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THE JAY TREATY FREE PASSAGE RIGHT IN THEORY AND PRACTICE

Caitlin C.M. Smith*

INTRODUCTION

In 1794, the United States became a party to the Jay Treaty.¹ The treaty is formally titled *Treaty of Amity, Commerce and Navigation, between His Britannick Majesty; and the United States of America, by their President, with the Advice and Consent of their Senate*, but it was negotiated by then-Chief Justice John Jay, and the treaty is generally called Jay's Treaty, or simply the Jay Treaty, after him.² Most of the treaty is no longer in force,³ but one key provision remains important. The United States and Great Britain recognized that groups of Native Americans⁴ were separated by what would become the U.S.–Canada border, and Article 3 of the Jay Treaty established that Native peoples would be able to move freely across the border:

It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and re-pass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America.⁵

There is some debate about whether this right still exists as a treaty right per se, or whether it was abrogated by the war of 1812 and now exists only as a statutory right.⁶ That question is interesting and complicated, but it does not affect the right of

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¹ United States Department of State, Treaties in Force 2010 291, *available at* <http://www.state.gov/documents/organization/143863.pdf> (last visited Oct. 31, 2012).

² See Library of Cong., Jay's Treaty: Primary Documents in American History, <http://www.loc.gov/rr/program/bib/ourdocs/jay.html> (last visited Oct. 31, 2012).

³ "Only articles 9 and 10 appear to remain in force between the United States and the United Kingdom. Article 3, so far as it relates to the right of Indians to pass across the border, appears to remain in force between the United States and Canada." Treaties in Force 2010, *supra* note 1, at 291.

⁴ In this paper, "Indian" and "Native American" are used interchangeably to apply to American Indians, First Nations people, Native Alaskans, and other indigenous North American persons.

⁵ Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate, Art. III, Nov. 19, 1794, 8 Stat. 116, *available at* http://avalon.law.yale.edu/18th_century/jay.asp#art3 (last visited Oct. 31, 2012).

⁶ See generally Marcia Yablon-Zug, *Gone but not Forgotten: The Strange Afterlife of the Jay Treaty's Indian Free Passage Right*, 33 QUEEN'S L.J. 565 (2008) (arguing that treaty was abrogated and now exists solely through statute); Dan Lewerenz, *Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug*, 27 ARIZ. J. INT'L & COMP. L. 193 (2010) (arguing that the right was restored after the War of 1812 by the Treaty of Ghent).

Canadian-born Indians to pass across the United States border today.⁷ That right is enshrined in the Immigration and Nationality Act. In the midst of the thousands of complicated chapters and subchapters that make up the United States' immigration laws, one simple sentence stands out: "Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."⁸ The Jay Treaty free passage right remains, in theory at least, as an exception to the requirements that the United States Customs and Immigration Service otherwise requires from people who would choose to immigrate to the United States.⁹

Anyone who has dealt with the federal government will immediately suspect that a Canadian-born Indian cannot simply walk up to the border, wave at the border patrol, and skip across. Normally, a Canadian citizen who hopes to immigrate to the United States must deal with a laundry list of agencies (and an alphabet soup of agency names).¹⁰ Most prospective immigrants cannot even petition on their own to move to the United States; instead, a family member or prospective employer within the United States would have to sponsor the person.¹¹ The sponsoring family member or employer would petition for a visa from the United States Citizenship and Immigration Services (USCIS), which is a division of the Department of Homeland Security (DHS). If the prospective immigrant was moving to the United States to work, her visa might require labor certification, which is issued by the Department of Labor. The immigrant would have to receive health screening from the Public Health Service (a division of the Department of Health and Human Services) to ensure that she was free from communicable diseases. Once the visa was approved, the Canadian immigrant would wait, possibly for months or years, until the Department of State issued the visa. At that point, she would cross the border, where she would be checked by officers from Customs and Border Protection (CBP), a division of DHS. In order to work in the United States, she would also have to visit an office of the Social Security Administration (SSA) in order to get a social security number.

⁷ The same is *not* true for United States-born Native Americans who wish to enter Canada, who must prove that the right is "an unextinguished aboriginal right under section 35(1) of the 1982 Constitution." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02(2)(f) (2009).

⁸ Immigration and Nationality Act § 289 [8 U.S.C. § 1359] (2006). This provision is the only remaining explicit racial restriction in the Immigration and Nationality Act. For an analysis of this issue, see Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301 (2009).

⁹ A Jay Treaty immigrant to the United States is not only not subject to the usual restrictions on immigration; he is also not removable for violations of United States law. See *MacDonald v. United States*, No. 11-cv-1088 – IEG (BLM) (S.D. Cal. Dec. 23, 2011) (order granting defendants' motion to dismiss), at 1 ("As a Canadian-born American Indian, MacDonald is exempt from restrictions imposed on aliens by the United States' immigration laws and is not subject to removal.")

¹⁰ For a clear explanation of the different government agencies involved in immigration and the roles they play, see THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 268–291 (6th ed. 2008).

¹¹ *Id.* at 298.

With that in mind, this paper set out to explore how exactly the Jay Treaty free passage right works in practice. I was curious about how willingly these government agencies waive their usual procedures and requirements for beneficiaries of the Jay Treaty free passage right.¹² I was also curious about how accessible information about the free passage right would be. Even in agencies that have formal rules accommodating beneficiaries of the free passage right, those rules are of little benefit when people cannot find out about them. Without accessible, user-friendly information, people cannot know about their rights and therefore are ill-equipped to take advantage of them. This becomes especially true when the government agents responsible for administering programs do not know about these rights.

DESK-CLERK LAW

This type of law, in which researchers examine the law as reported by public employees, is sometimes called “desk-clerk law”—a term coined by Elizabeth Emens in an illuminating article about the law surrounding marital name changes.¹³ In this article, Emens wrote,

Desk-clerk law is what the person at the desk tells you the law is. In the realm of marital names, the government functionaries who answer questions and direct choosing behavior around marital names seem frequently to give incorrect or normatively driven responses that discourage unconventional choices. In this informal way, desk clerks effectively make the rules for many citizens. Desk-clerk law is important to government-citizen interactions in the realm of marital names and beyond.¹⁴

In her research on name changes, Emens and her research assistant called and emailed county clerks’ offices and Departments of Motor Vehicles around the country, asking them what name-change options were available to couples who married in that county.¹⁵ Their survey revealed that “federal, state, and local government clerks gave inaccurate, incomplete, contradictory, or normative responses to specific questions about legal options.”¹⁶ Several clerks gave information that conflicted with state law or with official agency policy, while other clerks offered unsolicited advice about the value of keeping or changing a name.¹⁷

Questions about immigration law and Indian law are probably less likely to elicit personal advice than questions about marital law, but a Jay Treaty migrant, like a newlywed couple, is dependent on the knowledge and discretion of government

¹² Throughout the paper, such persons are referred to variously as “beneficiaries,” “migrants,” and “immigrants.” No distinction is meant by these different terms.

