BORDER POLICY RESEARCH INSTITUTE

Western Washington University
Western CEDAR

Border Policy Research Institute Publications | Border Policy Research Institute

2013

American Indians Born in Canada and the Right of Free Access to the United States

Greg Boos

Greg McLawsen

Follow this and additional works at: https://cedar.wwu.edu/bpri_publications

Part of the Economics Commons, Geography Commons, International and Area Studies Commons, and the International Relations Commons

Recommended Citation

Boos, Greg and McLawsen, Greg, "American Indians Born in Canada and the Right of Free Access to the United States" (2013). *Border Policy Research Institute Publications*. 69.
https://cedar.wwu.edu/bpri_publications/69

This Research Report is brought to you for free and open access by the Border Policy Research Institute at Western CEDAR. It has been accepted for inclusion in Border Policy Research Institute Publications by an authorized administrator of Western CEDAR. For more information, please contact westerncedar@wwu.edu.

BORDER POLICY
RESEARCH INSTITUTE
WESTERN WASHINGTON UNIVERSITY

American Indians Born in Canada and the Right of Free Access to the United States

Greg Boos
Attorney, Cascadia Cross-Border Law and
Adjunct Professor, Canadian-American Studies, WWU

Greg McLawsen
Principal Attorney, Puget Sound Legal, P.C.

Research Report No. 20
October 2013

Border Policy Research Institute
Western Washington University
Bellingham, Washington
www.wwu.edu/bpri/

WESTERN
WASHINGTON UNIVERSITY

About the Authors

Greg Boos practices at Cascadia Cross-Border Law (www.cascadiaimmigrationlaw.com/), an immigration law firm with offices in Bellingham, WA and Anchorage, AK. A results-oriented advocate with 30+ years of professional experience, Greg has been named one of the world's leading practitioners of U.S. business immigration law by the International Who's Who of Corporate Immigration Lawyers. Based on peer reviews, Martindale-Hubbell has awarded Greg an AV Preeminent rating, a testament to the fact that his colleagues rank him at the highest level of professional excellence. He writes on a variety of immigration related topics.

Greg McLawsen is the principal attorney of Puget Sound Legal, P.C. in Tacoma, Washington (www.pugetsoundlegal.net). Greg serves as treasurer for the Washington Chapter of the American Immigration Lawyers Association and has been recognized as a Rising Star by the Chapter. His research interests include the intersection of psychology and immigration law. Previous publications are available at http://tinyurl.com/cocz6qp.

The authors thank research assistant Heather Fathali for her creativity and dedication brought to this project. Heather is a third-year law student at Seattle University.

About the Border Policy Research Institute

The BPRI focuses on research that informs policy-makers on matters related to the Canada-U.S. border. Policy areas of importance include transportation and mobility, security, immigration, energy, environment, economics and trade.

Border Policy Research Institute
Western Washington University
516 High Street
Bellingham, WA 98225-9110
(360)650-3728

This report is accessible at: http://www.wwu.edu/bpri

Copyright 2013 Greg Boos and Greg McLawsen. All rights reserved.

Executive Summary

In 1794, the United States and Great Britain negotiated the Jay Treaty, established in part to mitigate the effects of the recently established boundary line between Canada and the United States on the native peoples who suddenly found their lands bisected.

The rights and benefits originally set out by the Jay Treaty are now codified in statute, and continue to bestow upon Canadians with a 50% native bloodline (euphemistically referred to as "American Indians born in Canada" in U.S. immigration law) the right to freely pass the border and remain in the United States for any purpose, virtually unrestricted by the Immigration and Nationality Act.

This article explores the scope of the statutory term "American Indian born in Canada," expounding on the expressly racial—as opposed to cultural or political—nature of the status, with a 50% native bloodline and birth in Canada being the essential elements. The bloodline requirement is broader than tribal membership; as such, even Canadians who are not members of an Indian tribe may be eligible—what matters is that the person possesses the requisite bloodline.

In outlining the procedure for documenting status as an American Indian born in Canada, and what specific rights and benefits accompany the status, this article suggests that inconsistent and inaccurate information disseminated by government agencies complicates an already sensitive and misunderstood issue.

In the wake of post-9/11 security enhancements, it has become increasingly difficult for American Indians born in Canada to exercise their Jay Treaty rights to the extent they are entitled. In conclusion, this article emphasizes the importance of harmonizing the often-competing interests of national security, cross-border commerce, and the preservation of indigenous cultures to reflect the intent of the Jay Treaty.

This page intentionally blank.

Table of Contents

Introduction 1

I. History 2

- A. The War of 1812 and continuing validity of Jay Treaty rights 3
- B. A determination based on racial considerations 6
- C. No reciprocal right to enter Canada 8

II. Eligibility 13

- A. Scope 13
  - i. Dependents 14
  - ii. Bloodline exemption for pre-INA entrants 14
- B. Indian, Inuit, Métis, and métis 15

III. Kickapoo and Other Southern Borderlands Peoples 17

IV. Benefits 19

- A. Free passage 20
- B. Exemption from removal 20
- C. Cross-border commerce 21
- D. Public benefit programs 24
- E. Civil damages 25
- F. Affirmative defense to illegal entry/reentry 26

V. Procedures 28

- A. Documenting status at a port of entry 28
- B. Documenting status within the U.S. 30
- C. Work authorization 32
- D. Western Hemisphere Travel Initiative (WHTI) 35

VI. Conclusion 37

Exhibit I. A reproduction of John Jay's diplomatic credential for presentation to British authorities 39

Exhibit II. A reproduction of an announcement summarizing the conclusion of the Jay Treaty 40

Exhibit III. A reproduction of George Washington's analysis of Article III of the Jay Treaty 44

Exhibit IV. A reproduction of a Jay Treaty negotiator's notes related to Indian trade 45

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 46

This page intentionally blank.

American Indians Born in Canada and the Right of Free Access to the United States

By Greg Boos and Greg McLawsen

Certain American Indians born in Canada[1] (ABCs) enjoy access to the United States unrestricted by the Immigration and Nationality Act (INA), a right stemming from the Jay Treaty (1794).[2] 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"[3] or any other reason.

Jay Treaty rights[4] 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.[5] With Canada's current population at about 33.5 million people,[6] roughly one out of every thirty Canadians has a lineage to which Jay Treaty eligibility may attach.[7]

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,

---

1 "American Indians born in Canada" (ABC) is a term of art arising from statute. See Part II, *infra*. 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.

2 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.

3 EMBASSY OF THE UNITED STATES, OTTAWA, CANADA, *First Nations and Native Americans*, http://tinyurl.com/k7jy5rp (last visited Sept. 12, 2013).

4 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.

5 Kristy Kirkup, *2011 Census: Aboriginal Population Grows to 1.4M, Reports Statistics Canada*, TORONTO SUN (May 8, 2013), *available at* http://tinyurl.com/lbatdwk (last visited Sept. 14, 2013).

6 STATISTICS CANADA, *Population and dwelling counts, for Canada, provinces and territories, 2011 and 2006 censuses*, *available at* http://tinyurl.com/n6levwp (last visited Sept. 14, 2013).

7 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. U.S. DEP'T OF HOMELAND SEC., *2011 Yearbook of Immigration Statistics*, 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.

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) 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,[8] 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 of 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, they sought to relieve tribal tensions arising from imposition of the new boundary.[9] 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.[10] The Jay Treaty did not create a new right for the continent's Indian population; it simply recognized the Indians' pre-existing right to move freely across the U.S./Canada border.[11] In 1796, an explanatory provision was added to the treaty providing that no further treaties should derogate

---

[8] 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.

[9] 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.

[10] *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.").

[11] 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).

from the rights guaranteed by Article III.[12] 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 Ghent[13] revived the rights of native tribes predating that conflict.[14] However, several alternative views on this point are discussed below.

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

Despite a Supreme Court opinion declaring the War of 1812 abrogated the Jay Treaty and that the Treaty of Ghent revived Jay Treaty rights,[15] 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.[16] Others argue the Treaty of Ghent did not revive the Jay Treaty, and Jay Treaty rights exist now only by virtue of statute.[17] 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.[18]

The Supreme Court of Canada's (SCC) decisions regarding the validity of Jay Treaty rights[19] 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.[20] Canada's Department of External

---

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

[13] 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).

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

[15] *Id.*

[16] *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).

[17] *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 163–165.

[18] 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 26. Additionally, there is the presumption 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).

[19] *See, e.g.*, Francis v. The Queen, [1956] S.C.R. 618.

[20] 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

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.[21] The Canada Treaty Information webpage lists the Jay Treaty as a bilateral treaty with the U.S. that has been only "partially terminated,"[22] 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 with Canada), while the Treaty of Ghent only appears under its listing of treaties in force with Canada.[23]

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 Principle 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."[24] A handwritten volume

---

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.

[21] 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).

[22] GOV'T OF CANADA, *Canada Treaty Information* (last modified Mar. 3, 2011), http://tinyurl.com/ngvtlvy (last visited Sept. 14, 2013).

[23] 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 to 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. DEP'T 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).

[24] 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 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

produced by the British Foreign Office in 1823 briefly characterizes the Jay Treaty as "[n]ull, not revised at last peace, nor since."[25] 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 eligible for citizenship could enter the U.S.[26] Because Indians were ineligible for citizenship because of race-restricted naturalization laws dating back to 1790,[27] the Act of 1924 barred their entry to the U.S.[28] Shortly thereafter, the Bureau of Immigration[29] began deporting ABCs who had not registered as aliens or obtained immigrant visas, based on its determination these Indians were inadmissible.[30]

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.[31] In defense of its position, the Department of Labor argued that the

---

Treaties are put an end to by a subsequent War between the same Parties. (*See* British and Foreign State Papers, Vol. 7, p. 94)).

[25] *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.

[26] 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.

[27] Act of March 26, 1790, ch. III, § 1, Stat. 103 (restricting citizenship to "free white person[s]"); Act of 1924, *supra* note 26 ("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* LIBRARY OF CONGRESS, *Fourteenth Amendment and Citizenship*, http://tinyurl.com/2wzs24f (last visited Sept. 14, 2013); *see also* NebraskaStudies.org, 1924 Indian Citizenship Act, 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.

