

XX

Early Federal Tribal Policy:

Then and Now

President Washington’s “Indian Country” Boundary Line.

The 1787 Constitutional Convention finessed most tribal issues. The Constitution authorizes Congress to regulate “Commerce” with “the Indian Tribes”---without specifying how. Other Constitutional powers are implicit. Congress’s power to declare war, for example, includes the power to declare war on tribes, and the treaty power comprehends treaties with tribes. Everyone concerned understood that Constitution would make a significant difference in the management of tribal affairs, but agreement ended there. In this tense atmosphere, President Washington and Secretary of War Knox made two proposals to Congress in 1789: that the Constitution’s general treaty procedure be employed as the federal government’s central vehicle in managing relations with independent tribes, and that Congress pass a “declarative law” spelling out federal tribal regulatory powers. These administrative initiatives combined with Congress’s responses to them clarified what was continuous as well as what was innovative about post-Revolutionary U.S. tribal policy.

While the British government had negotiated numerous treaties with tribes, these treaties were with subjects of a divine right monarch, and were legally binding on tribes, but not on the monarch. U.S. treaties were by contrast defined in the Constitution itself as having the standing of federal law, and were therefore binding on the U.S. government as well as on tribes. Moreover, British tribal treaties did not even pretend to be part of a system. In contrast, federal

Hutchins Report – Chapter Twenty

treaties, while adapted to specific circumstances, were meant to contribute to the development of a coordinated and predictable tribal policy.

Like the federal treaty procedure, the 1790 Indian Trade and Intercourse Act was modeled on British precedents, suitably modified. Drafters of the 1790 Act appear to have had in mind King George III's Proclamation of October 7, 1763---even as they departed from it. This Proclamation had described a north-south line between areas of direct royal administration of tribes to the west of the Appalachians and areas of direct colonial administration of tribes east of the Appalachians. Tribes living east of the Proclamation Line were subject to regulation by royally appointed colonial governors. Tribes west of this 1763 Line functioned as independent polities, and all ungranted land there not currently needed for Crown purposes was reserved for the use of these tribes as hunting grounds until King George III's "further Pleasure be known."¹ The federal government's 1790 Indian Trade and Intercourse Act similarly envisioned on the one hand a sprawling, federally regulated western region referred to in the Act as "the Indian country" and, on the other, areas under ordinary state jurisdiction.

President Washington's decision to employ the federal treaty procedure in tribal negotiations and his decision to define a line between federal "Indian Country" and regions under ordinary state jurisdiction seem to have been parts of a single policy, because Washington's initial use of tribal treaties was to define a comprehensive "Indian Country" boundary. As Congressman John Bell noted in 1830,

the extent of the treaty-making power, in regard to Indian tribes, was among the first points which it became necessary to settle....It was then, that General Washington appears to have conceived the design of establishing one connected Indian boundary, from Lake Erie, to the Saint Mary's [River] of the South, which should be in advance of all the white settlements, and of employing all the energies of the Government to secure

¹ See above, page 15.

Hutchins Report – Chapter Twenty

its observance. For this purpose, he caused a series of negotiations to be commenced with the various hostile tribes, which terminated in treaties, at different times, between 1789 and 1795....This...series...fixed the general Indian boundary described in the act of Congress of 1796, regulating the trade of the Indian tribes.²

In Bell's view, President Washington by 1789 already had in mind the establishment of a comprehensive north/south line. No specific boundary for "the Indian country" was however indicated in either the 1790 or the 1793 Act because both these Acts were passed immediately prior to tribal treaty negotiations aimed at defining the boundaries of "the Indian country." Advance description of a specific boundary in either of these Acts would have complicated or even aborted planned negotiations. A 1763-style line was therefore omitted from the 1790 and 1793 Acts, and then inserted in the 1796 Act, by which time the President's original objective had been achieved. In 1794, Seneca lands in New York State had been explicitly bounded by the federal Treaty of Canandaigua, and thus in 1796 no longer needed to be taken into account in describing a general boundary for "the Indian country." And the 1795 Treaty of Greenville had for the first time established an agreed boundary line for "the Indian Country" from the Ohio River to Lake Erie, a line incorporated directly into the 1796 Act.

