

VII

Pursuant to the Constitution:

The Indian Trade and Intercourse Acts of 1790 and 1793

The 1790 Act.

In 1792, in appointing General Israel Chapin to supervise federal relations with the “Five Nations,” Secretary of War Henry Knox cautioned him not to yield to state intimidation because the federal government possessed “under the Constitution, the sole regulation of Indian affairs, in all matters whatsoever.”¹ Knox did not elaborate, but presumably had principally in mind the reference to tribes in the Constitution’s Commerce Clause (Article One, Section Eight). In his 1787 *Federalist 24*, Alexander Hamilton cited the President’s Constitutional role as Commander-in-Chief as another basis for Presidential authority in tribal relations. In 1790 at Tioga, Federal Treaty Commissioner Timothy Pickering offered an analysis of the bases of what he described as an “exclusive” federal authority in tribal relations that drew on several additional parts of the Constitution, mentioning the President’s role in negotiating treaties, and also his omnibus duty to “take Care that the laws be faithfully executed.”² To supplement the Constitution’s reticence, creative analysts found rationales for broad, sometimes even “exclusive” federal authority to manage tribal relations. But enthusiasts of states’ rights could just as readily cite limiting Constitutional language, particularly the Tenth Amendment proposed

¹ ASPIA 1:232.

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in 1789 and finally adopted in 1791. Even Knox and Hamilton acknowledged the need to supplement the Constitution's terse phrases with specific legislative authorization for federal control of crucial aspects of tribal relations.

What became the July 22, 1790, Indian Trade and Intercourse Act was thus an early item on the federal agenda. Final passage of this Act was prompted by a desire to impress Creek chiefs about to arrive in the nation's capital, but the need for some such Act had been articulated by Knox more than a year earlier. In a discursive Memorandum to the President dated July 7, 1789, Knox offered a series of "observations, resulting from a general view of the Indian department... suggested with the hope, that some of them might be considered as proper principles to be interwoven in a general system, for the government of Indian affairs." Knox never defined what he meant by "Indian affairs." His entire Memorandum however concerned "the Indian department" of the federal government's War Department and was thus implicitly confined to "Indians" with whom Knox's understaffed War Department wished to concern itself. These were "Indians" residing in what Knox's Memorandum termed "the Indian country," a vast expanse of contiguous territory which in 1789 encompassed the western regions of some states, including New York and Georgia, and most of the federal Northwest territory.

"Indians" in "the Indian country" often had connections to foreign governments, sometimes accepted foreign military commissions or even entered into formal treaty alliances with foreign governments occupying U.S.-claimed territory. Knox therefore recommended that,

2 TPP 61:76-79.

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In the administration of the Indians, every proper expedient that can be devised to gain their affections, and attach them to the interest of the Union, should be adopted. The British Government had the practice of making the Indians presents of silver medals and gorgets, uniform clothing, and a sort of military commission. The possessors retained an exclusive property to these articles; and the Southern Indians are exceedingly desirous of receiving similar gifts from the United States, for which they would willingly resign those received from the British officers. The policy of gratifying them cannot be doubted.

Never a rigorous thinker, Knox made no attempt to define “the Indians” whose “administration” was his concern as Secretary of War. But even when engaging in hyperbole, as in General Chapin’s appointment letter, Knox seems never to have imagined that the beleaguered federal government could or should concern itself with those “Indian” groups over whom states were already exercising ordinary jurisdiction. Knox, who hailed from the Maine District of Massachusetts, knew that the populous eastern states contained “Indian” individuals as well as groups. But his July 7, 1789, Memorandum did not even casually consider the legal status of these “Indians.” Indeed the one perfunctory allusion he made to them ironically confirmed how irrelevant he considered them to the administration of federal “Indian affairs.” Knox informed Washington that he found it “painful to consider, that all the Indian tribes, once existing in those States now the best cultivated and most populous, have become extinct.” Knox’s Memorandum presupposed that whereas the “Indian department” of the War Department would have continuous and complex dealings with “independent tribes...on the frontiers” it could disregard tribally descended groups living peacefully under ordinary state jurisdiction, even if they were commonly referred to in one sense or another as “Indians” or “tribes.”

Turning to specifics, Knox urged that

It would reflect honor on the new Government, and be attended with happy

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effects, were a declarative law to be passed, that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation, of the United States.

As the source of all Indian wars are disputes about their boundaries, and as the United States are, from the nature of the government, liable to be involved in every war that shall happen on this or any other account, it is highly proper that their [i.e., the federal government's] authority and consent should be considered as essentially necessary to all measures for the consequences of which they are responsible.

No individual State could, with propriety, complain of invasion of its territorial rights. The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular State.

Each individual State, indeed, will retain the right of preemption of all lands within its limits, which will not be abridged; but the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend peace or war.³

By “right of the soil” Knox meant what would later be conventionally termed “Indian Title,” that is the right of tribes to continue to use the lands they had been established on aboriginally. Ever since 1783, this had been repeatedly declared (in various ways and with various caveats) to be U.S. policy, and many today assume that it was always acknowledged as such. But Knox in 1789 felt it urgent to pass a *law* federally securing “the right of the soil” to tribes because not all states felt bound by mere U.S. *policy*. North Carolina for example, which in 1789 still included what would become the State of Tennessee, had declared tribes within North Carolina’s claimed bounds to be tenants-at-will with no security of tenure in their ancestral lands. Knox wanted aboriginal “Indian Title” recognized in federal law, and further recommended that the treaty procedure, which under the Constitution had become an exclusive federal monopoly, be the only way that a tribe’s aboriginal “Indian Title” could be extinguished.