¹³ Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

¹⁴ *Id.* at 765.

¹⁵ *Id.* at 811, n.175.

¹⁶ *Id.* at 824.

¹⁷ *Id.*

employees. Many Jay Treaty migrants will not have lawyers, and one of the benefits of the Jay Treaty free passage right is its simplicity. The value of the right is diminished if the rights-bearer must obtain formal legal help in order to exercise it. Therefore, without formal legal assistance, a Jay Treaty migrant must depend on legal information available in pamphlets, on websites, and from government employees.

The free passage right is also an area ripe for the proliferation of misinformation. Immigration law generally is spread across so many agencies that no single government agency or employee will be likely to know every aspect of the process of coming to the United States. (The same is true for Indian law.) Therefore, a potential Jay Treaty migrant who is confused about her rights may have to consult several sources in order to find her answer. This compounds the possibility that one of the sources she encounters will give her bad information—and if two sources contradict each other, she will have no way of knowing which one to trust.

Furthermore, as in Emens's study, many of the government agents involved in the process of exercising Jay Treaty rights will wield significant power over the people who seek their services. As Emens noted with concern, "[D]esk clerks have been granted no [formal] discretionary authority. Nonetheless, they become the face of the government, the source of information as well as the immediate authority encountered by most citizens, and thus can exert tremendous influence."¹⁸ Several of the key players in a Jay Treaty migrant's journey *will* have formal discretion. For example, a CBP officer at the border has virtually unreviewable authority to turn away someone attempting to enter the country.¹⁹ If the CBP officer decides that a person cannot enter the United States, then regardless of the state of formal law, that person effectively cannot enter.

Additionally, the stakes for a Jay Treaty migrant are very high. He is in the United States with minimal documentation—no visa, possibly no green card, maybe even no passport—and therefore runs the risk of being misidentified as an "illegal immigrant." Even a government employee who lacks formal discretion can choose whether or not to alert Immigration and Customs Enforcement (ICE) to the migrant's presence, thereby potentially thrusting the migrant into removal proceedings.²⁰ This danger is exacerbated when states themselves play a role in enforcing immigration laws. A law like Arizona's Senate Bill 1070²¹ could create enormous difficulties for a Jay Treaty migrant, who

¹⁸ *Id.* at 827.

¹⁹ See *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("As to [foreigners], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–44 (1950) ("The action of the executive officer . . . is final and conclusive. . . . [I]t is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien."); *Landon v. Plasencia*, 459 U.S. 21 (1982) (a United States permanent resident who traveled to Mexico could, upon returning, be detained at the border and subjected to an exclusion hearing).

²⁰ Of course, removal is not a concern if the ICE officers understand the Jay Treaty free passage right. Their knowledge and judgment could make the difference between a non-issue and a bureaucratic nightmare, potentially involving the immigration courts and even incarceration.

²¹ S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2011), *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf> (last visited Oct. 31, 2012). Senate Bill 1070 requires that state officers verify the immigration status of any person they encounter in the course of

would have to explain to state law enforcement officers that while he had no documents, he was in fact authorized to be in the country—that in this case, “undocumented” was not synonymous with “illegal.” A Jay Treaty migrant caught in a traffic stop might find himself in jail if he failed to persuade state officers that a little-discussed eighteenth-century treaty gave him the right to enter the country.

METHODOLOGY

I conducted research for this paper in three waves. As a preliminary matter, I researched laws and regulations involving the Jay Treaty free passage right to see what the formal rules were about the free passage right. Second, I did extensive internet research about rights and benefits available to Jay Treaty immigrants. For this, I used a combination of simple internet searches, information available on government websites, and some electronic pamphlets from legal services organizations that work with American Indians. During this wave, I was trying to accomplish two goals: first, since the laws and regulations about the right were frustratingly vague, I was hoping to learn more about the substantive rights and benefits available to Jay Treaty migrants, and second, I was trying to learn how easily accessible this information was on the internet.

For the next phase, I called government agencies. Using publicly available phone numbers, I called the national phone lines for the Bureau of Indian Affairs, United States Customs and Immigration Services, and the Social Security Administration. I also called Social Security offices and Women, Infants, and Children (WIC) agencies in states along the United States–Canada border. Finally, I called CBP offices at several ports of entry along the border. On each call, I asked the people I spoke with about the free passage right and about their agencies’ policies toward people who exercised the right.

Wave I: Federal Laws and Regulations

Federal laws and regulations contain minimal information about how the Jay Treaty free passage right functions as a practical matter. In addition to the single provision of the United States Code codifying the free passage right,²² there are a handful of regulations in the Code of Federal Regulations that reference the free passage right. These establish that

- the free passage right applies only to persons “possessing 50 per centum or more of the blood of the American Indian race” and does not extend to their spouses and children or to adopted Indians;²³
- persons admitted pursuant to the free passage right “shall be regarded as having been lawfully admitted for permanent residence” if they have “maintained residence in the United States” since they entered;²⁴

their duties if they have a “reasonable suspicion” that the person is unlawfully present in the United States. Ariz. S.B. 1070.

²² Immigration and Nationality Act § 289 (8 U.S.C. § 1359) (2006).

²³ 8 C.F.R. § 289.1 (2010).

- “[t]he lawful admission for permanent residence of an American Indian born in Canada shall be recorded on Form I-181”,²⁵
- persons admitted under the free passage right are eligible for food stamps,²⁶ and
- American Indians born in Canada who meet the blood quantum requirement are not required to obtain immigrant visas.²⁷

These provisions raise as many questions as they answer. What types of identification must Jay Treaty migrants produce in order to benefit from the right? In particular, how does a person prove that she “possess[es] 50 per centum or more of the blood of the American Indian race”? If Jay Treaty migrants are “regarded as having been lawfully admitted for permanent residence,” are they eligible for ordinary legal permanent resident status (i.e. green cards)? If so, may they remain in the United States *without* obtaining a green card? What public benefits are Jay Treaty migrants eligible for when they arrive in the United States? Few of these questions are answered by the regulations.