[28] Act of 1924, *supra* note 26, at ch. 190, § 13(c) ("No alien ineligible to citizenship shall be admitted to the United States. . . .").

[29] Both the Bureau of Immigration and the Bureau of Naturalization were governed by the Department of Labor from 1913–1933. *See* U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *See Our History*, http://tinyurl.com/yzeb8bp (last visited Sept. 14, 2013).

[30] Akins v. Saxbe, 380 F. Supp. 1210, 1214 (D. Me. 1974).

[31] *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

War of 1812 had abrogated the Jay Treaty.[32] 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.[33]

On appeal, the Court found for the Indians.[34] 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.[35] 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.[36] 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.[37]

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.[38]

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:

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 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.

[32] 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).

[33] *Supra* note 32.

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

[35] *Id.*

[36] *Id.*

[37] *Id.* at 72–73.

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

> 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.[39]

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*[40] involved a white Canadian woman married to an Indian who wished to be considered an Indian under Canada's Indian Act,[41] 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.[42] Ultimately, it reached the conclusion that the determination should be based on political (i.e., tribal membership) rather than ethnological considerations,[43] despite government assertions that only persons of American Indian blood should be beneficiaries of the Act of 1928.[44]

In the 1947 opinion *U.S. ex rel. Goodwin v. Karnuth*, a Federal District Court analyzed the term "Indian."[45] 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 tribe now under Federal jurisdiction . . . and *shall further include all other persons of one-half or more Indian blood*."[46]

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,"[47] and that "[t]he popular or received import of words furnishes the general rule for the interpretation of public laws."[48]

---

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

[40] Matter of S., 1 I. & N. Dec. 309 (BIA 1942).

[41] *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].").

[42] Matter of S., 1 I. & N. Dec. at 310.

[43] *Id.* at 311.

[44] *Id. See also supra* note 38.

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

[46] *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.

[47] *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)).

[48] *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)).

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."[49] 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."[50] 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."[51]

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.[52] The court cited *Goodwin* for the proposition that a racial, rather than political, test should apply.[53] 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.[54]

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.[55]

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.[56] Rather, admissibility of all non-citizens to Canada is governed by the

---

[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Matter of M., 4 I. & N. Dec. 458, 460 (BIA 1951).
[53] *Id.* at 458.
[54] *Id.* at 460.
[55] Spruhan, *supra* note 38, 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.
[56] *See* Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911.

Immigration and Refugee Protection Act,[57] 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*[58] unanimously held that a treaty such as the Jay Treaty is not enforceable in Canada without enabling legislation:[59]

> [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 . . .[60]

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.[61] 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.[62] Despite a striking similarity to the rights in force in the U.S. under

---

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

[58] Francis v. The Queen, [1956] S.C.R. 618. 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; therefore, its language is important and relevant to the admissibility of U.S.-born Indians into Canada.

[59] 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 enacting legislation, but choose to recognize the U.S./Canada border, which was also created by treaty and also not enacted by legislation.

[60] Francis v. The Queen, [1956] S.C.R. 618. The *Francis* decision may be subject to attack. In *Sappier v. Canada,* [1989] 15 A.C.W.S. (3d) 315, 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 enacting 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."

[61] Francis v. The Queen, [1956] S.C.R. 618.

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

the Jay Treaty, these rights are not rooted in any treaty, but are rather protected by Canada's constitution[63] in Part II of the Constitution Act, 1982 (Constitution Act).[64]

Section 35(1) of the Constitution Act recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."[65] Subsection (2) defines "aboriginal peoples of Canada" to include the Indian, Inuit, and Métis peoples of Canada.[66] 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*,[67] 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.[68] It declared that under Section 35(1), the government cannot extinguish an aboriginal right without a clear intention to do so,[69] 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."[70] 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 35(1).[71] The Court described Section 35(1) as "the

---

[63] 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 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. Government of Canada: Justice Laws Website, The Third Schedule: Provincial Public Works and Property to be the Property of Canada (last modified Aug. 30, 2013), http://tinyurl.com/k7n2df8 (last visited Sept. 14, 2014).

[64] 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.

[65] Rights of the Aboriginal Peoples of Canada, *supra* note 64.

[66] *Id.*

[67] R. v. Sparrow, [1990] 1 S.C.R. 1075.

[68] *Id.* at 1106.

[69] Note the similarity to the concept that Congress cannot abrogate a treaty without evidencing a clear intent to do so. *See* Vogel, *supra* note 18.

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

[71] R. v. Van der Peet, [1996] 2 S.C.R. 507. 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.

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."[72]

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."[73] 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."[74] The Court concluded that aboriginal rights must be based on those that existed prior to contact with European society.[75]

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*,[76] 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]."[77] While the Court of Appeal 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.*

---

[72] R. v. Van der Peet, [1996] 2 S.C.R. 507, 508.
[73] *Id.* at 527. The Court employed this test as the starting point for the tests laid out by the Court in *Sparrow*.
[74] *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.").
[75] *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 take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

[76] Watt v. Liebelt, [1999] 2 F.C. 455.
[77] *Id.*

Finally, in *Mitchell v. M.N.R.*,[78] 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.[79] "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."[80] The appellant argued that Section 35(1) "protects the treaty rights of Canada's aboriginal people, including the rights preserved under the Jay Treaty."[81] "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."[82] 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,"[83] subject to limitations based on evidence of the traditional range of Mohawk trading.[84] 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.[85] 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.

---

[78] Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911.
[79] Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 211–12 (2000).
[80] *Id. See also infra* Part IV.C.
[81] Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

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.[86] Even prior to the INA, courts had held that the phrase "American Indians born in Canada" designated a racial, rather than political test.[87] To qualify as an ABC, an individual must possess "at least 50 per centum blood of the American Indian Race" (bloodline requirement).[88] Tribal membership alone is inadequate to demonstrate an individual's qualification as an ABC because membership does not require a 50% blood quantum.[89] Likewise, an individual's self-identification or recognition in the community as an Indian is inadequate.[90] 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.[91]

Further, even when a Canadian-born individual's Indian status in Canada was lost upon marriage to a white person under § 14 of the Indian Act of Canada,[92] she did not lose her status as an ABC.[93] A

---

[86] For a discussion of why such an eligibility criterion might be subject to constitutional challenge, *see* Spruhan, *supra* note 38, 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).

[87] 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.").

[88] INA, *supra* note 39, 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 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).

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

[90] *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.").

[91] *See infra* Part II.B.

[92] *Indian Act*, R.S.C. 1927, c. 98.

[93] 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* PARLIAMENT OF CANADA, *Indian Status and Band Membership Issues* (Feb. 1996, rev. Feb. 2003), 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." ABORIGINAL AFFAIRS AND NORTHERN

derivative spouse or child does not qualify for Jay Treaty rights unless she meets the definition of an ABC in her own right.[94]

i. Dependents

Jay Treaty rights are not available to the spouse or child (derivatives) of an ABC unless the individual meets the bloodline requirement.[95] An ABC who resides in the U.S. is regarded as lawfully admitted for permanent residence[96] and can therefore file an I-130 petition for a derivative.[97] Before filing the I-130 the ABC petitioner should establish her status as an ABC, following the procedures described below in Part V. Unless the derivative is already present in the U.S. in a bona fide non-immigrant status, she probably cannot pursue adjustment of status.[98] Hence, the derivative will need to pursue an immigrant visa by way of consular processing. Strict numerical limitations, of course, 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.[99]

ii. 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 requirement if he entered the U.S. between April 2, 1928 and December 24, 1952, and has maintained residence in the U.S. during that period.[100] The person must have qualified for entry as an ABC under the statute enacted on April 2, 1928.[101] Yet while the 1928 statute contained no express bloodline requirement, the statute has been construed by courts to contain such a requirement.[102] It therefore seems unlikely the bloodline requirement exemption will be a practical avenue for relief.

DEVELOPMENT CANADA, *Gender Equity in Indian Registration Act* (last modified Feb. 11, 2013), http://tinyurl.com/n8go386 (last visited Sept. 14, 2013).

94 *See infra* Part II.B.

95 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").

96 8 C.F.R. § 289.2.

97 U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *Green Card for an American Indian Born in Canada* (rev'd Feb. 28, 2011), 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.).

98 *Cf.* INA, *supra* note 39, at § 245(a) (setting forth general eligibility rules for adjustment of status).

99 U.S. Dep't of State Bureau of Consular Affairs, Visa Bulletin, Vol. IX, No. 60, at 5 (Sep. 2013).

100 8 C.F.R. § 289.2.

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

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

B. Indian, Inuit, Métis, and métis

The Canadian constitution recognizes three separate cultural groups as aboriginal peoples: Indian,[103] Inuit, and Métis.[104] Therefore, the term "Indian" as used in Canada does not include Inuit or Métis.[105] The question then remains whether Inuit or Métis are eligible for ABC status.

While the Inuit do not self-identify as Indians[106] 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 establishment of the requisite blood quantum.[107] This is because the U.S. does not rely on Canadian definitions in determining which groups qualify for the benefits of INA § 289.[108] Within the U.S., the term "Indian" includes Inuit.[109] 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.[110] 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.

---

[103] 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)." INUIT TAPIRIIT KANATAMI, *A Note on Terminology: Inuit, Métis, First Nations, and Aboriginal*, 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 1.

[104] Rights of the Aboriginal Peoples of Canada, *supra* note 64, at § 35(2); *see* GOV'T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV., *Frequently Asked Questions About Inuit Relations*, http://tinyurl.com/kxsoylq (last visited Sept. 14, 2013). *See* GOV'T OF CANADA ABORIGINAL AFFAIRS AND NORTHERN DEV., *Terminology*, http://tinyurl.com/ld5hwxx (last visited Sept. 14, 2013) ("These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs.").

[105] *See supra* note 104.

[106] TUNGASUVVINGAT INUIT, *Inuit Are a Distinct Group*, 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.").

[107] *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).

[108] *First Nations and Native Americans, supra* note 3 ("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.").

[109] *Supra* note 107.

[110] *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").