³ ASPIA 1:52-54.

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Knox believed that the federal government alone and not states or private individuals should decide when aboriginally occupied tribal land was to become subject to ordinary state jurisdiction.

Knox urged that “Indian Title” extinguishments through federal treaties become mandatory in dealings with what he termed “independent nations and tribes of Indians” because “the source of all Indian wars are disputes about their boundaries” and “the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend peace or war.”

The 1790 law that resulted from Knox’s 1789 recommendations covered three loosely related subject areas deemed by Congress to be appropriate matters of federal responsibility. Sections One through Three dealt with professional traders and their periodic licensing by the department” clearly an allusion to the “Indian department” of the War Department. Section Four mandated that any sale of “lands made by any Indians” must be “made and duly executed at some public treaty, held under the authority of the United States.” Sections Five and Six concerned crimes by citizens or inhabitants of the United States committed in “any town, settlement, or territory, belonging to any nation or tribe of Indians.”

Section Four’s reference to “lands” concerned aboriginal claims made by what Knox in 1789 had termed “independent nations and tribes of Indians” in “the Indian country.” In fact the entire Act had “the Indian country” as its presumptive setting. But the Act, which was rushed through Congress so that it could be shown to visiting Creek chiefs, described no boundary delimiting “the Indian country.” This was at least in part because the relocation of a section of its

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boundary was about to be discussed with the Creeks. Because the Act dealt with circumstances that were evolving rapidly, it was to be in force for only three years. In candid acknowledgment of the difficulty of legislating for a moving frontier, Section One concerning the licensing of traders allowed the President to “make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.”

This federal law defining *federal* responsibilities was intended to join many uncontroversial *state* laws already in force. The 1790 Indian Trade and Intercourse Act said nothing about many on-going state regulatory functions, which were assumed to be unaffected by it. Indicative of this understanding of federal responsibility was President Washington’s April 10, 1792, response to a letter from Baltimore’s Catholic Bishop John Carroll, regarding the spiritual needs of all U.S. tribes. Deftly deflecting Bishop Carroll’s suggestion that the federal government subsidize Catholic missions, Washington offered three separate, regional excuses:

The war, now existing between the United States and some tribes of the western Indians prevents, for the present, any interference of this nature with them. The Indians of the five nations are, in their religious concerns, under the immediate superintendance of the Reverend Mr. Kirkland, and those who dwell in the eastern extremity of the United States are, according to the best information that I can obtain, so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protection. Any application therefore relative to these Indians for the purposes mentioned in your memorial, would seem most proper to be made to the Government of Massachusetts.⁴

Catholic missions were impractical in the federally supervised Northwest Territory because war

⁴ GWP

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was underway with tribes resident there. As for the tribes of Maine, Washington suggested that they had been for many years under ordinary state jurisdiction, or as he put it under the “immediate care and protection” of a particular state, and therefore “Any application...relative to these Indians...would seem most proper to be made to the Government of Massachusetts”---which included Maine until 1820. Washington identified the “Five Nations” as a middle category, both in their geographic position and in their legal status, intermediate between the wholly independent, federally regulated western tribes and the wholly state-regulated Maine tribes. Washington accurately perceived the legal status of the “Five Nations” as less clear-cut than either of the other categories, since the “Five Nations” were being dealt with by the federal government for certain purposes even though New York State considered some of these tribes subject to ordinary State jurisdiction for at least some other purposes. Even though the “Five Nations” included both the New York State-regulated Oneidas and the independent Senecas, the President had just agreed to establish a regular program of assistance to address needs they possessed in common, notwithstanding their different legal statuses. The “Five Nations” were moreover unusual in claiming to have a political structure of their own transcending distinct U.S. jurisdictions.

Choosing not to enter into these controversial issues in a private letter to Bishop Carroll, the President characterized the hybrid status of the “Five Nations” in the most minimal of ways, by the presence among them of one New England missionary. Reverend Kirkland came readily to the President’s mind in April of 1792, because he was then in the capital conferring with Secretary of War Knox and Postmaster General Pickering. Although Bishop Carroll could not

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fail to be impressed by Washington’s gracious attention to his request, he was not likely to be persuaded by Washington’s theory that the spiritual needs of the “Five Nations” could be adequately addressed by a Protestant minister! And Reverend Kirkland would have been surprised to learn that his spiritual responsibilities were imagined by Washington to extend beyond the Oneidas, among whom he lived, to comprehend all U.S.-resident Iroquois.

The 1793 Act.

