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Legal and Procedural Issues Related to Seating a Cherokee Nation Delegate in the House of Representatives

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SUMMARY

On August 22, 2019, Cherokee Nation Chief Chuck Hoskin Jr. announced his tribe's intention to nominate a delegate to a seat in the U.S. House of Representatives to represent the Cherokee Nation for the first time. This announcement invoked a provision of the 1835 Treaty of New Echota, a pact between the Eastern Cherokee Tribe of Georgia and the U.S. government. On August 29, 2019, the Council of the Cherokee Nation approved Chief Hoskin's nomination of Kimberly Teehee to serve as the Cherokee Delegate. The Coronavirus Disease 2019 pandemic reportedly delayed congressional considerations for seating Ms. Teehee, and as of June 2022, no decision had yet been announced.

This report identifies and analyzes issues Congress may consider when evaluating the Cherokee Nation's nomination of a delegate to the House of Representatives. The relevant treaty language is subject to different interpretive principles, including the so-called Indian canons of construction. Use of similar language in other contemporaneous documents and available historical context may also aid in interpretation. In the event Congress chooses to take action to execute the delegate language in the Treaty, Congress may consider a few procedural options as well as potential objections to those actions. Congress may also wish to consider potential legal challenges that could arise if a Cherokee Delegate were seated, including whether such challenges would be justiciable in court.

R47190

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Contents

Tables

Contacts

On August 22, 2019, Cherokee Nation Chief Chuck Hoskin Jr. announced his tribe's intention to nominate a delegate to a seat in the U.S. House of Representatives to represent the Cherokee Nation for the first time. This announcement invoked a provision of the 1835 Treaty of New Echota, a pact between the Eastern Cherokee Tribe of Georgia and the U.S. government.[1] On August 29, 2019, the Council of the Cherokee Nation unanimously approved Chief Hoskin's nomination of Kimberly Teehee to serve as the Cherokee Delegate.[2] As of June 2022, congressional leaders had not yet announced a decision as to whether or when to seat the delegate. Efforts to seat her were reportedly delayed due to the Coronavirus Disease 2019 (COVID-19) pandemic.[3]

If seated, the Cherokee Delegate would presumably be a nonvoting participant in Congress, as the Constitution requires that the House be composed of "Members chosen every second Year by the People of the several States,"[4] a requirement not met by a Cherokee Delegate. Accordingly, she could not vote on the House floor to pass legislation, but might be authorized by the chamber to vote in committee and address House Members from the floor. This is akin to the current role of delegates for the U.S. territories and the District of Columbia, which changes in its particulars (such as voting in the Committee of the Whole) from time to time depending on the priorities of the party controlling the House.[5]

This report identifies and analyzes issues Congress may consider when evaluating possible congressional action in response to the Cherokee Nation's nomination of a delegate to the House of Representatives. This includes a discussion of applicable treaty interpretation principles, examination of relevant treaty provisions and historical context, evaluation of events subsequent to treaty signing, procedural options for recognizing a claim, and potential objections to such actions.

Principles for Interpreting Treaties with Indian Tribes

Treaties with federally recognized tribes[6] are sui generis because of the tribes' unique legal status under the U.S. Constitution.[7] The Supreme Court has characterized federally recognized tribes as

[1] Treaty with the Cherokee, 1835, 7 Stat. 478 (Dec. 29, 1835) [hereinafter Treaty of New Echota].

[2] For additional background on Ms. Teehee's nomination, see Stephanie Akin, *Delegate-in-Waiting (for 184 Years)*, CQ WEEKLY, Oct. 15, 2019, at 27–29.

[3] *See* Chuck Hoskin, Jr., *Cherokee Nation's Path to Seating Congressional Delegate*, THE HILL, March 4, 2022, https://thehill.com/blogs/congress-blog/politics/596946-cherokee-nations-path-to-seating-congressional-delegate.

[4] U.S. CONST. art. 1, § 2. For more legal analysis of this language, see Cong. Rsch. Serv., ArtI.S2.C1.2 Electors and the House of Representatives, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S2-C1-2/ALDE_00001032/ (last visited July 18, 2022).

[5] *See generally* 48 U.S.C. Ch. 16 (territorial delegates to Congress); Pub .L. No. 93–198 (1973) (District of Columbia Home Rule Act). *See also* CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, by Jane A. Hudiburg.

[6] Unless otherwise specified, the terms "Indian" and "tribe" reflect statutory language denoting tribal entities that, through a process known as federal recognition or federal acknowledgment, have a government-to-government relationship with the United States and are entitled to certain rights and privileges. *See, e.g.*, 25 U.S.C. § 5131 (directing Secretary of Interior to publish annually a list of all Indian tribes recognized as "eligible for the special programs and services provided by the United States to Indians because of their status as Indians").

[7] U.S. CONST. art. 1, § 8 (Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). For more legal analysis of Congress's Indian Commerce Clause power, *see* Cong. Rsch. Serv., *ArtI.S8.C3.1.3 Commerce with Native American Tribes: Scope of Authority*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-1-3/ALDE_00012976/ (last visited Ap. 14, 2022).

"domestic dependent nations" with a relationship to the federal government akin to a ward's relationship to its guardian.[8] As a consequence, the courts have implied a trust relationship between the United States and federally recognized tribes, and have developed three distinct canons of construction for interpreting Indian treaties to reflect the relative inequality between the parties.[9]

First, treaties with Indian tribes must generally be interpreted in the sense in which the tribal signers would have understood them.[10] Second, ambiguities regarding tribal interests must be construed to the tribes' benefit.[11] Third, if Congress intends to diminish tribal lands or abrogate a treaty, it must do so explicitly.[12] Notwithstanding this clear-intent requirement, Congress retains the authority to abrogate an Indian treaty by subsequent legislation.[13]

Historical Provisions Mentioning a Legislative Deputy or Delegate

Given the canon of construction requiring that the words of a treaty be interpreted as they would have been understood by the Indian tribe signing it, one source for developing that understanding may be the use of similar language in other contemporaneous documents, such as other historical treaties containing delegate provisions.[14] Several other treaties from approximately the same time period—including one entered with the Cherokee Nation and the Confederate States of America during the Civil War—contain references to delegates or other representatives that may shed light on the contemporaneous understanding of those terms.

Agreements Between the United States and Tribes Other Than the Cherokee Nation

The practice of sending delegates to the national legislature began in the colonial period, predating the Revolutionary War, the 1789 establishment of the U.S. Congress, and the rise of treaties between the United States and Indian tribes.[15] The first treaty with a tribal nation signed

[8] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[9] "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). *See also* Worcester v. Georgia, 31 U.S. 515 (1832).

[10] *Worcester*, 31 U.S. at 546–47, 552–54 (Marshall, C.J.); *see also id*. at 582 (McLean, J., concurring) ("How the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction."); *accord* Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019).

[11] *Worcester*, 31 U.S. at 582 (McLean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice."); *accord Herrera*, 139 S. Ct. at 1699 ("Indian treaties must be interpreted . . . with any ambiguities resolved in favor of the Indians." (internal quotation omitted)).

[12] *Worcester*, 31 U.S. at 554 (Marshall, C.J.) (Congressional intent to diminish tribal sovereignty must "have been openly avowed."); *see also Herrera*, 139 S. Ct. at 1698 ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999))).

[13] There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Mille Lacs*, 526 U.S. at 202–03.

[14] Other potential sources, such as those that may have been maintained orally or otherwise by tribal elders or historians, are beyond the scope of this report.

[15] HERMAN J. VIOLA, DIPLOMATS IN BUCKSKINS: A HISTORY OF INDIAN DELEGATIONS IN WASHINGTON CITY 25–26 (1995) (providing an extensive history of the practice dating to the colonial period and indicating that one of the chief motives for promoting and funding tribal delegations to Washington DC was to subdue bellicosity). There were official and unofficial delegations; some delegations were federally funded, with expenses paid by appropriations, including after the establishment of the U.S. Congress. *See, e.g.*, Act of June 28, 1834, ch. 15, 4 Stat. 705 (appropriating $5,600 for the expenses of 13 Cherokee Delegates to the U.S. Congress).

by the United States—the Treaty with the Delawares of September 17, 1778—contained a provision for representation in the Continental Congress at a future date, subject to certain conditions including congressional approval.[16] Thus, the Cherokee Nation was not the only tribe with a treaty provision permitting a legislative delegate, though it does not appear that the U.S. Congress or its predecessor bodies has ever taken action to effectuate such a provision by seating a tribal delegate from any tribe.