Although the absence of a 1763-style line in the 1790 and 1793 Acts is attributable to contemporary events, omission of such a line had serious consequences. Key terms and even whole sections in the 1790 and 1793 Acts were hard to interpret without reference to an explicitly bounded "Indian country." Illustrating the potential for confusion, Secretary of War Timothy Pickering and Attorney General William Bradford proposed in 1795 that as written the 1793 Act could apply even to New York State-granted reservations. From 1796 forward, any such an interpretation seemed precluded. The entire Act was territorial in referent, and was

² House of Representatives, 21st Cong., 1st Sess, Report 227, 16-17.

conventionally expounded as such. For example, the first U.S. Commissioner of Indian Affairs, Elbert Herring in his *Report* dated November 19, 1831, referred to “the boundary line, defined by that act, and to which its provisions were applicable.”³

“Indian Country” and “Indian Title.”

With few exceptions, “Indian Country” was coextensive with the region where “Indian Title” claims persisted. The extinguishment of such claims thus typically coincided with the transfer of a region from direct federal regulation to ordinary state jurisdiction. The land sale section of the Indian Trade and Intercourse Act was in other words fundamental to it, and helped to define the region to which the Act applied, when its boundary definition grew outdated. In his 1877 Supreme Court Opinion in *Bates v. Clark* (95 US 204), Justice Samuel Miller observed that the first section of the 1802 Indian Trade and Intercourse Act “describes a boundary, the description occupying over a page of the statute book.” Similarly, the 1834 Act “begins by describing in its first section the country or territory in which that act shall be operative.”

Moreover,

Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the country who so punished them had no jurisdiction, if the offences were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain

3 Wilcomb Washburn, *The American Indian and the United States: A Documentary History*, New York: Random House, 1973, 1:21.

what it was at any time since then.

Miller argued that Congress and the courts had concluded that a specifically described boundary circumscribing every tract of “the Indian Country” was not actually needed because (unless the federal government provided otherwise) “the Indian Country” could be identified simply as that area where “Indian Title” had not yet been extinguished. In the absence of affirmative federal action, the survival of “Indian Title” was the only sensible way to define where “Indian Country” was, and therefore where all the various provisions of the Indian Trade and Intercourse Act applied. Wherever “Indian Title” survived, logically a tribe subject to direct federal regulation must still be present.

Miller thus concluded that “the Indian Country” comprehended “lands alone to which the Indian title has not been extinguished.” Tribal existence was not a workable criterion, since tribes existed outside “the Indian Country.” Tribal possession of land was also not a workable criterion, since tribes held land on all sorts of bases. But tribal possession of “Indian Title” land was a workable criterion. Extinguishment of “Indian Title” could only be done by the federal treaty process or its equivalent, and it was therefore not difficult to ascertain whether “Indian Title” had been extinguished in a given area. As Miller argued,

The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

The reasoning advanced by Justice Miller in this 1877 Opinion was applied to New York State in a 1926 Opinion issued by the British-American Arbitration Tribunal in a case concerning the Cayugas’ 1795 relinquishment reservation lands. Presumably written primarily

by the American on the three-member Tribunal, Roscoe Pound, this Opinion concluded that the “subject matter” of the confusingly named 1795 “treaty” between New York State and the Cayugas was not

one of Federal cognizance. The title of the Cayuga Indians, one of occupation only, had been extinguished by the [pre-Constitutional State] Treaty of 1789, which ceded the lands of the Cayugas to New York, providing for a reservation, which, we think, must be taken to have been held of New York by the nation. It is argued that the language of the treaty is rather that of a common-law reservation, so that the reserved land was reserved out of the grant.... We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession. Such a construction is indicated by Marshall, C.J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17.... We must hold that the Treaty of 1795 was a contract of the State of New York and that it was not a contract on a matter of Federal concern or in which the Federal Government had an interest.⁴

The Tribunal’s citation of Chief Justice Marshall’s 1831 *Cherokee* Opinion was to this observation:

Treaties were made with some tribes by the State of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves in which they admit their dependence.

As noted by the British American Tribunal in 1926, Marshall’s argument implied that the Cayugas in “taking back” a State grant had acknowledged that this was no longer “Indian Title” land. Its subsequent sale therefore did not require use of the federal treaty procedure.