President Washington was disinclined to enter publicly into on-going controversies. But he was well aware of the need to introduce greater clarity into federal tribal law and policy, and was working quietly toward this goal. Within months of its passage, major defects in the 1790 Indian Trade and Intercourse Act had already been brought to his attention. Sections Five and Six were embarrassingly unworkable, Timothy Pickering warned Washington on December 4, 1790, since even when someone was apprehended and tried for committing a crime in “the Indian country,” “acquittals on trials in frontier counties may always be expected, for many of their inhabitants appear to me far more savage and revengeful than the Indians themselves.”⁵ A few months later, on April 10, 1791, Treasury Secretary Hamilton similarly warned the President that trials in state courts of persons charged with crimes against “Indians” left “the public peace of the Union at the mercy of each State government.”⁶

Problems relating to Section Four of the Act were examined in an elaborate Opinion by

⁵ TPP 61:108-09.

⁶ Fitzpatrick 31:273-74.

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U.S. Attorney General Edmund Randolph, written at the request of Secretary of State Jefferson who was concerned by reports that unauthorized individuals were attempting to acquire land rights from southern tribes. After Jefferson reviewed Randolph's confidential Opinion and returned it to him, Randolph received an inquiry from Washington about a separate issue. He sent the President the Opinion he had prepared for Jefferson, with a cover letter dated September 12, 1791, explaining that he felt this Opinion might illuminate the "somewhat analogous" subject raised by the President.⁷ In this manner, Randolph's undated Opinion, written for Jefferson some time prior to September 12, 1791, ended up in Washington's files.

Randolph's Opinion began with a carefully-phrased definition of what it was (and was not) concerned with:

The question is, whether any punishment can be inflicted on persons, treating with the Indian tribes, within the limits of the United States, for land, lying within those limits; the preemption of which is vested in the United States?

Randolph's answer to this question proceeded in logical steps:

The constitution is the basis of federal power.
This power, so far as the subject of Indians is concerned, relates

1. To the regulation of commerce with the Indian tribes.
2. To the exclusive right of making treaties.
3. To the right of preemption in lands.

⁷ GWP, Randolph to Washington, September 12, 1791. The Opinion is printed in Charles T. Cullen, ed., *Thomas Jefferson Papers*, Princeton: Princeton University Press, 1986, 22:114-16.

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Again Randolph moved cautiously, emphasizing Constitutional limitations to federal power rather than broad inherent authority. Only the second “federal power” was labeled “exclusive.” States thus might in theory regulate trade with tribes, if permitted by the federal government, and states could also hold a right of preemption to tribally occupied land. Randolph continued:

1. Even if the act, supposed in the question, were really an infraction of the right to regulate commerce, there could be no penalty, unless the law prescribed it. Accordingly, a law of the second session [the 1790 Indian Trade and Intercourse Act] enters into such a case, but only forfeits the merchandize carried into the Indian country. No other law affects it.

Under the 1790 law, Randolph argued, unauthorized individuals attempting to purchase aboriginal land rights from tribes and making presents to them for this purpose could perhaps be deemed unlicensed traders subject to the penalties in Section Three of the law. But while Section Four declared an unauthorized “sale” of “Indian lands” invalid, no penalty for attempting to negotiate such a sale was specified.

2. Without an existing law, no treaty, or compact made by an individual of our nation with the sovereign of another, and not partaking of a treasonable quality, is punishable. It seems indeed to be an assumption of the sovereignty of the United states in this respect. But the compact being in the name of an individual, does virtually disclaim any assumption of public authority. If it be void, the United States cannot be deprived of their rights. It may be indecent and impertinent for a citizen thus to behave. But where no law is, no crime is.

3. As to the right of preemption. No man has a right to purchase my land from my tenant. But if he does purchase, I cannot sue him on the supposition of damages, arising from the mere act of purchase. Nor could the United States sue the purchaser of the right of preemption, since the purchase itself is void, and their interest cannot be prejudiced by any purchase, which an individual can make. Far less would the purchaser be indictable.

Persons purporting to have purchased U.S. land directly from a tribe might be evicted as trespassers, but had acquired no rights and therefore caused no damage to tribes. Paying money

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to a tribal tenant expecting to acquire fee title was spendthrift fantasizing, which was not an indictable federal crime.

In conclusion, Randolph emphasized that he was simply addressing the current state of affairs existing under the 1790 Act, and

it undoubtedly is in the power of congress, to regulate commerce with the Indians in any manner to guard the right of making treaties, by forbidding the citizens to meddle under a penalty, and to provide a security to their preemption by passing adequate laws. Until this shall be done, I conceive that this commerce is protected by no law, but the act above mentioned, that an interference in the article of treaties has no penalty, denounced against it; and that the federal property, like that of individuals, must depend upon existing laws.

It may perhaps be proper, if the testimony be strong, to warn all persons by proclamations that the rights of government will be enforced; and possibly a monitory message to the Indians might have a good effect.

Randolph endorsed both the passage of a stronger law and, pending that, public warnings addressed to citizens as well as to independent tribes.

According to Randolph, until Congress prohibited a specific category of commerce with “Indian tribes,” then it must be deemed free and unregulated. It didn’t matter that the conduct might be mischievous and dangerous, that it might put the nation’s security at risk, or damage the interests of independent tribes. The Constitution did not countenance arbitrary actions against U.S. citizens by the federal government, however well-motivated such actions might be.

Replying from Mount Vernon less than a month later, Washington instructed Randolph in characteristically firm language, allowing neither objection nor misinterpretation, that he had been entirely persuaded by the Opinion Randolph had prepared for Jefferson, and as a result wanted drastic changes made in Section Four of the 1790 Indian Trade and Intercourse Act.

