

XI

Drawing a Line:

The 1796 Indian Trade and Intercourse Act

Establishing Federal Trading Houses for “Indians.”

The third Indian Trade and Intercourse Act, passed on May 19, 1796, contained an explicit geographic boundary line defining the area within which the Act was to apply, a boundary that excluded all of New York State. While no evidence directly connects the Act’s inclusion of this boundary line to the 1795 crisis regarding New York State, the inference is strong that Congress felt a need to head off any recurrence of such disputes. In addition to its boundary line, the Act reflected geographic specificity in its full title: “An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers.”

Closely related to the issues addressed by all the Indian Trade and Intercourse Acts was the question of whether or not the federal government should establish fixed-price trading houses for the convenience of tribes engaged in commercial hunting. In his Fifth Annual Message to Congress, dated December 3, 1793, President Washington had recommended

the establishment of commerce with the Indian nations in behalf of the United States...with...a stated price for what they give in payment, and receive in exchange. Individuals will not pursue such a traffic, unless they be allured by the hope of profit; but it will be enough for the United States to be reimbursed only.¹

A year later, in his Sixth Annual Message to Congress, dated November 19, 1794, Washington

¹ George Washington, *Writings*, New York: Library of America, 1997, 849-50.

pointed out that nothing had been done about this, adding

I cannot refrain from again pressing upon your deliberations, the plan which I recommended at the last session, for the improvement of harmony with all the Indians within our limits, by the fixing and conducting of trading houses, upon the principles then expressed.²

This time Congress responded, and in March of 1795 appropriated \$50,000 for the purchase of goods for sale to tribes on a trial basis. With this comparatively small amount, an experiment was begun limited to the Cherokees and Creeks.³ This experiment having been deemed promising, on April 18, 1796, Congress passed “An Act for establishing Trading Houses with the Indian Tribes” thereby inaugurating a general program of indefinite duration.

Proposed in 1793, tried in the south on a limited basis in 1795, non-profit federal trading houses became national policy in 1796. Then should New York State have a tribal trading house? On December 12, 1795, Secretary of War Pickering reported to the Senate assessing the first year’s experiment and making suggestions for future expansion. Writing only a few months after the New York controversy, Pickering ruled out federal trade with the “Six Nations.” He also ruled out “tribes northwest of the river Ohio” because these tribes were currently hostile to the United States. Among the southeastern tribes, the Choctaws and Chickasaws, Pickering suggested, probably would prefer a trading house on the Mississippi River, which was not currently practical. This left only the Cherokees and Creeks to whom this national policy could sensibly be applied.

2 Washington *Writings* 894.

3 Francis Paul Prucha, *American Indian Policy in the Formative Years*, Cambridge: Harvard University Press, 1962, 86.

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But hadn't Washington referred to "all the Indians within our limits"? What about "Indians" living on reservations in Washington's own State of Virginia? Here, as in many other contexts in which the term "Indians" was used in federal policy discussions, Washington's phrase "all the Indians within our limits" evidently meant "all the Indians" with whom the federal government was appropriately concerned.

This category did include U.S.-resident tribes of the "Six Nations." Though eligible, these tribes would not be accorded a federal trade depot. Pickering's reasons were characteristically comprehensive:

The situation of the Six Nations, surrounded either wholly by the settlements of citizens of the United States, or on one side of them, and on the other by the British of Upper Canada, and by both in near neighborhoods, seemed to exclude them from the experiment proposed to be made, of commencing a trade on the principle of furnishing cheap supplies to the Indians; for the familiar intercourse between them and the whites would have subjected the public to continual impositions, against which no checks were provided.

Without naming names, Pickering placed "Six Nations" tribes in two categories. In one would have been the Senecas on the western border of New York State abutting British Canada, "surrounded" on only one side "by the settlements of citizens of the United States." In Pickering's other category would have been the Oneidas, Onondagas and Cayugas, whose New York State reservations were "surrounded...wholly by the settlements of citizens of the United States." Concerning both categories, Pickering concluded that the federal trading program was not

applicable.⁴

The conceptual framework Pickering employed in excluding U.S.-resident “Six Nations” tribes was drawn from Section Thirteen of the 1793 Indian Trade and Intercourse Act, which stated “That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual States.” Pickering did not discuss whether any of the “Six Nations” might be “within the jurisdiction” of New York State as well as “surrounded by settlements of the citizens” of New York State but he could scarcely deny that the Oneida, Onondaga and Cayuga State reservations were “surrounded” on all sides.