Contemporaneously with the signing of the Treaty of New Echota in 1835, Congress considered various bills to remove the Indian tribes to the West and to provide for an Indian Territory outside of any state (thus free of state interference with federal Indian policy).[17] The House Committee on Indian Affairs recommended the creation of an Indian Territory subject to federal law and control, over which the Indian tribes, united in a confederation, would exercise limited self-government.[18] The Committee also recommended providing "to the confederation a delegate in Congress, with the privileges and emoluments of a territorial delegate," encouraging the hope "of their eventual admission as a State into the Union."[19]

This provision appeared in a bill—favorably reported by the House Committee on Indian Affairs—to provide for the establishment of a Western Territory and for the security and protection of the emigrant and other Indian tribes therein. That bill included provisions for a territorial governor, appointed by the President; the organization of a confederation of the tribes settled in the Territory with power to enact ordinances regarding intertribal affairs that would go into effect upon the governor's approval; civil and criminal jurisdiction over the territory and persons within it; and applicability of the Indian trade and intercourse laws.[20] Also included was a provision allowing "the said confederated tribes to elect, in such manner as the General Council may prescribe, a Delegate to Congress, who shall have the same powers, privileges, and compensations as are possessed by the Delegates of the respective Territories."[21] This was deemed desirable for, among other reasons, affording the tribes "convincing proof of the desire of the United States" to secure for the tribes "all the blessings of free government" and "full participation" in the privileges of the American people.[22]

The Committee further expounded on its reasons for recommending such a delegate, and concluded that the "right to a delegate in Congress" was "the strongest assurance" that the United States would fulfill its promises. In fact, the Committee wrote, the right to a delegate would probably do more to cement the relationship between the tribal nations and the United States

[16] Article VI of the 1778 Treaty with the Delawares, 7 Stat. 13 (Sept. 17, 1778) [hereinafter Delawares Treaty], provided, inter alia:

> [S]hould it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.

[17] *See* H.R. REP. No. 23-474, at 18 (1834) (House Committee on Indian Affairs stating: "Our inability to perform our treaty guaranties [sic] arose from the conflicts between the rights of the States and of the United States.").

[18] *Id.*

[19] *Id.* at 21.

[20] *See generally id.*

[21] *Id.* at 37.

[22] *Id.*

"than any, or perhaps, all other causes combined."[23] The Committee Report also provides a history of other treaties calling for Indian delegates to Congress.[24]

Treaty Between the Cherokee Nation and the Confederacy

On October 7, 1865, the Cherokee Nation concluded a treaty with the Confederate States of America, which included as Article XLIV a detailed entitlement to "a Delegate to the House of Representatives of the Confederate State [sic] of America . . . [with] the same rights and privileges as may be enjoyed by Delegates from any Territories of the Confederate States to the said House of Representatives."[25] This provision was intended "to enable the Cherokee Nation to claim its rights and secure its interests without the intervention of counsel or agents."[26]

Though perhaps of limited usefulness given its status as a non-U.S. treaty, this delegate provision could shed light on the expectations the Cherokee Nation would have assigned to a promise of a delegate. The fact that the rights and privileges would have been tied to those of delegates from other territories of the Confederacy, rather than delegates from the Confederate States, may indicate an understanding that Cherokee delegates would not be on the same footing as elected representatives.

Treaties Between the Cherokee Nation and the United States

Prior to the Cherokee's treaty with the Confederate States of America, two treaties between the Cherokee Nation and the United States mentioned a tribal deputy or delegate to the national legislature. (A third treaty reaffirmed the relationship between the Nation and the United States after the Confederacy surrendered, but does not explicitly mention a delegate.[27])

Treaty of Hopewell (1785)

Article XII of the 1785 Hopewell Treaty with the Cherokee Nation[28] provides, in order that "the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit to Congress."

The Treaty of Hopewell predates the U.S. Constitution.[29] At that time, the goals of the Confederation Congress[30] were to make peace with tribes that had sided with the British in the

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[23] *Id.* at 21.

[24] *Id.* at 21–22. The Committee noted that the 1830 Treaty with the Choctaws indicated the executive branch's negotiators doubt in their ability to bind Congress in the matter of an Indian delegate. Article XXII of the 1830 Treaty with the Choctaw, 7 Stat. 333, 338 (Sept. 27, 1830) [hereinafter Choctaw Treaty], provides: "The Chiefs of the Choctaws . . . have expressed a solicitude that they might have the privilege of a Delegate on the floor of the House of Representatives extended to them. The Commissioners do not feel that they can under a treaty stipulation accede to the request, but at their desire, present it in the Treaty, that Congress may consider of, and decide the application."

[25] Treaty Between the Confederate States of America and the Cherokee Nation of Indians, Oct. 7, 1861, Official Records, Series 7, vol. 1, pt. 1, 669 [hereinafter Treaty With the Confederacy].

[26] *Id.*

[27] Treaty with the Cherokee Nation, 1866, 14 Stat. 799 (July 19, 1866) [hereinafter 1866 Cherokee Treaty].

[28] Treaty with the Cherokees, 1785, 7 Stat. 18, art. 12 (Nov. 28, 1785) [hereinafter Hopewell Treaty].

[29] U.S. CONST., art. VI, cl. 2, recognizes treaties made by the United States prior to adoption of the Constitution. *See* Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[30] Following the adoption of the Articles of Confederation, the national legislature that convened in 1781 is known as the Confederation Congress. For a discussion of the Confederation Congress's actions and authority, *see, e.g.*, Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781-1789*, 41 AM. J. LEGAL

Revolutionary War, to establish boundaries with Indian nations, and to consolidate power over Indian affairs in the national government.[31] Thus, the guarantee of the right to send a deputy to the Confederation Congress appears in this context. The Hopewell Treaty also provided for exchanging prisoners of war; acknowledged the Cherokees as under the United States' protection; designated boundaries and jurisdiction; established commercial relations; and pledged peace.

The minutes of the treaty council do not elaborate on the intent behind establishing a right to send a deputy to the Confederation Congress, nor do they reflect whether its inclusion came at the request of the Cherokee Nation or at the commissioners' suggestion.[32] According to the minutes, the commissioners produced a draft treaty, which was read to the Cherokee Nation and interpreted, at which point the Cherokee Nation agreed that they understood and would sign the treaty.[33]

Nonetheless, because (1) the Cherokee Nation purports to act on the Treaty of New Echota, rather than the Hopewell Treaty, in nominating a delegate; (2) the Confederated Congress is not the same body as the current U.S. Congress; and (3) the right to a deputy may differ materially from the right to a delegate, this report does not further analyze the Hopewell Treaty's deputy provision.

Treaty of New Echota (1835)

Article 7 of the 1835 Treaty of New Echota between the United States and the Cherokee Nation provides that the Cherokee Nation "shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same."[34] A closer understanding of the New Echota Treaty's historical context may be useful when interpreting its provisions. In particular, an examination of what the Cherokee Nation gave up (or what the United States gained) from the treaty could inform interpretation of what the Cherokee Nation received in exchange.

In the New Echota Treaty, the Cherokee signatories agreed to relinquish their eastern lands and remove their Nation to new territory west of the Mississippi. Ultimately, tens of thousands of

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HIST. 411, 411 (1997).

[31] *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 58–62 (1982).

[32] AMERICAN STATE PAPERS: INDIAN AFFAIRS, vol. I, at 40–43 (1832) (1998 reprint, William S. Hein & Co, publ.).

[33] *Id.* One of the Cherokee representatives is quoted as saying:

> I am fond to hear the talks of the beloved men of Congress, and of ours. You commissioners remember the talks, and I shall always endeavor to support the peace and friendship now established. . . . I now depend on the commissioners. If any thing depends on me to strengthen our friendship, I will faithfully execute it. You are now our protectors. When I go and tell those of our people who could not come to hear your talks, what I have seen and heard, they will rejoice. I have heard your declarations of a desire to do us any service in your power; I believe you, and in confidence shall rest happy.

Though minimal, this mention of the Confederated Congress in the context of promises to protect the tribe may shed some light on how the role of a deputy was viewed at the time the treaty was signed.