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Writing on October 10, 1791, the President told the Attorney General,

It is my wish and desire that you would examine the Laws of the General Government which have relation to Indian affairs, that are for the purpose of securing their lands to them, Restraining States or Individuals from purchasing their lands and forbid[d]ing unauthorized intercourse in their dealing with them.

And moreover that you would suggest such auxiliary Laws as will supply the defects of those which are in being, thereby enabling the Executive to enforce obedience.

If Congress expect to live in peace with the neighbouring Indians and to avoid the expenses and horrors of continual hostilities, such a measure will be found indispensably necessary; for unless adequate penalties are provided that will check the spirit of Speculation in lands and will enable the Executive to carry them into effect, this country will be constantly embroiled with and appear faithless in the eyes not only of the Indians but of the neighbouring powers also. For notwithstanding the existing laws, solemn Treaties and Proclamations which have been issued to enforce a compliance with both, and some attempts of the Government S.[outh]west of the Ohio to restrain their proceedings, the agents for the Tennessee Company are at this moment by public advertisements under the Signature of a Zachariah Cox encouraging by offers of land and other inducements a settlement at the Muscle Shoals, and is likely to obtain Emigrants for that purpose, altho' there is good evidence that the measure is disapproved by the Creeks and Cherokees, and it is presumed is so likewise by the Chicasaws and Choctaws, unless they have been imposed upon by assurances that trade is the only object they have in view by the Establishment.⁸

Washington's parallel usage of the word "neighbouring" to refer both to the "powers" Great Britain and Spain as well as to those "Indians" whose "lands" were protected by the "General Government" makes clear that the "Indians" he then had in mind were independent tribes occupying "the Indian country," tribes such as the Creeks, Cherokees, Chickasaws and Choctaws which he mentioned explicitly. Though not mentioned, Robert Morris's provocative recent attempt to acquire Seneca land rights during wartime may well have also been in Washington's mind when he wrote this strong directive on October 10, 1791.

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Though under consideration for more than a year, the Act passed on July 22, 1790, had been finally approved so that it could be shown as an earnest of U.S. good faith to Creek chiefs soon to arrive in the capital to negotiate a treaty. Similarly, the long-discussed successor Indian

⁸ GWP, Washington to Randolph, October 10, 1791.

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Trade and Intercourse Act of March 1, 1793, was eventually passed to advance another ad hoc purpose, to head off war with hostile midwestern tribes.⁹ To this end, President Washington took a number of interrelated initiatives early in 1793. Three federal treaty commissioners were appointed, one of whom was Postmaster General Pickering. But Washington this time also appointed a senior national figure, Revolutionary War General Benjamin Lincoln, who had been Secretary at War before Knox, as well as former Virginia Governor Beverly Randolph, to accompany the independent-minded Pickering. Moreover, perhaps recalling the problems that had arisen during Pickering's earlier ventures into Iroquois diplomacy because of his unfamiliarity with New York State law, Washington decided it would be helpful to acquire reliable information about New York State tribes for use by Pickering and his fellow commissioners. To this end, on February 17, 1793, President Washington's personal secretary Tobias Lear sent a note to Secretary of State Jefferson, requesting in the President's name that Jefferson

write to the Governor New York, by the post of tomorrow, for authenticated Copies, under Seal, of the several treaties between the Six nations and the Governors of New York from the Year 1683; and especially those with Colo. Dongan. They were preserved under the old Government of New York, in the Office of the Secretary for Indian Affairs.

The Attorney General of the United States having been directed by the President to go into an examination of the several treaties which have been made with the Northern and Western Indians, from the earliest period that they can be obtained, has desired that the foregoing application may be made to obtain a copy of those which are preserved in New York---and the President conceiving it

⁹ Regarding the military and political situation in the midwest, see Wiley Sword, *President Washington's Indian War, The Struggle for the Old Northwest, 1790-1795*, Norman: University of Oklahoma Press, 1985.

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proper that the application should be made through the Secretary of State, has therefore sent him this request; and wishes that the Copies may be had as early as possible, that all arrangements necessary for the Commissioners should be made, if possible, before the Close of the present Session of Congress.¹⁰

Not waiting for “the post of tomorrow,” Jefferson the same day wrote Governor Clinton that,

As it is possible and perhaps probable that at the ensuing conferences on Lake Erie with the Northern and Western Indians they may be disposed to look back to antient treaties, it becomes necessary that we should collect them, in order to be in a state of preparation. This can only be done with the aid of the several state-offices where these treaties have been deposited, which, in New York I am told, was in the office of the Secretary for Indian affairs under the old government.¹¹

Clinton replied on March 5, 1793, explaining that he had

been endeavoring to discover, where the Indian Treaties that you request, are deposited but my researches have hitherto been unsuccessful. Our Indian affairs were formerly under the direction of a superintendant, the last of whom was Sir John Johnson, and I am inclined to believe that most of the papers respecting Indian Affairs were in his possession at the commencement of the Revolution and either destroyed or carried off by him within the British Lines. In our Secretary’s Office there are certainly none that would be of any use. I have however reason to suppose, that there may be some Records of Antient Indian treaties in the Clerk’s Office of the County of Albany, and have written to him to furnish me with copies if he should discover any. Will you please to let me know whether transcripts of those made under the State Government are required.¹²

On March 13th, Jefferson replied that he would indeed be happy to have copies of New York State’s post-1776 treaties,

as it is conceived they may be necessary to put the Commissioners in full possession of all facts relative to the subjects they have to treat of, and to prevent

¹⁰ John Catanzariti, ed., *The Papers of Thomas Jefferson*, Princeton: Princeton University Press, 1992, 25:216.