The need to distinguish by federal law between areas of ordinary state jurisdiction and a defined geographic area within which the federal government would guarantee aboriginal land claims until federally extinguished was considered urgent because of lack of agreement in the early republic about the nature of the land rights tribes might be said to possess. Federal gate-

4 Fred K. Nielsen, *American and British Claims Arbitration*, Washington: Government Printing Office, 1926, 309, 310, 326-328.

keeping along the boundary of “the Indian country” was thought imperative to prevent states from extending opportunistic theories about the nature of aboriginal land rights into “the Indian Country” and thereby provoking potentially dangerous tribal resistance. For this reason, it made sense for the federal government to supervise extinguishment of any and all tribally self-asserted land rights of whatever merit or description, prior to the transfer of an aboriginally claimed region to ordinary state jurisdiction.

The Post-Revolutionary Emergence of the Concept of “Indian Title.”

In defining aboriginal land rights, Revolutionaries had no clear British precedent to follow, because pre-Revolutionary British definitions of aboriginal tribal land rights had not been uniform. Moreover, the most important British precedent of the decades immediately preceding the Revolution was that embodied in King George III’s 1763 Proclamation, according to which tribes possessed a hunting ground use right enjoyed at the monarch’s “pleasure.” To Revolutionaries, King George III’s “pleasure” was not a legal concept commanding respect. But agreeing on an alternative was difficult.

Of the various terms applied by Revolutionaries to aboriginal land rights, *right of pre-emption* was the first to be used with an agreed meaning. Because this term possessed an accepted meaning in other contexts, and when applied to “the Indian Country” referred only to the rights of non-tribals, *right of pre-emption* came into accepted use at an early date, as exemplified by its inclusion in the land sale section of the 1790 Indian Trade and Intercourse Act. Sometimes a non-tribal’s right of pre-emption was said to be held with reference to a tribe’s

Hutchins Report – Chapter Twenty

fee title. In his Dissenting Opinion in *Fletcher v. Peck* (1810), Justice William Johnson argued that independent tribes held fee title to their lands, and that a state could possess “nothing more than a pre-emptive right” to such lands. Johnson questioned “how that could be called a fee simple which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be pleased to sell?” But Johnson’s position was unusual. More often, a non-tribal’s right of pre-emption was claimed with reference to some sort of aboriginal use right, which might be no more than a right to hunt during the “pleasure” of a state government. That independent tribes possessed a durable *occupancy* right was however accepted by most federal officials. The term for this right that in time gained acceptance was “Indian Title.” But this term was not in general use before it was adopted by a majority of the Supreme Court in *Fletcher v. Peck* (1810). Nor was “Indian Title” authoritatively defined prior to the Supreme Court’s 1823 decision in *Johnson v. McIntosh*, and even this did not end controversy.

Obligated to work in a volatile political environment in his efforts to affirm aboriginal land rights, Marshall made progress only by drawing on all his skill as a legal strategist. Because of his ability to look beyond the immediate case, Marshall knew how to conduct even an apparent retreat in a manner that put the Court in a position to advance when occasion offered. *Marbury v. Madison* (1803) is Marshall’s most celebrated use of this tactic, but Marshall’s inclusion of a reference to “Indian Title” in his majority Opinion in *Fletcher v. Peck* (1810) seems to have been a comparable instance. The Court’s decision in *Fletcher v. Peck* could be called a setback for tribal land rights because (over Justice Johnson’s strenuous objection) the Court upheld the right of states to sell fee title to lands still occupied by tribes. Yet Marshall’s Opinion in *Fletcher*

Hutchins Report – Chapter Twenty

v. Peck also unobtrusively added substance to aboriginal land rights. Of the available terms that might have been applied to these rights, Marshall chose the most formidable. In speaking of aboriginal “Title,” though only in passing and with no apparent emphasis, Marshall prepared the way for the elaborate definition of this “Title” that he would provide in 1823. In 1810, Marshall appeared to be subordinating aboriginal “Indian Title” to state fee title. More importantly, he had unobtrusively affirmed the existence and enforceability of “Indian Title.”

