from the Jay Treaty or the Treaty of Ghent).

174. See 25 U.S.C. § 1300b-13(a) (2006); Pub. L. No. 97-429, § 4, Jan. 8, 1983; 96 Stat. 2269 (“the Secretary shall, after consultation with the Tribe, compile a roll of those members of the Tribe who possess Kickapoo blood and who are also members of the Band.”).

175. 25 U.S.C. § 1300b-13(d) (2006).

176. 8 C.F.R. § 212.1(c)(1)(ii) (2013). See also *infra* Part V.D.

177. 8 C.F.R. § 235.1(h)(1)(iii)(A), (v) (2013).

tribes maintaining communities on both sides of the border.¹⁷⁸ Although similarly situated to ABCs and the Kickapoo, these other tribes do not receive the same benefits. The Tohono O'odham are an example of one such tribe. The Tohono O'odham Nation's traditional lands were bisected by treaty and political agreements; yet its foreign members may not freely enter the U.S. despite a historical and political background similar to ABCs and Texas Kickapoo Indians.

In 1848, the Treaty of Guadalupe Hidalgo brought an end to the Mexican-American War.¹⁷⁹ The treaty established the international boundary line at the Gila River,¹⁸⁰ making the Tohono O'odham residents of Mexico.¹⁸¹ Five years later, the Tohono O'odham's territory was affected once again, this time by the Gadsden Purchase of 1853; as the Peace of Paris divided Indian tribes on the northern border of the U.S., so too did the Gadsden Purchase divide the Tohono O'odham. Approximately 1,000 out of the Tohono O'odham's 25,000 members now live across the border in Mexico.¹⁸²

The Mexican Tohono O'odham share cultural and familial ties with tribal members living in the U.S. In this way, they are not dissimilar to many ABCs and the Kickapoo, yet they do not enjoy similar immigration benefits.¹⁸³ An extension of a right of free access to the U.S. to the Mexican Tohono O'odham and other indigenous groups whose traditional lands and communities have been bisected by the U.S./Mexico border is long overdue. Recently, the Tohono O'odham nation began working with the U.S. Department of Homeland Security (DHS) to develop an Enhanced Tribal Card for WHTI-compliant border

178. There are "four Native American tribes that straddle the Mexico/U.S. border: the Tohono O'odham, Yaqui, Cocopah, and Kickapoo." Zalfa Feghali, *Border Studies and Indigenous Peoples: Reconsidering Our Approach*, in BEYOND THE BORDER: TENSIONS ACROSS THE FORTY-NINTH PARALLEL IN THE GREAT PLAINS AND PRAIRIES 1 (Kyle Conway & Timothy Pasch eds., McGill-Queens Univ. Press 2013). Furthermore, "[b]etween Texas and California, there are eight tribes with communities on both sides of the border: Kumeyaay, Cocopah, Tohono O'odham, Yaqui, Gila River Pima, Yavapai, Ysleta del Sur (Tira) and Kickapoo." Sara Singleton, *Not Our Borders: Indigenous People and the Struggle to Maintain Shared Lives and Cultures in Post 9/11 North America*, 4 BORDER POL'Y RES. INST. (2004), available at <http://tinyurl.com/me45zpx> (last visited Sept. 14, 2013).

179. See Tom Gray, *Teaching with Documents: The Treaty of Guadalupe Hidalgo*, NATIONAL ARCHIVES, <http://tinyurl.com/2clp7gf> (last visited Sept. 14, 2013).

180. See Singleton, *supra* note 178, at 4.

181. *Id.*

182. *Id.*

183. Prior to 9/11, Tohono O'odham members had some flexibility in their border crossing with a number of unofficial, rarely-monitored crossing points which spanned their 75-mile stretch of border with Mexico; post-9/11, these informalities are long-gone. See *id.*

crossings.¹⁸⁴ As developed in Part V.D of this paper, possession of WHTI-compliant documentation facilitates the border-crossing process but fails to confer an equivalent of the Jay Treaty right of free access.

IV. BENEFITS

ABCs possess a set of rights unlike those of any other group recognized by U.S. immigration law. ABCs possess the core entitlement to freely pass into the U.S. From this flows a robust set of rights, including exemption from removal and eligibility for federally-funded public benefits.

The precise rights afforded to ABCs have been misunderstood. In late 2003, as the U.S. Armed Forces felt the personnel shortage caused by concurrent wars in Iraq and Afghanistan, recruiters visited Canadian Indian reservations, reportedly under the impression residents were “dual citizens.”¹⁸⁵ Similarly, in 2004 an ABC from Calgary ran for state legislature in Hawaii, believing himself to be a U.S. citizen based on a misunderstanding of Jay Treaty rights.¹⁸⁶

ABCs may encounter confusion from state officials when applying for benefits requiring proof of lawful immigration status. For example, a Texas driver’s license applicant must demonstrate lawful immigration status, but an ABC cannot acquire a driver’s license without approval from the Texas Department of Safety’s Austin-based headquarters.¹⁸⁷

A. Free passage

The principal Jay Treaty right is the entitlement of an ABC to freely cross from Canada into United States. This right follows from the strongly worded language of the INA: “[n]othing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States.”¹⁸⁸ ABCs are not required to obtain

184. Press Release, Dep’t of Homeland Sec., Department of Homeland Security and Tohono O’odham Nation Announce Agreement to Develop Enhanced Tribal Card (Nov. 3, 2009), <http://tinyurl.com/mxbsbtj> (last visited Sept. 14, 2013). See also *infra* Part V.D.

185. David Pugliese, *Pentagon to Stop Recruiting Aboriginal Canadians*, VANCOUVER SUN, Dec. 10, 2003, at A7. United States citizenship, of course, is not required for military service. See MARGARET STOCK, IMMIGRATION LAW AND THE MILITARY, Ch. 2 (American Immigration Lawyers Association 2012).

186. Randy Boswell, *Canadian Cree Seeks Election in Hawaii*, VANCOUVER SUN, Oct. 13, 2004, at A2.

187. TEXAS DEPARTMENT OF PUBLIC SAFETY, TEMPORARY VISITOR ISSUANCE GUIDE: DOCUMENTS ESTABLISHING LAWFUL PRESENCE FOR TEXAS DRIVER’S LICENSE/ID APPLICANTS, 4 (rev’d Sept. 2011) (AILA Doc. No. 11101238).

188. INA, *supra* note 40 (emphasis added).

immigrant visas.¹⁸⁹ DOS notes briefly that Canadians meeting the bloodline requirement are exempt as non-immigrants from passports, visas,¹⁹⁰ and border crossing identification cards.¹⁹¹ In the 1974 case of *Akins v. Saxbe*, a federal district court held that the right of free passage meant ABCs were not required to comply with alien registration rules.¹⁹²

B. Exemption from removal

The Jay Treaty right of free passage exempts ABCs from removal. This proposition is now settled, though historically the exemption had not always been recognized.

U.S. immigration authorities have long recognized that Jay Treaty rights exempt ABCs from exclusion proceedings,¹⁹³ an inescapable application of the Treaty entitlement “freely to pass and repass” the border. But the agencies stumbled in the context of deportation proceedings. In the 1943 case, *Matter of A*, the BIA contemplated an ABC possessing the “loathsome” disease of syphilis, which was grounds for deportation.¹⁹⁴ The BIA reasoned that the right to freely enter the country “does not presuppose a right to remain here at his sufferance with license to engage in conduct that would subject the ordinary alien to deportation.”¹⁹⁵ Splitting the baby, the BIA concluded an ABC is deportable only with respect to grounds of deportation arising after entry.¹⁹⁶ Shortly after *Matter of A*, the BIA affirmed its view.¹⁹⁷

Yet the judiciary parted paths with the BIA on the matter of deportability. In *U.S. ex rel. Goodwin v. Karnuth*, an ABC challenged a

189. 22 C.F.R. § 42.1(f) (2012). See 9 FAM § 41.1(b) (ABCs are exempt from nonimmigrant visa requirements); 9 FAM § 42.1 (citing INA § 289 regarding non-citizens not required to obtain immigrant visas). But this is not to say ABCs are not “aliens” for purpose of the INA. See *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, at *13-17 (S.D. Cal. Dec. 23, 2011) (order granting defendants’ motion to dismiss or, in the alternative, for summary judgment) (holding a full-blood Canadian-born Indian was an alien for purpose of construing the jurisdiction-stripping provision at 8 USC § 1252(g) (2006)).

190. With the recent enactment of the Western Hemisphere Travel Initiative this exemption is no longer a surety. See *infra* Part V.D.

191. 22 C.F.R. § 41.1(b) (2012).

192. 380 F. Supp. 1210, 1221 (D. Me. 1974).

193. 8 C.F.R. § 114.6 (1943).

194. *Matter of A*, I. & N. Dec. 600 (BIA 1943).

195. *Id.* at 603.

196. *Id.* The BIA recognized this approach led to the arguably bizarre situation that an ABC could be deported, then immediately reenter the United States, being exempt from exclusion. Puzzlingly, the BIA believed this would be prevented in part by the fact that Canadian-born Indians were, at the time of the decision, wards of the state and Canada would ensure its laws discouraged undesirable Indians from reentering the U.S. *Id.*

197. *Matter of B*, 3 I. & N. Dec. 191 (BIA 1948) (*dicta*); *Matter of D*, 3 I. & N. Dec. 300 (BIA 1948).

deportation warrant by way of a habeas petition.¹⁹⁸ The issue in the case was whether Mr. Karnuth qualified as an ABC, having married a non-Indian.¹⁹⁹ Once the court resolved that the standard was one of blood lineage only, the court concluded without discussion that the Jay Treaty right of free passage rendered Mr. Karnuth exempt from deportation.²⁰⁰

Akins v. Saxbe later addressed whether ABCs were exempt from the visa and registration requirements of the INA.²⁰¹ While *Akins* did not specifically address deportation, the court rejected a narrow and literal construction of the right to freely “pass” the borders of the U.S., holding ABCs were exempt from visa and registration requirements.²⁰² The BIA later adopted this approach when revisiting the question of deportability.

In *Matter of Yellowquill*, the BIA considered the appeal of an ABC convicted of selling heroin and issued with an order of deportation.²⁰³ Notably, counsel for the INS urged the BIA to adopt the reasoning of *Akins* and overrule *Matter of A.*²⁰⁴ The BIA did precisely so, holding ABCs are not deportable on any ground.²⁰⁵

No precedent decision has tested the application of *Yellowquill* in removal proceedings, but there appears to be no reason to question its ongoing viability.²⁰⁶

C. Cross-border commerce

Article III of the Jay Treaty states in part “[n]o duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever

198. U.S. *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660 (W.D.N.Y. 1947).

199. *Id.*

200. *Id.* at 663.

201. *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974).

202. *Id.* at 1221.

203. *Matter of Yellowquill*, 16 I. & N. Dec. 576 (BIA 1978).

204. *Id.* at 578.