Wave II: Information Available on Websites

Many of the questions above are answered on the websites of various government agencies. For example, the website of Customs and Border Patrol gives some useful information about the identification required to cross the border. Since the advent of the Western Hemisphere Travel Initiative (WHTI) in 2009,²⁸ crossing the United States–Canada border has, in general, required either a passport or an “enhanced driver’s license.” However, this restriction apparently does not apply to members of Native tribes or bands in the United States and Canada. The CBP site announces that although the United States government and United States tribes continue to work on developing enhanced tribal IDs, “Until further notice, Native American United States and Canadian citizens may continue to present their current tribal documents, including the current Indian and Northern Affairs Canada (INAC) card, as proof of identity and citizenship.”²⁹ This ostensibly means that a Canadian Indian can show her INAC card at the border and be granted admission into the United States.

²⁴ 8 C.F.R. § 289.2 (2010). This regulation also grandfathers in persons of less than 50% American Indian descent who entered prior to 1952.

²⁵ 8 C.F.R. § 289.3 (2010). See also *MacDonald*, No. 11-cv-1088 – IEG (BLM) at 2 (“MacDonald’s Form I-181, which documents his status as a lawful permanent resident, indicates that he is admitted for permanent residence as a ‘Canadian Born American Indian.’”).

²⁶ 7 C.F.R. § 273.4(a)(3)(i) (2010).

²⁷ 22 C.F.R. § 42.1(f) (2010).

²⁸ See 8 U.S.C. § 1185(b) (2006) (passport requirement for U.S. citizens); 22 C.F.R. § 53.2 (exceptions to passport requirement under WHTI).

²⁹ Customs and Border Patrol, Document Requirements for Land and Sea Travel, http://www.cbp.gov/xp/cgov/travel/vacation/ready_set_go/whiti_bg/land_sea/ (last visited Oct. 30, 2012). As of this writing, two tribes in the United States, the Pascua Yaqui Tribe of Arizona and the Kootenai

A visit to the USCIS website clarifies another issue: Jay Treaty immigrants *are* eligible for green cards.³⁰ The site explains that to get a green card, a Jay Treaty immigrant must request a creation of record by going to his local USCIS office with

- two passport-style photos,
- a copy of government-issued photo identification (which government is not specified),
- a copy of his “long form Canadian birth certificate,” and
- “[d]ocumentation to establish membership, past or present, in each Band or tribe for yourself and every lineal ancestor (parents and grandparents) through whom you have derived the required percentage of American Indian blood.”³¹

This final documentation is supposed to come either from the tribal government or from Indian and Northern Affairs Canada (INAC), a Canadian government agency. If the immigrant does not have this documentation, USCIS will accept an “Original Letter of Ancestry” issued by INAC, or else documentation from the United States or Canadian governments (although it is not clear what form this would take).³²

Assuming that the immigrant has all of these documents, he can then receive a green card, which confers two important advantages. First, while Jay Treaty status does not extend to an immigrant’s spouse or children,³³ ordinary legal permanent resident status does. Once an immigrant has his green card, he can petition for visas for his spouse and children to join him in the United States.³⁴ Second, green cards are the standard way of conferring status as a legal permanent resident in the United States.

Tribe of Idaho, have created enhanced tribal cards. *Id.* Canada is in the process of rolling out a new WHTI-compliant card called the Secure Certificate of Indian Status, which will apparently replace the old INAC cards over time. Indian & Northern Affairs Canada, Frequently Asked Questions—Secure Certificate of Indian Status, <http://www.ainc-inac.gc.ca/br/is/scs/faq-eng.asp> (last visited Oct. 31, 2012).

³⁰ U.S. Citizenship and Immigration Services, Green Card for an American Indian Born in Canada, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=82a83a4107083210VgnVCM10000082ca60aRCRD&vgnnextchannel=82a83a4107083210VgnVCM10000082ca60aRCRD> (last visited Oct. 31, 2012).

³¹ *Id.* Paul Spruhan has pointed out that since Indian status in Canada is not defined by blood quantum, the United States has inserted a requirement for Canadian Indian status that the Canadian government does not recognize or enforce. Spruhan, *supra* note 8, at 317. This is why the INAC card, while permitted for identification at the border, is not considered proof of eligibility for the free passage right. Instead, the United States requires documentation from the Indian band—but not all Canadian Indians are members of bands, since “status and band membership are separate concepts” in Canada. *Id.* at 318.

³² Green Card for an American Born in Canada, *supra* note 29.

³³ 8 C.F.R. § 289.1 (2010).

³⁴ Immigration and Nationality Act § 203(a)(2)(A) (spouses and minor children of legal permanent residents), 203(a)(2)(B) (unmarried adult sons and daughters of legal permanent residents) [8 U.S.C. §§ 1153(a)(2)(A), (B)] (2006).

Employers, government agencies, and universities know how to deal with ordinary legal permanent resident status. A Jay Treaty immigrant might well have an easier time in the United States if he can say, simply, “I’m a permanent resident,” and produce his green card, instead of having to explain his status under the free passage right.³⁵

However, it is not at all clear from the USCIS website what the options are for a Jay Treaty migrant who does not apply for a green card. The website seems to leave room for a category of people who exercise the free passage right but never go through the process of obtaining a green card. The site says, bluntly, “American Indians born in Canada (with at least 50% American Indian blood) cannot be denied admission to the United States,” but adds that “a record of admission for permanent residence will be created *if* an American Indian born in Canada wishes to reside permanently in the United States” (emphasis added).³⁶ This statement seems to recognize that exercising the free passage right is distinct from choosing to live permanently in the United States. Furthermore, the site says that a Canadian-born person of 50% or more American Indian blood “*may* be eligible to receive a green card (permanent residence)” (emphasis added), when it has just said that the same category of people cannot be denied admission to the United States.³⁷

Put together, the CBP and USCIS websites suggest that there are two ways to exercise the free passage right. The first way would be to enter the United States, request a creation of record, and become a legal permanent resident. The second way would be to enter the United States, but choose not to apply formally for legal permanent resident status, at least not immediately. The first way would require dramatically more identification than the second. Even if the United States began requiring Canada’s new WHTI-compliant Secure Certificate of Indian Status cards, a person could obtain a USCIS card without having a long-form birth certificate or documentation that every one of her lineal ancestors was Indian (both of which would be required to become a legal permanent resident).³⁸ Therefore, a Jay Treaty migrant could meet Customs and Border Protection’s requirements to enter the country, but still not have the degree of documentation required to obtain a green card from USCIS. There must be a status for Jay Treaty entrants without green cards—but the USCIS website gives no indication of what that status looks like.