Based on Pickering’s December 12, 1795, recommendation, a long-range federal trading house program was approved by Congress on April 18, 1796. A month later, on May 19, 1796, Congress passed a new Indian Trade and Intercourse Act to replace the 1793 Act.

Congress Deliberates: James Madison, James Hillhouse, William Lyman.

The 1793 Act had strengthened the enforcement powers of the federal government, an end accomplished consensually with the support of Hamilton and Jefferson as well as Jefferson’s principal ally in Congress, James Madison. By the time this Act expired in 1796, Jefferson had

⁴ ASPIA 1:583-4. In 1770, Pickering’s illustrious precursor Sir William Johnson had similarly characterized New England tribes as “surrounded by our settlements” (WJP 7:597-602).

left the administration, and Madison though still in Congress was now a leader of the Jeffersonian opposition. This time, a replacement Indian Trade and Intercourse Act was agreed to only after contentious debate.

By 1796, the federal government's possession of arbitrary enforcement powers to protect tribes had begun to alarm Jeffersonians, who were concerned that this could lead to violations of the rights of U.S. citizens. Regarding one enforcement tool in the proposed 1796 bill (confiscation of estates, Section Five), Madison for example stated on the House floor that he would not say that it was against the letter, but it was certainly against the spirit of the Constitution.⁵ These were powerful words from the Constitution's principal drafter. Federal authority to confiscate the estates of U.S. intruders into "Indian Country" was however ultimately approved over Madison's opposition, on a vote of 47 to 36.⁶

In its final form, the 1796 Act was a tense compromise produced by a sharply divided Congress. The Act allowed the federal government to exercise arbitrary enforcement powers to protect tribes, but restricted the geographic region within which these powers could be employed. The Act began by detailing a boundary for federal "Indian country," a boundary described as having been "established by treaty between the United States and various Indian tribes." This line started "at the mouth of Cuyahoga river, on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence,

⁵ *Annals of Congress*, 4th Congress, 1st Session, 900.

⁶ *Annals of Congress*, 4th Congress, 1st Session, 905.

down that branch....” This northern portion of the Indian Trade and Intercourse Act boundary was identical with that established by the August 3, 1795, Treaty of Greenville, on which it was based, as several Members of Congress pointed out in debate. Article Three of the Greenville Treaty declared that “The general boundary line between the lands of the United States and the lands of the said Indian tribes, shall begin at the mouth of the Cuyahoga river, and run thence up the same to the portage, between that and the Tuscarawas branch of the Muskingum, thence down that branch....”

The 1796 Indian Trade and Intercourse Act further stated that “if the boundary line between the said Indian tribes and the United States, shall at any time hereafter be varied by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied in the same manner as the said provisions now apply to the boundary line hereinbefore recited.” This was very explicit language. An effort would be required to imagine that *any* section of this Act was *not* intended to be construed with reference to this elaborately described boundary line. To remove doubt even more conclusively, Section Nineteen of the 1796 Act stated categorically that “nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States.” A similar proviso had appeared in the 1793 Act, but the clarifying word “ordinary” was new, and linkage of this proviso to a specific geographic region would seem to have precluded future speculative discussions such as that Pickering had engaged in on December 12, 1795, regarding whether or not the “Six Nations” of

New York State were “surrounded.” New York State was excluded altogether from the purview of the Act.

Pertaining exclusively to the region it delineated, the 1796 Indian Trade and Intercourse Act had no implications, positive or negative, for other regions. The federal government was not precluded by it from regulating the affairs of tribes elsewhere under its general Constitutional powers, nor did the 1796 Act alter in any way the terms of treaties already proclaimed. Once specific treaties with specific tribes were negotiated, the particular provisions of such treaties took precedence over the generic or default provisions of the 1796 Act. Because treaties that continued in force had already been negotiated with all of the “Six Nations” tribes resident in New York State, Congress saw no need to include New York State within the boundary line delimiting the area where the 1796 Act applied.

