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Related to Western Lands

Introduction: Ordinances Related to Western Lands

The establishment of constitutional government for the United States in 1781 did not end the debate over the extent of power needed by Congress to manage the affairs of the nation. Between 1781 and 1787 many individuals and some states suggested additional powers for Congress, but most of the significant proposals for strengthening the central government came from Congress itself. Furthermore, Congress assumed powers and adopted measures that had a fundamental and lasting impact on the future settlement and growth of the United States.

Those measures concerned the national domain, the creation of which was made possible by the Virginia cession of the Old Northwest in January 1781. In creating the national domain, and in adopting ordinances for its government and the sale of land within it, Congress exercised power for which there was no constitutional warrant in the Articles of Confederation, but it was an exercise of power accepted by political leaders of all shades of opinion. As James Madison put it in the fall of 1787: "Congress had never scrupled to recommend measures foreign to their constitutional functions, whenever the public good seemed to require it; and had in several instances, particularly in the establishment of the new western governments, exercised assumed powers of a very high and delicate nature. . . ."

Americans in 1776 recognized that the territory west of the Appalachians would eventually be divided into states, but they were at odds from the beginning about how to create and to govern them. The point of view of the states with claims extending beyond the mountains was expressed in June 1776 by Thomas Jefferson in his final draft of a constitution for Virginia. He provided that Virginia would create new western colonies "free and independent of this colony and of all the world." The point of view of the states with definite western boundaries was expressed the next month in John Dickinson's draft of articles of confederation. The draft gave Congress power to limit the boundaries of states claiming lands to the "South Seas," and the power to establish the boundaries of new states in the area "within which Forms of Government are to be established on the Principles of Liberty." The Articles of Confederation, as adopted, denied Congress such power, but the issue was revived by Maryland's refusal to ratify unless the Articles of Confederation were amended to give Congress control of western lands.

While Virginians were willing to cede some of Virginia's claims, they insisted that Congress must declare void all pre-war purchases from Indians as Virginia had done, while Maryland continued to insist that the land did not belong to Virginia, and that in any case, the pre-war claims must be validated.

In September 1780, in an effort to break the deadlock, Congress voted to ask the states to cede a portion of their western claims for the sake of the Union and asked Maryland to ratify the Articles of Confederation. Congress refused to consider the merits of the rival claims since Con-

gress had declined to discuss them when “the Articles of Confederation were debated. . . .” Virginians then proposed specific policies for the future of the lands to be ceded and Congress agreed. Congress promised the states on 10 October 1780 that any land ceded (1) would be “disposed of for the common benefit of the United States”; (2) would be “settled and formed into distinct republican states, which shall become members of the federal Union, and have the same rights of sovereignty, freedom and independence, as the other states”; and (3) each state would not be “less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit.” However, Congress refused to guarantee the remaining claims of the ceding states or to declare invalid purchases from Indians within the areas to be ceded.

On 2 January 1781 the Virginia legislature ceded the territory northwest of the Ohio River to Congress. The legislature’s resolutions incorporated the promises of Congress and, in addition, required Congress to void all pre-war purchases from Indians and to guarantee Virginia’s territory south of the Ohio River to her.

Three years elapsed between the first Virginia cession in 1781 and the actual establishment of the national domain by the acceptance of the second Virginia cession on 1 March 1784. The delay was the consequence of the conditions attached to Virginia’s first cession. That act required Congress, in effect, to nullify the claims of the Indiana Company south of the Ohio River and the Illinois-Wabash Company north of the river.

Powerful Maryland leaders such as Thomas Johnson, Samuel Chase, and Charles Carroll of Carrollton, and equally powerful Pennsylvania leaders such as Robert Morris and James Wilson were members of those companies, and they fought in Congress and out to prevent the acceptance of the Virginia cession with the conditions attached. Land speculators argued that sovereignty over the West had “devolved” from the British government upon Congress and that Virginia had no valid claim. James Wilson, as president of the Illinois-Wabash Company, was only one of the members of Congress who supported the speculators. The Virginians countered by demanding that each member of Congress declare his connection with the land companies whenever the Virginia cession came before Congress.