[34] The full provision reads:

> The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

members of the Cherokee Nation followed the Trail of Tears,[35] a forced trek westward during which an estimated 4,000 Cherokees died.[36] The treaty signing occurred during an era when one of the national government's policy goals was removal of Indian tribes to unsettled lands in the west, freeing eastern lands for white settlers.[37] The parties entered into the Treaty[38] three years after the Supreme Court, in *Worcester v. Georgia*,[39] rejected Georgia's attempt to exercise authority within Cherokee country.[40] Thus, at a time when the Cherokees were suffering "increasing abuse from white settlers," the United States "signed a treaty with the supporters of removal"[41] among the Cherokees. However, because the signatories did not include Cherokee leaders,[42] the New Echota Treaty appears to have lacked the support of the majority of the Cherokee Nation.[43]

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[35] According to one scholar: "The ratification of the Treaty of New Echota 'legalized' the forced removal of Cherokees from their Georgia and Tennessee homeland and led directly to the infamous Trail of Tears." Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L. J. 91, 91–92 (2005). *See also* Chadwick Smith & Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 TULSA L.J. 263, 273 (1993) ("This treaty was the basis for the infamous Trail of Tears. In Article 1, the Cherokees relinquished to the United States all their lands east of the Mississippi.").

[36] Smith & Teague, *supra* note 35, at 266 ("[B]eginning in 1838, the Cherokee Nation and its people were forcibly removed from their homeland in Georgia, Tennessee, Alabama and North Carolina. Four thousand Cherokees died during this forcible removal." (citing RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 74 (1990); CHARLES C. ROYCE, THE CHEROKEE NATION OF INDIANS 170–78 (1975); CHEROKEE REMOVAL: BEFORE AND AFTER (William L. Anderson, ed., 1991))).

[37] In 1830, Congress enacted what is known as the Removal Act: "An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi," 4 Stat. 411, ch.148 (May 28, 1830).

[38] Treaty of New Echota, *supra* note 1, at 478 ("Articles of a treaty Concluded at New Echota in the State of Georgia on the 29th day Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs and Head Men and People of the Cherokee tribe of Indians.").

[39] Worcester v. Georgia, 31 U.S. 515, 561 (1832) (Marshall, C.J.) ("The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress.").

[40] The dispute over state jurisdiction within the Cherokee reservation has reached the Supreme Court twice. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court essentially upheld the United States' authority, ruling Georgia lacked authority to enforce its laws within the Cherokee territory. For a discussion of the dispute, see GRANT FOREMAN, INDIAN REMOVAL, 229–50 (1932); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY, 156–82 (1994).

[41] 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03, (4)(a) (Lexis ed.).

[42] *Id.* § 1.03 n.176 ("When the unauthorized treaty was signed, Principal Chief John Ross was actually in Washington, D.C. petitioning for relief from abuse and trespass committed by Georgian soldiers and settlers against Cherokees and their lands." (citing COLIN G. CALLOWAY, PEN & INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY 145 (2013)). *See also* Rosser, *supra* note 35, at 92 ("An influential minority ultimately rebelled against Ross's leadership and signed the Treaty of New Echota on behalf of the Cherokee majority who did not share the treaty-signers' perspectives. . . . Presented officially by the administration of President Andrew Jackson as bringing with them liberal terms for the Cherokees, the U.S. negotiators for the Treaty of New Echota bypassed the elected Cherokee leadership.").

[43] *See* H. DOC. NO. 25-316, at 1–2,7 (1838) ("The Cherokee Delegation submitting the memorial and protest of the Cherokee people to Congress" claimed there were 15,665 signatures protesting that the New Echota Treaty was concluded by "unauthorized individual Cherokees . . . [and] a violation of the fundamental principles of justice, and an outrage on the primary rules of national intercourse, as well as of the known laws and usages of the Cherokee nation; and, therefore, to be destitute of any binding force on us."). For further historical discussion, including Principal Chief Ross's efforts to prevent ratification and a U.S. soldier's characterization of the treaty as "no treaty at all," see Ovid Andrew McMillion, Cherokee Indian Removal: The Treaty of New Echota and General Winfield Scott (2003) (M.A.

Those who signed the Treaty of New Echota advocated and agreed to removal, assenting to a Preamble asserting that the Cherokees desired to move west and establish a permanent homeland for their entire Nation.[44] They also agreed to a broad program for that removal. For example, under Article 16 of the Treaty, the Cherokee Nation agreed "to remove to their new homes within two years from the ratification of this treaty."[45] Provisions on claims for former reservations[46] and accommodating Cherokees who wished to remain[47] were eliminated based on President Andrew Jackson's "determination . . . that the whole Cherokee people should remove together and establish themselves in the country provided for them west of the Mississippi."[48]

The Treaty also covered several other issues. Article 1 of the Treaty ceded Cherokee lands east of the Mississippi to the United States in consideration of $5,000,000.[49] Under Article 2, the United States agreed to supplement western lands already provided for the Cherokees in earlier treaties by selling 800,000 additional acres to them in fee simple for $500,000.[50] Article 5 provided that the ceded lands would not "be included within the territorial limits or jurisdiction of any State or Territory" without the Cherokee Nation's consent.[51] Other provisions of the Treaty addressed establishing forts;[52] guaranteeing peace;[53] extinguishing Osage title to lands within the area guaranteed to the Cherokees;[54] covering expenses for Cherokee removal;[55] appointing agents to

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thesis, East Tennessee State University), *available at* https://dc.etsu.edu/etd/778; Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836-1838*, 73 GA. HIST. Q. 540 (1989), http://www.jstor.org/stable/40582016 ("Even friends of President Andrew Jackson's administration condemned the treaty as a fraud on the Cherokee people . . . .").

[44] Treaty of New Echota, *supra* note 1, at 478 ("[T]he Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity . . . .").

[45] *Id.* at 485, art.16.

[46] *Id.* at 484–85, art. 13 ("[T]o make a final settlement of all the claims of the Cherokees for reservations granted under former treaties to any individuals belonging to the nation it is . . . expressly understood by the parties . . . that all the Cherokees and their heirs and descendants to whom any reservations have been made under any former treaties with the United States, and who have not sold or conveyed the same by deed or otherwise and who in the opinion of the commissioners have complied with the terms on which the reservations . . . and which reservations have since been sold by the United States shall constitute a just claim against the United States and the original reservee or their heirs or descendants shall be entitled to receive the present value thereof from the United States . . . .").

[47] *Id.* at 483, art. 12 ("Such heads of Cherokee families as are desirous to reside within the States of No. Carolina Tennessee and Alabama subject to the laws of the same; and who are qualified or calculated to become useful citizens shall be entitled, on the certificate of the commissioners to a pre-emption right to one hundred and sixty acres of land or one quarter section . . . .").

[48] *Id.* at 488, supp. arts. to Treaty.

[49] *Id.* at 479, art. 1.

[50] *Id.* at 480, art. 2 ("[W]hereas it is apprehended by the Cherokees that . . . there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation.").

[51] *Id.* at 481, art. 5.

[52] *Id.* at 480–81, art. 3.

[53] *Id.* at 481, art. 6 ("The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine [sic.] wars between the several tribes.").

[54] *Id.* at 481, art. 4.

[55] *Id.* at 482, art. 8 ("The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with

value improvements on ceded land;[56] investment of Cherokee funds;[57] commuting the Cherokee school fund;[58] granting pensions to Cherokee warriors for aid in the War of 1812;[59] and division of the funds among the various Cherokee groups.[60] Finally, the Treaty included provisions authorizing the commissioners to settle the claims specified in the Treaty[61] and providing for advances of annuities to meet pre-removal conditions.[62]

In terms of shedding light on the likely meaning of the delegate provision, the larger context of the New Echota Treaty's other provisions is not likely to be conclusive. One could argue that the concessions made by the Cherokee signers were so broad that the concessions made by the United States would also have been interpreted expansively. One could argue conversely that the delegate provision was only one small part of a wide-ranging treaty, so that no inferences should be drawn from the broader negotiations. Because no court has been faced with a question related to the New Echota Treaty's delegate provision, it is difficult to predict which interpretive factors such a court would find most persuasive.

Current Status of the Treaty of New Echota's Delegate Provision

Congress has never affirmatively provided for a Cherokee Delegate in the House of Representatives pursuant to the Treaty of New Echota. However, both before and after the Hopewell Treaty, representatives from the Cherokee Nation were present in the District of Columbia.[63] One historian writes: "During the 1820s and 1830s Cherokee Delegates were virtual residents of Washington as they monitored and fought legislation designed to evict them from their ancestral homes."[64] Similarly, following the Treaty of New Echota and throughout the 19th century, Cherokee representatives were present in Washington, DC, to interact with the federal government.[65]

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medicines shall accompany each detachment of emigrants removed by the Government.").

[56] *Id.* at 482, art. 9 ("The United States agree to appoint suitable agents who shall make a just and fair valuation of all such improvements now in the possession of the Cherokees as add any value to the lands . . . .").

[57] *Id.* at 482, art. 10 ("The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee nation west of the Mississippi the following sums as a permanent fund for the purposes hereinafter specified and pay over the net income of the same annually . . . .").