Like the Inuit, Métis do not self-identify as Indians and are distinguished from Indians in Canada's constitution.[111] The term "métis" originates from a French word meaning "mixed," and was historically used in Canadian French for persons of mixed ancestry.[112] While "métis" denotes only mixed Aboriginal-European ancestry, "Métis" carries a specific cultural, ethnological, and political meaning.[113] 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.[114]

The Métis maintain a strong and unique identity, with specific criteria dictating membership within the community.[115] "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."[116]

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."[117] However, the definition of ABC is contingent only upon a satisfaction of the bloodline requirement and *jus soli* Canadian citizenship.[118] While Métis identification alone is

---

[111] Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911.

[112] The Oxford Companion to Canadian History 401 (Gerald Hallowell ed., Oxford Univ. Press 2004).

[113] *Id.*

[114] *Id.*

[115] 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.

Library and Archives Canada, Genealogy and Family History: Métis, http://tinyurl.com/lcp3r8o (last visited Sept. 14, 2013).

[116] *Supra* note 112, at 403.

[117] 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).

[118] *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 39. 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. U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS., *Green Card for an American Indian Born in Canada*, *supra* note 97. 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.

insufficient to satisfy 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. 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 enjoy a special right of travel across the U.S. border into Canada or Mexico.

The Kickapoo Indians originated in the Great Lakes region of the U.S.[119] In 1852, after treaty agreements, relocations, and land exchanges, a substantial number settled in Nacimiento, Mexico.[120] 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. Because the two bands shared cultural traditions and marital ties, band members from each side made frequent trips across the border.[121]

Throughout the early 1900s the ties between the two bands remained strong, and many Kickapoo began living in Mexico year-round.[122] However, summer droughts[123] eventually caused Kickapoo farm laborers residing in Mexico to move temporarily to Eagle Pass, Texas, between the months of April and October.[124] These workers returned to Mexico when the agricultural season ended.[125] This migratory pattern continued, prompting the Immigration and Naturalization Service to issue the Kickapoo immigration cards granting the tribe the right to cross the border freely, in one-year increments. In 1983, Congress passed the Texas Band of Kickapoo Act (TBKA), making their migratory right a permanent one.[126] 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

---

[119] 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 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.

[120] 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).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

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

border.[127] This is the type of relationship INA § 289 seeks to protect.[128] 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.[129]

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."[130]

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.[131] 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.[132]

In addition to the Kickapoo, there are at least three other Indian tribes whose communities straddle the U.S./Mexico border, and seven Indian tribes maintaining communities on both sides of the border.[133] 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

---

[127] *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. . . .").

[128] 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).

[129] *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.").

[130] 25 U.S.C. § 1300b-13(d) (2006).

[131] 8 C.F.R. § 212.1(c)(1)(ii) (2013). *See also infra* Part V.D.

[132] 8 C.F.R. § 235.1(h)(1)(iii)(A), (v) (2013).

[133] 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, BORDER POLICY RESEARCH INSTITUTE, *Not Our Borders: Indigenous People and the Struggle to Maintain Shared Lives and Cultures in Post 9/11* NORTH AMERICA 1, 4 (2004), http://tinyurl.com/me45zpx (last visited Sep. 14, 2013).

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.[134] The treaty established the international boundary line at the Gila River,[135] making the Tohono O'odham residents of Mexico.[136] 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 America's northern border, 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.[137]

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.[138] 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 crossings.[139] As developed in Part V.D of this paper, possession of WHTI-compliant documentation facilitates the process of crossing the border 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 reservations, reportedly under the impression residents were "dual citizens."[140]

---

[134] *See* Tom Gray, *Teaching with Documents: The Treaty of Guadalupe Hidalgo*, NATIONAL ARCHIVES, http://tinyurl.com/2clp7gf (last visited Sept. 14, 2013).
[135] *See* Singleton, *supra* note 133, at 4.
[136] *Id.*
[137] *Id.*
[138] 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.*
[139] 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 Sep. 14, 2013). *See also infra* Part V.D.
[140] 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).

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.[141]

ABCs may encounter confusion from state officials when applying for benefits requiring 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.[142]

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."[143] ABCs are not required to obtain immigrant visas.[144] DOS notes briefly that Canadians meeting the bloodline requirement are exempt as non-immigrants from passports, visas[145] and border crossing identification cards.[146] In the 1974 case of *Akins v. Saxbe*, a federal district court held that the free passage right meant ABCs were not required to comply with alien registration rules.[147]

B. Exemption from removal

The Jay Treaty free passage right 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,[148] derived from 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.[149] The BIA reasoned that the right to freely enter the

---

141 Randy Boswell, *Canadian Cree Seeks Election in Hawaii*, VANCOUVER SUN, Oct. 13, 2004, at A2.
142 Texas Department of Public Safety*, Temporary Visitor Issuance Guide: Documents Establishing Lawful Presence for Texas Driver's License/ID Applicants*, 4 (rev'd Sep. 2011) (AILA Doc. No. 11101238).
143 INA, *supra* note 39 (emphasis added).
144 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)).
145 With the recent enactment of the Western Hemisphere Travel Initiative this exemption is no longer a surety. *See infra* Part V.D.
146 22 C.F.R. § 41.1(b) (2012).
147 380 F. Supp. 1210, 1221 (D. Me. 1974).
148 8 C.F.R. § 114.6 (1943).
149 Matter of A., I. & N. Dec. 600 (BIA 1943).

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."[150] Splitting the baby, the BIA concluded an ABC is deportable only with respect to grounds of deportation arising after entry.[151] Shortly after *Matter of A,* the BIA affirmed its view.[152]

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 deportation warrant by way of a habeas petition.[153] The issue in the case was whether Mr. Karnuth qualified as an ABC, having married a non-Indian.[154] Once the court resolved that the standard was one of blood lineage only, the court concluded without discussion that the Jay Treaty free passage rendered Mr. Karnuth exempt from deportation.[155]

Akins v. Saxbe later addressed whether ABCs were exempt from the visa and registration requirements of the INA.[156] 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.[157] 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. [158] Notably, counsel for the INS urged the BIA to adopt the reasoning of *Akins* and overrule *Matter of A*.[159] The BIA did precisely so, holding ABCs are not deportable on any ground.[160]

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

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 nature, pay for the

---

150 *Id.* at 603.
151 *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.*
152 Matter of B., 3 I. & N. Dec. 191 (BIA 1948) (*dicta*); Matter of D., 3 I. & N. Dec. 300 (BIA 1948).
153 U.S. *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660 (W.D.N.Y. 1947).
154 *Id.*
155 *Id.* at 663.
156 Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974).
157 *Id.* at 1221.
158 Matter of Yellowquill, 16 I. & N. Dec. 576 (BIA 1978).
159 *Id.* at 578.
160 *Id.*

same any import or duty whatever."[161] 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.[162]

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.[163] 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.[164] Although statutory exemptions from customs duties had been previously maintained in various iterations of the Tariff Act, the exemption was deleted in 1897.[165] 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 that language granting Indians the right to pass with their goods duty free "was not included in the Tariff Act of 1897,[166] and it has not been included in any subsequent tariff act."[167] It maintained questions of customs duties and importation to be within the exclusive jurisdiction of the customs courts.[168]

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.[169]

Despite restrictive policies in force today, traditional aboriginal 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 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."[170]

---

[161] 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.").

[162] Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974).

[163] United States v. Garrow, 88 F.2d 318, 323 (C.C.P.A. 1937).

[164] *Id.* at 320–21.

[165] *Garrow*, 88 F.2d at 321.

[166] 30 Stat. 151.

[167] *Akins v. Saxbe,* 380 F. Supp. at 1213.

[168] *Id.* at 1215.

[169] Mitchell v. M.N.R., 2001 SCC 33, [2001] 1 S.C.R. 911; *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.

[170] 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).

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."[171] Indeed, "[f]rom the Indian viewpoint, he crosses no boundary line. For him this does not exist."[172]

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.[173] "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."[174] 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."[175] While a customs search may seem a benign inconvenience to a non-Indian, it can be devastating to the integrity of certain sacred items.[176]

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.[177] 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.[178] Policies exist to allow members of federally-recognized tribes to travel with eagle parts between the

---

171 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).
172 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).
173 *See* Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 322 (1984) (citations omitted).
174 *Id.*
175 *Id.* (citations omitted); U.S. DEP'T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Native American Reservations are Subject to Customs and Duties Regulations*, 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.").
176 *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 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 133, at 10.
177 16 U.S.C. § 668 (2006).
178 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.

U.S. and Canada or Mexico without a permit in certain circumstances,[179] and Canadians presenting a Certificate of Indian Status are permitted to travel in and out of the U.S. with eagle parts under similar circumstances.[180] All items are still subject to customs declarations.[181] 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, the Marine Mammal Protection Act (MMPA) being one example.[182] The MMPA bans the import of marine mammals and marine mammal products into the U.S.[183] 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."[184]

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.[185] Generally, foreign nationals may receive means-

---

[179] 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. U.S. FISH AND WILDLIFE SERV., *Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America* (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.*

[180] *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/lpscb2l (last visited Sept. 14, 2013); *Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America*, *supra* note 180.

[181] *Id.*

[182] *See* Gastle, *supra* note 170, at ch. 3.1; *Marine Mammal Protection Act*, 16 U.S.C. §§ 1361-1421h (1972).

[183] Gastle, *supra* note 170, at 19; *Marine Mammal Protection Act*, *supra* note 182.

[184] Gastle, *supra* note 170, 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.

[185] 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

tested benefits, only after maintaining status as a lawful permanent resident for five years.[186] Nonetheless, ABCs are treated as U.S. citizens for purposes of certain public benefit programs.[187] These programs include the Supplemental Nutrition Assistance Program (SNAP; commonly known as Food Stamps), Social Security Insurance, and Medicaid.[188] If the individual has not acquired documentation of his status through the immigration agencies, the Social Security Administration may make its own determination.[189]

The U.S. Department of Health and Human Services' Administration for Children and Families has advised ABCs are treated as non-citizens for eligibility for the cash benefits program, Temporary Aid for Needy Families (TANF).[190] But at least three states—Alaska, Colorado, and North Dakota—treat such individuals as qualified non-citizens for TANF eligibility.[191]

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),[192] a 1978 law impacting placement of Indian children removed from their homes with non-Indian families.[193]

E. *Civil damages*

In the 1978 case of *Matter of Yellowquill*, the BIA squarely held ABCs are exempt from all grounds of deportation.[194] What recourse might lie if an ABC is removed in violation of this long-established

---

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").