According to the websites of other federal agencies, Jay Treaty immigrants are eligible for a variety of social programs and public benefits, often to a greater extent than ordinary immigrants. In general, anyone petitioning for a visa to bring a family

³⁵ David Armstrong, a lawyer with Wisconsin Judicare, told me that “practically it is much easier to get by if you do have a green card.” E-mail from David Armstrong, Staff Attorney, Indian Law Office, Wisconsin Judicare (Apr. 15, 2011, 6:20 p.m. CDT) (on file with author).

³⁶ U.S. Citizenship and Immigration Services, Green Card for an American Indian Born in Canada, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=82a83a4107083210VgnVCM100000082ca60aRCRD&vgnnextchannel=82a83a4107083210VgnVCM100000082ca60aRCRD> (last visited Oct. 31, 2012).

³⁷ *Id.*

³⁸ See Indian & Northern Affairs Canada, Frequently Asked Questions—Secure Certificate of Indian Status, <http://www.ainc-inac.gc.ca/br/is/scs/faq-eng.asp#q19> (last visited Oct. 31, 2012).

member to the United States must complete a legally enforceable “affidavit of support,” in which she promises to support the person so that the new immigrant will not become a public charge.³⁹ In addition to that restriction, many public benefits that are available to United States citizens are unavailable to legal permanent residents until the resident has worked for 40 quarters (essentially 10 years).⁴⁰

However, Jay Treaty immigrants are exempt from many of these bars. For example, a manual available on the website of the United States Department of Agriculture says that “American Indians born in Canada living in the United States under section 289 of the INA” (that is, Jay Treaty immigrants) “are eligible for food stamps on the same basis as citizens,” without any additional requirements.⁴¹ This is consistent with federal regulations.⁴² Neither the manual nor the regulation mentions the possibility that a Jay Treaty immigrant might also have a green card. It is not clear whether the food stamp program assumes that a Jay Treaty migrant necessarily will have a green card, assumes that a Jay Treaty migrant necessarily will *not* have a green card, or is not in close enough communication with USCIS even to realize that this is a concern.

The Social Security website similarly confirms that Jay Treaty immigrants are eligible for some benefits. The Social Security Administration posts its Program Operations Manual online, and this manual contains provisions on determining eligibility for Social Security cards for American Indians born in Canada. The Social Security website indicates very strongly that Jay Treaty migrants can stay in the United States (and, indeed, interact with the Social Security Administration) without obtaining green cards or any other immigration paperwork:

Certain Canadian born Indians who establish “one-half American Indian blood” are considered LAPR [legally admitted for permanent residence] and may freely cross borders and live and work in the U.S. *without DHS documentation*. DHS will provide documentation, if the individual requests it. SSA may also make a determination of LAPR status for SSA purposes, based on receipt of evidence of at least 50 per cent American Indian blood and evidence of birth in Canada [emphasis added].⁴³

³⁹ Immigration and Nationality Act §§ 212(a)(4), 213A [8 U.S.C. §§ 1182(a)(4), 1183A] (2006); see also Aleinikoff, *supra* note 9, at 523–531.

⁴⁰ 8 U.S.C. § 1631 (2006).

⁴¹ United States Department of Agriculture, Eligibility Determination Guidance: Non-Citizen Requirements in the Food Stamp Program 7, 34 (Jan. 2003), available at http://www.fns.usda.gov/SNAP/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf (last visited Oct. 31, 2012).

⁴² “No person is eligible to participate in the Program unless that person is . . . An American Indian born in Canada who possesses at least 50 per centum of blood of the American Indian race to whom the provisions of section 289 of the Immigration and Nationality Act . . . apply.” 7 C.F.R. § 273.4(a)(3)(i) (2010).

⁴³ Social Security Online, Program Operations Manual, SI 00502.105: Exemption from Alien Provisions for Certain Noncitizen Indians, available at <https://secure.ssa.gov/poms.nsf/lnx/0500502105> (last visited Oct. 31, 2012).

For the purposes of the Social Security Administration, at least, a Jay Treaty immigrant may be lawfully admitted for permanent residence without ever receiving a document showing that USCIS has declared the immigrant a legal permanent resident.⁴⁴ If the immigrant does not produce a green card, the Social Security Administration requires “[s]atisfactory evidence of birth in Canada” and a “document that indicates the percentage of American Indian blood in the form of a: birth certificate issued by the Canadian reservation, or a letter, card or other record issued by the tribe.”⁴⁵ These are slightly different from the requirements to obtain a green card: here, a long-form birth certificate is not specifically required, and the documents required to prove blood quantum are described in less detail. This lack of detail might create more discretion for individual Social Security employees in terms of what they will and will not accept.

The Social Security Administration warns its officers *not* to accept the “Certificate of Indian Status card (‘Band’ card) issued by the Canadian Department of Indian Affairs,”⁴⁶ which seems to mean the INAC cards that Customs and Border Patrol specifically authorized for use as identification at the border. Therefore, it seems that a Jay Treaty beneficiary might have sufficient identification to cross the border, but not enough to receive public benefits or authorization to work (in the form of a Social Security card) once he arrived in the United States. This might well be deliberate on the part of the United States government. Canadians in general can come to the United States as tourists with very few restrictions.⁴⁷ Similarly, a Canadian-born Native American with an INAC card is essentially coming to the United States on a tourist visa. If he wants to stay in the United States permanently, or if he wants to work in the United States, he must produce evidence of his blood quantum.⁴⁸ To receive the full benefits of the free passage right, he must show that he falls within the parameters of § 289.

It is worth noting that no single government agency provides a comprehensive list of the requirements and benefits associated with the free passage right. Ferreting out the information available on the various government sites requires a considerable investment of time even for people who are experienced with electronic searches and have some familiarity with the federal agencies involved. The information above would be extremely difficult to find for someone who lacked experience with technology, had limited literacy in English, or did not know the names and functions of federal agencies in the United States. Many people, therefore, would have difficulty finding even this information—particularly individuals who did not live in the United States and were unfamiliar with the various agencies in the federal government.

Wave III: Information Available by Telephone

⁴⁴ Note, though, that the Social Security Administration will also accept USCIS’s determination of legal permanent resident status. This section of the Program Operations Manual instructs agents to accept a Form I-551, which is the formal term for a green card. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 8 C.F.R. § 212.1(a)(1) (2010).