¹¹ Catanzariti 25:215.

¹² Catanzariti 25:317.

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their being surprised by the producing of any matter whatever with which they may be unacquainted, which they might therefore be unprepared to answer, or even to correct if mistated.¹³

On April 19, 1793, Governor Clinton sent Jefferson the requested “Exemplification of the different Treaties entered into by this State with the Indians of the Six Nations since the conclusion of the late War.”¹⁴ Jefferson acknowledged their receipt on April 27, 1793.¹⁵

A year after the federal government had announced its future-oriented conceptualization of the New York State-based Iroquois as “Five Nations,” the historic name still preferred by most Iroquois leaders---“Six Nations”---had resurfaced, as federal commissioners prepared to negotiate not with New York State Iroquois exclusively but with all Iroquois factions scattered far and wide, including the Mohawk Captain Joseph Brant, who was then actively seeking to organize midwestern tribes into a British-backed coalition under his leadership.

Another component of President Washington’s preparations for his midwestern tribal peace initiative was the Cabinet discussion he initiated regarding whether aboriginal land rights in the Northwest Territory previously ceded by tribes to the federal government could be retroceded by the federal government to them. Tribes would no doubt welcome this, but did the federal government have authority under the Constitution to take such a step? Did it make legal sense to suppose that aboriginal “Indian Title” once extinguished could be resuscitated, or could only an

¹³ Catanzariti 25:373.

¹⁴ National Archives, Diplomatic Branch, Indian Treaties.

¹⁵ Catanzariti 25:592.

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affirmative new grant of federal rights be made? Moreover, since tribes had ceded their aboriginal “Indian Title” by treaty, would not a federal retrocession of such rights (even if imaginable) be in effect a new treaty, requiring Senate consent? To Secretary of State Jefferson, Secretary of War Knox, Treasury Secretary Hamilton and Attorney General Randolph, the President on February 25 posed this question: “Have the Executive, or the Executive and Senate together authority to relinquish to the Indians the right of soil of any part of the lands north of the Ohio, which has been validly obtained by former treaties?” Meeting at the Presidential Mansion rented from Robert Morris, Knox, Hamilton and Randolph collectively advised Washington they thought it Constitutional, where state or private interests were not affected, for “the Executive and the Senate” to approve a treaty that would return federal territory to the status of aboriginal “Indian Title” lands. Jefferson disagreed and explained his reasoning as follows:

I considered our right of preemption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever but of preventing other nations from taking possession and so defeating our expectancy: that the Indians had the full, undivided and independent sovereignty as long as they chose to keep it and that this might be forever: that as fast as we extended our rights by purchase from them, so fast we extended the limits of our society, and as soon as a new portion became encircled within our line, it became a fixed limit of our society: that the Executive with either or both branches of the legislature could not alien any part of our territory: that by the law of nations it was settled that the unity and indivisibility of the society was so fundamental that it could not be dismembered by the Constitutional authorities except 1. where *all power* was delegated to them (as in the case of despotic governments) or 2. where it was expressly delegated. That neither of these delegations had been made to our general government, and therefore that it had no right to dismember or alienate any portion of territory once ultimately consolidated with us: and that we could no more cede to the Indians than to the English or Spaniards, as it might according to acknowledged principles remain as irrevocably and eternally with the one as the other. But I thought that as we had a right to sell

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and settle lands once comprehended within our lines, so we might forbear to exercise that right, retaining the property, till circumstances should be more favorable to the settlement, and this I agreed to do in the present instance if necessary for peace.¹⁶

Jefferson's response to Washington's inquiry was a thoughtful policy statement arguing that the extinguishment of aboriginal "Indian Title" was irreversible, and that the federal government could not possibly do what Washington was contemplating. After their aboriginal occupancy rights were extinguished, tribes could be allowed to use the land in question on specified terms. But once extinguished, aboriginal "Indian Title" stayed extinguished.

Only one Cabinet member had sufficient daring and intellectual range to challenge Jefferson on his own philosophical level. Alexander Hamilton rejected as fundamentally inappropriate Jefferson's effort to define tribal land rights by applying old-fashioned principles of international law evolved in Europe, where "universality of settlement" was the norm, to the "circumstance of our unsettled country." What's more, argued Hamilton, wasn't the "power of treaty" enjoyed by the President and the Senate under the Constitution "given in as plenipotentiary a form as held by any sovereign in any other society"? Hamilton preferred to think of North America as a blank page, and of the Constitution as a charter that accorded the President immense discretionary power. Committed to a search for universal social norms, Jefferson considered Hamilton's approach an invitation to arbitrary misrule.