The end of the war in 1783 produced a change. Congress needed the money to be acquired from the sale of western lands; Virginia was selling land in the West; and people were settling on the land without paying anyone for it. The deadlock was broken on 13 September 1783. Congress adopted a report on the Virginia cession of 1781, which, James Madison said, “tacitly” excluded the claims of the land companies. Congress requested a new cession, and on 20 December 1783 the Virginia legislature ceded the Old Northwest to Congress a second time. The act embodied the general principles for the government of the West and its division into states, which Congress had promised on 10 October 1780 and reiterated on 13 September 1783.

Congress accepted the cession on 1 March 1784 and on 23 April adopted a plan for the government of the national domain. Thomas Jefferson was the chief architect of the ordinance, the broad outlines for which were established in October 1780 and made mandatory by the Virginia cession. The Ordinance divided the national domain into ten districts and provided for self-government by the people within them. The people were to create temporary governments, and whenever the population of a district equalled that of the smallest of the original thirteen

states, the district was to be admitted to the Union as a state and as an equal partner of the original states.

On 20 May 1785 Congress adopted an ordinance for the survey of the Western Territory and the sale of the land surveyed. The Ordinance divided the national domain into townships each containing thirty-six square miles, with each square mile or “section” containing 640 acres. Four sections in each township were reserved for the United States, and one section was set aside for public schools. Once the land was surveyed, it was to be sold at public auction at not less than a dollar an acre.

The method prescribed for the survey and sale of land was soon ignored because of the slow pace of the survey, the rise of new speculative interests, and the growing demand for money to enable Congress to make payments on the national debt. The Ordinance required that seven ranges of townships be surveyed before land sales could begin, but only four ranges had been surveyed by 1787. Meanwhile, a group of New Englanders, calling themselves the Ohio Company, appeared before Congress and offered to buy a million acres of land in the Northwest Territory beyond the seven ranges to be surveyed. Congress agreed to sell the land in July 1787. However, the division of the West into townships and sections set forth in the Land Ordinance of 1785 remained a permanent part of American land policy.

The abandonment of orderly land sales was accompanied by mounting opposition to the prospect of new western states and to the self-government provided for in the Ordinance of 1784. In December 1785 James Monroe reported to James Madison that the “most enlightened members” of Congress were doubtful about admitting even one new state into the Union, and that the Virginia cession should be revised to allow Congress to reduce the number of prospective western states.

On 24 March 1786 a committee reported that if the Western Territory were divided into states according to the Ordinance of 1784, many of the states would not soon, if ever, have enough inhabitants to form a government, would remain “without laws, and without order among them,” and the Union would have no advantage from them. Therefore, Virginia should be asked to revise its cession, and the provision of the Ordinance of 1784 relating to the size of future states should be repealed.

On 10 May a second committee reported a plan of government to replace the Ordinance of 1784. The committee declared that a government should be established in the West before any lands were sold. Furthermore, instead of self-government by the inhabitants until a state was admitted to the Union, the West would be governed by officials appointed by Congress, including a governor with virtually dictatorial powers. The next day, James Monroe reported to Thomas Jefferson: “It is in effect to be a colonial government similar to that which prevailed in these states previous to the Revolution. . . .” The details of the plan contradicted Monroe’s assurance to Jefferson that the most important principles of the Ordinance of 1784 were preserved.

Debate on the proposed ordinance was resumed in July, but by then Congress was involved in the power struggle between the Northern and Southern states over the proposed Jay-Gardoqui treaty, which provided for closing the Mississippi River to Americans for twenty-five years in exchange for commercial privileges for Northern merchants in Spanish ports. James Monroe was convinced that the purpose of the Northerners, and particularly of the New Englanders, was to break up the western settlements, prevent the admission of new states, keep population in the

East, and increase the value of vacant lands in New York and Massachusetts. The ordinance was discussed again in September and then dropped until April 1787, when it became the basis for the Ordinance for the Western Territory adopted by Congress on 13 July 1787.