⁴⁸ See *supra* note 30.

For many people who have difficulty with internet searches, the most readily available means of getting this kind of information will be by telephone. In order to gauge the quality of information available by telephone, I compiled lists of phone numbers and started calling government agencies. I had no special access or assistance, and the phone numbers I called were pulled off the internet from sources of varying reliability: some were official agency telephone numbers, others were pulled from semi-official-looking websites, and still others were numbers that came up when I ran Google searches with terms like “Social Security Idaho.”

Ultimately, I called WIC agencies and Social Security offices in every state bordering Canada, border crossings in four states, and national phone numbers for USCIS, the Bureau of Indian Affairs, and the Social Security Administration. On every phone call, I began with a scripted opening that varied slightly depending on which agency I was calling. For example, when I called social security offices, I began by saying the following:

“Hi, I have a slightly unusual question about eligibility for a social security card. My friend told me that if you’re a Native American born in Canada, you can come to the United States without a visa or green card and stay here, and you would be eligible for a social security card. Is that true?”

When I called a WIC office, I said the same thing but substituted “WIC benefits” for “a social security card.” When asked, I told the people I was speaking with that I was a student researching this area of immigration and Indian law; most people were happy to help me with my research.

When I called border checkpoints and immigration agencies, I initially began by asking whether a Native American born in Canada actually *could* come to the United States without a visa or green card, then asked about benefits if the person confirmed that that was possible. However, one CBP officer told me that he was not authorized to speak with researchers and that he did not want to get in trouble by being quoted in a paper.⁴⁹ After that conversation, I began conversations with CBP officers by explaining that I was a student conducting a research project. No other officer expressed concerns about answering my questions.

The information I obtained from these phone calls was a mixed bag. Many people I spoke with were not familiar with the free passage right, although some of them looked up relevant rules or asked colleagues and then passed on their findings to me. A few operators were extremely well-informed; others gave me serious misinformation. The results of the full phone survey are summarized below.⁵⁰

⁴⁹ I have excluded his responses from my data. For obvious reasons, I have not cited the date or location of this call.

⁵⁰ See Appendix for an explanation of how the categories were defined.

	Border crossing Points (n=4)	Federal information lines ⁵¹ (n=3)	Social Security Offices (n=19)	WIC Offices and hotlines (n=12)
Knew of Jay Treaty right?	75%	67%	53%	25%
Referred me to a website, agency, or person?	25%	67%	37%	33%
Looked up information or asked someone for help?	0%	0%	42%	8%
Gave adequate correct information?	25%	33%	37%	92%
Gave misinformation?	50%	67%	53%	8%

Surprisingly poor information was available from the federal help lines. As soon as the agent at the Bureau of Indian Affairs heard my question, he told me to call the Department of Homeland Security because “that’s their issue, their jurisdiction.”⁵² He also told me that if an operator at any other department referred me to the BIA, I should ask to speak to the person’s manager.⁵³ The BIA agent was technically right that this was not his area, since the BIA plays no role in administering the free passage right, either in terms of handling border crossings or in distributing benefits to Jay Treaty immigrants. However, a person who had recently arrived in the United States could be forgiven for thinking that the “Bureau of Indian Affairs” might be able to help them understand a right that is specific to American Indians, and it is more than a little surprising that the BIA was so completely disconnected from this area of Indian law. The BIA agent’s eagerness to hand me off to another agency was additionally problematic because of the misinformation I received from the agency that he recommended.

The USCIS agent I spoke to was friendly and helpful, and he was able to share a lot of information about how a Jay Treaty immigrant could become a legal permanent resident (and ultimately a citizen). However, he also told me that a person who comes to the United States by means of the free passage right *must* apply to become a legal permanent resident in order to stay in the United States long-term.⁵⁴ He explained that if a Jay Treaty immigrant did not become a legal permanent resident, “[there would be] a stipulation, like you must leave within so many days, and so forth. Just like the border

⁵¹ I did not include my conversation with a very helpful agent at the E-Verify hotline (run by USCIS) because I had no opportunity to assess her knowledge of the free passage right—I wound up explaining everything I already knew in order to frame my questions about E-Verify.

⁵² Telephone conversation with representative at Bureau of Indian Affairs (Apr. 20, 2011).

⁵³ *Id.*

⁵⁴ Telephone conversation with representative at U.S. Customs and Immigration Servs. (Apr. 15, 2011).

crossing cards—some of the border crossing cards are good for 72 hours, so they have to return back after the expiration of the card.”⁵⁵ This is not only a contradiction of information contained on the Social Security Administration website,⁵⁶ it also suggests that if a Jay Treaty immigrant did not apply for legal permanent resident status, she would have to leave the United States in a matter of hours or days. In fact, Canadian citizens coming to the United States as tourists can stay for up to 90 days,⁵⁷ so even if the person in question had no additional rights under the Jay Treaty, she would not be required to leave in 72 hours.

The agent at the national Social Security Administration line was even less prepared. She had never heard of the free passage right,⁵⁸ which makes some sense given that the Social Security Administration does not handle immigration matters directly. However, when I asked her if someone who came to the United States in this way might be able to get a Social Security card, she told me that the person “would need to have residency paperwork.”⁵⁹ When I asked her what that residency paperwork would have to be, she told me she was not sure, but it would be something from “Immigration.”⁶⁰ This is in stark contrast to the Social Security operations manual, which says, “Certain Canadian born Indians . . . may freely cross borders and live and work in the U.S. without DHS documentation.”⁶¹ This agent did not look up any agency rules or refer me to any other source of information. Her oversights were particularly egregious because she was at the official nationwide Social Security hotline, to which websites and voice recordings directed me throughout the project.

The local Social Security offices provided information of varying quality. Just over half of the offices (10 out of 19) gave me significant misinformation, and only 7 of 19 offices gave me complete, accurate information about the identification that a person would have to produce to obtain a Social Security Card.⁶² At different offices, agents told me that I would need a passport to get a Social Security card,⁶³ that I would need “lawful presence and a work permit,”⁶⁴ that I would need to provide immigration documents,⁶⁵ and that I would need to provide a tribal ID as well as “of course,

⁵⁵ *Id.*

⁵⁶ Soc. Sec. Admin., Program Operations Manual , SI 00502.105: Exemption from Alien Provisions for Certain Noncitizen Indians, available at <https://secure.ssa.gov/poms.nsf/lnx/0500502105> (last visited Oct. 31, 2012).