[186] 8 U.S.C. § 1613(a) (2006).

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

[188] 8 U.S.C. § 1612(1)(2)(G)(i) (2006) (American Indians born in Canada are exempt from the alienage restriction on means-tested public benefits); 7 C.F.R. § 273.4(a)(3)(i) (2013) (American Indians born in Canada 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 Sep. 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").

[189] *Program Operations Manual System*, *supra* note 188.

[190] 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/assk5ft (last visited Sept. 14, 2013). *See* 8 U.S.C. § 1641 (2006) (defining "qualified aliens").

[191] 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).

[192] 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).

[193] *See* National Indian Child Welfare Association, *Frequently Asked Questions About ICWA*, http://tinyurl.com/kdetkny (last visited Sept. 14, 2013).

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.[195] Mr. MacDonald conceded removability to avoid prolonged detention and was then long-delayed reentering the U.S.[196] Finally the government recognized its error and rescinded the removal order.[197] Mr. MacDonald then commenced a *Bivens* lawsuit[198] 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.[199] 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.[200] 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.[201] Claims against the government prosecutor were generally barred by absolute immunity, though the Court 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.[202]

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 she

---

194 16 I. & N. Dec. 576, 577 (BIA 1978). *See* text accompanying notes 158–160 (discussing the case).
195 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).
196 *Id.* at *5-6.
197 *Id.*
198 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
199 *MacDonald*, 2011 U.S. Dist. LEXIS 148409, at *6.
200 *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).
201 *MacDonald*, 2011 U.S. Dist. LEXIS 148409, at *30.
202 *Id.* at *35-36.

> (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.[203] The petitioner argued the conviction constituted a restraint on his right to free passage.[204] The court did not reach the merits of the argument as the petitioner had failed to prove the requisite blood quota.[205] Exemption from 8 U.S.C. § 1325(a) would require an expansive reading of the free passage right. 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.[206]

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

> (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 . . . .

First, as described above, ABCs cannot be denied admission,[207] and are not subject to exclusion, deportation, or removal.[208] 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 free passage right guaranteed by INA § 289.[209] 8 U.S.C. § 1326(a)(b)(B) expressly provides that consent is not required if an exemption is provided for in the INA.

---

[203] 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).
[204] Perrault v. Larkin, 2005 WL 2455351, at *2 (D. Kan. Oct. 5, 2005).
[205] *Id.*
[206] *See infra* Parts IV.A and IV.B.
[207] *See supra* Part IV.A.
[208] *See supra* Part IV.B.
[209] *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).

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.[210]

A. Documenting status at a port of entry

An ABC may apply for admission at any port of entry.[211] As with any non-citizen, the ABC must prove eligibility for entry in his asserted status, that is, as an American Indian born in Canada.[212] 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 time of entry to the U.S.[213]

When the ABC presents himself for entry as a permanent resident, CBP will review all documentation submitted by the ABC to support his 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).[214]

---

[210] *See* Caitlin C.M. Smith*, The Jay Treaty Free Passage Right in Theory and Practice*, 1 Amer. INDIAN L. J. 161, 164 (Fall 2012), *available at* http://tinyurl.com/moj375g (last visited Sept. 14, 2013) (suggesting the free passage right is "ripe" for misinformation from the several agencies involved).
[211] *Cf.* U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR'S FIELD MANUAL (2006) § 11.3(a) [hereinafter IFM].
[212] AFM, *supra* note 89, at § 23.8(a).
[213] 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 210, at 172. *See also* Lornet Turnbull, *Canadian Indian Wonders Why U.S. Yanking Back Welcome Mat*, Seattle Times, Jan. 15, 2008, *available at* 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").
[214]IFM*, supra* note 211, at 11.3(a); *Green Card for an American Indian Born in Canada*, *supra* note 97. For requirements of admission to the U.S. (not to document ABC status), *see also* U.S. DEP'T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Travel Documents for Native Americans, Including U.S., Canadian and Mexican Born Members of U.S. Tribes* (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, *available at* 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,

An applicant would be unwise to rely on an expert declaration regarding American Indian ancestry, unless the expert can reliably attest that the applicant meets the bloodline requirement.[215] 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.[216] If the ABC is arriving by air he must possess a current passport; no passport is required at a land port of entry.[217] CBP will then complete a central index check and open an alien file at the port of entry.[218] For any applicant over 14 years of age, CBP will initiate an Interagency Border Inspection Systems check.[219] 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.[220]

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.[221] 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.[222]

The ABC will then be asked to complete a Form I-89, Data Collection Card, and submit fingerprints and a photograph.[223] The completed I-89 is forwarded to the USCIS Texas Service Center[224] with a copy of the Form I-181, for issuance of an I-551 Permanent Residence Card.[225]

CBP will also forward a set of fingerprints to the FBI, though criminal grounds of inadmissibility may not be used to deny entry.[226]

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 he desires permanent resident status.

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.").

215 *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).

216 IFM*, supra* note 211, at § 11.3(a).

217 *Travel Documents for Native Americans*, *supra* note 214; U.S. DEP'T OF HOMELAND SEC. CUSTOMS AND BORDER PROT., *Visiting the U.S. - Documents Required for Canadian Citizens/Residents/Landed Immigrant to Enter the U.S. and How Long They Can Stay*, http://tinyurl.com/qc5a964 (last visited Sept. 14, 2013).

218 IFM, *supra* note 211, at § 11.3(b).

219 *Id.*

220 *See supra* Part IV.B. *See also* AFM, *supra* note 89, at § 23.8(a) (ABC is entitled to recognition of status even if subject to ground of inadmissibility or previously deported).

221 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 211, at § 11.3(b).

222 IFM, *supra* note 211, at § 11.3(b).

223 *Id.*

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

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

226 *Id.*

B. Documenting status within the U.S.

An ABC may apply to USCIS without fee to seek recognition of his status.[227] 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.[228]

Adjudicators have no authority to deny such an application as an exercise of discretion.[229] Indeed, The *Adjudicator's Field Manual* (AFM) states an ABC is entitled to proof of her lawful permanent resident status even if she is subject to one or more grounds of inadmissibility or was previously deported.[230] To apply, the individual should schedule an Infopass appointment.[231] No fee or formal application is required.[232] 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
- Documentation of tribal membership and bloodline.[233]

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.[234]

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

---

[227] *Green Card for an American Indian Born in Canada*, *supra* note 97. 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 3 ("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.").

[228] *See* AFM, *supra* note 89, 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.").

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

[230] *Id.* at § 23.8(a).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

> 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).[235]

It is unclear whether USCIS currently enforces the strict documentation requirement described by its website. The website guidance was posted in 2011, whereas the less rigorous AFM provision is contained in the current 2013 edition. If indeed USCIS requires documentation of every lineal ancestor, an ABC who has the option practically available to her may wish to pursue adjudication of her 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.[236] Similarly, a medical examination is not required.[237]

If the documentation is acceptable, the adjudicator will complete Form I-181 Memorandum of Creation of Record of Admission for Lawful Permanent Residence.[238] A notation should be made reading, "Canadian-born American Indian admitted for permanent residence" and an indication made that the status is under INA § 289.[239] 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.[240] The ABC should be issued a temporary I-551 for use while his permanent documentation is processed.[241]

Identification, such as tribal certification based on reliable tribal records, birth certificates, and other documents establishing the bloodline requirement, will usually suffice to 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 along with the requisite fee. The AFM directs the reader to Chapter 51 for instructions and processing requirements of such applications.

---

[235] *Green Card for an American Indian Born in Canada*, *supra* note 97 (emphasis added).
[236] AFM, *supra* note 89, at § 23.8(b).
[237] *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.").
[238] *Id.* at § 23.8(b) (cross-referencing IFM, app. 15-8).
[239] *Id.*
[240] *Id.*
[241] *Id.*

Where an individual applies within the U.S. for recognition of status as an ABC, USCIS takes the position denials of such an application are non-reviewable.[242] This position is described in the AFM but is not codified in regulations.[243] 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.[244] To prove she is authorized to work in the U.S., the employee must produce 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.[245]

An ABC producing documentation as a permanent resident of the U.S. satisfies List A's requirements.[246] However, an ABC without a permanent resident card may or may not satisfy the requirements of Lists B and C,[247] 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 LPRs, and the E-Verify program.

An ABC wishing to exercise her free passage right without permanently documenting bona fide status as an ABC must establish her bloodline upon every time she crosses the border.[248] Because of the time, uncertainties, and possible confusion involved this endeavor,[249] some instead choose to

---

242 AFM, *supra* note 89, at § 23.8(b).
243 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).
244 U.S. DEP'T OF HOMELAND SEC. CITIZENSHIP AND IMMIGRATION SERVS. *Instructions for Employment Eligibility Verification*, (Mar. 8, 2013), http://tinyurl.com/y9e22k (last visited Sep. 14, 2013).
245 *Id.*
246 *Id.*
247 *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 97; *First Nations and Native Americans*, *supra* note 3. 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 USICS decision that a person does not qualify as an ABC may be challenged in exclusion or deportation proceedings. Alternatively, one denied 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).
248 *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.
249 Including misinformation regarding the required documentation, and border agents who are unfamiliar with the procedure. *See, e.g.*, Smith*, supra* note 210, at 166.

formally become LPRs[250] 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 American Indians born in Canada who continue to reside in Canada."[251] The U.S. taxes its citizens on worldwide income; generally, the worldwide income of LPRs is taxed in the same way.[252] 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.

Those ABCs who choose not to become LPRs and instead exercise their right to 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."[253] 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.[254]

Under this policy, ABCs who have not documented as LPRs will only be able to 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.