205. *Id.*

206. This is not to say that ABCs do not fall between the cracks upon occasion. This fact was brought home to one of the authors at a recent event at which he spoke on ABCs. Immigration and Customs Enforcement (ICE) provides exclusive legal representative for the U.S. government in exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice. In a conversation with the author at the event, an ICE Chief Counsel (the head ICE lawyer for a particular district) shared a story of troublesome case involving an Inuit child from Canada who obtained status in the U.S. by virtue of adoption by U.S. citizen parents. The child experienced increasing problems with the law in early adult years, and was eventually deported because of criminal convictions. Jay Treaty rights were not explored in the case by the immigration court, ICE, or the deportee. *See also* Part IV.E, *infra*.

nature, pay for the same any import or duty whatever.”²⁰⁷ However, the U.S. government does not recognize the continued validity of this provision in the way it has Jay Treaty rights regarding free passage.²⁰⁸

In *U.S. v. Garrow*, a 1937 U.S. Court of Customs and Patent Appeals case, the court opined the Jay Treaty, including its duties provision, was abrogated by the War of 1812.²⁰⁹ The court maintained the Treaty of Ghent was not self-executing and was not enacted by legislation; therefore, no treaty right remained for the duties provision.²¹⁰ Although statutory exemptions from customs duties had been previously maintained in various iterations of the Tariff Act, the exemption was deleted in 1897.²¹¹ No legal basis remained for the Treaty’s duties provision.

Nearly thirty years later, the federal district court in *Akins v. Saxbe* followed *Garrow*, noting language granting Indians the right to pass with their goods duty free “was not included in the Tariff Act of 1897,²¹² and it has not been included in any subsequent tariff act.”²¹³ It maintained questions of customs duties and importation to be within the exclusive jurisdiction of the customs courts.²¹⁴

More recently, in 2001, the Supreme Court of Canada held there exists no aboriginal right to transport goods duty free across the U.S./Canada border.²¹⁵

Despite restrictive policies in force today, traditional indigenous cross-border commerce and culture is well documented: “[a]boriginal economies were vibrant—they produced and traded, often over long distances and through elaborate trade coalitions. Trading relations

207. Article III of the Jay Treaty, 8 Stat. 116 (excepting that “goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.”). A reproduction of a Jay Treaty negotiator’s notes related to Indian trade is attached as Exhibit IV (in part, “If the American Indians are to have the privilege of trading with Canada - ought not the Canada Indians to be privileged to trade with the United States?”). A reproduction of a portion of an early draft of treaty provisions with particular reference to commerce between Indians, settlers, and British subjects is attached as Exhibit V (in part, “It shall at all times be free to the Indians dwelling within the boundaries of either of the parties to pass and repass with their own proper goods and effects, and to carry on their commerce within or without the jurisdiction of either of the same parties.”).

208. *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974).

209. *United States v. Garrow*, 88 F.2d 318, 323 (C.C.P.A. 1937).

210. *Id.* at 320–21.

211. *Id.* at 321.

212. 30 Stat. 151.

213. *Akins v. Saxbe*, 380 F. Supp. at 1213.

214. *Id.* at 1215.

215. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.); see *supra* Part I.C. As with the Supreme Court of Canada’s other decisions regarding aboriginal rights, *Mitchell* was restricted to the specific facts of the case.

evolved over millennia . . . It is a mistake to assume that Aboriginal peoples and their economies were local, static, subsistence-oriented or unresponsive to opportunities for wealth generation.”²¹⁶

These longstanding traditions of cross-border commerce and culture continue to survive despite the U.S./Canada border, a boundary-line described as a “figment of someone else’s imagination.”²¹⁷ Indeed, “[f]rom the Indian viewpoint, he crosses no boundary line. For him this does not exist.”²¹⁸

The Blackfeet (U.S.) and Bloods (Canada) provide an illustration of the many tribes whose lands were bifurcated by the drawing of this boundary line, and whose traditional practices are affected by its imposition.²¹⁹ “Today there is considerable intermarriage and contact [between the Blackfeet and Bloods] through social, recreational and religious events. . . . These gatherings form the center of tribal cultural and religious life. Tribal members often trade animals, meat, berries, roots, herbs, handmade goods and medicine bundles at these events.”²²⁰ However, both “Canadian and American customs laws . . . forbid the import and export of certain plants and animals that are significant in ceremonial life. In addition, these laws require a search of all goods, thereby inhibiting the exercise of tribal culture and religion.”²²¹ While a customs search may seem a benign inconvenience to a non-Indian, it can be devastating to the integrity of certain sacred items.²²²

216. CHARLES M. GASTLE, BENNETT GASTLE PROF’L CORP., THE IMPORTANCE OF SUSTAINABLE ABORIGINAL CULTURES: DEFINING ABORIGINAL TRADE ISSUES IN THE CONTEXT OF INTERNATIONAL TRADE RELATION 6 (Nov. 27, 2006) (citing National Chief Dwight Dorey of the Congress of Aboriginal Peoples in DEVELOPMENT UNRESERVED: ABORIGINAL ECONOMIC DEVELOPMENT FOR THE 21ST CENTURY (Joseph Eliot & Dwight Dorey eds.), in LEGAL ASPECTS OF ABORIGINAL BUSINESS DEVELOPMENT 9, 10 (Dwight Dorey & Joseph Magnet eds., Butterworths 2005)).

217. Joshua D. Miner, *Navigating the “Erotic Conversion”: Transgression and Sovereignty in Native Literatures of the Northern Plains*, in BEYOND THE BORDER: TENSIONS ACROSS THE FORTY-NINTH PARALLEL IN THE GREAT PLAINS AND PRAIRIES 1 (Kyle Conway and Timothy Pasch, eds., McGill-Queens University Press 2013) (citation omitted).

218. U.S. *ex rel* Diabo v. McCandless, 18 F.2d 282, 283 (E.D. Pa. 1927) *aff’d*, 25 F.2d 71 (3d Cir. 1928).

219. See Sharon O’Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 322 (1984) (citations omitted).

220. *Id.*

221. *Id.* (citations omitted); *Native American Reservations are Subject to Customs and Duties Regulations*, U.S. DEP’T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., <http://tinyurl.com/m8zw73u> (last visited Sept. 14, 2013) (“goods imported into reservations are subject to all U.S. laws concerning admissibility and payment of duty.”).

222. *Id.* (“[F]or many tribes, the medicine bundle is the most sacred of all articles. Its search and mishandling by outsiders destroys its spiritual and ceremonial use.”). In a distressing twist, smugglers intending to transport drugs across the border have begun “to hide drugs in objects that

The current debate over eagle feathers, which carry religious significance for many Indians, provides an illustration of the competing interests and policies at play. Under the Bald and Golden Eagle Protection Act (BGEPA), possession of eagles or eagle parts carries civil and criminal penalties.²²³ However, a religious exception to BGEPA allows enrolled members of federally-recognized Indian tribes to apply for a permit allowing them to possess or take bald or golden eagles or their parts.²²⁴ Policies exist to allow members of federally-recognized tribes to travel with eagle parts between the U.S. and Canada or Mexico without a permit in certain circumstances,²²⁵ and Canadians presenting a Certificate of Indian Status may travel in and out of the U.S. with eagle parts under similar circumstances.²²⁶ All items are still subject to customs declarations.²²⁷ Because the policy for Canadians is restricted to those carrying a Certificate of Indian Status, it necessarily excludes Métis, Inuit, and non-status Indians.

Outside of ceremonial implications, well-intentioned legislation aimed at protecting endangered or threatened wildlife has also created unanticipated economic difficulties for Canadian Aboriginal populations,

are then claimed to be materials associated with religious practices,” knowing that some customs inspectors, in a bid to become more culturally-sensitive, have become “become more respectful (and perhaps less rigorous) in their inspection of sacred objects.” See Singleton, *supra* note 178, at 10.

223. 16 U.S.C. § 668 (2006).

224. Jessica L. Fjerstad, *The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA, and the Regulation of Indian Religious Practices*, 55 S.D. L. REV. 528, 529 (2010). The regulations state that the permit allows transport of dead eagles and their parts into and out of the United States, but such transportation is restricted to Indians “authorized to participate in bona fide tribal religious ceremonies.” 50 C.F.R. § 22.22 (2012). While the religious exception might initially appear a good compromise, many have claimed that the permitting requirement and process burdens their free exercise rights. “The majority of claimants rely on the Religious Freedom Restoration Act (RFRA) for relief. These cases often reach the federal courts of appeals, but the United States Supreme Court has not yet determined whether the religious exception to BGEPA and its permit system violates RFRA.” Fjerstad, *supra* at 529.

225. These circumstances include that the parts were lawfully acquired, are personally owned, and that the same person travels in and out of the country with the same parts. *Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America*, U.S. FISH AND WILDLIFE SERV. (last updated Feb. 14, 2013), available at <http://tinyurl.com/kqzuly4> (last visited Sept. 14, 2013). Mexican law requires permits for all wildlife items entering or leaving the country. *Id.*

226. See Memorandum from the Office of the Att’y Gen. to Assistant Att’y Gen., Env’t and Natural Res. Div., *Memorandum on Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural or Religious Purposes* n. 7 (Oct. 12, 2012), available at <http://tinyurl.com/lpscb21> (last visited Sept. 14, 2013); *Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America*, *supra* note 225.

227. *Id.*

the Marine Mammal Protection Act (MMPA) being one example.²²⁸ The MMPA bans the import of marine mammals and marine mammal products into the U.S.²²⁹ The practical effect is “[a]n American Indian or Eskimo living one mile west of the Alaskan/Yukon border can sell traditional handicrafts made from seal skin into the ‘lower 48’, while a Canadian Aboriginal person living one mile east of the same border, cannot do so.”²³⁰

As long as border security and species protection are the realities of the world we live in, they may continue to impact aboriginal cross-border commerce and customs. However, it is possible to mitigate adverse effects through recognition of Jay Treaty principles, encouragement of cross-border relationships, and inclusion of indigenous border peoples’ opinions and respect for their customs in the development of the laws and policies impacting traditional ways of life.

D. Public benefit programs

Sweeping welfare reform in 1996 had the effect of precluding most non-citizens from receiving federally-funded means-tested public benefits.²³¹ Generally, foreign nationals may receive means-tested benefits, only after maintaining status as a lawful permanent resident for five years.²³² Nonetheless, ABCs are treated as U.S. citizens for purposes of certain public benefit programs.²³³ These programs include

228 See GASTLE, *supra* note 216, at ch. 3.1; *Marine Mammal Protection Act*, 16 U.S.C. §§ 1361-1421h (1972).

229. GASTLE, *supra* note 216, at 19; *Marine Mammal Protection Act*, *supra* note 228.

230. GASTLE, *supra* note 216, at 21 (further noting that “Alaskan Inuit are also allowed to kill fifty bowhead whales a year, but Canadian Inuit are prohibited from trading in whale products of any kind. If the objective of the legislation is to protect marine mammals, there is no logical basis to distinguish exemptions given to U.S. and Canadian Aboriginals with respect to personal consumption, subsistence and traditional handicrafts.”). Gastle goes on to assert that “[w]ith respect to this kind of legislation, there should be a general presumption that Canadian and American Aboriginal peoples should be treated equally.” *Id.* One might continue this line of reasoning and argue that rather than being *two* separate groups that should be treated equally, this is *one* group of American Indians who are being treated differently based on which side of the border they happen to live, which begins to sound like an equal protection violation.

231. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 [hereinafter PRWORA]. Cf. *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999) (holding that PRWORA’s eligibility bar to non-citizens passes the 14th Amendment rational basis test, noting that it was not “wholly irrational” to exempt ABCs “given the historically unique relationship of Indians to this country”).

232. 8 U.S.C. § 1613(a) (2006).

233. See, e.g., *Workers’ Action Guide 03-01-02-b*, ILLINOIS DEP’T OF HUMAN SERV., available at <http://tinyurl.com/l36zlgj> (last visited Sept. 14, 2013) (noting that ABCs may reside in U.S. without “INS” documentation, and explaining what the non-citizen could provide to demonstrate this status).

the Supplemental Nutrition Assistance Program (SNAP; commonly known as Food Stamps), Social Security Insurance, and Medicaid.²³⁴ If the individual has not acquired documentation of his status through the immigration agencies, the Social Security Administration may make its own determination.²³⁵

The U.S. Department of Health and Human Services' Administration for Children and Families has advised ABCs are to be treated as non-citizens for eligibility for the cash benefits program, Temporary Aid for Needy Families (TANF).²³⁶ But at least three states—Alaska, Colorado, and North Dakota—treat such individuals as qualified non-citizens for TANF eligibility.²³⁷

At least one court has held an ABC qualifies as an “Indian person” belonging to an “Indian tribe” for purpose of the Indian Child Welfare Act (ICWA),²³⁸ a 1978 law impacting placement of Indian children removed from their homes with non-Indian families.²³⁹

234. 8 U.S.C. § 1612(1)(2)(G)(i) (2006) (ABCs are exempt from the alienage restriction on means-tested public benefits); 7 C.F.R. § 273.4(a)(3)(i) (2013) (ABCs meet the citizenship requirements for SNAP). *Cf.* U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: GUIDANCE ON NON-CITIZEN ELIGIBILITY 26 (June 2011), available at <http://tinyurl.com/3o5sujx> (last visited Sept. 14, 2013) (offering guidance for documenting the individual's status as a qualifying American Indian for purposes of SNAP); U.S. SOCIAL SEC. ADMIN., *Program Operations Manual System, SI 00502.105: Exemption from Alien Provisions for Certain Noncitizen Indians* (2008), available at <http://tinyurl.com/k7s7t9s> (last visited Sept. 14, 2013) (offering guidance for documenting status for purposes of Social Security benefits). *See also* Rodriguez v. United States, 169 F.3d 1342 (11th Cir. 1999) (holding a rational basis exists for exempting ABCs from the alienage restriction on means-tested public benefits). *See also* Dep't of Justice, *Affidavits of Support on Behalf of Immigrants*, 62 Fed. Reg. 54346, 54350 (Oct. 20, 1997) (“American Indians born in Canada referred to in section 289 of the Act are exempt from the 5-year ban with respect to SSI and Medicaid benefits only”).

235. *Program Operations Manual System*, *supra* note 234.

236. Public Announcement, U.S. Dep't of Health and Human Servs. Admin. For Children and Families, Eligibility of Native Americans Born in Canada or Mexico for Federal TANF and State Maintenance-of-Effort (MOE) Benefits, TANF-ACF-PA-2005-01 (Nov. 15, 2005), available at <http://tinyurl.com/ask5ft> (last visited Sept. 14, 2013). *See* 8 U.S.C. § 1641 (2006) (defining “qualified aliens”).

237. Issue Brief, U.S. Dep't of Health & Human Serv., Overview of Immigrants' Eligibility for SNAP, TANF, Medicaid, and CHIP n. 11 (March 2012), available at <http://tinyurl.com/nxd4kzz> (last visited Sept. 14, 2013).

238. *In re the Adoption of Linda J.W.*, 682 N.Y.S.2d 565 179 Misc.2d 96 (N.Y. Fam. Ct. Dec. 1, 1998). *See* 25 U.S.C. § 1901, *et seq.* (2006).

239. *See Frequently Asked Questions About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, <http://tinyurl.com/kdetkny> (last visited Sept. 14, 2013).

E. Civil damages

In the 1978 case of *Matter of Yellowquill*, the BIA squarely held ABCs are exempt from all grounds of deportation.²⁴⁰ What recourse might lie if an ABC is removed in violation of this long-established rule? In at least one case an ABC has brought a damages claim for violations of his Jay Treaty rights. That case is summarized here, though a full analysis of possible damages claims is beyond the scope of this article.

In *MacDonald v. U.S.* a full-blood ABC, admitted to the U.S. as a permanent resident, was placed into removal proceedings after pleading guilty to a drug offense.²⁴¹ Mr. MacDonald conceded removability to avoid prolonged detention and was then long-delayed reentering the U.S.²⁴² Finally the government recognized its error and rescinded the removal order.²⁴³ Mr. MacDonald then commenced a *Bivens* lawsuit²⁴⁴ seeking compensatory and punitive damages under four causes of action: (1) Fourth Amendment violations; (2) Fifth Amendment violations; (3) violations of the Non-Detention Act and (4) violations of the Federal Tort Claims Act.²⁴⁵ The defendants asserted grounds of dismissal under the jurisdiction-stripping provision at 8 U.S.C. § 1359 and immunity grounds.

All claims were dismissed, except that the plaintiff was given leave to amend Fifth Amendment claims against two individual defendants. The court concluded that Mr. MacDonald's Fifth Amendment claim did not fall under U.S.C. § 1359 because it embraced the government's conduct prior to "commencement" of removal proceedings, when defendants failed to acknowledge the implication of Mr. MacDonald's S13 category permanent resident card.²⁴⁶ A plausible Fifth Amendment case might have lay against the DHS official whose signature was on the document executing Mr. MacDonald's removal, but the complaint had failed to allege facts showing personal participation in the "apprehension, detention or removal" of the plaintiff.²⁴⁷ Claims against the government prosecutor were generally barred by absolute immunity, though the Court

240. 16 I. & N. Dec. 576, 577 (BIA 1978). See text accompanying notes 203–205 (discussing the case).

241. *MacDonald v. United States*, 2011 U.S. Dist. LEXIS 148409, at *2–3 (S.D. Cal. Dec. 23, 2011) (order granting defendants' motion to dismiss or, in the alternative, for summary judgment).

242. *Id.* at 5–6.

243. *Id.*

244. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

245. *MacDonald*, 2011 U.S. Dist. LEXIS 148409, at *6.

246. *Id.* at *20. See *infra* Part V.B (explaining that I-551 permanent residency cards issued to ABCs should receive designation as S13 to indicate the individual's status as a bona fide ABC).

247. *MacDonald*, 2011 U.S. Dist. LEXIS 148409, at *30.

recognized the possibility that a Fifth Amendment claim might lie if the individual had participated in actionable conduct that was investigatory rather than prosecutorial in nature.²⁴⁸

F. Affirmative defense to illegal entry/reentry

Bona fide status as an ABC may be an affirmative offense to a criminal charge of illegal entry under 8 U.S.C. § 1325(a) or illegal reentry under 8 U.S.C. § 1326(a).

A non-citizen commits an offense under 8 U.S.C. § 1325(a) if the non-citizen:

- (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
- (2) eludes examination or inspection by immigration officers, or
- (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact. . . .

In *Perrault v. Larkin* a purported ABC brought a habeas action to challenge his detention following conviction for illegal entry.²⁴⁹ The petitioner argued the conviction constituted a restraint on his right of free passage.²⁵⁰ The court did not reach the merits of the argument as the petitioner had failed to prove the requisite blood quota.²⁵¹ Exemption from 8 U.S.C. § 1325(a) would require an expansive reading of the right of free passage. The federal government may impose regulatory restrictions on the entry of ABCs (such as the procedures for recognition of status described below), and it seems like the government possesses authority to enforce these restrictions.²⁵²

A more viable argument lies regarding illegal reentry under 8 U.S.C. § 1326(a). A non-citizen commits an offense under this provision if she:

248. *Id.* at *35–36.

249. *Perrault v. Larkin*, 2005 WL 2455351 (D. Kan. Oct. 5, 2005). See also *United States v. Malachowski*, 425 Fed.Appx. 307, 312-13 (2d Cir. March 23, 2011) (refusing to address for the first time on appeal whether the defendant charged under 8 U.S.C. § 1325(a) could assert an affirmative defense under 8 U.S.C. § 1359).

250. *Perrault v. Larkin*, 2005 WL 2455351, at *2 (D. Kan. Oct. 5, 2005).

251. *Id.*

252. See *infra* Parts IV.A and IV.B.

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act .

²⁵³

First, as described above, ABCs cannot be denied admission,²⁵⁴ and are not subject to exclusion, deportation, or removal.²⁵⁵ Hence any order required by 8 U.S.C. § 1326(a)(1) will necessarily have been erroneously issued. Second, requiring an ABC to seek consent for reentry constitutes a clear restraint on the right of free passage guaranteed by INA § 289.²⁵⁶ 8 U.S.C. § 1326(a)(b)(B) expressly provides consent is not required if an exemption is provided for in the INA.

V. PROCEDURES

Neither the INA nor its regulations set forth specific procedures to establish bona fide status as an ABC. However, both U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS) have promulgated informal guidance in this regard. Especially because of the lack of formal regulations governing the application processes, there is cause for concern that ABCs may encounter confusion when seeking to assert their rights before the immigration agencies.²⁵⁷

253. 8 U.S.C. § 1326(a)(1)-(2).

254. *See supra* Part IV.A.

255. *See supra* Part IV.B.

256. *See supra* Part IV.A.; *United States v. Curnew*, 788 F.2d 1335 (8th Cir. 1985) (holding a Canadian national failed to prove his status as an ABC, which he raised as a defense to an illegal reentry charge).

257. *See* Caitlin C.M. Smith, *The Jay Treaty Free Passage Right in Theory and Practice*, 1 AMER. INDIAN L. J. 161, 164 (Fall 2012) (suggesting the right of free passage is "ripe" for misinformation from the several agencies involved).