⁵⁷ Immigration and Nationality Act § 217 [8 U.S.C. § 1187] (2006).

⁵⁸ Telephone conversation with agent from Soc. Sec. Admin. (Apr. 20, 2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Soc. Sec. Admin., Program Operations Manual , SI 00502.105: Exemption from Alien Provisions for Certain Noncitizen Indians, available at <https://secure.ssa.gov/poms.nsf/lnx/0500502105> (last visited Oct. 31, 2012).

⁶² My baseline for accuracy was the information contained in the POMS operating manual.

⁶³ Telephone conversation with agent in Soc. Sec. Offices in Billings, Mont. and Butte, Mont. (both April 25, 2011).

⁶⁴ Telephone conversation with agent in Soc. Sec. Office in Burlington, Vt. (April 22, 2011). This is technically true—applicants for Social Security cards must be lawfully present and authorized to work—but the phrasing and context suggested that applicants would need some sort of documentation affirming their lawful presence or work authorization.

⁶⁵ Telephone conversation with agent in Soc. Sec. Office in Montpelier, Vt. (Apr. 22, 2011).

additional IDs.”⁶⁶ One agent answered the phone, cheerfully said, “I’m going to have to put you on hold while I double-check on that,” and then left me on hold for more than 15 minutes.⁶⁷ (I hung up.) Agents at other offices insisted that the determination of eligibility is made on a case-by-case basis, so they could not describe the document requirements to me in the abstract.⁶⁸

It is important to recognize that these phone calls did *not* test whether agents could recognize appropriate documentation when it was presented to them. Some of the agents who answered my questions incompletely or incorrectly might nevertheless have been able to process a Jay Treaty immigrant’s actual application for a Social Security card. In some of the calls, it was clear that we were having trouble communicating, and it is possible that a face-to-face meeting would have ameliorated the problem. Some people I spoke to seemed to misunderstand my questions.⁶⁹ One agent kept saying “Bureau of Indian Affairs” when (I think) she meant Indian and Northern Affairs Canada.⁷⁰ Another agent, who seemed to have some familiarity with the free passage right, nevertheless told me that the documentation required for Social Security “can’t be a tribal card—it has to be an official Canadian document,”⁷¹ which is almost exactly the opposite of the Social Security Administration’s policy. It is possible that she would have recognized correct documentation when she saw it. But if a Jay Treaty immigrant took her advice, he might wind up leaving his (required) tribal records at home and bringing his INAC card (which the SSA will not accept) to the Social Security office.

I should also recognize here the terrific information that many offices did provide. One agent called me back twice in order to correct earlier misinformation.⁷² An agent in a border office gave me the most complete information I received from anyone in the entire project.⁷³ Finally, one agent gave me excellent advice for dealing with any government situation: “I would bring every piece of [identification] that you have.”⁷⁴

The WIC offices stand out in the data for providing very little misinformation and providing a lot of useful information. This is partially due to a policy that is (at least officially) shared by WIC offices in every state I contacted: proof of citizenship or legal

⁶⁶ Telephone conversation with agent in Soc. Sec. Office in Concord, N.H. (Apr. 25, 2011).

⁶⁷ Telephone conversation with agent in Soc. Sec. Office in Geneva, N.Y. (Apr. 25, 2011).

⁶⁸ Telephone conversations with agents in Soc. Sec. Offices in Pocatello, Idaho (Apr. 22, 2011); Butte, Mont. (Apr. 25, 2011); and Bismarck, N.D. (Apr. 26, 2011) (the agent in Bismarck told me that the United States had different treaties with different tribes). Other agents were deliberately vague about the requirements for specific documents, probably out of concern for security, but these few offices failed to provide general information that was publicly available on the Social Security Administration’s website.

⁶⁹ Telephone conversations with agents in Soc. Sec. Offices in Kenosha, Wis. (Apr. 25, 2011) (thought I meant Canadian-born children of United States Indians) and Nashua, N.H. (Apr. 25, 2011) (thought I meant Canadian-born members of United States tribes, who have a different set of rights).

⁷⁰ Telephone conversation with agent in Soc. Sec. Office in Oswego, N.Y. (Apr. 25, 2011).

⁷¹ Telephone conversation with agent in Soc. Sec. Office in Burien, Wash. (Apr. 25, 2011).

⁷² Telephone conversations with agent in Soc. Sec. Office in West Bend, Wis. (Apr. 25, 2011).

⁷³ Telephone conversation with agent in Soc. Sec. Office in Bemidji, Minn. (Apr. 26, 2011).

⁷⁴ Telephone conversation with agent in Soc. Sec. Office in Pocatello, Idaho (Apr. 22, 2011).

residence is not required in order to obtain WIC benefits.⁷⁵ Several WIC offices emphasized that applicants would need to prove state residency (using a lease agreement, utility bill, or something similar), but all agreed that applicants did not need to provide proof of legal admission to the United States.⁷⁶ This policy is easy to remember, communicate, and implement. Representatives in Social Security offices and officers at border checkpoints (see *infra*) got confused about exactly what documentation their agencies required, but this rarely happened to the WIC representatives I spoke to.⁷⁷

The Customs and Border Protection officers at the border (or, as CBP calls them, “Ports of Entry”) had mostly at least heard of the free passage right: three out of four officers knew that there were special immigration rules for some Canadian-born Native Americans.⁷⁸ None of the officers gave rules for entry that were more restrictive than the rules on the CBP website, but two were less restrictive. One officer told me that since all Canadians can enter the United States without a visa, Canadian-born Native Americans could enter with only a tribal ID, but also insisted that there was nothing else special about their status.⁷⁹ Another recognized that Native Americans born in Canada could become permanent residents, but never mentioned that they would have to show a birth certificate and prove blood quantum (despite my questions).⁸⁰

THE RAMIFICATIONS OF POOR INFORMATION

At first blush, it might not seem to matter that some federal officials are giving out misinformation to potential Jay Treaty immigrants; if anything, the last officer I mentioned would seem to make their lives easier. However, even if he fails to ask for the required documentation, applicants for legal permanent resident status will still need to provide it in order for USCIS to issue a green card. This officer’s misinformation might make Jay Treaty immigrants have to apply twice—or worse, it might encourage them to enter the United States with less documentation than they needed. Multiple agents I spoke with encouraged would-be migrants to stop at border offices to make sure that their documents were adequate before they traveled any further. This advice is unhelpful if the border offices are evaluating documents incorrectly. Furthermore, CBP

⁷⁵ Telephone conversations with assorted state WIC offices, help lines, and local offices in Maine, New Hampshire, New York, Michigan, Wisconsin, Minnesota, North Dakota, Montana, and Idaho (Apr. 22–25, 2011).