[58] *Id.* at 483, art. 11 ("[T]o commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund . . . .").

[59] *Id.* at 485, art. 14 ("[S]uch warriors of the Cherokee nation as were engaged on the side of the United States in the late war with Great Britain and the southern tribes of Indians, and who were wounded in such service . . . .").

[60] *Id.* at 485, art. 15 ("[S]hall be equally divided between all the people belonging to the Cherokee nation east according to the census just completed; and such Cherokees as have removed west since June 1833 . . . .").

[61] *Id.* at 485–86, art. 17.

[62] *Id.* at 486, art. 18 ("[W]hereas the nation will not, until after their removal be able advantageously to expend the income of the permanent funds of the nation it is therefore agreed that the annuities of the nation which may accrue under this treaty for two years, the time fixed for their removal shall be expended in provision and clothing for the benefit of the poorer class of the nation . . . .").

[63] A Cherokee representative was present in Philadelphia to sign the treaty between the Cherokee Nation and the United States in 1794. Treaty with the Cherokees, 7 Stat. 43 (June 26, 1794).

[64] VIOLA, *supra* note 15, at 79.

[65] *Id.* Cherokee Principal Chief John Ross appears to have been the primary delegate prior to the Civil War, and William P. Adair was a delegate on twelve occasions before his death in 1889; both men died in Washington, DC. *See* GARY E. MOULTON, JOHN ROSS: CHEROKEE CHIEF (1978).

Notwithstanding this historical practice, the delegate provision of the New Echota Treaty likely requires additional congressional action before a Cherokee Delegate could be seated in the House of Representatives. Whether a treaty provision carries the force of law depends on the nature of the agreement—specifically, whether the treaty provisions are self-executing or non-self-executing.[66] The Supreme Court has long recognized a distinction between self-executing treaties—those that "automatically have effect as domestic law"—and non-self-executing treaties—those that "do not by themselves function as binding federal law."[67] A self-executing treaty is "'equivalent to an act of the legislature' . . . when it 'operates of itself without the aid of any legislative provision.'"[68] A non-self-executing treaty, however, may be enforced only "pursuant to legislation to carry [it] into effect."[69] Treaty provisions are deemed non-self-executing if the text manifests intent that the provision not be enforceable by U.S. courts because the legislature must first "execute the contract."[70] There is also broad agreement that treaty provisions should be construed as non-self-executing if they require action that the Constitution assigns exclusively to Congress or the House of Representatives.[71]

In the Treaty of New Echota's delegate provision, the phrase "whenever Congress shall make provision for the same" appears to render any right to a House delegate contemplated by the provision non-self-executing. The United States, at least, seemed to believe that congressional action would be required to seat a Cherokee Delegate.[72] Constitutional considerations may also favor reading the delegation provision as non-self-executing. The House does not have a direct role in the treaty-making process. It may raise significant constitutional issues if the President and Senate could pledge the House to seat a delegate by way of a treaty commitment, without the need for implementing legislation approved by that chamber.[73] As a result, a court would seem unlikely to find that the delegate provision created an enforceable right in the absence of further

[66] CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan.

[67] Medellin v. Texas, 552 U.S. 491, 505 (2008).

[68] *Id. See also* Foster v. Neilson, 27 U.S. 253, 314 (1829), *overruled in part* by United States v. Percheman, 32 U.S. 51 (1833) (noting that under the U.S. Constitution, a treaty is the "law of the land" and should be regarded by courts as "equivalent to an act of the legislature, whenever it operates of itself without the aid of an legislative provision").

[69] *Medellin*, 552 U.S. at 505.

[70] *Foster*, 27 U.S. at 314; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (noting "the United States ratified [the Covenant on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts").

[71] *See, e.g.*, Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) ("[E]xpenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable. Similarly, the constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives,'. . . appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes."), *cert. denied*, 436 U.S. 907 (1978). *See also* 5 ANNALS OF CONGRESS 771 (1796) (House resolution declaring that "when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress").

[72] *See generally* Rosser, *supra* note 35, at 119-29 (discussing context surrounding the delegate provision in the New Echota Treaty). For example, 1834 articles of agreement between John H. Eaton, U.S. Commissioner and a Cherokee delegation, predating negotiation over the 1835 New Echota Treaty, contemplated the seating of a Cherokee delegate by way of a statutory enactment, stating that "it is agreed that, as soon as a majority of the Cherokee people shall reach their western homes, the President will refer their application to the two Houses of Congress for their consideration and decision." SEN. EXEC. DOC. 23-7, at 4 (emphasis added).

[73] *See, e.g.*, *Edwards*, 580 F.2d at 1058 (observing need for legislation to implement treaty obligations that require authority exclusively vested in the House of Representatives). *See also* U.S. CONST. art. I, §§ 1, 2, 5 (vesting legislative power in the House and Senate; providing that the House "shall chuse their Speaker and other Officers"; and establishing that each chamber "may determine the Rules of its Proceedings").

action by Congress. However, the question of how the canons of treaty interpretation discussed earlier in this report might affect that interpretation is not necessarily clear.

In any event, if Congress were inclined to consider congressional action to effectuate the promise of the New Echota Treaty's delegate provision, it might first wish to confirm where the Treaty, and that provision, continue in force. This question is discussed in the next section.

The Possibility of Abrogation or Ineffectiveness

The Treaty of New Echota's delegate provision, even if non-self-executing, likely remains relevant to the extent Congress could still take action to effectuate it. That is, the delegate provision would generally remain in effect unless it has been abrogated or otherwise rendered invalid or unenforceable. Several considerations may be relevant to this analysis.[74]

Effectiveness. Although Congress has never enacted legislation to establish and fund an Office of the Cherokee Delegate to the House of Representatives, it does not appear to have explicitly abrogated the New Echota Treaty's delegate provision. However, one could argue that the Cherokee Nation broke off relations with the United States when it entered into a subsequent treaty with the Confederacy, thereby violating and possibly terminating or abrogating the New Echota Treaty.[75] On the other hand, the President does not appear to have expressly abrogated the Treaty following that action, and the Treaty of July 19, 1866, subsequently restored relations between the Cherokee Nation and the United States.[76] The 1866 Treaty did not explicitly refer to a Cherokee Delegate, but did explicitly reaffirm "[a]ll provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty."[77] This language seemingly reaffirms that the New Echota Treaty's delegate provision remains in effect.

As to the nature of the New Echota Treaty's delegate provision, one view is that it represents a promise to seat a delegate nominated by the Cherokee Nation (even if that promise might require implementing legislation[78]), and not merely a pledge that Congress might consider whether to seat such a delegate if nominated.[79] Another view, finding support in differences between the New Echota Treaty's provision and a parallel provision in a treaty the Cherokee Nation leaders negotiated with the Confederacy,[80] might suggest that the New Echota Treaty was understood *not* to constitute a pledge to seat a Cherokee Delegate. Under that view, the treaty with the

[74] Federal courts have continued to reference the New Echota Treaty as a whole, presuming its continued validity. *See, e.g.*, E. Band of Cherokee Indians v. Lynch, 632 F.2d 373 (4th Cir. 1980); Choctaw Nation v. Oklahoma, 397 U.S. 620, 624 (1970).

[75] Treaty with the Confederacy, *supra* note 25; Act of July 5, 1862, 12 Stat. 512, 528, 25 U.S.C. § 72 ("Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.").

[76] 1866 Cherokee Treaty, *supra* note 27.

[77] *Id.*at 806, art. 31.

[78] *See supra* at 8–9 (discussing whether the delegate provision may require implementing legislation).

[79] *See* Rosser, *supra* note 35, at 118 ("The long standing principle of interpreting treaties between the U.S. government and Indian tribes in the light most favorable to Indians provides the proper framework for judging the delegate right contained in the New Echota Treaty. . . . [D]espite protests as to its legitimacy, Cherokees were told that the Treaty was unalterable. The right to a delegate was not a promise included by U.S. agents in the Treaty in an ad hoc manner.").

[80] Treaty with the Confederacy, *supra* note 25, at 394. The Treaty contains a preliminary recital that declares that it was "[m]ade and concluded . . . by Cherokee Nation of Indians, by John Ross, the Principal Chief, Joseph Verner, Assistant Principal Chief, James Brown, John Drew and William P. Ross, Executive Councillors, constituting with the Principal and Assistant Principal Chiefs the Executive Council of the Nation, and authorized to enter into this treaty by a General Convention of the Cherokee People."