This 1793 debate between Hamilton and Jefferson may seem abstract, but it anticipated a

¹⁶ Catanzariti 25:258, 272.

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public confrontation over tribal land rights two years later between Hamilton's protégé Timothy Pickering and Jefferson's ally New York Governor George Clinton that was anything but abstract. In this 1795 controversy, Pickering argued Hamilton's position that the federal government possessed vast discretionary powers to assist tribes, while Clinton argued Jefferson's position that the federal government's power to extinguish aboriginal "Indian Title" was a one-time power with no residual application.

Jefferson recorded that throughout the 1793 Cabinet debate between himself and Hamilton, Washington "discovered no opinion, but he made some efforts to get us to join in some terms which could unite us all, and he seemed to direct these efforts more toward me: but the thing could not be done." Jefferson wanted to theorize before acting, Hamilton wanted to act first, theorize later, Washington understood the problem but above all wanted consensus. Washington prevailed, obtaining everyone's agreement to a compromise formula that would permit discussion at the upcoming treaty sessions with midwestern tribes of the return of lands, but without explicitly identifying this as a restoration of aboriginal "Indian Title."

As it turned out, no lands were handed back to midwestern tribes in 1793 because President Washington's peace offensive fizzled. Federal Commissioners Lincoln, Randolph and Pickering spent the summer distracted and misled by British Canadian authorities, who refused to allow them to confer with British-influenced tribes on U.S. soil. The one fully realized product of federal attempts in February and March of 1793 to improve relations with midwestern tribes was the second Indian Trade and Intercourse Act passed March 1, 1793.

Two important improvements were introduced in the 1793 Act, one a result of Hamilton's

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efforts, the other of Jefferson's. New procedures outlined in Sections Ten and Eleven of the 1793 Act switched jurisdiction over crimes committed by U.S. citizens and inhabitants in "Indian country" away from state courts and into the federal court system. By Section Ten, the "Courts of the United States" were "invested with full power and authority, to hear and determine all crimes, offences, and misdemeanors, against this act." The 1790-91 lobbying efforts of Pickering and Hamilton proved successful in winning over Washington and Congress.

The other important change flowed directly from the concerns voiced by Jefferson and Randolph about the absence of criminal sanctions in the land sale section of the 1790 Act. Section Eight of the 1793 Act proclaimed that

it shall be a misdemeanor in any person, not employed under the authority of the United States in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed. *Provided nevertheless,* That it shall be lawful for the agent or agents of any State, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of, the Commissioner or Commissioners of the United States appointed to hold the same, to propose to, and adjust with, the Indians, the compensation to be made for their claims to lands within such State, which shall be extinguished by the treaty.

Jefferson had reopened the question of criminal sanctions first raised in 1791, when on January 13, 1793, he sent the President a proposed draft of an amendment, confiding that he had already discussed it with "a gentleman or two in the legislature."¹⁷ Jefferson's draft amendment read as follows:

Be it enacted etc. that no person shall be capable of acquiring any title, in law or

¹⁷ Catanzariti 25:46-48.

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equity, to any lands beyond the Indian boundaries and within those of the U.S. by purchase, gift, or otherwise, from the Indian holding or claiming the same; and that it shall be a misdemeanor in any person, punishable by fine and imprisonment at the discretion of a jury, to obtain, accept, or directly or indirectly to treat for, any title to such lands from the said Indians or any other for them. But where any such Indians shall of their own accord desire to sell any part of their lands, and it shall be deemed the interest of the U.S. that a purchase shall be made, the same shall be done by treaty or convention, to be entered into by the President of the U.S. and ratified by two thirds of the Senate according to the constitution; to enure to the use of the states respectively, where the said lands lie within the limits of any state, they paying the price, and to the use of the U.S. where such lands lie within any territory ceded to them by particular states.

James Madison, then a member of the House of Representatives and one “gentleman...in the legislature” with whom Jefferson had been in touch, introduced Jefferson’s amendment in the House on January 15, in a form that left unchanged Jefferson’s first sentence with its reference to “lands beyond the Indian boundaries.” The second sentence substituted the words “who may have the right of preemption thereto, and shall pay the price thereof” in place of Jefferson’s original language referring only to states and not to private preemption right holders such as Robert Morris. In presenting this amendment,

Mr. Madison observed, that misunderstandings, quarrels, and wars with the Indians, had originated from the circumstance of persons having obtained, through fraud, or other improper means, possession of lands belonging to the Indians. This consideration rendered it highly important that this whole business should be under the absolute and sole direction of the public authority, in order to guard effectually against the fatal consequences which may result to the public by being precipitated into a war, through the arts of unprincipled persons, who, while the public are made to sustain great calamities, often find means to extricate themselves from bearing their proportion of its inconveniences and expenses.¹⁸

Madison’s version of Jefferson’s amendment was approved by the House on January 18

¹⁸ *The Debates and Proceedings of the Congress of the United States*, Washington: Gales and

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with only minor verbal changes. The Senate however substantially redrafted the House-passed amendment, and the Senate version was then accepted by the House. Senator Morris may have urged eliminating explicit reference to private preemption right holders such as himself, as well as the language proclaiming that no sales of “Indian land” would ever go forward unless “such Indians shall of their own accord desire” such a sale.¹⁹ In the more compressed version finally passed, Section Eight thus lacked some of the distinctions made by Jefferson’s fuller original text, but none of the Senate’s revisions seems to have been intended to alter Section Eight’s exclusive application to lands “beyond the Indian boundaries” where “absolute and sole” federal authority was imperative for the reasons Madison outlined. As in 1790, it was however impossible to specify precisely where the line ran in an Act passed in conjunction with an attempt to renegotiate that line.