⁷⁶ As the representative in my local WIC office said: “We don’t ask for no type of papers.” Conversation with agent in New York City WIC office (April 25, 2011).

⁷⁷ The exception was the Idaho Care Line, which told me that people “usually have to show proof of citizenship to apply for those services.” Telephone conversation with agent on Idaho Care Line (Apr. 22, 2011). The WIC numbers that I found mostly sent me to state WIC headquarters and hotlines, so I was hearing the official policies rather than hearing how local WIC offices implemented those policies. Nevertheless, given my mixed results with the official national hotlines, I still find the results of the WIC survey encouraging.

⁷⁸ Telephone conversations with Customs & Border Prot. officers from Ports of Entry at Pittsburg Station, N.H. (Apr. 21, 2011); Lewiston Bridge, N.Y. (Apr. 21, 2011); Pembina, N.D. (Apr. 26, 2011); and Baudette, Minn. (Apr. 26, 2011).

⁷⁹ Telephone conversation with Customs & Border Prot. officer at Lewiston Bridge, N.Y. (Apr. 21, 2011).

⁸⁰ Telephone conversation with Customs & Border Prot. officer in Baudette, Minn. (Apr. 26, 2011).

officers who do not know the details of how to create a record of admission for permanent residence may wind up filling out the wrong forms at the border.

Even though Jay Treaty immigrants are allowed stay in the United States indefinitely without obtaining green cards, incorrect immigration paperwork can have major consequences. When I began work on this project, one issue I was alerted to was a concern that the E-Verify system for employers might incorrectly “flag” Jay Treaty immigrants.⁸¹ According to USCIS, the E-Verify system is “an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.”⁸² Essentially, employers enter their employees’ identifying information into E-Verify, and E-Verify determines if the Social Security numbers that the employees provided were validly issued to them. The idea is to screen for individuals who are not authorized to work and are using fraudulent Social Security cards. Since Jay Treaty immigrants with proper identification are entitled to legitimate Social Security cards, I was unsure about why E-Verify would not work adequately for them.

I called the E-Verify hotline to get some information about problems that might occur with Jay Treaty immigrants’ information.⁸³ Initially, the E-Verify agent suggested that Jay Treaty immigrants might be receiving “restricted” Social Security cards. According to the agent, some Social Security cards do not authorize their bearers to work in the United States.⁸⁴ However, she also said that these restricted Social Security cards have their restrictions printed on them, so anyone with a restricted card would know it.⁸⁵ Furthermore, the identification that a Jay Treaty immigrant would need to show in order to receive a Social Security card would also probably be sufficient to authorize him to work.⁸⁶

A more convincing explanation for why E-Verify might erroneously flag Jay Treaty immigrants has to do with how E-Verify works. The agent explained that E-Verify takes the information that an employee provides in an I-9 form (the employee’s name, address, Social Security number, date of birth, and supporting documentation) and

⁸¹ Thanks to David Armstrong for bringing this to my attention.

⁸² U.S. Citizenship and Immigration Services, E-Verify, <http://www.dhs.gov/e-verify> (last visited Oct. 31, 2012).

⁸³ In order to ask my question, I had to explain the existence of the Jay Treaty free passage right and some of its benefits, such as the right to a Social Security card. Therefore, I did not include the E-Verify agent in the data explained above.

⁸⁴ Conversation with E-Verify agent, April 26, 2011. She explained that restricted Social Security cards may either say “valid for work only with DHS authorization,” in which case the bearer may work if he presents independent evidence that he is authorized to work, or say “not valid for work authorization,” in which case the bearer would have to obtain a new card before being able to work.

⁸⁵ *Id.*; see also Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. Times Magazine, June 22, 2011, <http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?pagewanted=all> (describing a Social Security card stating “Valid for work only with I.N.S. authorization” on its face).

⁸⁶ See U.S. Citizenship and Immigration Services, Form I-9, Employment Eligibility Verification (Rev. 08/07/09) 5 (“List of Acceptable Documents”), available at <http://www.uscis.gov/files/form/i-9.pdf>. A Native American tribal document (which the E-Verify agent confirmed could be from tribes in the United States or Canada) plus a photo ID would constitute proof of identity and authorization to work. *Id.*; Telephone conversation with E-Verify agent (Apr. 26, 2011).

matches it against records kept by the Social Security Administration and the Department of Homeland Security.⁸⁷ If the Jay Treaty immigrant has a valid Social Security card, then the SSA records should not be a problem. However, if he never applied to be a permanent resident, then there will be no DHS record of his admission as a legal permanent resident, and that disparity might cause E-Verify to flag the record as problematic.⁸⁸

A negative result from E-Verify can cause an employee to lose his job or even cause an encounter with Immigration and Customs Enforcement. If missing DHS documentation really does trigger problems with E-Verify, then problems with E-Verify are a risk for any Jay Treaty immigrant who does not formally become a legal permanent resident. It would not matter if the person deliberately chose not to become a legal permanent resident, lacked required documentation (such as the long-form birth certificate), or was admitted by a CBP officer who did not realize that he needed to create a record. Any of these circumstances could cause a Jay Treaty immigrant not to have DHS paperwork, which in turn could lead to problems with E-Verify. This makes it extremely important that CBP officers know how to properly record the entry of Jay Treaty immigrants.⁸⁹

CONCLUSION AND RECOMMENDATIONS

On some level, we should not be surprised that government agents do not know the details of the Jay Treaty free passage right. The free passage right is a complicated set of policies that affects relatively few people; most agents will rarely encounter circumstances that involve the Jay Treaty.⁹⁰ However, for the people who do enter the United States using the free passage right, it is of the utmost importance that agents know how to handle their cases, or at least where to look for more information.

One feasible means of addressing this problem would be to create a single government website listing all of the rules and benefits available under the free passage right. A single page with a checklist of required documents would make it easy for Jay Treaty immigrants to find out how to take advantage of their entitlements under United States law. Furthermore, government agencies could refer their agents to this site in

⁸⁷ Telephone conversation with E-Verify agent (Apr. 26, 2011).

⁸⁸ A Jay Treaty immigrant who has not become a permanent resident also will not have an Alien Number or Admission Number, as required by the I-9. See I-9, *supra* note 85, at 1, available at <http://www.uscis.gov/files/form/i-9.pdf> (last visited Oct. 31, 2012).