A. Documenting status at a port of entry

An ABC may apply for admission at any port of entry.²⁵⁸ As with any non-citizen, ABCs must prove eligibility for entry in their asserted status, that is, as an American Indian born in Canada.²⁵⁹ There is some cause for concern that CBP agents may be ill-informed about Jay Treaty crossing rights, so an ABC should be prepared for self-advocacy at the time of entry to the U.S.²⁶⁰

When the ABC presents for entry as a permanent resident, CBP will review all documentation submitted by the ABC to support the individual's claimed status. This evidence may include the following documents—sworn statements alone are insufficient:

Documentation to establish membership, past or present, in each Band or tribe for yourself and every lineal ancestor (parents and grandparents) through whom you have derived the required percentage of American Indian blood. This documentation must come from the official tribal government or from Indian and Northern Affairs Canada (INAC).²⁶¹

An applicant would be unwise to rely on an expert declaration regarding American Indian ancestry, unless the expert can reliably attest that the

258. Cf. U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR'S FIELD MANUAL (2006) § 11.3(a) [hereinafter IFM].

259. AFM, *supra* note 90, at § 23.8(a).

260. One researcher reports one of four CBP agents interviewed was unaware of Jay Treaty crossing rights, though these numbers are too small to draw generalizable inferences. Smith, *supra* note 2577, at 172. See also Lornet Turnbull, *Canadian Indian Wonders Why U.S. Yanking Back Welcome Mat*, SEATTLE TIMES, Jan. 15, 2008, <http://tinyurl.com/qazm8os> (last visited Sept. 14, 2013) (reporting on an ABC placed into immigration court proceedings possibly based on physical appearance as an individual of European ancestry, despite history of travel to the U.S. as an ABC); Daniel C. Horne, *Requests for Evidence*, 10 BENDER'S IMMIGR. BULL. 1741, 1742 (Nov. 15, 2005) ("You might not want to assume that the US Customs and Border Protection officer on duty at a given US-Canada port of entry . . . will automatically be aware of this provision of the law.").

261. IFM, *supra* note 2588, at 11.3(a); *Green Card for an American Indian Born in Canada*, *supra* note 100. For requirements of admission to the U.S. (not to document ABC status), see also *Travel Documents for Native Americans, Including U.S., Canadian and Mexican Born Members of U.S. Tribes*, U.S. DEP'T OF HOMELAND SEC. CUSTOMS AND BORDER PROT. (last modified July 29, 2013), <http://tinyurl.com/lnagha7> (last visited Sept. 14, 2013). Nor will the U.S. recognize a passport issued by a tribe. See, e.g., Verena Dobnik and Eva Dou, *Iroquois May Miss Lacrosse Tourney Over Visa Dispute*, SEATTLE TIMES, July 13, 2010, <http://tinyurl.com/ksrfjjo> (last visited Sept. 14, 2013) (reporting U.S. refusal to acknowledge validity of passport issued by Iroquois nation); Press Briefing, U.S. Dep't of State Bureau of Pub. Affairs, Iroquois Lacrosse Team: Iroquois Passports (Taken Question), July 13, 2012, available at <http://tinyurl.com/khs72hd> (last visited Sept. 14, 2013) ("Requiring U.S. citizen tribal members to carry U.S. passports for this air travel into and out of the United States is not a violation of treaty obligations.").

applicant meets the bloodline requirement.²⁶² Applicants should be aware that the Canadian Certificate of Indian Status (Form IA-1395), which specifies tribal affiliation, does not indicate percentage of Indian blood.²⁶³ An ABC arriving by air must possess a current passport; no passport is required at a land port of entry.²⁶⁴ CBP will then complete a central index check and open an alien file at the port of entry.²⁶⁵ For any applicant over 14 years of age, CBP will initiate an Interagency Border Inspection Systems check.²⁶⁶ However, as discussed above, ABCs are not subject to criminal grounds of inadmissibility and the results of the background check may not serve to deny admission.²⁶⁷

If the documentation is adequate, CBP will fingerprint the applicant and register the entry on a Form I-181, Memorandum of Creation of Record of Admission for Lawful Permanent Residence.²⁶⁸ The words “Canadian born American Indian admitted for permanent residence” should be endorsed on the Form I-181 and under the box marked “Other Law” § 289 must be indicated.²⁶⁹

The ABC will then be asked to complete a Form I-89, Data Collection Card, and submit fingerprints and a photograph.²⁷⁰ The completed I-89 is forwarded to the USCIS Texas Service Center²⁷¹ with a copy of the Form I-181, for issuance of an I-551 Permanent Residence Card.²⁷²

CBP will also forward a set of fingerprints to the FBI. Although criminal grounds of inadmissibility may not be used to deny entry,²⁷³ the prints might serve several law enforcement purposes. For example, if DHS believes that an I-551 card issued to an ABC has been lost, stolen,

262. *Cf. Curnew*, 788 F.2d 1335 (holding the trial court did not abuse its discretion in refusing to allow the testimony of an expert who conceded she could not testify the defendant met the bloodline requirement).

263. IFM, *supra* note 2588, at § 11.3(a).

264. *Travel Documents for Native Americans, supra* note 2611; *Visiting the U.S. - Documents Required for Canadian Citizens/Residents/Landed Immigrant to Enter the U.S. and How Long They Can Stay*, U.S. DEP'T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., <http://tinyurl.com/qc5a964> (last visited Sept. 14, 2013).

265. IFM, *supra* note 2588, at § 11.3(b).

266. *Id.*

267. *See supra* Part IV.B. *See also* AFM, *supra* note 90, at § 23.8(a) (ABC is entitled to recognition of status even if subject to ground of inadmissibility or previously deported).

268. 8 C.F.R. § 289.3 (2013) (“[t]he lawful admission for permanent residence of an American Indian born in Canada shall be recorded on Form I-181”); IFM, *supra* note 2588, at § 11.3(b).

269. IFM, *supra* note 2588, at § 11.3(b).

270. *Id.*

271. *Id.* at app. 15-8.

272. *Id.* at 11.3(b). The applicant must provide a U.S. mailing address to which the card can be mailed.

273. *Id.*

or borrowed, and is being used for border crossing or employment purposes by a person to whom it was not issued, comparing the fingerprints of the person to whom the card was issued to those of its current holder can provide proof of identity. Similarly, an ABC who has the right of free access could still pose other law enforcement concerns, such as drug smuggling, and the fingerprints would provide this information. In such cases the ABC could not be barred from the U.S., but most likely the ABC would be searched upon each entry to the U.S.

This procedure initiates recognition the ABC's status as a permanent resident of the U.S. As discussed in Part V.C, the ABC should make an informed decision about whether the ABC desires permanent resident status.

B. Documenting status within the U.S.

An ABC may apply to USCIS without fee to seek recognition of his status.²⁷⁴ Such an application seeks recognition of the individuals existing status as a *de jure* lawful permanent resident; it is not an application for a new status.²⁷⁵

Adjudicators have no authority to deny such an application as an exercise of discretion.²⁷⁶ Indeed, The *Adjudicator's Field Manual* (AFM) states an ABC is entitled to proof of lawful permanent resident status even if subject to one or more grounds of inadmissibility or has been previously deported.²⁷⁷ To apply, the individual should schedule an Infopass appointment.²⁷⁸ No fee or formal application is required.²⁷⁹ The individual should bring the following documents:

- Two passport-style photos;
- A copy of government-issued photo identification;
- The individual's long-form Canadian birth certificate; and

274. *Green Card for an American Indian Born in Canada*, *supra* note 100. Note that the DOS website for the embassy in Canada incorrectly reports that an ABC must file an I-485 application. *First Nations and Native Americans*, *supra* note 4 ("Canadian-born American Indian cannot be denied [permanent resident] status, but is required to complete the I-485 in order to receive any benefits under U.S. federal law.").

275. *See* AFM, *supra* note 90, at § 23.8(a) ("USCIS is not adjudicating an application to become a lawful permanent resident, USCIS is verifying a status which the person already has and issuing documentation thereof.").

276. *Id.* at § 23.2(d) (listing ABC applications for permanent residency as one not involving discretion).

277. *Id.* at § 23.8(a).

278. *Id.*

279. *Id.*

- Documentation of tribal membership and bloodline.²⁸⁰

The AFM sets forth the following guidelines regarding documentation of the bloodline requirement:

The applicant bears the burden of proof in establishing eligibility. Usually, this is accomplished by presenting identification such as a tribal certification that is based on reliable tribal records, birth certificates, and other documents establishing the requisite percentage of Indian blood. The Canadian Certificate of Indian Status (Form IA-1395) issued by the Canadian Department of Indian Affairs in Ottawa specifies the tribal affiliation but does not indicate percentage of Indian blood. Membership in an Indian tribe in Canada does not necessarily require Indian blood.²⁸¹

The USCIS website describes far more burdensome requirements for documenting the bloodline requirement:

Bring the following to your appointment: . . . Documentation to establish membership, past or present, in each Band or tribe for yourself and *every lineal ancestor (parents and grandparents) through whom you have derived the required percentage of American Indian blood*. This documentation must come from the official tribal government or from Indian and Northern Affairs Canada (INAC).²⁸²

It is unclear whether USCIS enforces the strict documentation requirement described on its website. The online guidance was posted in 2011, whereas the less rigorous AFM provision is reflected in the current 2013 edition. If USCIS requires documentation of every lineal ancestor, ABCs who have the option practically available may wish to pursue adjudication of status through CBP at a port of entry rather than via USCIS.

If the ABC is 14 years of age or older, her fingerprints will be taken for the file but are not forwarded to the FBI for screening, presumably because criminal grounds of inadmissibility are inapplicable.²⁸³ Similarly, a medical examination is not required.²⁸⁴

If the documentation is acceptable, the adjudicator will complete Form I-181, Memorandum of Creation of Record of Admission for

280. *Id.*

281. *Id.*

282. *Green Card for an American Indian Born in Canada*, *supra* note 100 (emphasis added).

283. AFM, *supra* note 90, at § 23.8(b).

284. *Id.* at § 40.1(d)(12) (“Because neither an immigrant visa nor an adjustment of status application is required, the applicant is not required to comply with the medical examination and vaccination requirements.”).

Lawful Permanent Residence.²⁸⁵ A notation should be made reading, “Canadian-born American Indian admitted for permanent residence” and an indication made the status is under INA § 289.²⁸⁶ The I-181 is forwarded to the Texas Service Center for processing accompanied by Form I-89, Data Collection Card, showing the ABC’s class of admission as S13.²⁸⁷ The ABC should be issued a temporary I-551 for use while their permanent documentation is processed.²⁸⁸

Identification, such as tribal certification based on reliable tribal records, birth certificates, and other documents establishing the bloodline requirement, will usually prove one’s eligibility. However, applicants should note the Canadian Certificate of Indian Status (Form IA-1395) issued by the Canadian Department of Indian Affairs in Ottawa does not indicate percentage of Indian blood.

If records show the applicant has already been accorded creation of a record of lawful permanent admittance and has been issued a Permanent Resident Card, the AFM advises a Form I-90 Application to Replace Permanent Resident Card should be filed with the requisite fee. The AFM directs the reader to Chapter 51 for instructions and processing requirements of such applications.

Where an individual applies within the U.S. for recognition of status as an ABC, USCIS maintains denials of such an application are non-reviewable.²⁸⁹ This position is described in the AFM but is not codified in regulations.²⁹⁰ Presumably, such denials are without prejudice to future application.

C. Work Authorization

All employers within the United States must verify the work eligibility of every employee hired after November 6, 1986 within three working days of hire; newly hired employees must complete and sign Form I-9 no later than the first day of employment.²⁹¹ To prove the employee is authorized to work in the U.S., the employee must produce

285. *Id.* at § 23.8(b) (cross-referencing IFM, app. 15-8).