---

[250] 8 C.F.R. § 289.2 (2010); 25 8 C.F.R. § 289.3 (2010). *See also* Smith*, supra* note 210, at 168.
[251] *Policy Makers, Please Provide a Beyond the Border "Fix" for American Indians Born in Canada*, *supra* note 248; Internal Revenue Service, Income From Abroad is Taxable (last modified Jan. 23, 2013), http://tinyurl.com/lyz3m6h (last visited Sept. 14, 2013).
[252] Internal Revenue Service, *Taxation of Resident Aliens* (last modified Apr. 17, 2013), http://tinyurl.com/kvsms7g (last visited Sept. 14, 2013).
[253] 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). 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).
[254] M-274 HANDBOOK FOR EMPLOYERS: GUIDANCE FOR COMPLETING FORM I-9 42–43 (2013), *supra* at 253 (emphasis added).

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; in fact, tribal affiliation may be evidenced[255] with an INAC card.[256] Furthermore, there are many individuals who qualify as ABCs but are not registered with any Indian tribe in Canada—Inuit, Métis, and métis, for example.[257]

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 LPR status—despite Jay Treaty guarantees of ability to work and live in the U.S.

These considerations raise further complications when one takes into account the E-Verify program. E-Verify is an electronic employment verification program administered by USCIS; while today the program is largely voluntary,[258] recent legislative proposals have called for it as a mandatory requirement imposed on all U.S. employers.[259] The goal of the system is to ensure those holding jobs in the U.S. are indeed authorized for employment;[260] it screens for individuals who are not authorized to accept employment, or who are using false documentation.

Those ABCs who have been documented as LPRs should encounter minimal issues under E-Verify, as it should easily confirm their authorization to work.[261] 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,[262] 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.[263]

---

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

[256] 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.

[257] See *supra* Part II.B. *See also First Nations and Native Americans*, *supra* note 3.

[258] 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.

[259] *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).

[260] Bruno, *supra* note 258, at 7.

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

[262] *See also* Smith*, supra* note 210, 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.").

[263] Bruno, *supra* note 258 (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* becoming an LPR, *see* Smith*, supra* note 210, 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.").

However, in the likely event that E-Verify becomes mandatory for all employers, a great many ABCs will experience an uncontemplated new barrier to their legal right to work in the U.S.—a result which is 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.[264]

An ideal solution lies in the creation of 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, they 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."[265] 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 of the fact that ABCs are exempt from passport requirements), a stamp denoting Jay Treaty Card status could be utilized, in addition to 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 those who are issued Jay Treaty Cards, this option should work in conjunction 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. The WHTI—a result of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)[266]—requires U.S. and Canadian travelers to present a passport or other approved document denoting identity and citizenship when entering the U.S.[267] At present, Indians

---

266 *See* Smith, *supra* note 210.

265 *Policy Makers, Please Provide a Beyond the Border "Fix" for American Indians Born in Canada*, *supra* note 248.

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

267 *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 the 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).

are able to present tribal documents, including the INAC card.[268] In December 2009, Aboriginal Affairs and Northern Development Canada began issuing a "Secure Certificate of Indian Status" (SCIS) card.[269] Both the SCIS and older "Certificates of Indian Status" are currently accepted by CBP as valid identity documents,[270] 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 specifically issued to Texas and Oklahoma Kickapoo including the tribe's Mexican members.[271] 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.[272]

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; 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 the WHTI.[273]

If the WHTI requirements are not modified for ABCs, their Jay Treaty right to free passage will remain limited.[274] A non-expiring WHTI-compliant Jay Treaty Card, as suggested above in Part IV.C, would remedy this situation. 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.

---

[268] 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.

[269] *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).

[270] *Id. See also infra* note 271.

[271] 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 214.

[272] *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).

[273] *Travel Documents for Native Americans*, *supra* note 214; News Release, Dep't of Homeland Sec., Pascua Yaqui ETC Officially Designated as WHTI-Compliant Travel Card (Jun. 9, 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/l5jtsku (last visited Sept. 15, 2013).

[274] In promulgating its implementing regulations for the IRTPA, the Department of Homeland Security took the view the ABC right of free passage right 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.

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.[275] 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.[276]

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 (INA). 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 U.S. "for the purpose of employment, study, retirement, investing, and/or immigration"[277] 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.[278] 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*."[279] 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.[280] The two governments collaborate to provide periodic updates as to progress made on the Action Plan.[281]

---

[275] Singleton, *supra* note 133, at 11.

[276] 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/kc8vupq (last visited Sept. 9, 2013).

[277] *First Nations and Native Americans*, *supra* note 3.

[278] 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).

[279] *Id.* (emphasis added).

[280] *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).

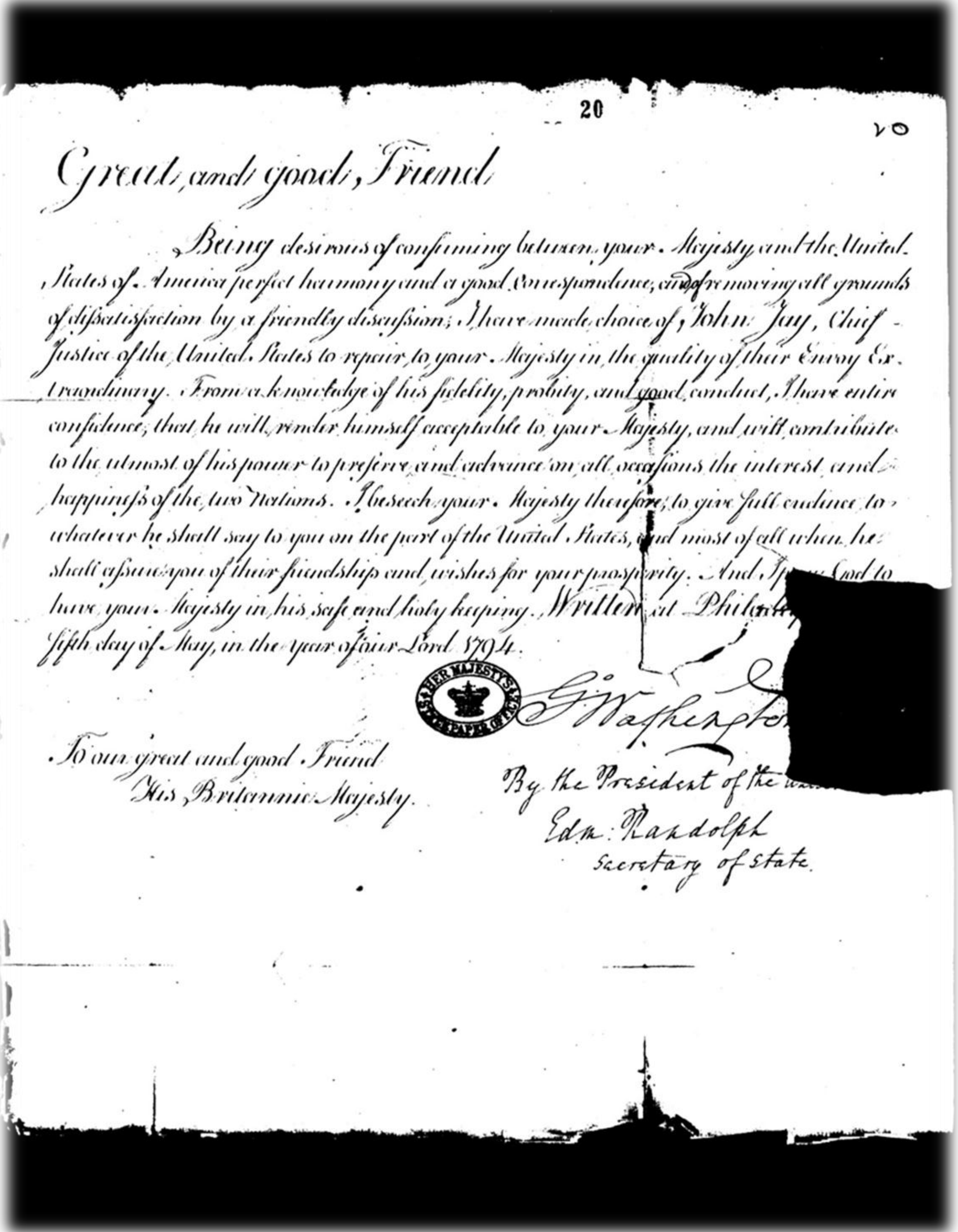
[281] *See* Beyond the Border Implementation Report, The White House (December 2012) *available at* http://tinyurl.com/k9ptx7u (last visited Sept. 12, 2013). *Cf.* Forum Proceedings, Border Policy Research Institute, *Beyond the Border: Making the Action Plan Work for You* (Oct. 24, 2012), *available at* http://tinyurl.com/mnyaydz (last visited Sep. 14, 2013).

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.

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.



20

20

Great and good Friend

Being desirous of confirming between your Majesty and the United States of America perfect harmony and a good Correspondence, and of removing all grounds of dissatisfaction by a friendly discussion; I have made choice of John Jay, Chief Justice of the United States to repair to your Majesty in the quality of their Envoy Extraordinary. From a knowledge of his fidelity, probity, and good conduct, I have entire confidence, that he will render himself acceptable to your Majesty, and will contribute to the utmost of his power to preserve and advance on all occasions the interest and happiness of the two Nations. I beseech your Majesty therefore, to give full credence to whatever he shall say to you on the part of the United States, and most of all when he shall assure you of their friendship and wishes for your prosperity. And I pray God to have your Majesty in his safe and holy keeping. Written at Philad[...] fifth day of May, in the year of our Lord 1794.