John Quincy Adams, President from 1825 to 1829, was not persuaded by Marshall’s 1823 Opinion. On March 22, 1830, two months before passage of Jackson’s Removal Act, Ambrose Spencer, then a Member of Congress opposing the Act, visited Adams, hoping for support from the ex-President defeated by Jackson. But when asked by Spencer for his “opinion upon the Indian question,” Adams

told him that as to a primitive abstract right of soil, owned by the Indians when the European settlers first came here, I did not believe in any such right, and thought it probable his opinion differed in that respect from mine, as I knew those of Chief Justice Marshall and Judge Story did. But as to the treaties and Acts of Congress, I supposed our opinions would concur.⁵

Adams believed that any governmentally confirmed right was substantive. But seven years after Marshall’s Opinion defining “Indian Title,” Adams thought preposterous the idea that a self-asserted aboriginal claim could be enforced in U.S. courts. Nor was this a new or casual thought. Twenty years earlier, in arguments before the Supreme Court in *Fletcher v. Peck*, Adams had already questioned the substantiality of “Indian Title”:

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like

5 John Quincy Adams, *Memoirs*, Philadelphia: Lippincott, 1876, 8:205.

Hutchins Report – Chapter Twenty

our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be transferred but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

A year after making this argument to the Supreme Court, Adams was himself nominated and confirmed *in absentia* to a seat on the Supreme Court, while Adams was serving as U.S. Minister to the Tsar. Adams declined when word of his nomination and confirmation finally reached him, and this “Massachusetts” seat was filled by Joseph Story.⁶

Andrew Jackson had an even lower opinion of “Indian Title” than Adams. Jackson was prepared to concede to independent tribes only a “right of possession granted to the Indians for the purpose of hunting” which endured only as long as hunting was good. No federal treaty was required to free up for use by U.S. citizens hunting grounds that tribes could no longer exploit profitably. So far as Jackson was concerned, absence of game spoke for itself.

Jackson not only scoffed at the idea of an enforceable aboriginal “Indian Title” but even contended that a state could disregard a federal treaty with a tribe situated within state limits, even when the full Constitutional procedure had been employed. Jackson’s position was extreme, but it did force a valuable discussion of the nature and limits of federal treaties with tribes within state boundaries, as well as of the way federal tribal treaties had in fact been employed by President Jackson’s predecessors.

That federal tribal treaties were solemn and binding on the federal government was

⁶ Massachusetts native Adams was nominated to fill the seat vacated by Massachusetts native William Cushing. When Adams declined, this seat was then offered to Massachusetts native Joseph Story.

Hutchins Report – Chapter Twenty

authoritatively affirmed by the Supreme Court in *Worcester v. Georgia* (1832). Pertinent additional distinctions were made by Congressman John Bell in a lengthy Report that accompanied introduction of Jackson's 1830 Removal Bill. Bell was an independent-minded Tennessean who collaborated with Jackson on some issues, including the Removal Bill, but broke with Jackson in 1834 and became Secretary of War in the Whig administrations of Presidents Harrison and Tyler. Attempting to qualify Jackson's sweeping dismissal of federal tribal treaties as a "farce" that states could disregard at will, Bell argued that such treaties did have the status of federal law and therefore were binding. As Bell put it, the federal government's "obligation is equal, whether a treaty or compact be made with a foreign State, with dependent or subject communities, or with individuals, citizens, or aliens." Nonetheless, any federal treaty with any party, just like any federal law, if found to have violated the Constitution would have to be invalidated. Because of the way President Washington and his immediate successors employed tribal treaties, Bell pointed out, committing such violations had been difficult to avoid. Washington's goal was to mediate between states and tribes occupying lands within state boundaries, in order to work out a general agreement about tribal land-holding rights within states. In practice, the federal government often found itself negotiating exclusively with one side or the other. As a result, tribal treaties were sometimes completed over state objections, and agreements with states were sometimes made without consulting tribes. The federal government had more than once entered into a binding federal tribal treaty, well aware that it was flawed, and hopeful that such flaws could be dealt with amicably in future negotiations. This mode of proceeding was not optimal, was but employed as better than nothing,

Hutchins Report – Chapter Twenty

in the hope that it would further a process of negotiation and renegotiation that would in time lead to a result acceptable to both states and tribes. Often, the terms of flawed treaties were in fact renegotiated within a few years, before controversies focused on a former treaty's flaws generated violent conflict. When renegotiation failed, the treaty in question would have to be reviewed and invalidated if it violated Constitutionally protected rights. In Bell's words,