286. *Id.*

287. *Id.*

288. *Id.*

289. AFM, *supra* note 90, at § 23.8(b).

290. 8 C.F.R. § 103.3(a)(ii) cross-references 8 C.F.R. § 103.1(f)(2) for a list of agency adjudications appealable to the Associate Commissioner, Examinations (*i.e.*, Administrative Appeals Office), but the latter regulation was repealed. See *Immigration Benefits Business Transformation, Increment I*, 76 Fed. Reg. 53764, 53780 (Dep’t of Homeland Sec. Aug. 29, 2011).

291. *Instructions for Employment Eligibility Verification*, U.S. DEP’T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS. (Mar. 8, 2013), <http://tinyurl.com/y9e22k> (last visited Sept. 14, 2013).

one document satisfying both identity and employment eligibility as set forth in List A, or documentation fulfilling both the List B identity requirement and List C employment eligibility requirement.²⁹²

An ABC producing documentation as a permanent resident of the U.S. satisfies List A's requirements.²⁹³ However, an ABC without a permanent resident card may satisfy the requirements of Lists B and C,²⁹⁴ with many attendant issues regarding employment authorization arising when one considers such matters as the entry requirements for ABCs, the obligations the U.S. may impose on legal permanent residents (LPRs), and the E-Verify program.

ABCs wishing to exercise their right of free passage without permanently documenting bona fide status as an ABC must establish their bloodline every time they cross the border.²⁹⁵ Because of the time, uncertainties, and possible confusion involved in this endeavor,²⁹⁶ some ABCs instead choose to formally become LPRs²⁹⁷ simply as a means of documenting their Jay Treaty status and avoiding this stressful and unpredictable procedure. In terms of work authorization, holding a permanent resident card will benefit the individual by fulfilling the I-9 requirement for documentation under List A, as discussed above, and streamlining the E-Verify process, as discussed below. However, LPR status carries certain responsibilities above and beyond those contemplated under the Jay Treaty.

Significantly, “[t]he IRS maintains that [LPRs] have the obligation to file certain U.S. documents relating to foreign income and assets,” creating “potentially onerous financial and disclosure consequences for

292. *Id.*

293. *Id.*

294. *Id.* Interestingly, tribal documentation does not depend on a 50% Indian bloodline, it does not itself establish its holder to be exempt from immigration restrictions to the U.S. as an ABC. *See Green Card for an American Indian Born in Canada*, *supra* note 100; *First Nations and Native Americans*, *supra* note 4. Thus, the Native American tribal documentation that fulfills the requirements of Form I-9 is insufficient to guarantee exemption from other restrictions of the INA, including Jay Treaty status. As many cases cited throughout this article reveal, a USCIS decision that a person does not qualify as an ABC may be challenged in exclusion or deportation proceedings. Alternatively, an applicant denied a benefit of INA § 289 may bring an Action for a Declaratory Judgment in federal court. *See Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974).

295. *Policy Makers, Please Provide a Beyond the Border “Fix” for American Indians Born in Canada*, PACIFIC CORRIDOR ENTERPRISE COUNCIL (Feb. 11, 2013), <http://tinyurl.com/nu2mvgs> (last visited Sept. 14, 2013). Of course, ABCs are also free to present their WHTI-compliant tribal identification for entry into the U.S. *See infra* Part V.D. However, such persons would be admitted as Canadian tourists in B-2 status, without the rights and benefits of ABC status.

296. Including misinformation regarding the required documentation, and border agents who are unfamiliar with the procedure. *See, e.g., Smith*, *supra* note 2577, at 166.

297. 8 C.F.R. § 289.2 (2010); 25 8 C.F.R. § 289.3 (2010). *See also Smith*, *supra* note 2577, at 168.

American Indians born in Canada who continue to reside in Canada.”²⁹⁸ The U.S. taxes its citizens on worldwide income; generally, the worldwide income of LPRs is taxed in the same way.²⁹⁹ For those who desire LPR status along with the rights and responsibilities that attend it, this is not a problem; however, for those who seek to become an LPR only as a means of documenting and securing their border crossing and employment rights under the Jay Treaty, the status may create unexpected and inappropriate obligations and is therefore not an ideal solution.³⁰⁰

298. *Policy Makers, Please Provide a Beyond the Border “Fix” for American Indians Born in Canada*, *supra* note 295; *Income From Abroad is Taxable*, INTERNAL REVENUE SERVICE, (last modified Jan. 23, 2013), <http://tinyurl.com/lyz3m6h> (last visited Sept. 14, 2013).

299. *Taxation of Resident Aliens*, INTERNAL REVENUE SERVICE, (last modified Apr. 17, 2013), <http://tinyurl.com/kvsm57g> (last visited Sept. 14, 2013).

300. In addition to taxation on worldwide income, Canadians who hold U.S. permanent resident status may be subject to both FBAR and FACTA compliance. FBAR is an acronym for the Foreign Bank Account Report, an annual report filed with the United States Treasury for U.S. citizens, permanent residents, and others to report the existence of foreign bank accounts and other financial accounts held abroad. Filing is required if a person subject to FBAR has \$10,000 or more held in a non-U.S. bank account at any time during the year. 31 U.S.C. § 5314; *Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERV. (last updated Feb. 3, 2014), <http://tinyurl.com/m9ds7d8> (last visited Apr. 10, 2014). FATCA is an acronym for the Foreign Account Tax Compliance Act, a statute that requires U.S. citizens, permanent residents, and others to report their financial accounts held outside of the United States, and requires foreign financial institutions to report to the Internal Revenue Service about FATCA covered clients. 26 U.S.C. § 1471–74; *see also Comparison of Form 8938 and FBAR Requirements*, INTERNAL REVENUE SERV., <http://tinyurl.com/bxkacz> (last visited Apr. 10, 2014) (comparing FATCA and FBAR requirements). The FACTA reporting requirements have created a strong reaction worldwide. First, there are the enormous administrative costs of compliance. The cost to large banks in Canada is estimated to be \$100 million. James Fitz-Morris, *Canadian banks to be compelled to share clients’ info with U.S.*, CBC NEWS POLITICS (Nov. 25, 2013, 5:09 AM), <http://tinyurl.com/m63ubxc>. Rather than shoulder such immense costs, banks worldwide have been closing the accounts of U.S. citizens. *See, e.g., Ari Shapiro, Why More Americans are Renouncing U.S. Citizenship Abroad*, NPR: PARALLELS (Feb. 20, 2014, 3:42 AM), <http://tinyurl.com/mzrlroh> (“They canceled the accounts of just about every American in Europe,” says retiree John Mainwaring, “including me.” Seventy-year-old Mainwaring grew up in Ohio, served in the U.S. Army, and has lived in Munich, Germany, for about 40 years. After his old German banks kicked him out, he tried to find new ones that would take him in. “I went everywhere,” he says, “to every bank in Germany. The problem is, the ones here don’t deal with Americans.”). In response to this situation, many U.S. citizens choose to renounce their U.S. citizenship. Ari Shapiro, *Why More Americans are Renouncing U.S. Citizenship Abroad*, NPR: PARALLELS (Feb. 20, 2014, 3:42 AM), <http://tinyurl.com/mzrlroh> (“I want to be clear: It’s not about a dollar value of taxes that I don’t want to pay,” says Brian Dublin, a businessman who lives near Zurich. “It’s about the headache associated with the regulations, filing in the U.S., and then having financial institutions in the rest of the world turn me away.”). Furthermore, it has been suggested that compliance with FACTA violates Canada’s constitution. *See, e.g., James Fitz-Morris, Canadian banks to be compelled to share clients’ info with U.S.*, CBC NEWS POLITICS (Nov. 25, 2013, 5:09 AM), <http://tinyurl.com/m63ubxc> (last visited Apr. 10, 2014) (“Constitutional lawyer and expert Peter Hogg wrote . . . ‘To impose on financial institutions the duty to report to CRA (en route to the IRS) the names, addresses, place of birth and date of birth and details of the bank accounts of

Those ABCs who choose not to become LPRs and instead exercise their right of free passage by establishing bloodline at each entry into the U.S. may or may not be able to fulfill Form I-9 requirements under Lists B and C by presenting a Native American tribal document. USCIS is ambiguous in its description of what qualifies as a Native American tribal document, other than advising “the tribal document *should* be issued *by a tribe* recognized by the U.S. federal government.”³⁰¹ The INAC card does not suffice as a Native American tribal document because it is issued by a body “which is a part of the Canadian government,” and not by a federally-recognized tribe.³⁰²

Under this policy, ABCs who are not documented as LPRs can only satisfy the documentary requirements of Form I-9 if they are also members of a federally-recognized U.S. tribe. However, this is incongruent with the policy and purpose behind the Jay Treaty.

ABC status affords an individual the full right to work in the U.S. Documenting oneself as an ABC is not contingent upon possessing a Native American tribal document; tribal affiliation may be evidenced³⁰³ with an INAC card.³⁰⁴ Furthermore, there are many individuals who

account-holders identified only by their place of birth in or citizenship of the United States, and all under the implicit threat of taxes, penalties or prosecutions by the IRS, seems to me to be a clear case of discrimination in contravention of [Section] 15 [Canadian Charter of Rights and Freedoms].” He goes on to say: “There is no mechanism in the Model IGA whereby individuals who are suspected to be U.S. citizens would even know that their personal information was provided . . . thus there may be no opportunity to provide additional information or take other steps in order to prevent the transmission of this information from Canada.’ At best, Hogg believes, it is an infringement ‘of liberty and privacy,’ but possibly also violations of at least three sections of the [Canadian Charter of Rights and Freedoms].”).

301. U.S. DEP’T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., M-274 HANDBOOK FOR EMPLOYERS: GUIDANCE FOR COMPLETING FORM I-9 42–43 (2013), available at <http://tinyurl.com/2unnff2> (last visited Sept. 14, 2013) (emphasis added). USCIS advises that “[e]ach of the 564 federally recognized tribes may issue its own unique tribal document based on private tribal information. USCIS does not have examples of these tribal documents nor can it provide guidelines on specific tribal documents.” U.S. DEP’T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *I-9 Central Questions and Answers*, <http://tinyurl.com/n6fs3kh> (last visited Sept. 14, 2013) (emphasis added).

302. M-274 HANDBOOK FOR EMPLOYERS: GUIDANCE FOR COMPLETING FORM I-9 42–43 (2013), *supra* note 301 (emphasis added).

303. While it is accepted for proof of tribal membership, it is by itself insufficient to satisfy the bloodline requirement.