Confederacy's more explicit description of the Cherokee Delegate's powers[81] may suggest that the Cherokee delegation negotiating with the Confederacy may have recognized and sought to correct some inadequacy in the Treaty of New Echota's language. From this perspective, a comparison of the delegate provisions in three Cherokee treaties highlights potential shortcomings in the Treaty of New Echota's language as a pledge to seat a Cherokee Delegate in the House of Representatives:

1. The first Cherokee treaty with the United States, the 1785 Treaty of Hopewell, speaks of "the right to send a deputy of their choice, whenever they think fit to [the Confederated] Congress," possibly referring to an agent rather than a right of representation in the Articles of Confederation-era national legislature.[82]
2. The 1835 Treaty of New Echota, by contrast, provides for "a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same,"[83] arguably incorporating some notion of representation.

[81] For a discussion of how the ratified version of the delegate provision in the Treaty with the Confederacy differed from the provision as negotiated, see Rosser, *supra* note 35, at 125. According to Rosser, the provision as ratified read:

> In order to enable the Cherokee Nation to claim its rights and secure its interest without the intervention of counsel or agents, it shall be entitled to a Delegate to the House of Representatives of the Confederate States of America, who shall serve for a term of two years, and be a native-born citizen of the Cherokee Nation, over twenty-one years of age, and laboring under no legal disability by the law of the said nation; and each Delegate shall be entitled to a seat in the hall of the House of Representatives, to propose and introduce measures for the benefit of the said nation, and to be heard in regard thereto, and on other questions in which the nation is particularly interested, with such other rights and privileges as may be determined by the House of Representatives.

Id. As first negotiated, the Treaty would have provided the delegate with authority equal to that of territorial delegates to the Confederate States:

> In order to enable the Cherokee Nation to claim its rights and secure its interests without the intervention of counsel or agents, it shall be entitled to a delegate to the House of Representatives of the Confederate States of America, who shall serve for the term of two years, and be a native born citizen of the Cherokee Nation, over twenty-one years of age, and laboring under no legal disability by the law of the said nation; and each delegate shall be entitled to the same rights and privileges as may be enjoyed by delegates from any territories of the Confederate States to the said House of Representatives. Each shall receive such pay and mileage as shall be fixed by the Congress of the Confederate States. The first election for delegate shall be held at such time and places, and shall be conducted in such manner as shall be prescribed by the Principal Chief of the Cherokee Nation, to whom returns of such elections shall be made, and who shall declare the person having the greatest number of votes to be duly elected, and give him a certificate of election accordingly, which shall entitle him to his seat. For all subsequent elections, the time, places and manner of holding them, and ascertaining and certifying the result, shall be prescribed by the Confederate States.

Treaty with the Confederacy, *supra* note 25, art. XLIV, at 403–04.

[82] Hopewell Treaty, *supra* note 28, art. 12, 7 Stat. 18, 20 ("That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit to Congress."). In *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), the Supreme Court acknowledged the existence of the deputy provision, but provided no binding interpretation of it. *Compare id.* at 25 (Johnson, J.) ("It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate."), *with id.* at 39 (Baldwin J.) ("The meaning of the words 'deputy to congress' in the twelfth article may be as a person having a right to sit in that body, as at that time it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister."). For a discussion of the Justices' various interpretations of the Treaty of New Echota's delegate provision in *Cherokee Nation v. Georgia*, see Rosser, *supra* note 35, at 121–22 & nn. 156–61 and accompanying text.

[83] Treaty of New Echota, *supra* note 1, art. 7, at 482.

3. In the 1861 Treaty with the Confederacy, the provision is more elaborate. It specifies a method of electing and compensating the Cherokee Delegate to the Confederate House of Representatives, stating that "each Delegate shall be entitled to a seat in the hall of the House of Representatives, to propose and introduce measures for the benefit of the said nation, and to be heard in regard thereto, and on other questions in which the nation is particularly interested."[84]

That Cherokee Principal Chief John Ross negotiated and concluded the treaty with the Confederacy[85] could potentially mean he had misgivings about the enforceability of the New Echota Treaty's delegate provision. Chief Ross took no part in the New Echota Treaty negotiations and protested that treaty.[86] Yet there appears to be no record or other evidence of his view of the implications of the delegate provision in the New Echota Treaty, other than that he later negotiated a treaty with the Confederacy containing a much more detailed delegate requirement.[87]

***Failure to Create a Confederation for Tribes*.** Arguments might be made that the New Echota Treaty's Cherokee Delegate provision was tied to the fate of Indian Territory, and that Congress abrogated the delegate guarantee either by failing to provide for a separate Indian Territory as envisioned by Congress in the 1830s, or by including Indian Territory in the State of Oklahoma. However, such arguments would likely be unsuccessful in court because of the lack of specific evidence of the intent to abrogate in these circumstances either in the treaty or in subsequent legislation.[88] As noted, Supreme Court jurisprudence generally[89] rejects treaty abrogation by implication and looks for legislative precision and clarity. Nonetheless, the fact that this possible purpose or context for the delegate provision is no longer relevant may factor into Congress's policy considerations today.

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[84] *See* Rosser, *supra* note 35, at 125 (quoting Treaty with the Confederacy, *supra* note 25, art. XLIV).

[85] Treaty with the Confederacy, *supra* note 25, at 394. The Treaty contains a preliminary recital that declares it was "[m]ade and concluded . . . by Cherokee Nation of Indians, by John Ross, the Principal Chief, Joseph Verner, Assistant Principal Chief, James Brown, John Drew and William P. Ross, Executive Councillors, constituting with the Principal and Assistant Principal Chiefs the Executive Council of the Nation, and authorized to enter into this treaty by a General Convention of the Cherokee People."

[86] *See* discussion *supra* note 42.

[87] *See* Rosser, *supra* note 35, at 106 n.88 ("Ross's writing first referenced a right to a delegate to Congress in 1846, and then only as an aside." (quoting *Memorial from John Ross, John Looney, David Vann, Stephen Foreman, C.V. McNair, R. Taylor, T. Walker, Richard Fields and John Thorn to the U.S. Senate and House of Representatives* (Apr. 30, 1846), *in* 2 THE PAPERS OF CHIEF JOHN ROSS, 1840–1866, at 295–96 (Gary E. Moulton, ed., 1985) ("'The seventh article of the treaty of 1835 stipulates that the Cherokees shall be entitled to a delegate in Congress! Can it be supposed that it was the intention of a people aspiring to the dignity of being represented in Congress, to have surrendered all the most essential elements of sovereignty, and to have transferred to another power the right to dispose of their territory without their consent, and to prescribe to them criminal and other laws? The articles of the treaty to which the undersigned have referred, are too explicit in their terms to admit of any doubt.'"))).

[88] *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (rejecting argument that Oklahoma statehood and assorted statutory actions sufficed to diminish or disestablish a reservation).

[89] *See supra* note 12 and accompanying text; *see also, e.g.*, Washington v. Wash. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."); United States v. Dion, 476 U.S. 734, 739 (1986) ("Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights . . . . We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.'" (citations omitted)).

Although Congress considered various bills to remove the Indian tribes to the West and to provide for an Indian Territory separate from any state,[90] none was enacted. The House Committee on Indian Affairs reported favorably a bill that would have created an Indian Territory over which a confederation of Indian tribes would exercise limited self-government subject to federal law and control.[91] The bill included a delegate provision, but not for a Cherokee Delegate specifically.[92] The bill would have provided "to the confederation a delegate in Congress, with the privileges and emoluments of a territorial delegate" and explicitly encouraged in tribes "a hope . . . of their eventual admission as a State into the Union."[93] The Committee detailed its reasons for recommending such a delegate, including a delegate's ability to communicate the "practical effect" of legislation as well as suggestions and complaints.[94]

The bill included provisions for a territorial governor, appointed by the President; a confederation of the Tribes settled in the Territory,[95] empowered to enact ordinances over intertribal affairs that would go into effect upon the governor's approval; civil and criminal jurisdiction over the territory and persons within it; and applicability of the Indian trade and intercourse laws.[96]

Oklahoma Statehood. Another argument may be that the Cherokee Delegate provision did not survive the Oklahoma Statehood Act of 1906[97] because Indian Territory was no longer outside

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[90] H.R. REP. NO. 23-474, at 18 (1834) (House Committee on Indian Affairs stating: "Our inability to perform our treaty guaranties [sic] arose from the conflicts between the rights of the States and of the United States.").

[91] *Id.* at 34 ("A Bill to provide for the establishment of the Western Territory, and for the security and protection of the emigrant and other Indian tribes therein.").