G. Washingto[...]

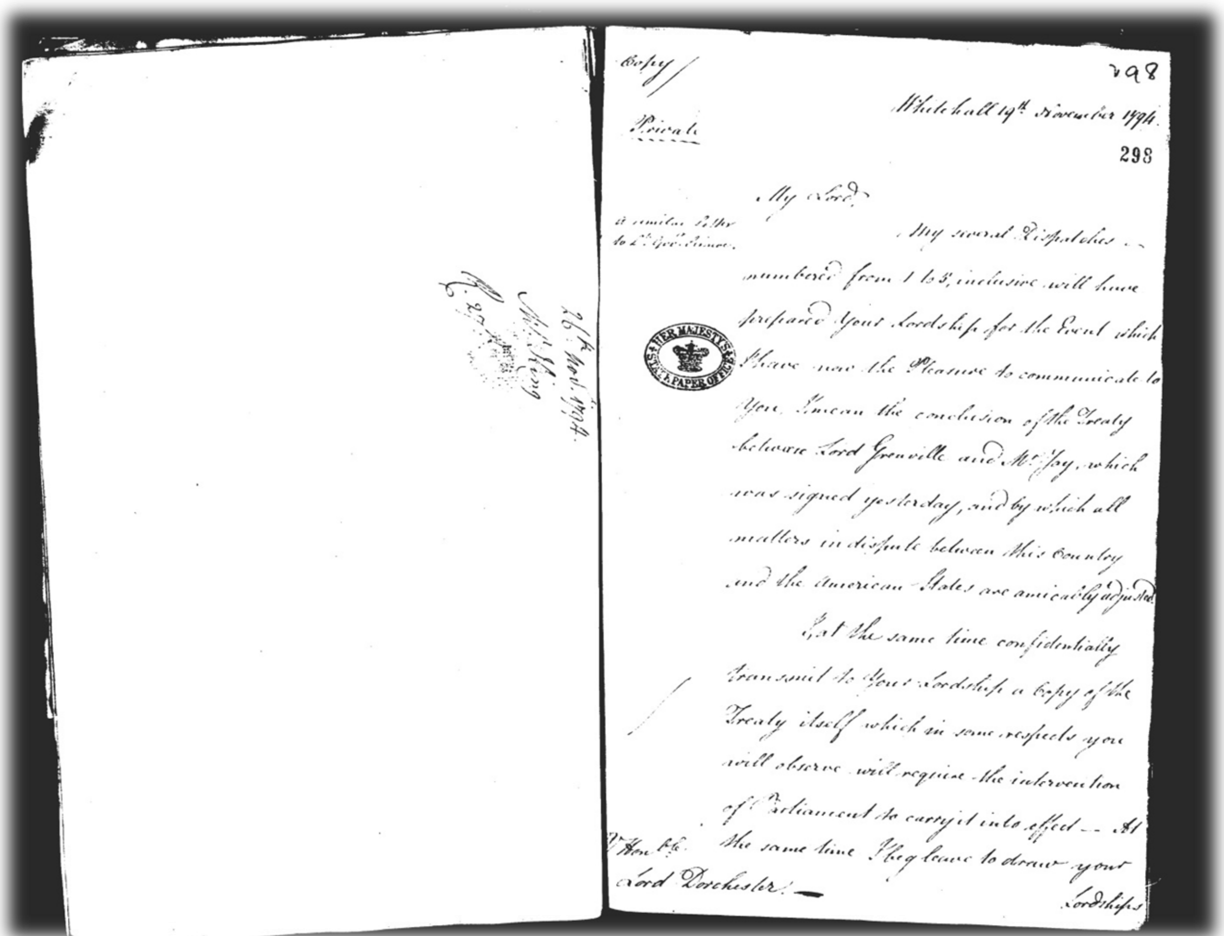
To our great and good Friend
His Britannic Majesty.

By the President of the [...]
Edm: Randolph
Secretary of State.

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)


Copy/

Private

298

Whitehall 19th November 1794.

298

My Lord,

A similar Letter to Lt. Gov. Simcoe.

My several Dispatches numbered from 1 to 5, inclusive will have prepared Your Lordship for the Event which I have now the Pleasure to communicate to You. I mean the conclusion of the Treaty between Lord Grenville and Mr. Jay, which was signed yesterday, and by which all matters in dispute between this Country and the American States are amicably adjusted.

I at the same time confidentially transmit to Your Lordship a Copy of the Treaty itself which in some respects you will observe will require the intervention of Parliament to carry it into effect — At the same time I beg leave to draw your Lordships

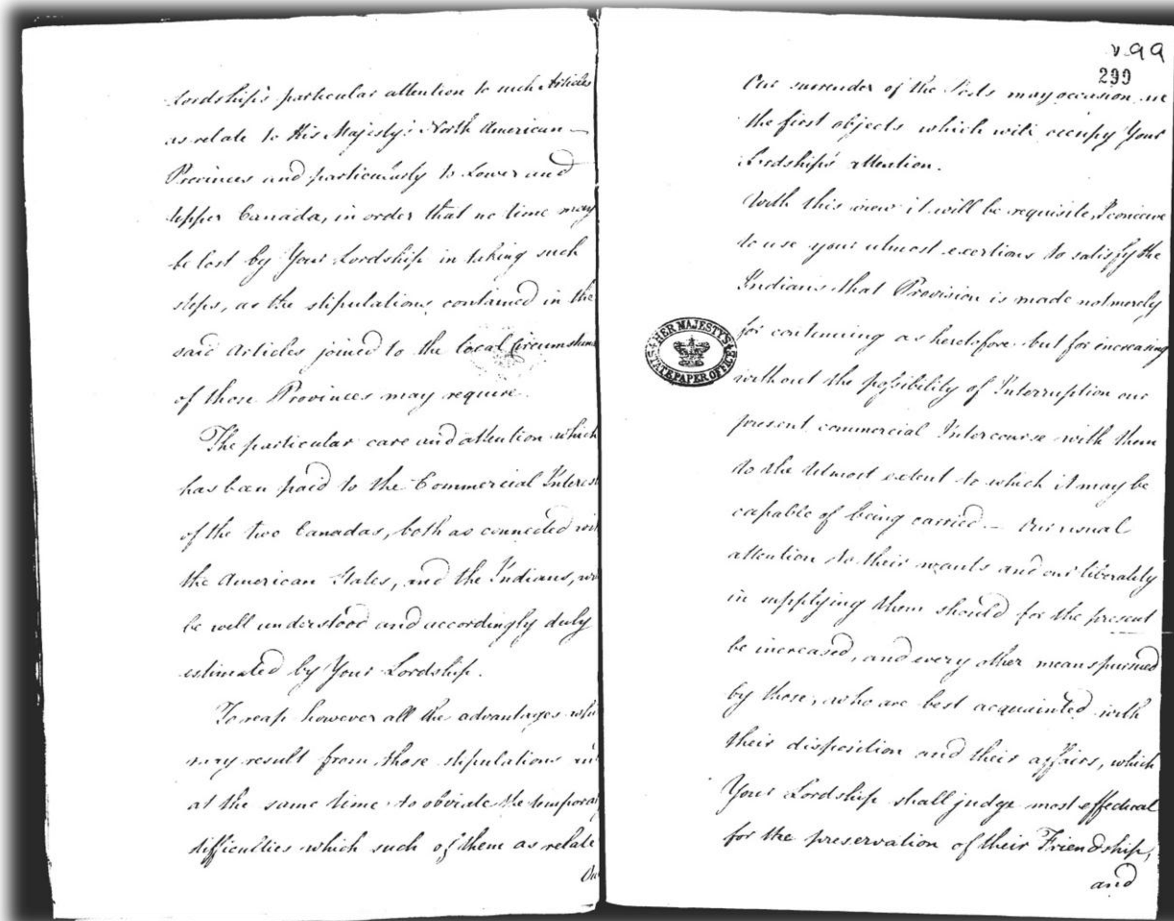
Rt Hon. &c.
Lord Dorchester.

26th Nov. 1794

HER MAJESTY'S STATE PAPER OFFICE

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 (2 of 4)



Lordship's particular attention to such Articles
as relate to His Majesty's North American
Provinces and particularly to Lower and
Upper Canada, in order that no time may
be lost by Your Lordship in taking such
steps, as the stipulations contained in the
said Articles joined to the local Circumstan[ces]
of those Provinces may require.

The particular care and attention which
has been paid to the Commercial Interest
of the two Canadas, both as connected wi[th]
the American States, and the Indians, wi[ll]
be well understood and accordingly duly
estimated by Your Lordship.

To reap however all the advantages whi[ch]
may result from those stipulations an[d]
at the same time to obviate the temporar[y]
difficulties which such of them as relate
Our

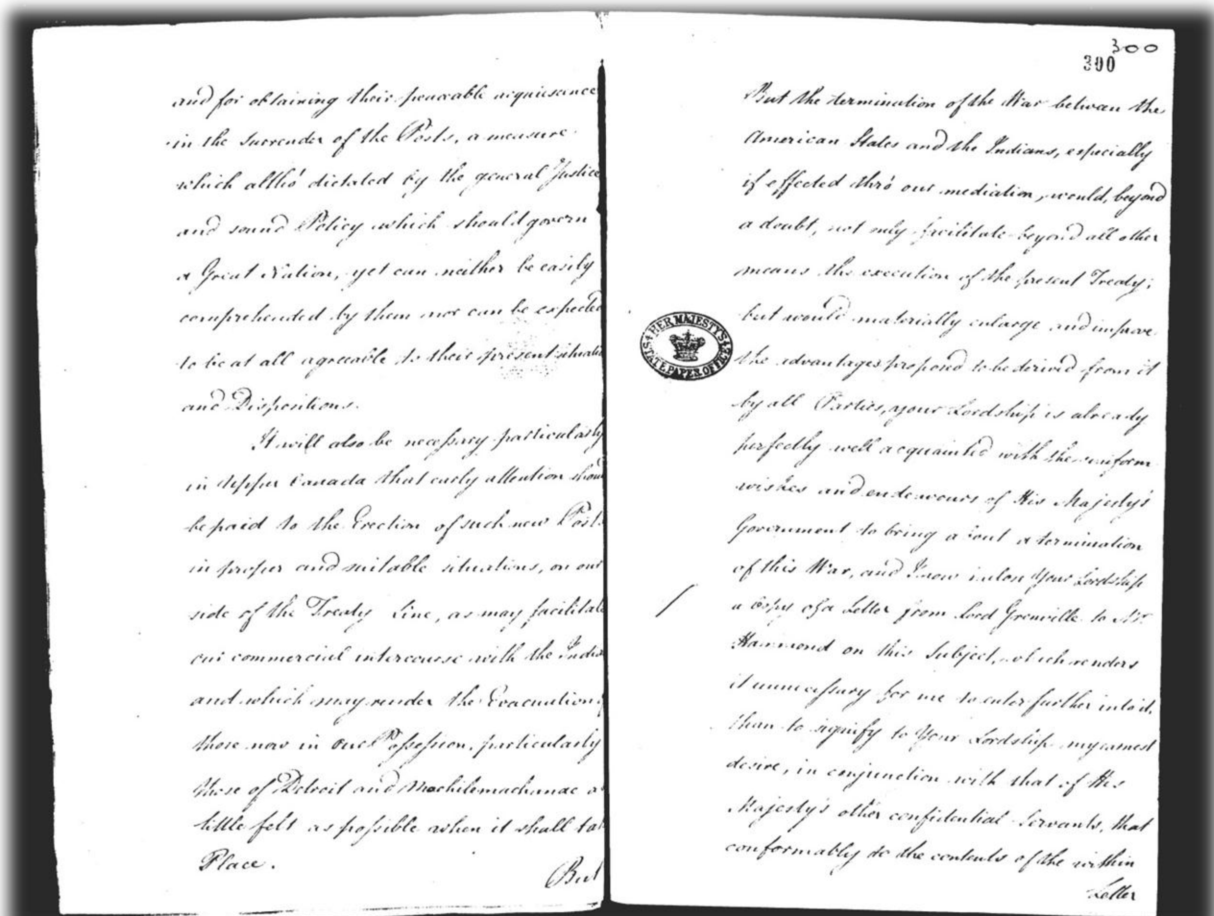
v.99
299

Our surrender of the Posts may occasion are
the first objects which will occupy Your
Lordship's attention.