The word “extinguished” contained in the final version of Section Eight indicated that Congress and the federal executive had in mind only aboriginal “Indian Title” claims, which were also only the kind of tribal land rights discussed by President Washington’s Cabinet in the days preceding passage of the March 1, 1793 Act. The applicability of Section Eight exclusively to “the Indian country” was similarly indicated by its use of the word “treaty,” and underscored by the general “proviso” placed at the end of the Act. Even though the 1790 Act implicitly applied

Seaton, 1849, 2:828.

¹⁹ Morris was not on the five-member Senate committee that revised the House-passed bill, but in a body with thirty members Morris could easily make his wishes known to those who were on the committee. These were Stephen Bradley (Vermont), Aaron Burr (New York), Oliver Ellsworth (Connecticut), James Monroe (Virginia), and Caleb Strong (Massachusetts). See *Debates and Proceedings* 2:631.

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only where tribes maintained a politically independent existence and claimed land by aboriginal right, the 1793 Act was revised to make clear that it also did *not* apply to lands granted by states, and over which states exercised ordinary jurisdiction. The 1793 Act achieved this by moving the 1790 Act's proviso referring to the licensing of traders. This proviso was placed near the end of the 1793 Act and made to apply to the entire Act, thereby initiating the practice also followed in subsequent versions of the Act, passed in 1796, 1799 and 1802. Section Thirteen of the 1793 Act specified "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."

On March 13, twelve days after the second Indian Trade and Intercourse Act was approved, Jefferson proposed disseminating it in a fashion calculated to impress and reassure frontier tribes. Extracts of the Act, Jefferson suggested to Washington, ought to be "*printed on parchment*, with the [Presidential] seal, and put into tin cases, so as to give them marks of solemnity which may strike those to whom they are given, or to whom they shall be shewn."²⁰ The tin cases were also to include a "Letter of protection...signed by the President under the great seal." Once again contesting Jefferson, Hamilton expressed concern that this might "at some time produce inconveniencies." This time, Washington sided with Jefferson rather than with Hamilton, and a number of potentially inconvenient tin cases containing Presidential letters of protection and extracts of the March 1, 1793 Indian Trade and Intercourse Act were in fact handed out to frontier tribes.

Washington’s First Cabinet Disintegrates.

Changes made in the 1793 Indian Trade and Intercourse Act reflected the brokering skills of Congressman James Madison and probably as well self-interested pressure exerted by Senator Robert Morris. Much more important however were the public-spirited initiatives of Hamilton and Jefferson. Always alert to ways to strengthen the federal government at the expense of states, Hamilton wanted to extend the jurisdiction of the federal court system to crimes committed in “the Indian country.” In line with his persistent determination to spell out the roles and rights of states and tribes and the federal government, Jefferson wanted to strengthen and make more honorable and better understood by all concerned---particularly, by tribes on the one hand and states and private land speculators on the other---the formal process by which aboriginal “Indian Title” was extinguished, and land transferred from federal to state jurisdiction. The second Indian Trade and Intercourse Act thus demonstrated that, as of March 1, 1793 Hamilton and Jefferson could work together effectively and, by appealing to their larger loyalties, Washington could still orchestrate constructive compromise between these two brilliant men.

Jefferson, the “sage of Monticello,” enjoyed the challenge of trying to formulate durable principles of policy continuous with ancient norms, of constructing a comprehensive philosophic system in which federal, state and tribal governments all had a place, being all equally

²⁰ Catanzariti 25: 380.

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constrained by regular, predictable laws which limited the actions of each but at the same time freed each from fear of arbitrary interference. The thirteen sovereign states were vital to his thinking, as the primary focus of many political concerns, and because of their capacity both individually and collectively to curb arbitrary federal initiatives. Tribes played no similarly indispensable role in Jefferson's conception, but still had affirmative rights in international and U.S. law that the federal government could not alter at will.

The equally gifted Hamilton was in contrast indifferent to the rights of both states and tribes. The Carribean-born Hamilton, who by his mid-twenties was functioning at the highest levels of U.S. decision-making as an aide to General Washington, had little feel or use for state and local institutions of government. Indeed he once privately predicted that if the federal government did not “triumph altogether over the state governments and reduce them to an entire subordination” then “in the course of a few years...the contests about the boundaries of power between the particular governments and the general government...will produce a dissolution of the Union.”²¹ Tribes were even more contemptible than states in Hamilton's eyes, being “vagrant” and unproductive. Hamilton's preference for federal control of tribal affairs did not reflect any desire to protect tribes.

Hamilton's most elaborate attempt to outline an ideal government for the United States came during a five-hour speech given at the closed-door 1787 Constitutional Convention, in which he advocated a unitary, non-federal governmental structure for the United States patterned

²¹ Joseph Ellis, *Founding Brothers, The Revolutionary Generation*, New York: Alfred A. Knopf, 2001, 77.