The spirit in which the Ordinance was written is indicated by the words of the men who wrote it. On 25 April 1787 a committee of Congress reported that the Ordinance of 1785 should be repealed. The sale of land would be too slow, and “discontented and adventurous” people were settling on the land, which would be lost “unless early measures are pursued for vesting a better kind of people with rights there.” A second reason was that experience had proven that “private adventurers” would be willing to pay for surveys if allowed to choose the lands they wanted.

After the Ordinance was adopted, Nathan Dane of Massachusetts, its principal draftsman, reported that Congress was “rather pressed” because of the Ohio Company offer to buy a large tract of land, “and we wanted to abolish the old system. . . .” He thought that the requirement that a district have 60,000 free inhabitants before it could be admitted as a state was too small, but that it might not be important since the easternmost of the states “will no doubt be settled chiefly by Eastern people” who would likely adopt “Eastern politics.” He was surprised that there was no opposition to forbidding slavery in the territory, but, as William Grayson of Virginia explained it, “the clause respecting slavery was agreed to by the Southern members for the purpose of preventing tobacco and indigo from being made on the North West side of the Ohio as well as for several other political reasons.”

Richard Henry Lee, who had returned to Congress in time to be appointed to the committee which drafted the Ordinance, reported to George Washington after its passage that “it seemed necessary, for the security of property among uninformed, and perhaps licentious people as the greater part of those who go there are, that a strong toned government should exist, and the rights of property be clearly defined.” A little later he wrote his brother William Lee: “The form of this government, as you will see by the enclosed paper, is much more tonic than our democratic forms on the Atlantic are.”

The provisions of the Ordinance illustrate the spirit and intent of its creators. The Ordinance abolished the self-government provided for in the Ordinance of 1784. The first government in the national domain would be by a governor, a secretary, and three judges appointed by Congress. The governor, appointed for five years, must own 1,000 acres of land in the district; the secretary, appointed for four years, and the judges, appointed during good behavior, must each own 500 acres. The governor would be commander in chief of the militia and would appoint all officers below general rank. The governor had the power to appoint magistrates and civil officials, to lay out counties and townships, and, with the judges, to adopt any of the criminal and civil laws of the original states, which would remain in effect unless disapproved by Congress.

The Ordinance provided that when a district had 5,000 free male inhabitants, a legislature would be established. Representatives must own 200 acres of land and be citizens of one of the United States or residents of the district for three years. Voters must own 50 acres of land and be citizens of one of the United States or residents in the district for two years.

The power of the elected branch would be carefully controlled. Congress would appoint an upper house of five men for five years from ten names nominated by the elected branch, and each councillor must own 500 acres of land. Furthermore, the governor would retain great power.

He would continue to appoint civil and military officers, have an absolute veto over legislation, and, like royal governors before 1776, have the “power to convene prorogue and dissolve the general assembly, when in his opinion it shall be expedient.”

A “bill of rights” guaranteed freedom of religion, the right to a writ of habeas corpus, trial by jury, proportional representation, right to bail, freedom from cruel and unusual punishments; and slavery and indentured servitude were forbidden. The “bill” also provided for the protection of property: no law should ever be made “that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.” Nor was the legislature of a district, or of the future states, to interfere with the sale of land by Congress, impose any tax on the property of the United States, or tax non-resident proprietors higher than the inhabitants.

The territory would be divided into not less than three nor more than five states. Whenever any district had 60,000 free inhabitants, it would be at liberty to form a constitution and state government and “be admitted by its delegates” to Congress on “equal footing with the original states. . . .”

The actions of Congress in adopting ordinances for the government and sale of the national domain were determined by political and economic realities, not by constitutional responsibilities or niceties. Even the final vote on the adoption of the Ordinance of 1787 ignored the requirement of the Articles of Confederation that no important question could be determined except by the approval of nine states. The states present in Congress voted unanimously for the Ordinance, but only eight states were represented.

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