[92] *Id.* at 37, § 11 ("That in order to encourage the said tribes, and to promote their advancement in the arts of civilized life, and to afford to them a convincing proof of the desire of the United States that they may eventually be secured in all the blessings of free government, and admitted to a full participation of the privileges now enjoyed by the American people, it shall be competent for the said confederated tribes to elect, in such manner as the General Council may prescribe, a Delegate to Congress, who shall have the same powers, privileges, and compensations as are possessed by the Delegates of the respective Territories.").

[93] *Id.* at 21.

[94] The Committee explained:

> In view of the relations which this bill will establish, there seems to be, not only a propriety, but a necessity of their having a delegate in Congress. The intercourse laws which, from time to time, shall be passed, and the acts of the executive officers we may place among them, are intimately connected with their prosperity. From a delegate we shall be able to learn their practical effect, and to receive suggestions for their amendment. It may be of still more consequence to them. Through their delegate we shall hear their complaints. Hitherto our agents have been almost irresponsible; not because our laws have not made them responsible, but because there was no channel through which their acts of injustice could reach us. And, on the other hand, the policy and legislation of our Government will be faithfully represented to them, ensuring mutual respect and confidence.
>
> . . . . The right to a delegate in Congress is a subject of the deepest solicitude to the Indians, and will be received by them as the strongest assurance for the fulfillment of our guaranties in all future time. It will probably do more to elevate the Indian character, and to establish and consolidate their confederacy, than any, or, perhaps, all other causes combined.

Id. The Committee Report also provided a history of other treaties calling for Indian delegates to Congress, noting the 1830 Treaty with the Choctaws revealed that the Executive Branch negotiators doubted their ability to bind Congress in the matter of an Indian delegate. *Id.* at 21–22. Article XXII of the 1830 Treaty with the Choctaw states: "The Chiefs of the Choctaws . . . have expressed a solicitude that they might have the privilege of a Delegate on the floor of the House of Representatives extended to them. The Commissioners do not feel that they can under a treaty stipulation accede to the request, but at their desire, present it in the Treaty, that Congress may consider of, and decide the application." Choctaw Treaty, *supra* note 24, at 338.

[95] H.R. REP. NO. 23-474, at 36.

[96] *Id.* at 34–37.

[97] Act of June 16, 1906, 34 Stat. 267 (1906). A Presidential Proclamation of Oklahoma Statehood followed.

any state. Such arguments may likely be unsuccessful both because the New Echota Treaty does not include language characterizing the Cherokee Delegate provision as temporary, and because the Supreme Court has rejected abrogation of Indian treaty rights by implication. In *Minnesota v. Mille Lacs Band of Chippewa*, for example, the Court declared, in relation to whether off-reservation treaty hunting and fishing rights survived Minnesota's statehood, that "[t]reaty rights are not implied terminated upon statehood."[98] Likewise, the Court in 2020 affirmed that Oklahoma statehood did not disestablish a reservation that had been established in Indian Territory by treaty.[99]

Additionally, in a 2019 case involving whether the Crow Tribe's treaty-protected hunting rights survived Wyoming's statehood, the Court explained that the crucial question in determining a treaty's status is whether Congress either (1) expressly abrogated the treaty or (2) the treaty terminated under its own provisions.[100] If neither of those can be answered affirmatively, the treaty continues in force. Statehood is thus irrelevant to a treaty termination analysis unless the legislation permitting statehood demonstrates Congress's clear intent to abrogate that treaty, or statehood is written as a termination point in the treaty.

Because "the laws governing the Indians of Oklahoma are so voluminous,"[101] CRS has not examined all of them. Nonetheless, no specific statutory language abrogating the Cherokee Delegate pledge has been identified to date. Under the Oklahoma Statehood Act, Oklahoma came into the Union comprising both the Territory of Oklahoma and the Indian Territory.[102] None of the chief laws leading to Oklahoma statehood—the Oklahoma Organic Act of 1890,[103] the Dawes Commission Act,[104] the Curtis Act of 1898,[105] and the Five Tribes Act[106]—includes any specific mention of a Cherokee Delegate or the relevant New Echota Treaty provision.

Procedural Options to Seat a Cherokee Delegate

Congress could continue to take no action on the Cherokee Nation's nomination of a delegate pursuant to the New Echota Treaty. However, if it wishes to consider seating a Cherokee Delegate in the U.S. House of Representatives, Congress could evaluate the following procedural options. Of these options, establishing the seat through a legislative enactment is the traditional method and the option least likely to raise constitutional concerns.

1. Enactment of Legislation

Historically, the method for adding a new delegate to Congress has been though the enactment of legislation. No such position in Congress has been established except by law. This approach

Proclamation of Nov. 16, 1907, 35 Stat. 2160 (Theodore Roosevelt).

[98] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).

[99] *McGirt*, 140 S. Ct. at 2477.

[100] Herrera v. Wyoming, 139 S. Ct. 1686, 1696 (2019).

[101] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 425 (1942 ed).

[102] Act of June 16, 1906, 34 Stat. 267 (1906).

[103] Act of May 2, 1890, 26 Stat. 81 (1890). Section 16 of this legislation provided for an Oklahoma Territorial Delegate to the House of Representatives: "a Delegate to the House of Representatives of the United States, to serve during each Congress of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the Delegates from the several other Territories of the United States in the said House of Representatives." *Id.* at 89.

[104] Act of Mar. 3, 1893, § 16, 27 Stat. 612, 645–46 (1893).

[105] Act of June 28, 1898, 30 Stat. 495 (1898).

[106] Act of Apr. 26 1906, 34 Stat. 137.

would require House and Senate agreement, and presidential approval (or a veto override), of a bill (H.R./S.) or joint resolution (H.J.Res./S.J.Res.) that establishes a seat in Congress for the new delegate. Terms of the position and responsibilities of a new delegate may also be addressed legislatively. For instance, a delegate representing the Northern Mariana Islands, a U.S. territory, was added to the House through passage of S. 2739 (Pub. L. No. 110-229), the Consolidated Natural Resources Act of 2008. The legislation defined attributes of the position such as the manner and timing of the delegate's election (§§ 712 and 714), qualifications required to hold the position (§ 713), and the level of compensation afforded to the position's occupants.

Two territories acquired by the United States from Spain—Puerto Rico and the Philippines—were afforded representation by way of a "resident commissioner" rather than a "delegate." Initially, the resident commissioners from Puerto Rico and the Philippines did not enjoy the same privileges as prior delegates (for instance, they were not allowed on the House floor). The positions of Delegates and the Resident Commissioner of Puerto Rico now are functionally equivalent, except that the Resident Commissioner serves a four-year term.

Reproduced below is **Table 1** of CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, which identifies legislative enactments since the First Congress (1789 to 1790) providing for territorial representation in the House. Most territories listed in **Table 1** were later incorporated into the Union as states.

Table 1. Statutes Providing for Territorial Representation in Congress

Territory	Statute	Year
Northwest of the River Ohio	1 Stat. 50	1789[a]
South of the River Ohio	1 Stat. 123	1790
Mississippi	1 Stat. 549	1798
Indiana	2 Stat. 58	1800
Orleans	2 Stat. 322	1805
Michigan	2 Stat. 309	1805
Illinois	2 Stat. 514	1809
Missouri	2 Stat. 743	1812
Alabama	3 Stat. 371	1817
Arkansas	3 Stat. 493	1819
Florida	3 Stat. 354	1822
Wisconsin	5 Stat. 10	1838
Iowa	5 Stat. 10	1838
Oregon	9 Stat. 323	1848
Minnesota	9 Stat. 403	1849
New Mexico	9 Stat. 446	1850
Utah	9 Stat. 453	1850
Washington	10 Stat. 172	1853
Nebraska	10 Stat. 277	1854
Kansas	10 Stat. 283	1854
Colorado	12 Stat. 172	1861

Territory	Statute	Year
Nevada	12 Stat. 209	1861
Dakota	12 Stat. 239	1861
Arizona	12 Stat. 664	1863
Idaho	12 Stat. 808	1863
Montana	13 Stat. 853	1864
Wyoming	15 Stat. 178	1868
District of Columbia	16 Stat. 426	1871
Oklahoma	29 Stat. 81	1890
Puerto Rico	31 Stat. 86	1900
Hawaii	31 Stat. 141	1900
Philippine Islands	32 Stat. 694	1902
Alaska	34 Stat. 169	1906
District of Columbia	84 Stat. 848	1970
Virgin Islands	86 Stat. 118	1972
Guam	86 Stat. 118	1972
American Samoa	92 Stat. 2078	1978
Commonwealth of the Northern Mariana Islands	122 Stat. 868	2008

Source: "Non-voting delegates to the House," *Congressional Record*, vol. 124 (October 3, 1978), p. 33287; P.L. 110-229.

a. This measure from the First Congress reenacted the provisions of the Northwest Ordinance of 1787, with the changes made necessary by ratification of the Constitution. The original Northwest Ordinance was enacted under the Articles of Confederation. For information on the history and evolution of Delegate representation in Congress, see CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, by Jane A. Hudiburg.