⁸⁹ The Code of Federal Regulations says that a creation of record requires a form I-181. 8 C.F.R. § 289.3 (2010). This was confirmed by one CBP officer from Pembina, N.D. Telephone conversation (Apr. 26, 2011). However, other officers said that they would use a form I-872 or a form I-551. Conversations with Customs & Border Prot. officers in Pittsburg Station, N.H. (Apr. 21, 2011) and Baudette, Minn. (Apr. 26, 2011). It is not clear which of these three forms would suffice to create an adequate DHS record for E-Verify.

⁹⁰ My survey was limited to states along the Canadian border, where these cases would tend to be, if anything, more common than in the rest of the country. As one agent said to me, "We're a border office . . . so [the free passage right is] something that we have to be familiar with. I mean, if you went down to Georgia or something they're not going to know this rule!" Telephone conversation with agent in Sec. Soc. Office in Bemidji, Minn. (Apr. 26, 2011).

order to find comprehensive, easily digestible information that they could then share with migrants.

Some legal services organizations have taken steps to make this information publicly available. Before it closed, the American Indian Law Alliance published a pamphlet called *Border Crossing Rights Between the United States and Canada for Aboriginal People*, which provided clear and accurate information to potential Jay Treaty immigrants. (Unfortunately, the AILA website is no longer maintained, and the pamphlet has been removed from its official site.⁹¹) Legal Services of North Dakota also provides information about the free passage right on its website.⁹² These sites provide a useful model of the content a government page might contain.

However, it is important for the United States government to provide this information itself, rather than relying solely on legal services organizations. People seeking reliable information about government policies deserve the certainty that comes from obtaining information from the official source. This would also allow the federal government to update the site whenever the substantive rules changed.

There remains the possibility that the murkiness surrounding the free passage right is deliberate, or at least not unwelcome as far as the federal government is concerned. The trend in immigration law has been to tighten the borders, rather than to make travel and immigration easier.⁹³ The lack of information about how to exercise the free passage right might serve to discourage would-be immigrants from taking advantage of their right to live freely within the United States. However, obscuring the contours of a right is not an acceptable way for the United States to make its policy. The Jay Treaty free passage right exists, and the bearers of that right should at least be able to find out how to exercise it.

⁹¹ The text of the pamphlet appears to have been copied to several websites, so the information remains on the internet, albeit from less reliable sources. See, e.g., danielnpaul.com, JAY TREATY: 1794, <http://www.danielnpaul.com/AmericanBritishJayTreaty-1794.html> (last visited Oct. 31, 2012).

⁹² Legal Services of North Dakota, Free Passage Rights of North American Indians Born In Canada, http://www.legalassist.org/?id=86&form_data_id=89 (last visited Oct. 31, 2012).

⁹³ See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104–208, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 and 18 U.S.C.); Immigration Reform and Control Act Of 1986, Pub.L. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

Appendix: Metrics

	Border crossing Points (n=4)	Federal information lines ⁹⁴ (n=3)	Social Security Offices (n=19)	WIC and Offices (n=12) hotlines
Knew of Jay Treaty right?	75%	67%	53%	25%
Referred me to a website, agency, or person?	25%	67%	37%	33%
Looked up information or asked someone for help?	0%	0%	42%	8%
Gave adequate correct information?	25%	33%	37%	92%
Gave misinformation?	50%	67%	53%	8%

The questions in the table above were scored as follows:

1) “Knew of Jay Treaty right?”

This question was scored generously. If the person with whom I was speaking made any sign that she had heard of a special right for Canadian-born Native Americans, she got credit for knowing about the Jay Treaty. My logic here was that if the operator had at least heard of the Jay Treaty right, she would be less likely to dismiss questions from a Jay Treaty immigrant and would be more likely to know where to look to find out more information.

2) “Referred me to a website, agency, or person?”

Many agents who had no useful information about the free passage right still directed me to their agency websites, which I knew from independent research contained helpful information. A person who had not previously done internet research might be helped by a reference to, for example, <http://www.socialsecurity.gov/>. On the other hand, the government agency websites to which I was directed were huge, sprawling, and likely to intimidate inexperienced researchers.

⁹⁴ I did not include my conversation with a very helpful agent at the E-Verify hotline (run by USCIS) because I had no opportunity to assess her knowledge of the free passage right—I wound up explaining everything I already knew in order to frame my questions about E-Verify.

References to specific people and agencies were more helpful. A few agents gave me very specific referrals, sometimes giving me a specific person's phone number or a direct line to another office.

3) "Looked up information or asked someone for help?"

Some agents who did not know the answers to my questions nevertheless made efforts to help (sometimes successfully, sometimes not). This is important not just on the theory of "A for Effort," but because an agent who takes the effort to find out information is more likely to uncover formal policies as recorded in manuals and on agency websites.

4) "Gave adequate, correct information?"

In order to pass this category, an agent had to correctly describe the documents that a Jay Treaty immigrant would need to show in order to cross the border, receive a Social Security card, or obtain whatever benefit we were discussing.

I checked the answers by reference to agency policy as listed on websites. Therefore, if an agent at a Social Security office told me that a Jay Treaty immigrant could receive a Social Security card by showing a tribal I.D. card, I did not count that as adequate, correct information, because the Social Security website says that you need a document proving your Native American heritage *and* a birth certificate. (Even if that particular agent would have issued a Social Security card based on less identification, the agent is still giving the caller inadequate information to get a Social Security card from any *other* agent.)

One of the reasons WIC offices did so well in this category is that none of the WIC agencies I called required proof of citizenship or legal immigration status to obtain benefits. "We don't need to see immigration documents" is an easy policy to remember and communicate.

5) "Gave misinformation?"

This category is not simply the opposite of the "adequate, correct information" category above, and in fact the two were not mutually exclusive. (For example, one agent at USCIS accurately described how a Jay Treaty immigrant could acquire legal permanent resident status, but then told me that Jay Treaty immigrants *must* become legal permanent residents in order to stay in the country long-term.) I put calls in this category when the agent affirmatively stated something that was not only wrong, but would also have significant consequences for a Jay Treaty immigrant (or would-be immigrant) who believed the agent.

In general, I excluded from my sample any phone calls where I could not reach a human being or where the agent with whom I spoke asked not to be included. I also excluded a call to the USCIS E-Verify hotline because the call gave me no useful opportunity to assess the agent's knowledge of the free passage right.