All the powers of the Government are acknowledged to be limited by the nature of the objects intended to be answered by the grant of them. A further limitation of the means by which many specific powers are to be executed, will be found in some fundamental principle of the Constitution, which was intended to be preserved entire. Such unyielding principles as these, of course, are closely identified with the main purposes of the Union....Let these principles be applied to the exercise of a power to interfere in the affairs of Indian tribes within any of the States....If the friendly disposition of a tribe of Indians inhabiting territory belonging to the United States, could not be secured without giving them the absolute property in their hunting grounds, although the President and Senate, under the treaty-making power, might not be competent to dispose of the public domain for that purpose, yet Congress, having the absolute control of the public property, might have the power to make the donation. But it would seem to be a different question, when the territory and jurisdiction of a State become the subjects of Federal power, exercised for the purpose of preserving peace with the Indians; in that case, whatever might be effected, in securing the general object of the power, by gratuities in money, by supplying such articles of trade as the wants of the Indians required, and other means of conciliation, not inconsistent with the rights of property and jurisdiction in the State, would be no infringement of the Constitution; but whatever went beyond this limit, would be the destruction of the very interests for the security and preservation of which, the Government itself was instituted, and would therefore be void. The objection that the power to treat with the Indians, or to regulate their trade, under this limitation, might be rendered inoperative by the obstinacy of the States, would be equally good against a limitation upon any other power of the Government.⁷

Bell was in favor of granting tribes “absolute property in their hunting grounds” to replace the limited use right known as “Indian Title,” and the 1830 Removal Act introduced by Bell

⁷ House of Representatives, 21st Cong., 1st Sess, Report 227, 2, 15.

Hutchins Report – Chapter Twenty

authorized the federal government to do just that---in federal territory. Where fee title to tribally occupied lands was held by states or private individuals, the federal government was Constitutionally required not to ignore their rights in negotiating treaties with tribes.

The Removal Act, passed by Congress on March 28, 1830, authorizing durable, full-value land grants to eastern tribes willing to move west. Tribes were to be offered federal lands west of the Mississippi “to which the Indian title has been extinguished,” as had been done since 1804. But for the first time the President could offer full-value land rights to tribes by “caus[ing] a patent or grant to be made and executed to them for the same.”

Redefining “Indian Title” as Full-Value Title.

After 1830, federal “Indian Country became a jumble of tracts, some held by full-value federal patent, others held by federally certified but minimally valued “Indian Title,” still others only by an uncertified “Indian Title” claim. Marshall’s 1810 and 1823 Opinions had affirmed the existence, durability and enforceability of “Indian Title,” but nothing in these Opinions pertained to the question of price. “Indian Title” remained distinct from fee title, which could be bought and sold while tribes retained their “Indian Title.” Unlike fee title which changed hands at market rates, “Indian Title” continued to be extinguished by the federal government for a few cents an acre. In 1830, John Bell had staunchly defended this practice as both just and “merciful”:

The Indians are paid for their unimproved lands as much as the privilege of hunting and taking game upon them is supposed to be worth, and the Government sells them for what they are worth to the cultivator. The difference between those values is the profit made

Hutchins Report – Chapter Twenty

by asserting the original rights of discovery and conquest. . . . To pay an Indian tribe what their ancient hunting grounds are worth to them, after the game is fled or destroyed, as a mode of appropriating wild lands, claimed by Indians, has been found more convenient, and certainly it is more agreeable to the forms of justice, as well as more merciful, than to assert the possession of them by the sword.

Bell contrasted this way of compensating “Indian Title” lands to the fact that “Improved lands, or small reservations in the States, are in general, purchased at their full value to the cultivator.”⁸

Only in 1946 was a standard of full market valuation finally adopted for “Indian Title.” On November 25, 1946, in a controversial five-to-three decision in *U.S. v. Tillamooks* (329 U.S. 40), the Supreme Court for the first time declared that a standard of market value should be employed in awarding compensation for uncompensated past extinguishments of verifiable “Indian Title” land claims.

The low valuation accorded “Indian Title” for most of the nation’s history was meanwhile obscured by Congress’s almost simultaneous endorsement of supplemental compensation for past extinguishments of “Indian Title” that had not provided “conscionable consideration.” The Indian Claims Commission Act passed August 13, 1946, affirmed that

The Commission shall hear and determine . . . claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity.