2. Incorporation of Position into the Standing Rules

Absent legislation, the U.S. House could choose to seat a new delegate by adjusting its standing rules to make the accommodation, either at the outset of a new Congress or at some point thereafter. A simple House resolution (H.Res.) may be appropriate for this purpose. Provisions to seat a new delegate could be presented to the House as part of the standing rules package traditionally agreed to on the opening day of a new Congress, or as a separate resolution proposing changes to the standing rules that would allow the delegate to be seated.

Measures to change the House's standing rules fall within the jurisdiction of the House Rules Committee. If called up on the House floor, a resolution to seat the new delegate could be considered "in the House" under the one-hour rule, under suspension of the rules (clause 1 of Rule XV), or through terms set forth in a special rule reported by the House Rules Committee and agreed to by the House.

Compared to enactment of legislation, a change to the standing rules could be accomplished with support from a simple majority of House members (a quorum being present), or with two-thirds support via suspension procedure. The Senate does not have a role in making changes to House rules. Unlike legislation, however, the House's standing rules expire at the end of each Congress.

Accordingly, for a position established in this way to endure, it would need to be incorporated into the standing rules of subsequent Congresses.

Whether the House could seat a Cherokee Delegate through a House rule, rather than by legislation passed by both chambers and enacted into law, is untested. The Constitution does not reference delegates. While the Constitution vests each chamber of Congress with power "to determine the rules of its proceedings,"[107] this authority focuses on the internal procedures of each body, rather than who may be seated.[108]

On the other hand, there are reasons to believe that the Cherokee Delegate could not be seated except through legislative enactment implementing a treaty obligation. As noted above, all other delegates who have been seated in the House have represented territories or the District of Columbia, and these seats have been authorized by statute, rather than by a change in House rules. At least one federal court has determined that Congress's constitutional authority to legislatively establish seats for these nonvoting delegates is derived from the Territories Clause and the District Clause.[109] The court characterized these clauses as conferring "Congress with plenary power to regulate and manage the political representation" of the U.S. territories and the District through the enactment of legislation. The House, however, has historically seemed to take the view "that the office of a delegate representing a territory (or the District of Columbia) could not be created other than through legislation."[110]

Assuming, based on prior practice relating to the seating of territorial and District delegates, that a constitutional source of authority besides the Rules Clause would be necessary to seat the Cherokee Delegate, that source of authority could come from the President's power to "make treaties,"[111] and Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . powers vested in the Constitution to the government of the United States."[112] The House's ability to seat to the Cherokee Delegate, in other words, derives from the terms of the 1835 Treaty of New Echota. The terms of that Treaty, in turn, appear to require an act of Congress be passed to authorize the delegation to be seated. Specifically, article 7 of the Treaty provides that the Cherokee "shall be entitled to a delegate in the House of Representatives of the United States *whenever Congress* shall make provision for the same."[113] If the constitutional authority for the House seating the Cherokee Delegate derives from the Treaty Clause, the terms of the Treaty could be read to require a statutory enactment to seat the Cherokee Delegate. Accordingly, the seating of a delegate by way of a change to House rules, rather than by positive legislation passed by both chambers, could prompt a legal challenge to that action's validity.

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[107] U.S. CONST. art. I, § 5, cl. 2.

[108] *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 550 (1969) (holding that the House was without power to exclude a duly elected Member from being seated); Michel v. Anderson, 817 F. Supp. 126, 134 (D.D.C. 1993) (citing the Territories Clause and the District Clause as the source of authority for the House to seat delegates, rather than its authority to determine the rules of its proceedings), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994).

[109] Michel v. Anderson, 817 F. Supp. 126, 134 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994).

[110] *See* Michel v. Anderson, 14 F.3d 623, 628 (D.C. Cir. 1994) (in litigation brought by then-House Minority Leader Bob Michel and other Members against the House Clerk, challenging a 1993 House rule change allowing delegates to vote in the Committee of the Whole, noting that all parties agreed that a statute was needed to seat the delegates).

[111] U.S. CONST. art. II, § 2, cl. 2.

[112] *Id.* at art. I, § 8 cl. 17.

[113] Treaty of New Echota, supra note 1, art. 7 (emphasis added).

3. Question of the Privileges of the House

In rare cases, questions surrounding the representation of delegates in the House have given rise to a *question of the privileges of the House*,[114] but in no case has such a proceeding been used to establish the position in the first instance. These kinds of questions, which are put to the House in the form of a simple House resolution, are "those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings."[115]

Questions involving the organization of the House and the rights of Members (or delegates) to their seats have in previous Congresses given rise to valid questions of the privileges of the House. For instance, in 1857, a question of the privileges of the House arose in connection with the seating of a delegate from the territory of Utah at a time when the territory appeared to be in a state of rebellion against the United States. A resolution set forth this question of the privileges of the House.[116] Similarly, a question involving the seating of Ohio Delegate James White in 1794 was raised as a question of the privileges of the House. Notably, in both cases, the delegate's position within the House had already been established through legislative enactment prior to the question of the privileges of the House being put to the House (see **Table 1**).

Potential Legal Challenges to Seating a Cherokee Delegate

Should the House act to seat Ms. Teehee or another Cherokee Delegate in the future, opponents to that action may consider challenging it in federal court. Such potential challenges could include both substantive issues, most especially related to constitutional guarantees of equal protection under the law,[117] as well as procedural issues, such as those related to justiciability.

Equal Protection Considerations

Potential legal challenges to seating a Cherokee Delegate may arise under the Constitution's Equal Protection Clause.[118] Equal protection challenges in the federal Indian law context are particularly complex because of the interaction of multiple constitutional and statutory provisions. As discussed above, the seating of a Cherokee Delegate may require congressional action, such as passing a law. Recognizing a Cherokee Delegate may prompt claims that this creates a *classification-based* law or rule that would affect the voting rights of the Cherokee, non-Cherokee

[114] CRS Report R44005, *Questions of the Privileges of the House: An Analysis*, by Megan S. Lynch.

[115] *Rule IX: Questions of Privilege*, RULES OF THE HOUSE OF REPRESENTATIVES, 117th Cong. (2021), https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf#page=10.

[116] The resolution read:

> Whereas it appears from the proclamation of Brigham Young, late governor of the Territory of Utah, from the President's message, and from later developments, that the said Territory is now in open rebellion against the Government of the United States: Therefore, *Be it resolved*, That the Committee on Territories be instructed to report the facts and to inquire into the expediency of the immediate exclusion from this floor of the Delegate from said Territory.

First Session, 35th Cong., Journal 112-115; *see also* Asher C. Hinds, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2594 (1907).

[117] *See, e.g.*, U.S. CONST. amend. XIV.; Cong. Rsch. Serv., *Amdt14.S1.4.1.1 Race-Based Classifications: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-1/ALDE_00000816/ (last visited June 23, 2022).

[118] *See id.*

general election voters, and non-Cherokee Tribe members. Classification-based laws or rules may give rise to equal protection concerns.[119]

The Supreme Court has said that the constitutional guarantee of equal protection must "coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[120] Therefore, to establish an equal protection claim, an aggrieved party must show it was "(1) treated differently from other, similarly situated persons and (2) 'that this selective treatment was based on an unjustifiable standard, such as race, or religion, or some other arbitrary factor or to prevent the exercise of a fundamental right.'"[121] If a law does not target a suspect class or burden a fundamental right, the law will survive an equal protection challenge so long as "it bears a rational relation to some legitimate end."[122]

Potential challengers may argue that recognizing a Cherokee Delegate violates the voting rights principle[123] known as the "one-person, one-vote" rule.[124] The Supreme Court has long held that the Constitution protects the right of all qualified citizens to vote in both state and federal elections.[125] Constitutional protections for the right to vote extend beyond the "initial allocation of the franchise" to include the "manner of exercise."[126] This means that once the government grants the electorate the right to vote, the right must be exercised on equal terms. The Equal Protection Clause prohibits any voting restrictions that "value one person's vote over that of another."[127] For example, the Supreme Court has held that the Equal Protection Clause prohibits the "debasement or dilution of the weight of a citizen's vote."[128] *Vote dilution* refers to "the idea

[119] The Fourteenth Amendment's Equal Protection Clause prohibits state government actors from denying "any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. While the Fourteenth Amendment applies only to *state* governments, the Fifth Amendment's Due Process Clause applies to *federal* government action. *See* Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 461 (1952) (noting that "[the Fifth Amendment] concededly appl[ies] to and restrict[s] only the Federal Government and not private persons"). The Supreme Court has held that the Fifth Amendment's Due Process Clause, while not explicitly providing for equal protection of federal law, does "forbid discrimination that is 'so unjustifiable as to be violative of due process.'" Schneider v. Rusk, 377 U.S. 163, 168 (1964). The Court therefore has analyzed Fifth Amendment equal protection claims "precisely the same" as equal protection claims brought under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). These equal protection provisions, according to the Supreme Court, require that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[120] Romer v. Evans, 517 U.S. 620, 631 (1996).