With this view it will be requisite, I conceive
to use your utmost exertions to satisfy the
Indians that Provision is made not merely
for continuing as heretofore but for increasing
without the possibility of Interruption our
present commercial Intercourse with them
to the utmost extent to which it may be
capable of being carried. — Our usual
attention to their wants and our liberality
in supplying them should for the present
be increased, and every other means pursued
by those, who are best acquainted with
their disposition and their affairs, which
Your Lordship shall judge most effectual
for the preservation of their Friendship,
and

HER MAJESTY'S STATE PAPER OFFICE

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).



and for obtaining their peaceable acquiescence
in the Surrender of the Posts, a measure
which altho' dictated by the general Justice
and sound Policy which should govern
a Great Nation, yet can neither be easily
comprehended by them nor can be expected
to be at all agreeable to their present situati
and Dispositions.

It will also be necessary particularly
in Upper Canada that early attention shou
be paid to the Erection of such new Posts
in proper and suitable situations, on our
side of the Treaty Line, as may facilitate
our commercial intercourse with the Indi
and which may render the Evacuation
those now in our Possession, particularly
those of Detroit and Machilemachinac a
little felt as possible when it shall ta
Place.

But

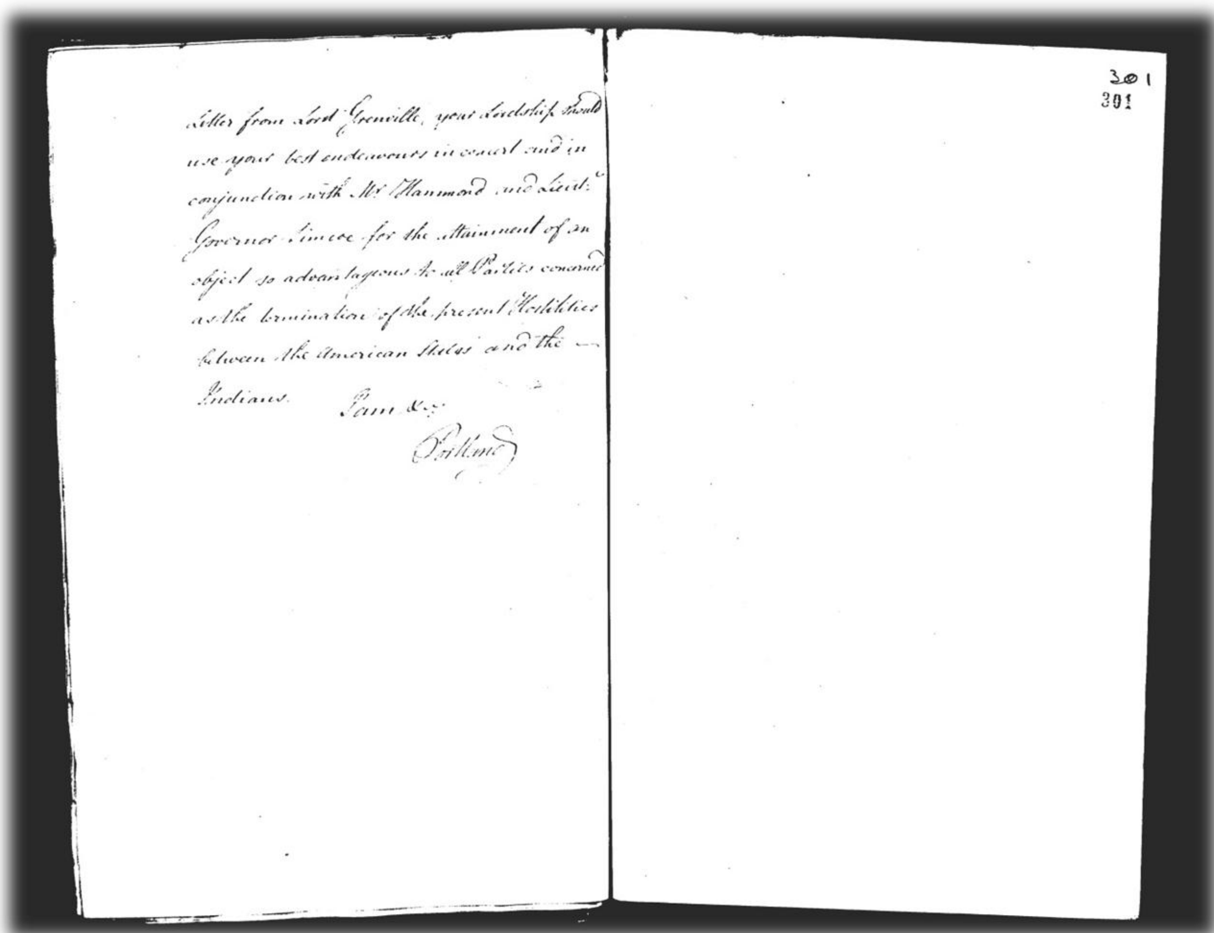
390 300

But the termination of the War between the
American States and the Indians, especially
if effected thro' our mediation, would, beyond
a doubt, not only facilitate beyond all other
means the execution of the present Treaty;
but would materially enlarge and improve
the advantages proposed to be derived from it
by all Parties, your Lordship is already
perfectly well acquainted with the uniform
wishes and endeavours of His Majesty's
Government to bring about a termination
of this War, and I now inclose Your Lordship
a Copy of a Letter from Lord Grenville to Mr
Hammond on this Subject, which renders
it unnecessary for me to enter further into it,
than to signify to Your Lordship my earnest
desire, in conjunction with that of His
Majesty's other confidential Servants, that
conformably to the contents of the within
Letter

HER MAJESTY'S STATE PAPER OFFICE

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 Lieut: 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

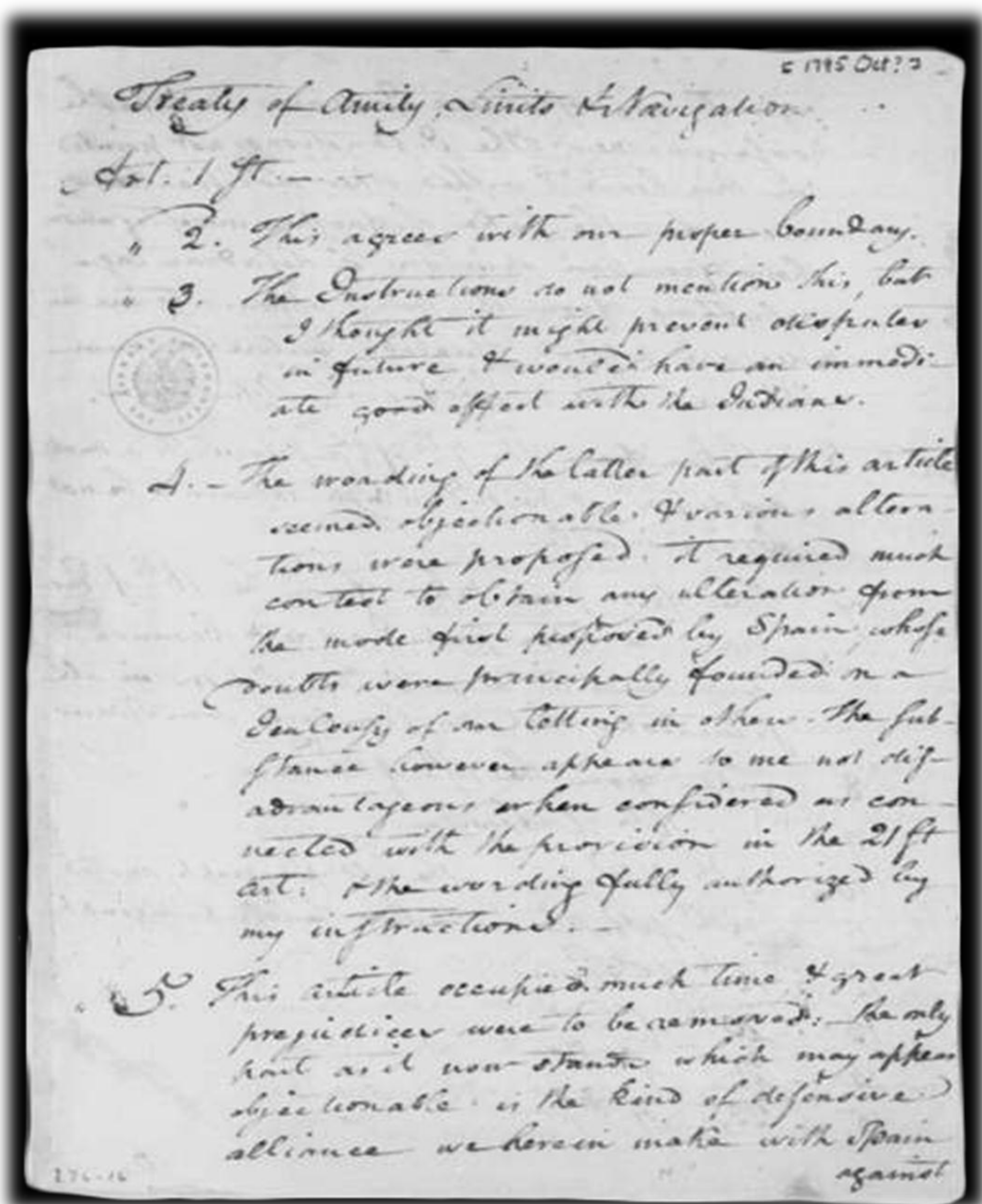
Portland

301

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.


c 1795 Oct??