In signing the Indian Claims Commission Act, President Truman remarked that

This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable

⁸ 21st Cong. 1st Sess., House Report 227, 6.

Hutchins Report – Chapter Twenty

dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings---the largest real estate transaction in history---we had not made some mistakes....But we stand ready...to correct any mistakes we have made.

The Indian Claims Commission Act and the remarks President Truman made in signing it implied that market value for “Indian Title” *had always been* federal policy, even if not consistently applied.

Truman’s remarks were not aberrant. By 1946 efforts were well underway to reconceptualize late eighteenth and early nineteenth federal tribal policy as having manifested twentieth century values. These efforts had been spearheaded by Felix S. Cohen, who in the 1920s had assisted John Collier and his American Indian Defense Association in opposing long-established tribal policies. When Collier became Commissioner of Indian Affairs in 1933, Cohen joined him as Assistant Solicitor of the Interior Department, and for the next decade worked alongside Collier to reverse the policies they had lobbied against. Cohen helped draft the 1946 Indian Claims Commission Act and may have even helped draft President Truman’s remarks, which Cohen later quoted approvingly.⁹ Cohen’s historical perspective was presented most comprehensively in his *Handbook of Federal Indian Law*, completed in 1940 and published by the federal government in 1942.¹⁰

In arguing for the theory that the land sale section of the 1790 Indian Trade and

9 Felix S. Cohen, “Original Indian Title,” *Minnesota Law Review*, 32(1947):28-59.

10 See *Felix Cohen’s Handbook of Federal Indian Law*, Albuquerque: University of New Mexico Press (reprint of original 1942 edition).

Hutchins Report – Chapter Twenty

Intercourse Act had directed the federal government to assume the role of fiduciary for tribal assets, Cohen glossed over the fact that between 1790 and 1946 the federal government had repeatedly extinguished “Indian Title” for trivial sums because of the way “Indian Title” was then defined in law. As Cohen put it,

Granted that the Federal Government bought the country from the Indians, the question may still be raised whether the Indians received anything like a fair price for what they sold. The only fair answer to that question is that except in a very few cases where military duress was present the price paid for the land was one that satisfied the Indians. Whether the Indians should have been satisfied and what the land would be worth now if it had never been sold are questions that lead us to ethereal realms of speculation.¹¹

Committed to the proposition that the federal government in 1790 had undertaken to exercise fiduciary trusteeship over all tribes throughout the United States, whether or not they were under ordinary state jurisdiction, Cohen described New York State’s longstanding exercise of jurisdiction over State-regulated tribes as illegal defiance of federal law. According to Cohen, “The United States entered into the treaties of 1789 and 1794 with the Iroquois (Six Nations) Indians, recognizing the Indians as distinct and separate political communities capable of managing their internal affairs as they had always done.” In 1794, the federal government had acted “prudently” (and by implication legally) in “restoring certain of the Seneca’s lands to them within the State of New York west of a line drawn due south from Buffalo to the Pennsylvania line” and had

guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and [placed] the tribes and their reservations beyond the operation and effect of general state laws....[Nonetheless the] State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United

¹¹ Cohen, “Original Indian Title.”

States Government.¹²

Cohen believed that these State “treaties” violated the Indian Trade and Intercourse Act because

even where the United States does not own the ultimate fee in the land of an Indian reservation, its relation of guardianship to the Indian tribe carries the power and duty of protecting the Indian possessory right against condemnation proceedings or other infringements by the state. As guardian of the Indians there is imposed upon the Government a duty to protect these Indians in their property; it follows that this duty extends to protecting them against the unlawful acts of the State of New York.¹³

Cohen further argued that tribes retained “Indian Title” to lands even when nominally held by state grant. According to Cohen, ““Indian reservations’ acquired their name from the fact that when Indians ceded land they commonly made “reservations” of land to be retained in Indian ownership.”¹⁴ Since in Cohen’s view “Indian Title” land had always been fully valued land even when not acknowledged as such, defining state reservation lands as “Indian Title” lands implied no financial loss to tribes.