304. This presumably creates a confusing situation for those who use the card to help document their status as an ABC (a status which allows them the right to work unrestricted by U.S. immigration laws), but are then unable to present the card to prove their right to work in the U.S. Furthermore, the INAC card it is currently being accepted as proof of identification under WHTI — one could fairly assume that a WHTI-compliant document would be sufficient to establish at least identity for I-9 purposes. For a discussion on WHTI, *see infra* Part V.D.

qualify as ABCs but are not registered with any Indian tribe in Canada—Inuit, Métis, and métis, for example.³⁰⁵

Thus, as it currently stands, if an individual meets the independent requirements of being an ABC, they may still not be able to document their work authorized status if they do not document their LPR status—despite Jay Treaty guarantees of ability to work and live in the U.S.

These considerations raise further complications when one considers the E-Verify program. E-Verify is an electronic employment verification program administered by USCIS; while today the program is largely voluntary,³⁰⁶ recent legislative proposals have called for it as a requirement imposed on all U.S. employers.³⁰⁷ The goal of the system is to ensure those holding jobs in the U.S. are authorized for employment;³⁰⁸ it screens for individuals who are not authorized to accept employment, or who are using false documentation.

ABCs documented as LPRs should encounter minimal issues under E-Verify, as it should easily confirm their authorization to work.³⁰⁹ However, those ABCs who choose not to document as LPRs may not receive an Alien Number or Admission Number upon entry, which could cause E-Verify to flag that individual as being unauthorized to work,³¹⁰ despite the fact that they actually have an unrestricted right to live and work in the U.S. Being incorrectly flagged as unauthorized is at the very least troublesome, and may contribute to post-hiring discrimination.³¹¹ However, in the likely event that E-Verify becomes mandatory for all employers, many ABCs will experience an unanticipated new barrier

305. See *supra* Part II.B. See also *First Nations and Native Americans*, *supra* note 4.

306. Andorra Bruno, *Electronic Employment Eligibility Verification*, CONGRESSIONAL RESEARCH SERVICE, March 19, 2013. While the program started out entirely voluntary, it is now a requirement for certain federal employers and contractors. *Id.* at 5.

307. *Id.* at 7. See also Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. *Border Security, Economic Opportunity, and Immigration Modernization Act*, Sec. 6 (3)(E)(xv), available at <http://tinyurl.com/kw5sdbb> (last visited Sept. 7, 2013).

308. Bruno, *supra* note 306, at 7.

309. For a discussion on the accuracy of E-Verify (or lack thereof), see *id.* at 12–13.

310. See also Smith, *supra* note 67, at 177 (explaining problems can arise for ABCs with E-Verify where an individual “chose not to become a legal permanent resident, lacked required documentation [such as the long-form birth certificate], or was admitted by a CBP officer who did not realize that he needed to create a record.”).

311. Bruno, *supra* note 306 (citing Westat Report, December 2009, p. 235). This may result in “missed work time to contest the finding and associated financial costs,” in the employee quitting their job, or even in the employee being fired. *Id.* For a discussion of the vulnerabilities beyond the employment realm posed by entering the United States under the Jay Treaty but *not* documenting as an LPR, see Smith, *supra* note 2577, at 164–65 (musing that “[a] Jay Treaty migrant caught in a traffic stop might find himself in jail if he failed to persuade state officers that a little-discussed eighteenth-century treaty gave him the right to enter the country.”).

to their legal right to work in the U.S.—a result fully inconsistent with the intent of the Jay Treaty.

With the advent of increased border security and programs such as E-Verify, an option must be created for ABCs that allows them to exercise their right to enter and work in the U.S. on a temporary or recurring basis without incurring the duties that documenting as an LPR entails, or the vulnerabilities implicit in choosing not to document as an LPR.³¹²

An ideal solution lies in creating a non-expiring Jay Treaty Card to document the holder's legal rights and status under the Jay Treaty, including the right to work. Upon an individual's initial adjudication as eligible by the CBP, the ABC could be issued the card upon entry. This card, which would bear the holder's photo and contain WHTI-compliant security elements, would not only save the ABC a lengthy and inconvenient adjudication at each border entry, but would also save the CBP "the time of having to make repeated adjudications of the same technical issue for the same person. . . . It would speed the crossings of those entitled to Jay Treaty Status and free up CBP inspectors for duties other than repeated bloodline adjudications."³¹³ The procedure could be done in a manner similar to that which would occur if the individual applied for legal permanent residence. The Jay Treaty Card could be included in Form I-9 under List A as a document that establishes identity and employment authorization, and be included in the databases searched by E-Verify. Similarly, for those who hold Canadian passports (taking note that ABCs are exempt from passport requirements), a stamp denoting Jay Treaty Card status could be utilized, besides or as an alternative to the issuance of a physical Jay Treaty Card. This passport/stamp combination could be then included as an acceptable document under I-9 List A, as an alternative to the Jay Treaty Card itself. Presuming the individual's status is updated in the appropriate database in the same way as those who are issued Jay Treaty Cards, this option should also work with E-Verify.

D. Western Hemisphere Travel Initiative (WHTI)

The Western Hemisphere Travel Initiative (WHTI) may affect the ability of qualifying ABCs to cross the border freely. WHTI—a result of the Intelligence Reform and Terrorism Prevention Act of 2004

312. See Smith, *supra* note 2577.

313. *Policy Makers, Please Provide a Beyond the Border "Fix" for American Indians Born in Canada*, *supra* note 2955.

(IRTPA)³¹⁴—requires U.S. and Canadian travelers to present a passport or other approved document denoting identity and citizenship when entering the U.S.³¹⁵ At present, Indians are able to present tribal documents, including the INAC card.³¹⁶ In December 2009, Aboriginal Affairs and Northern Development Canada began issuing a “Secure Certificate of Indian Status” (SCIS) card.³¹⁷ Both the SCIS and older “Certificates of Indian Status” are accepted by CBP as valid identity documents,³¹⁸ but this rule is not codified and there is no guarantee CBP will not reverse or modify current practice.

Form I-872 American Indian Card is a WHTI-compliant card issued to Texas and Oklahoma Kickapoo including the tribe’s Mexican members.³¹⁹ As discussed in Part III above, Texas and Oklahoma Kickapoo tribal members who bear this card are exempt from visa and passport requirements when crossing into the U.S. at land borders (both the U.S./Mexico border and the U.S./Canada border), with Mexican tribal members exempted from I-94 requirements in certain circumstances.³²⁰

Relatedly, DHS has begun work with several U.S.-based tribes to develop a WHTI-compliant Enhanced Tribal Card (ETC). These tribes include: the Seneca Nation of New York; Tohono O’odham of Arizona; the Coquille of Oregon; and the Hydaburg of Alaska. In 2011, the Pascua Yaqui Tribe of Arizona and the Kootenai Tribe of Idaho began issuing a DHS-approved ETC as stand-alone identification document for WHTI.³²¹

314. Pub. L. 108-488, 118 Stat. 3638 (2004).

315. See U.S. DEP’T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Information on the WHTI for Special Audiences*, <http://tinyurl.com/yfmo456> (last visited Sept. 14, 2013). Initially, following promulgation of WHTI, CBP had advised that after June 1, 2009 it would accept only enhanced tribal enrollment and identification card. U.S. DEP’T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *FAQs: Publication of Western Hemisphere Travel Initiative (WHTI) Land and Sea Final Rule*, available at <http://tinyurl.com/lu9z25j> (last visited Sept. 14, 2013).

316. U.S. DEP’T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Western Hemisphere Travel Initiative, Document Requirements for Land and Sea Travel*, <http://tinyurl.com/6roxazt> (last visited Sept. 14, 2013). Although DHS is presently accepting tribal ID cards, if it were to require an “enhanced” identification it is unclear how U.S. and/or Canadian tribal groups would find funding to implement a program to satisfy the requirement.

317. See GOV’T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV., *Border Crossing: What You Should Know*, <http://tinyurl.com/optpwje> (last visited Sept. 14, 2013).

318. *Id.* See also *infra* note 319.

319. U.S. DEP’T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Fact Sheet: Western Hemisphere Travel Initiative Protection (2009)*, available at <http://tinyurl.com/kd3r4ab> (last visited Sept. 14, 2013); *Travel Documents for Native Americans*, *supra* note 2611.

320. See *supra* Part III; 8 C.F.R. § 212.1(c)(1)(ii) (2013); 8 C.F.R. § 235.1(h)(1)(iii)(A), (v) (2013).

321. *Travel Documents for Native Americans*, *supra* note 2611; News Release, Dep’t of Homeland Sec., Pascua Yaqui ETC Officially Designated as WHTI-Compliant Travel Card (Jun. 9,

If WHTI requirements are not modified for ABCs, their Jay Treaty right of free passage will remain limited.³²² A non-expiring WHTI-compliant Jay Treaty Card, as suggested above in Part IV.C, would remedy this situation.³²³ The Jay Treaty Card would differ from WHTI-compliant ETCs in that it would also serve to establish both identity and work authorization for I-9 purposes.

One author has suggested DHS formalize a “government-to-government” relationship with the various tribes, perhaps going so far as to create an office of tribal affairs and tribal policy to work side by side with DHS on aboriginal border issues.³²⁴ DHS has since established a Tribal Desk within its Office of Intergovernmental Affairs (IGA), however it provides no indication it is working on the various problems experienced by ABCs.³²⁵

VI. CONCLUSION

Qualifying American Indians born in Canada enjoy a right of free access to the United States unrestricted by the Immigration and Nationality Act. This right, which has strong and important historical roots, is somewhat of an immigration anomaly as qualifying ABCs enjoy privileges unparalleled by all but U.S. citizens to enter and remain in the

2011), available at <http://tinyurl.com/lb3scmn> (last visited Sept. 15, 2013); News Release, Dep’t of Homeland Sec., CBP Designates Kootenai Tribe’s Enhanced Tribal Card as Acceptable Travel Document (Jan. 31, 2012), available at <http://tinyurl.com/15jtsku> (last visited Sept. 15, 2013).

322. In promulgating its implementing regulations for the IRTPA, the Department of Homeland Security took the view the ABC right of free passage was not denigrated by WHTI’s documentation requirements. Dep’t of Homeland Sec., *Final Rule and Notice*, Vol. 73 No. 65 Fed. Reg. 18384, 18397 (Apr. 3, 2008) (“[INA] Section 289 . . . benefits individuals who establish their identity, their Canadian citizenship, and that they are ‘American Indians’”). However, passports are not issued without a fee, and passport filing centers remain centered in urban areas. Moreover, ABC status is not dependent on tribal membership, let alone membership in a tribe that has qualified to issue ETCs.

323. Only a subset of ABCs are eligible for WHTI-compliant tribal border crossing cards. Many ABCs (Metis, Inuit, non-status Indians) are not members of tribes and therefore ineligible for tribal documentation. Most ABCs who do have tribal memberships are not members of U.S. tribes, and DHS approved Enhanced Tribal Cards are only issued by U.S. tribes to members of U.S. tribes. Further, Enhanced Tribal Cards do not afford enrollment in the DHS E-verify database.