Treaty of Amity, Limits & Navigation

Art. 1st.—

" 2. This agrees with our proper boundary.

" 3. The Instructions do not mention this, but I thought it might prevent disputes in future & would have an immediate good effect with the Indians.

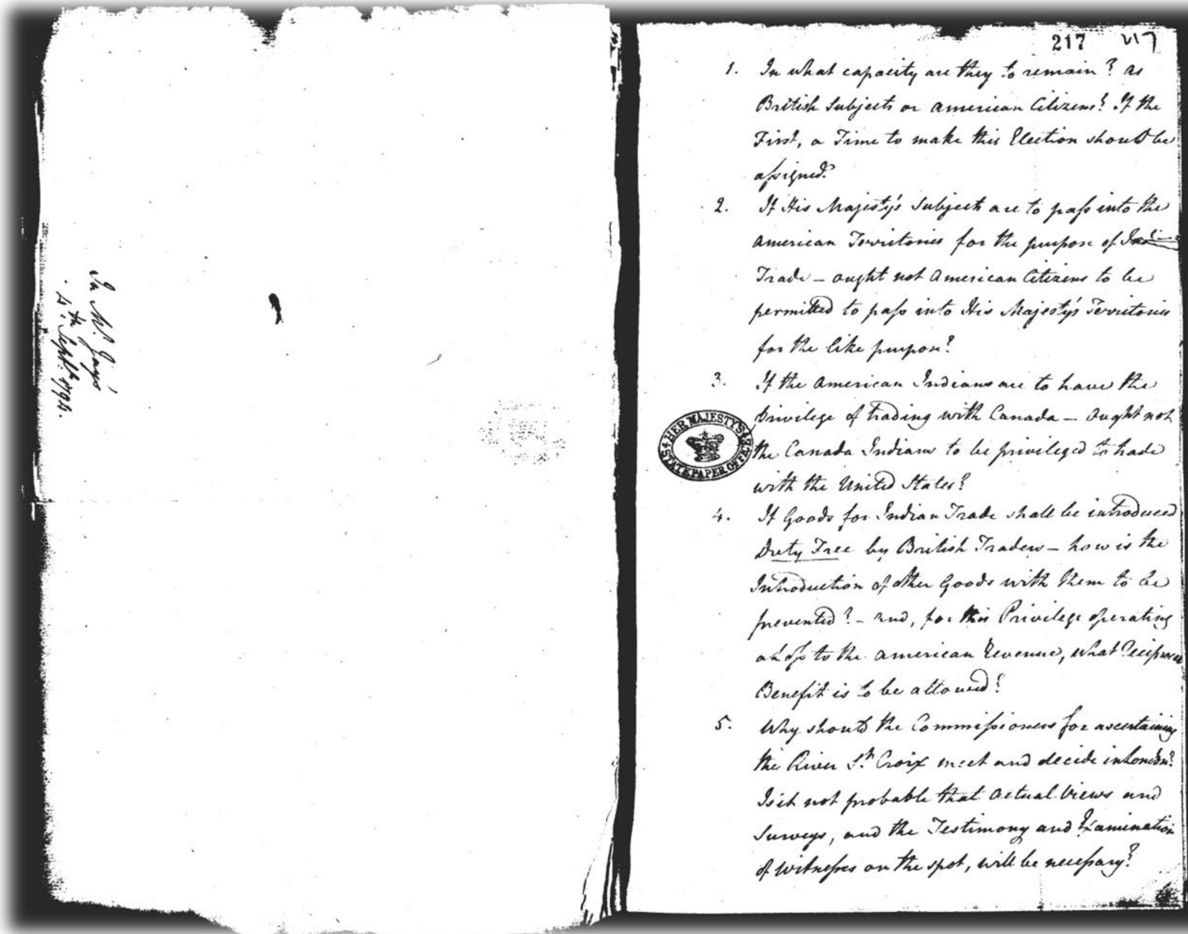
4.— The wording of the latter part of this article seemed objectionable & various alterations were proposed. It required much contest to obtain any alteration from the mode first proposed by Spain whose doubts were principally founded on a Jealousy of our Settling in them. The substance however appears to me not disadvantageous when considered as connected with the provision in the 21st art. & the wording fully authorized by my instructions.—

" 5. This article occupied much time & great prejudices were to be removed: the only part as it now stands which may appear objectionable is the kind of defensive alliance we herein make with Spain against

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.



In Mr. Jay's
4th Sept. 1794.

217 217

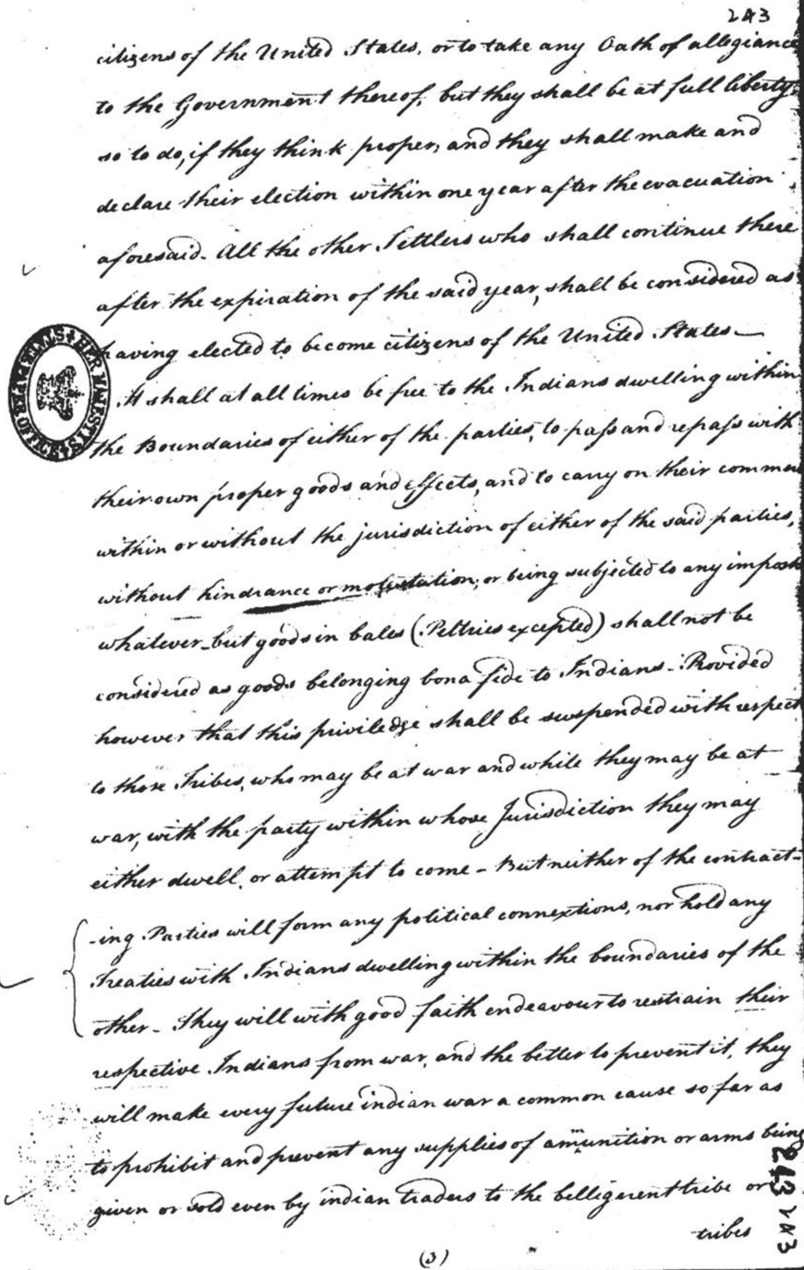
1. In what capacity are they to remain? as British Subjects or American Citizens? If the First, a Time to make this Election should be assigned?
2. If His Majesty's Subjects are to pass into the American Territories for the purpose of Indian Trade – ought not American Citizens to be permitted to pass into His Majesty's Territories for the like purpose?
3. 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?
4. If Goods for Indian Trade shall be introduced Duty Free by British Traders – how is the Introduction of other Goods with them to be prevented? – and, for this Privilege operating a Loss to the American Revenue, what Reciprocal Benefit is to be allowed?
5. Why should the Commissioners for ascertaining the River St. Croix meet and decide in London? Is it not probable that actual Views and Surveys, and the Testimony and Examination of Witnesses on the spot, will be necessary?

HER MAJESTY'S STATE PAPER OFFICE

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.


243

citizens of the United States, or to take any Oath of allegiance
to the Government thereof, but they shall be at full liberty
so to do, if they think proper, and they shall make and
declare their election within one year after the evacuation
aforesaid. All the other Settlers who shall continue there
after the expiration of the said year, shall be considered as
having elected to become citizens of the United States —
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 said parties,
without hindrance or molestation, or being subjected to any impost
whatever_but goods in bales (Peltries excepted) shall not be
considered as goods belonging bona fide to Indians - Provided
however that this priviledge shall be suspended with respect
to those Tribes, who may be at war and while they may be at
war, with the party within whose Jurisdiction they may
either dwell, or attempt to come - But neither of the contract-
-ing Parties will form any political connexions, nor hold any
Treaties with Indians dwelling within the boundaries of the
other - They will with good faith endeavour to restrain their
respective Indians from war, and the better to prevent it, they
will make every future indian war a common cause so far as
to prohibit and prevent any supplies of ammunition or arms being
given or sold even by indian traders to the belligerent tribe or
tribes

(3)

243

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).