The Act’s section regulating land sales (Section 12) appeared as one in a series of sections dealing with such matters as horse-stealing and the licensing of traders. All these sections were conceived as complementary parts of a single law authorizing the federal government to regulate “Trade and Intercourse” with independent tribes living in “the Indian Country,” a single, treaty-bounded region within the limits of the United States encompassing some federal territory and some territory within acknowledged state boundaries but outside the “ordinary jurisdiction” of these states. Fundamental to the 1796 Act was a formal, explicit separation of “the Indian Country” within which the federal government could exercise extraordinary powers from areas under ordinary state jurisdiction. The 1796 Act’s ironclad specificity about where the line between state and federal authority would be drawn was

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reassuring to Jeffersonians increasingly resistant to extending discretionary federal powers.

That all sections of the 1796 Act, including the land sale section, applied only to the region specified is corroborated by the fact that a Connecticut Congressman, James Hillhouse, chaired the Committee that prepared the bill. In defending it on the floor of the House, Hillhouse never indicated that the bill had any reference to his state. Nor did any other Congressman say anything in debate (which was far more extended than had been the case in 1790 or 1793) implying the bill's application anywhere other than on the "frontiers," a term used frequently in debate as well as in the Act's title.

During the House debate, a revealing exchange occurred regarding the nature of federally protected "Indian Title." William Lyman, a Jeffersonian Congressman from western Massachusetts, argued

that the Indians ought certainly to be treated with humanity; but he did not believe they had any real title to land; they did not allow them to sell land. Their property in land had been compared by an able writer to a fisherman's property upon a fishing bank. Their land was the property of the United States, which they were suffered to enjoy, but to which they had no real title.⁷

In Lyman's view, the rights possessed by tribes occupying federally regulated "Indian Country" resembled those of a fisherman to the fish in the ocean. In other words, tribes possessed a legal right only to the game they killed and none to the land itself, which was owned outright by the federal government. Congressman Lyman would never have described the Massachusetts-

⁷ *Annals of Congress*, 4th Congress, 1st Session, 900.

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granted reservations of tribal groups in his State as “the property of the United States.”

Congressman James Madison offered a more generous but still limited description of federally protected “Indian Title,” one that anticipated the definition provided almost a generation later by U.S. Supreme Court Chief Justice John Marshall in his authoritative 1823 Opinion in *Johnson vs. McIntosh*. Madison in 1796 contended that

it was not necessary to investigate the Indian mode of occupancy in opposition to that of civilized society. The natives are understood, by the nations of Europe possessing territories on this Continent, to have a qualified property only in the land. If they had an unqualified title, they could not be prevented from ceding to foreigners their lands lying within the limits of the United States.⁸

Like Lyman, Madison was referring to federal “Indian Country” and not to reservations granted by and under the ordinary jurisdiction of states, including his own State of Virginia. Despite--- indeed because of---the fact that it had almost no sale value, aboriginal “Indian Title” (what Madison called “the Indian mode of occupancy”) needed federal protection from states that might otherwise declare tribes to be tenants-at-will, as well as from sinister speculators prepared to offer better-sounding deals to independent tribes. But where states had made affirmative grants to tribal groups, federally protected aboriginal “Indian Title” *claims* had been superseded and were not at issue.

Both before and after implementation of the 1789 Constitution, responsibility for tribal regulation was shared by national and state governments. States regulated tribes and tribal reservations, as heirs to British colonies that had been administering tribal reservations, in some instances for more than a century. The 1789 Constitution made no change in the status of such

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state tribal reservations. Nor was this contemplated by the drafters of the Indian Trade and Intercourse Acts of 1790, 1793, and 1796.

⁸ *Annals of Congress*, 4th Congress, 1st Session, 900.

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Tribal groups occupying state reservations needed kinds of assistance only states could provide. State regulators supervised land sales and leases of restricted state reservation lands, as well as the education of young tribal members and the terms of contracts for apprenticeship. In the 1790s, though Pickering would have wanted it otherwise, the federal government offered no such services. Only states maintained lists of all enrolled tribal members with rights specifically guaranteed them as individuals. As President Washington informed Cornplanter in 1790, “the United States cannot distinguish the tribes to which bad Indians belong, and every tribe must take care of their own people.”⁹

If independent tribes preferred to continue functioning under the rough-and-ready supervision of the federal War Department, they were welcome to do so. But federal policy-makers hoped that some tribes would want follow the path taken by the various eastern tribes already under state jurisdiction in the direction that would lead ultimately to acquisition within states by members of tribes of the rights available only to U.S. citizens.

⁹ See above, page 94.