324. Singleton, *supra* note 178, at 11.

325. IGA may not have authority to deal with ABC issues. As DHS’ designated lead for tribal relations and consultation, “IGA serves as the main point of contact between the Secretary and tribal leaders across the country, working with our intergovernmental partners across the Department to coordinate Department-level engagement of elected officials, or their designees, related to key Department policy decisions. The Department continues to improve our nation-to-nations relationship by working and consulting with federally recognized tribal governments.” U.S. DEP’T OF HOMELAND SEC., *Tribal Desk*, <http://tinyurl.com/ke8vupq> (last visited Sept. 9, 2013).

U.S. “for the purpose of employment, study, retirement, investing, and/or immigration”³²⁶ or any other reason.

However, this right of free access is poorly understood, both by its intended beneficiaries and by persons administering law. It has been weakened by post-9/11 border security and immigration legislation. It may be diminished further by those shaping future law, a by-product of ongoing efforts to curb unauthorized immigration to the U.S.

In 2011, Canadian Prime Minister Stephen Harper and U.S. President Barack Obama met to announce the initiation of the Beyond the Border process.³²⁷ In doing so, they committed their respective nations to work together “within, at, and away from the borders of our two countries to enhance our security and *accelerate the legitimate flow of people, goods, and services between our two countries.*”³²⁸ Senior level officials of the two countries have since convened to establish a Beyond the Border Action Plan to identify specific action items to advance the goals of Beyond the Border.³²⁹ The two governments collaborate to provide periodic updates as to progress made on the Action Plan.³³⁰

Despite the opportunity for a thorough review, the Beyond the Border Action Plan contains nothing to ensure the unimpeded travel of ABCs across the U.S./Canada border. The fact this issue has not been addressed does not mean it cannot be added as an agenda item. However, uncertainty exists regarding the most appropriate national advocate for the interests of ABCs at the border. Canada has not ratified the Jay Treaty, so it is implausible it would advocate for acknowledgment of Jay Treaty rights in the Action Plan; and while the U.S. recognizes these rights, it may not be in the best position to evaluate and voice the cross-border issues experienced by ABCs. ABCs would be well advised to recruit a non-governmental organization to vigorously assert their rights in the Beyond the Border process.

326. *First Nations and Native Americans*, *supra* note 4.

327. Press Release, The White House, *Declaration by President Obama and Prime Minister Harper of Canada - Beyond the Border* (Feb. 4, 2011), available at <http://tinyurl.com/76ghott> (last visited Sept. 14, 2013).

328. *Id.* (emphasis added).

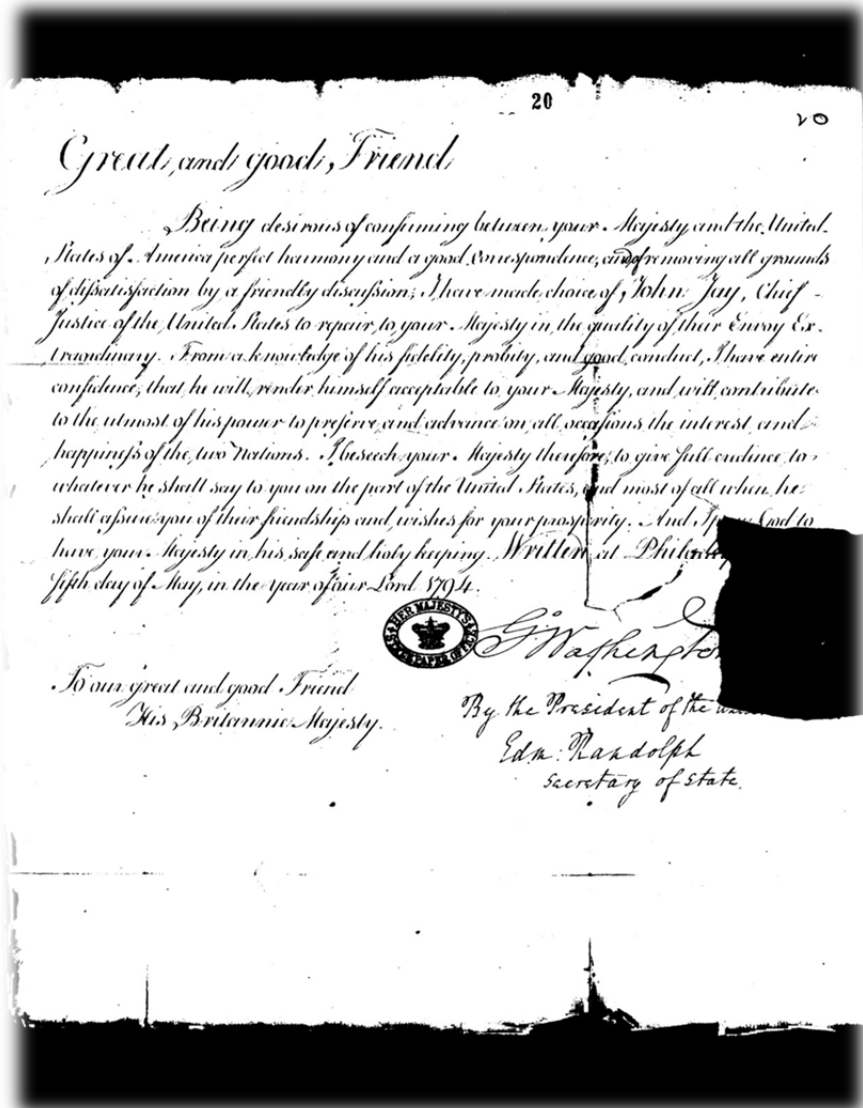
329. See GOV'T OF CANADA, CANADA'S ECON. ACTION PLAN, *Beyond the Border Action Plan* (2011), available at <http://tinyurl.com/lw78lbk> (last visited Sept. 7, 2013).

330. See *Beyond the Border Implementation Report*, The White House (December 2012) available at <http://tinyurl.com/k9ptx7u> (last visited Sept. 12, 2013). Cf. *Beyond the Border: Making the Action Plan Work for You*, 2012 BORDER POL'Y RES. INST., available at <http://tinyurl.com/mnyaydz> (last visited Apr. 10, 2014).

Regardless, until Jay Treaty rights receive significant rehabilitation, the Treaty's intent will be met in only a lukewarm fashion. Further incursions will rapidly diminish its usefulness to the Indian peoples it was designed to serve.

EXHIBIT I

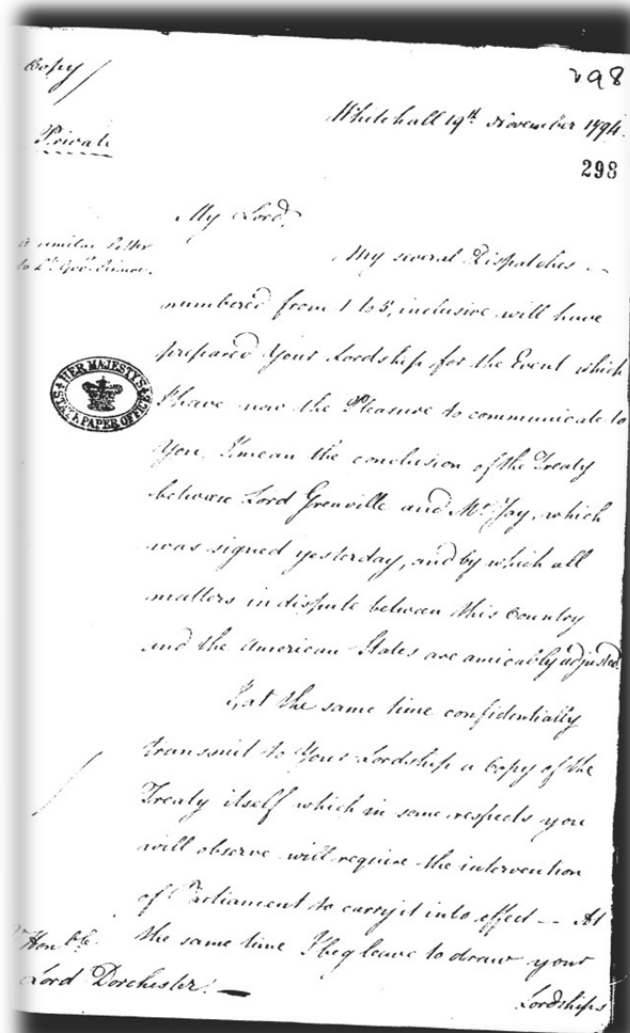
A reproduction of John Jay's diplomatic credential for presentation to British authorities.



The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).

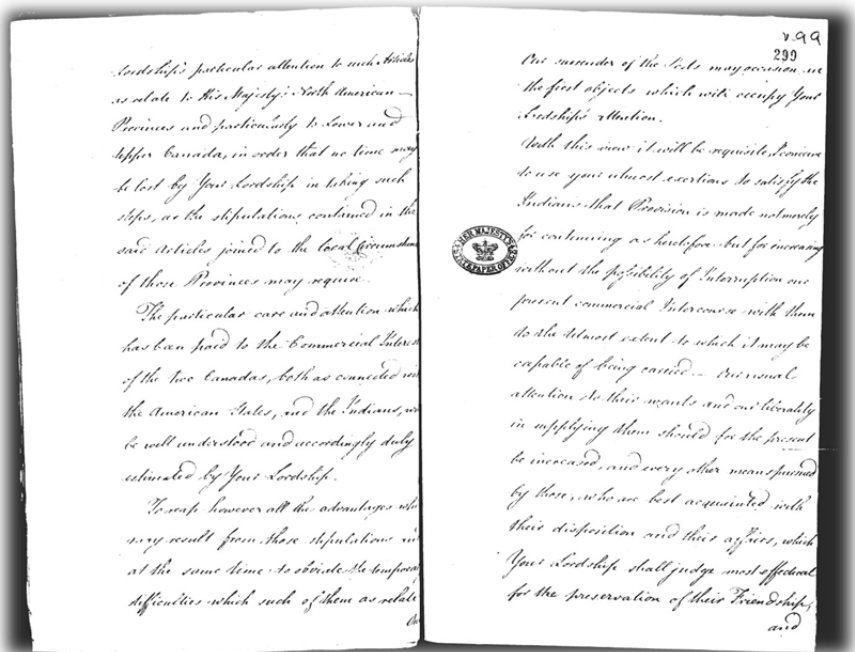
EXHIBIT II

A reproduction of an announcement summarizing the conclusion of the Jay Treaty (1 of 4)