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on the British monarchy. Hamilton singled out for particular praise the British House of Lords which, according to James Madison's notes, Hamilton called "a most noble institution" because "Having nothing to hope for by a change, and a sufficient interest by means of their property, in being faithful to the National interest, they form a permanent barrier against every pernicious innovation, whether attempted on the part of the crown or of the Commons." According to another note-taker, Robert Yates, Hamilton also urged the Constitutional Convention to emulate "the excellency of the British executive. He is placed above temptation. He can have no distinct interests from the public welfare. Nothing short of such an executive can be efficient" or possess what Hamilton called "public strength."²²

The Constitution actually approved by the Convention fell far short of this Anglophilic, quasi-monarchical ideal, but Hamilton proceeded to write more than half of the magisterial *Federalist Papers* urging ratification. When Hamilton became prominently responsible for administering the Constitution as the nation's first Treasury Secretary from 1789 to 1795, he became an in-house advocate for redefining the Constitution in ways that would expand Presidential discretion and contract the role of states. In 1802 he confided in a letter to Gouverneur Morris, "Perhaps no man in the U[nited] States has sacrificed or done more for the present Constitution than myself--and contrary to all my anticipations of its fate...I am still laboring to prop the frail and worthless fabric."²³ Hamilton himself might well have endorsed

²² Arnold A. Rogow, *A Fatal Friendship, Alexander Hamilton and Aaron Burr*, New York: Hill and Wang, 1998, 116-7.

²³ Rogow 210.

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Jefferson's derisive comment that Hamilton considered the Constitution "a shilly-shally thing of mere milk and water, which couldn't last, and was only good as a step to something better."²⁴

It is difficult to imagine two men so dissimilar as Jefferson and Hamilton agreeing to work together in an administration led by anyone other than George Washington. Nor is it surprising that their willingness to cooperate with each other in assisting Washington did not endure through even one full term of Washington's Presidency. The uneasy partnership between Virginia's patrician philosopher of states' rights and the immigrant admirer of urban wealth grew ever more strained, as a combination of Washington's slowly waning energy and Hamilton's dauntless ambition led gradually to a shift in the administration unfavorable to Jefferson. Hamilton's forceful personality and policy flexibility enabled him to isolate the ruminative Jefferson and intimidate Knox and Randolph, the other top figures surrounding Washington. Knox was a moderately competent field general and a dutiful administrator but the least acute member of Washington's inner circle. The fact that Washington himself was a general, and under the Constitution U.S. Commander-in-Chief, probably left him comfortable with a Secretary of War who was congenial but possessed only modest analytical abilities. Randolph was more acute, but could not hope to withstand Hamilton's self-assured, rapid-fire arguments. The Cabinet's February 25, 1793, debate on aboriginal land rights, which resulted in a unified position collectively affirmed by Hamilton, Knox and Randolph, with Jefferson all by himself in opposition and the President trying hard to mediate, accurately reflected the overall state of the

²⁴ Rogow 121.

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administration as Washington's first term neared its end.

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Later that year, Jefferson decided to resign, after concluding that Washington was increasingly unable to control or perhaps even to see through Hamilton's wiles. "The firm tone of his [Washington's] mind, for which he had been remarkable, was beginning to relax," Jefferson later recorded; "a listlessness of labor, a desire for tranquillity had crept on him, and a willingness to let others act, or even think, for him."²⁵ Well aware that his in-fighting skills were no match for Hamilton's, Jefferson felt he had no choice but to return to Monticello and prepare for eventual battle over the Revolution's future course.

Jefferson probably exaggerated Washington's declining analytical powers. Washington saw what was happening, but chose to ride out the whirlwind rather than start over from scratch. Formally, he was never challenged by Hamilton, and when he did issue an explicit order it was obeyed. Difficulties arose on occasions when Washington refrained from taking a strong stand, and these occasions grew more frequent as he experienced health problems and grew ever more anxious for retirement to Mount Vernon. Compounding the problem was the fact that Washington---no doubt correctly---believed that Presidential tours were an important part of his responsibility because they served to develop national pride and solidarity among U.S. citizens of all regions. Washington never allowed himself to become merely "the painted wooden head of the

²⁵ Ellis 125.

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ship and Hamilton the pilot and steersman.”²⁶ But insofar as he did lose vigor, it was the Hamiltonian quasi-monarchists who benefited by establishing themselves as an increasingly powerful palace guard. Hamilton himself resigned in January of 1795, but kept in active touch with those remaining in the administration, such as Timothy Pickering, who thought of themselves as guided by Hamilton.

The fact that Pickering was an early and unwavering adherent of Hamilton may seem odd, because personally Pickering and Hamilton had almost nothing in common. Pious Timothy Pickering, married to an intelligent woman with whom he shared his thoughts and concerns, could not have been more different in personal morals from Hamilton, a reckless womanizer and a publicly confessed adulterer. But Pickering wanted a job and Hamilton wanted allies, and both men agreed on the superior merit of a unitary, British-style executive with large discretionary powers. The self-righteous Pickering would however prove himself far less skillful than Hamilton in furthering this objective.

²⁶ John Adams’ characterization of a perspective he did not share. Rogow 177.