Cohen’s theory that New York’s exercise of jurisdiction over State tribes in the republic’s early decades was illegal cannot explain the close working relationship that existed in these years between federal and New York State officials on issues relating to tribal policy. New York did indeed have conflicts with the federal government over tribal policy through 1795, but not thereafter. In the next several decades, New York may have even surpassed Virginia as the top producer of federal officials. A New Yorker (Martin Van Buren) served as U.S. President

12 *Felix Cohen’s Handbook of Federal Indian Law*, Albuquerque: University of New Mexico Press (reprint of original 1942 edition), 418-420.

13 Cohen, *Handbook* 309.

14 Cohen, “Original Indian Title,” note 19.

Hutchins Report – Chapter Twenty

from 1837 to 1841. Four New Yorkers (Aaron Burr, George Clinton, Daniel Tompkins and Martin Van Buren) served as U.S. Vice President from 1801 to 1812, 1817 to 1825 and 1833 to 1837, a total of twenty-three out of thirty-six years. Three New Yorkers (Peter Porter, John Spencer and William Marcy) served as Secretary of War between 1828 and 1849, for seven out of twenty-one years. New Yorker Benjamin Butler served as U.S. Attorney General from 1833 to 1838. And New Yorker Elbert Herring served as the first U.S. Commissioner of Indian Affairs, from 1832 to 1836. Any one of these New Yorkers in high federal office could readily have amended the Indian Trade and Intercourse Act to exclude New York State, had he seen reason to do so. On May 6, 1833, Commissioner Herring cavalierly informed “Six Nations” federal agent James Stryker that all New York tribes should “be induced to leave the State of New York without delay.” On October 11, 1833, Herring added, “If the State of New York cannot be relieved of the entire Indian population, and some of the tribes refuse to be benefited, let us still remove all we can, because such removal would conduce to the benefit of the State and the welfare of the Indians.”¹⁵ These Herring letters accurately illustrate the candid, unconstrained communication in these years between federal and State officials as they formulated and implemented tribal policy.

Not content with having set federal tribal policy on a better future course, legal strategists of the early twentieth century led by Felix Cohen set out to portray this new course as the fulfillment of early federal tribal policy, properly interpreted. But the twentieth century United States was not just carrying out what the early republic had tried in vain to do. The present

15 Kohn 72.

deserves to be treated on its own terms, as does the past.

Past, Present, Future.

Early federal tribal policy was neither doctrinairely idealistic nor crudely exploitative. Early federal tribal policy reflected a mix of benevolent, pragmatic and manipulative impulses, whose contradictions were painstakingly glossed over in laws, treaties and policy discussions. The top priority of all early federal officials was preservation of a Union that included land-hungry states as constituents, and recognized independent tribes as polities functioning on U.S. soil. The federal government's approach to tribes therefore had to be flexible, and the long-standing role of states in tribal regulation had to be acknowledged. Indeed state jurisdiction over tribes was the norm in the early republic, and federal responsibility for tribal regulation was severely limited. The Army dealt with tribal war and frontier disorder; short-term federal treaty commissioners negotiated extinguishment of the aboriginal land claims of tribes, large and small; federal trading houses promoted interaction with tribal hunters; and gifts of domestic animals and plows promoted the transition of hunters to agriculture. Contacts between independent tribes and the federal government's War Department were by definition unsatisfactory, and designed to induce such tribes to relinquish their political independence and accept state regulation, and the greatly expanded opportunities this would bring for participation in the U.S. polity, including ultimately U.S. citizenship. The way state boundaries were extended across the continent expressed this. States were presumed to be durable units within the federal system, whereas tribes were all placed within state boundaries pending future developments. Independent tribes

Hutchins Report – Chapter Twenty

suffered severely in the nineteenth century as a result of this back-handed federal approach, and survived through their own tenacity rather than because of any federal intent to preserve them.

A fundamental redirection of tribal policy was accomplished in 1934, when the federal government committed itself to reinvigorating tribal autonomy. This initiative was propelled by polemical arguments that the Constitution mandated federal nurturance of tribal polities on U.S. soil, and that use of the federal treaty procedure proved this. But the Constitution's Framers had no agreed vision of the future status of tribes, as a fact-based analysis of how federal tribal policy evolved makes clear. The nation today can therefore plan, unconstrained by rigid inherited guidelines, for a future that encompasses tribes in a way that benefits all citizens, tribal as well as non-tribal.