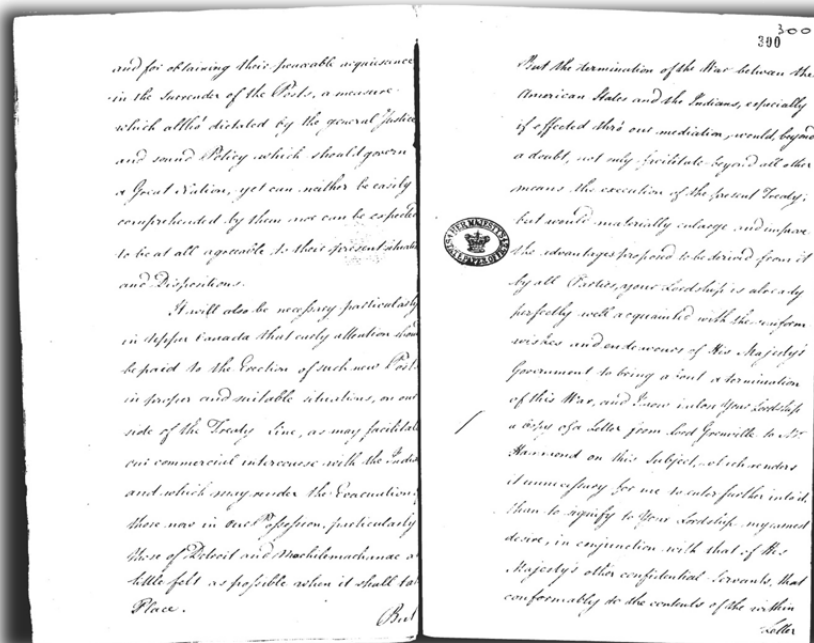
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A reproduction of an announcement summarizing the conclusion of the Jay Treaty (2 of 4)



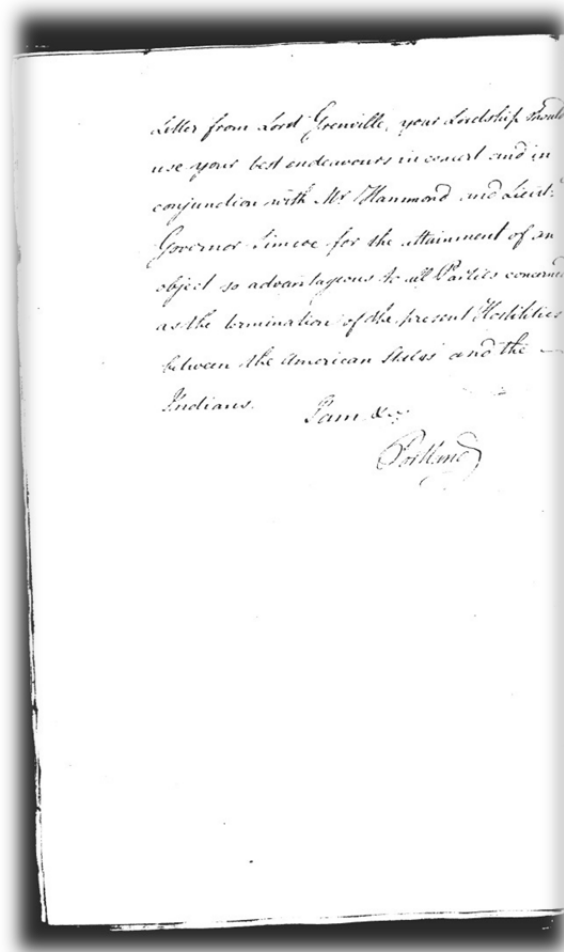
The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).

A reproduction of an announcement summarizing the conclusion of the Jay Treaty (3 of 4)



The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).

A reproduction of an announcement summarizing the conclusion of the Jay Treaty (4 of 4)

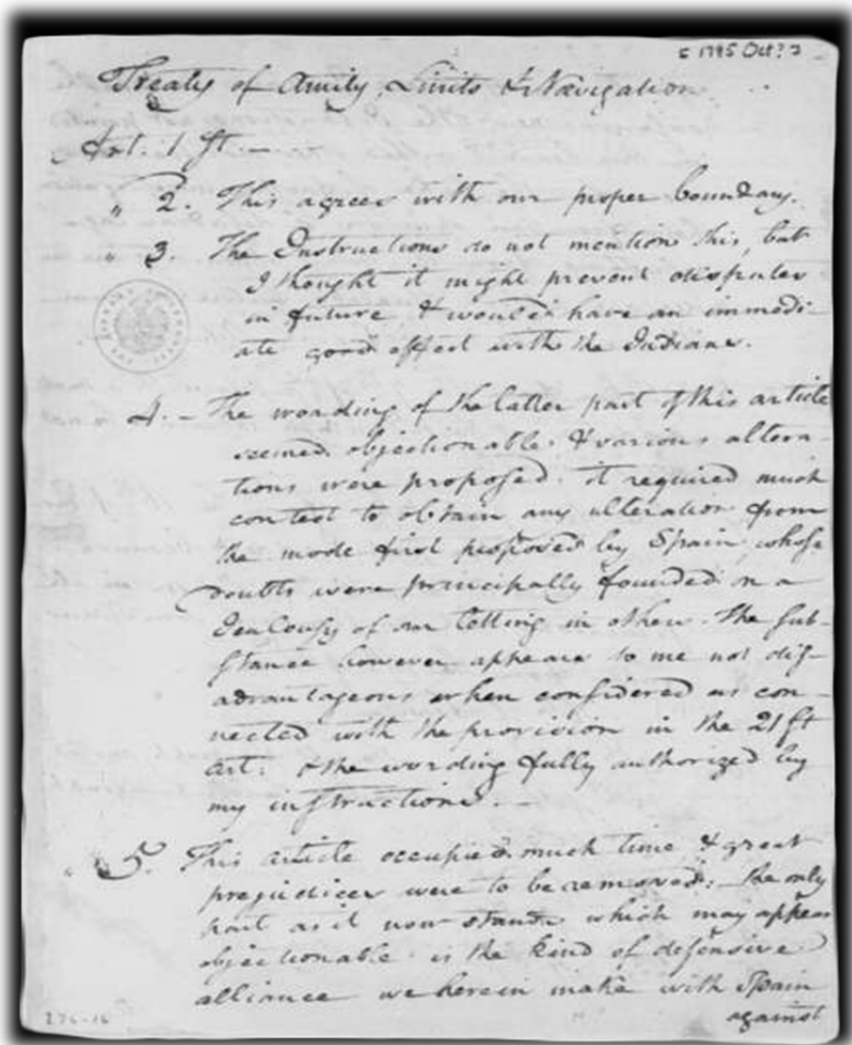


Letter from Lord Grenville, your Lordship should
use your best endeavours in concert and in
conjunction with Mr Hammond and Lord
Governor Simcoe for the attainment of an
object so advantageous to all Parties concerned
as the termination of the present Hostilities
between the American States and the
Indians. I am &c
Pittman

The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).

EXHIBIT III

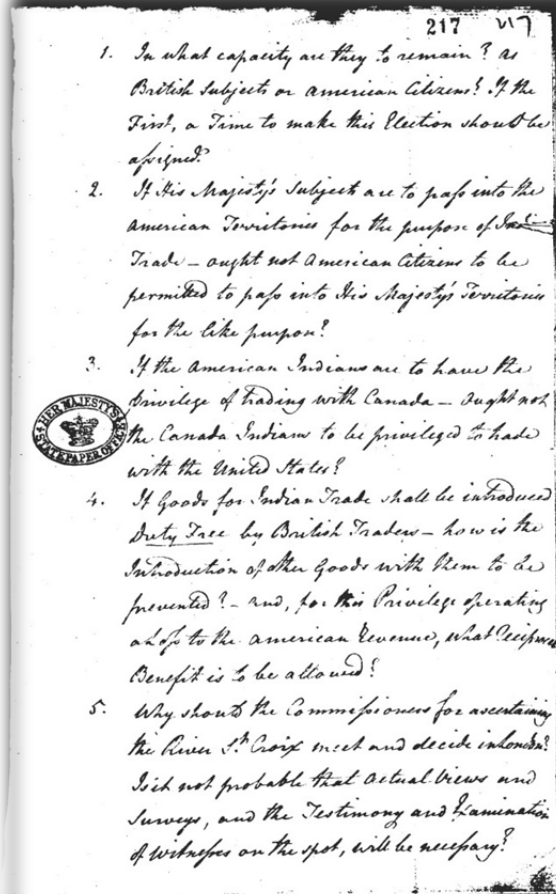
A reproduction of George Washington's analysis of Article III of the Jay Treaty.



George Washington Papers at the Library of Congress, 1741-1799: Series 4, General Correspondence. 1697-1799, Treaty of Amity and Commerce with Great Britain, October 1795, Analysis of Articles, available at <http://tinyurl.com/k6mszwq>.

EXHIBIT IV

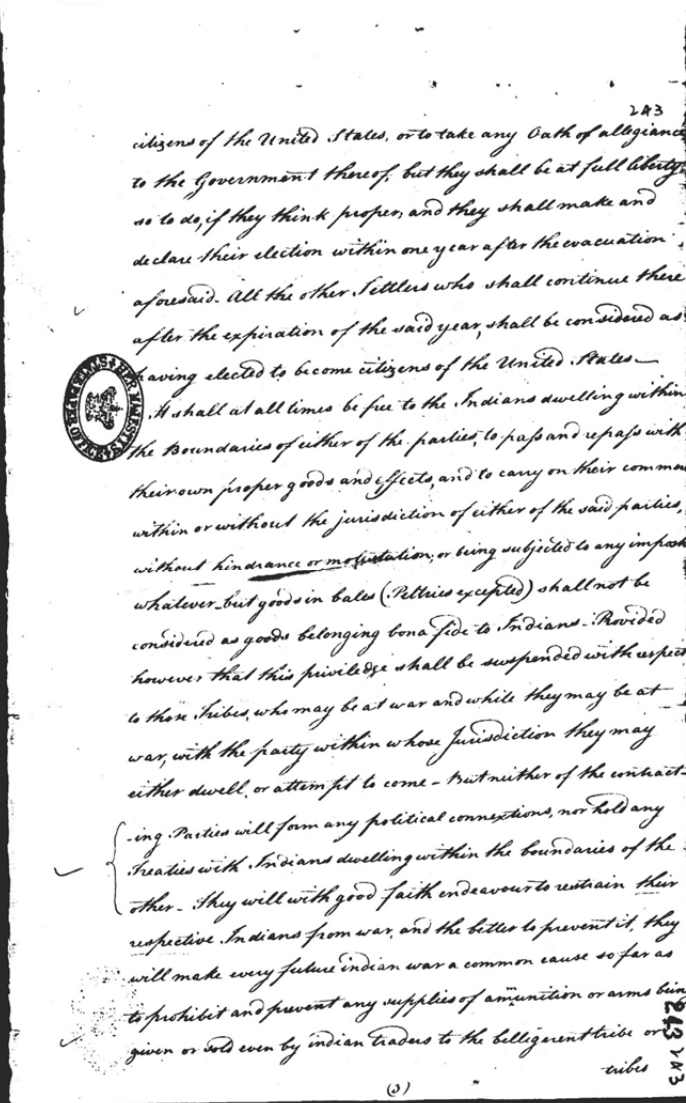
A reproduction of a Jay Treaty negotiator's notes related to Indian trade.



The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).

EXHIBIT V

A reproduction of a portion of an early draft of treaty provisions with particular reference to commerce between Indians, settlers, and British subjects.



The National Archives, Kew, Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794), Reference FO 95/512, available at <http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details> (digitized images on file with authors).