[121] Harvard v. Cesnalis, 973 F.3d 190, 205 (3d Cir. 2020).

[122] *Romer*, 517 U.S. at 631.

[123] The Supreme Court has long held that the right to vote is "of the most fundamental significance under our constitutional structure." Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). Although states retain the power to regulate elections, the federal government is constitutionally obligated "to avoid arbitrary and disparate treatment of the members of its electorate." Bush v. Gore, 531 U.S. 98, 105 (2000). Constitutional challenges to voting regulations are therefore often brought and analyzed under the equal protection framework.

[124] The Court has held that the Equal Protection Clause mandates "one-person, one-vote," a concept originating in the 1962 case *Baker v. Carr*, 369 U.S. 186 (1962); *see also* Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016) (noting "*Baker*'s justiciability ruling set the stage for what came to be known as the one-person, one-vote principle"). Voting rights jurisprudence has evolved since *Baker*, raising questions as to when certain conduct complies with the one-person, one-vote principle and when these challenges are justiciable.

[125] Reynolds v. Sims, 377 U.S. 533, 554 (1964).

[126] *Bush*, 531 U.S. at 104.

[127] *Id.*

[128] *Reynolds*, 377 U.S. at 555.

that each vote must carry equal weight," or that "each representative must be accountable to (approximately) the same number of constituents."[129]

The circumstances surrounding the constitutional validity of a Cherokee Delegate present unique questions that go beyond the traditional apportionment context. For example, according to some legal scholars, the seating of a Cherokee Delegate may infringe upon the equal protection rights of non-Cherokee citizens in two different voting contexts.[130] First, assume that only members of the Cherokee Tribe could vote for the Cherokee Delegate to Congress, and a member of the Cherokee Tribe lives in the state of Oklahoma. That individual might have the right to vote for his or her Oklahoma Representative *and* the Cherokee Delegate, thus potentially giving that person a "super-vote"[131] by providing the individual both state and tribal representation in Congress. It should be noted that the Cherokee individual would likely *not* be represented by two full-voting members because the Cherokee Delegate would likely not have full voting privileges. Many delegates, however, do retain similar privileges as regular Members of the House of Representatives.[132] For example, during some sessions of Congress, House rules allow territorial delegates to vote in Committee of the Whole.[133] At least one court has concluded that "the Committee of the Whole *is* the House of Representatives for most practical purposes," and to allow the territorial delegates to cast votes in the Committee of the Whole, "would be to invest them with legislative power in violation of Article I of the Constitution."[134] If the territorial delegates had been given legislative power—which is reserved only for *Members* of Congress elected by the people of the several *States*—the voting power of the state legislative representatives and the citizens who elected them would have been improperly diluted.[135] However, the rule that granted delegates the power to vote in the Committee of the Whole included a "savings clause" that provided that whenever a vote in the Committee of the Whole

[129] Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019); *see also Reynolds*, 377 U.S. at 590 (Harlan, J., dissenting) ("[T]he Court's argument boils down to the assertion that appellees' right to vote has been invidiously 'debased' or 'diluted' by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that 'equal' means 'equal.'").

Dilution or debasement of the vote may occur in many ways, including false tallies, refusal to count votes from certain precincts, or applying different standards to vote recounts. *Baker*, 369 U.S. at 208 ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally . . . or by a refusal to count votes from arbitrarily selected precincts . . . or by a stuffing of the ballot box."). *See also Reynolds*, 377 U.S. at 555; *Bush*, 531 U.S. at 109 (finding the Florida recount process in the 2000 general election was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount"). However, many one-person, one-vote questions arise in cases involving malapportionment, or when districts are divided unequally, resulting in arguably inequitable representation. *Reynolds*, 377 U.S. at 555. To prevent malapportionment from unconstitutionally diluting the vote, "jurisdictions must design both congressional and state-level legislative districts with equal populations and must regularly reapportion districts." Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016). For example, the Supreme Court has held that various apportionment schemes were unconstitutional when the state legislative maps did not account for changes in population growth or redistribution, which resulted in unequal districts. *Reynolds*, 377 U.S. at 568; Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

[130] Rosser, *supra* note 35, at 145.

[131] The Supreme Court has explained that the Equal Protection Clause "does not permit a small class of voters to be deprived of fair and equal voting power," but also forbids "the elevation of a small class of 'supervoters' granted an extraordinarily powerful franchise." Brown v. Thompson, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

[132] *See* Michel v. Anderson, 817 F. Supp. 126, 134 (1993) (noting that each of the territorial delegates were given a seat in Congress with the "right of debate, but not of voting," and have been given "significant authority in standing and select committees of the House").

[133] *See* CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, by Jane A. Hudiburg.

[134] Michel v. Anderson, 817 F. Supp. 126, 141 (D.D.C. 1993).

[135] *Id.* at 147.

was decided by a margin within which the delegates' votes were decisive, the issue was automatically referred to the full House for a vote without any intervening debate.[136] The territorial delegates were not allowed to participate in the full House vote.[137] While participation in the Committee of the Whole may give delegates "greater stature and prestige both in Congress and in their home districts," it did not "enhance their right to vote on legislation."[138] The court therefore concluded that because of the "savings clause," the delegates' participation in the Committee of the Whole would have no real effect on legislative power because the delegates' votes could not affect the "ultimate result."[139] The extent of the Cherokee Delegate's power within the House of Representatives may factor into the analysis as to whether joint representation would create a super-vote situation.

Second, assume a Cherokee individual must choose to vote in either the election for Oklahoma Representative *or* in the election for the Cherokee Delegate. This hypothetically could still result in the Cherokee individual retaining a "super-vote" because non-Cherokee Oklahoma voters would not have the same opportunity to "shop for the election in which their vote would be most powerful."[140] Thus, according to one commentator, "through the Cherokee delegate, non-Cherokees would see their representational rights diluted."[141]

Some legal scholars contend the "super-vote" issue may present constitutional challenges to seating a Cherokee Delegate, but suggest that the "sui generis," or "unique"[142] nature of tribal law and the historical context of the treaty right and past disenfranchisement practices toward Native Americans may factor into the analysis.[143] The Supreme Court has historically upheld legislation that "singles out Indians for particular and special treatment."[144] Because of the "unique legal status of Indian tribes under federal law," special treatment of Indians may not violate general equal protection principles "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[145] For example, in *Morton v. Mancari*, the Supreme Court upheld a classification-based law that provided employment preference for qualified Indians in the Bureau of Indian Affairs.[146] The Court determined that the employment preference was not based on race, but rather the political status of Indians and the relationship between tribes and the government.[147] Although *Morton* involved racial discrimination challenges in the employment context, the unique legal status of federally recognized tribes and their members may factor into a court's analysis as to whether a Cherokee Delegate violates one-person, one-vote principles under the Equal Protection Clause.[148]

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[136] *Id.* at 142.

[137] *Id*.

[138] *Id*. at 147.

[139] *Id.* at 148.

[140] Rosser, *supra* note 35.

[141] *Id.* at 46.

[142] *Sui Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[143] Rosser, *supra* note 35, at 149.

[144] Morton v. Mancari, 417 U.S. 535, 554–55 (1974).

[145] *Id.* at 555.

[146] *Id.* at 537.

[147] *Id.* at 551.

[148] *See* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500 (1979) ("It is settled that 'the unique status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.").

Another potential equal protection challenge to the recognition of a Cherokee Delegate may involve other tribes. If Congress were to seat a Cherokee Delegate, other tribes may argue they are entitled to a tribal delegate under equal protection principles. For example, other federally recognized tribes may claim they are denied equal protection under the law because the Cherokee members are granted superior voting and representational power in Congress, which results in arbitrary and disparate treatment among Indian voters. In analyzing the potential validity of an equal protection challenge brought by another tribe based on the recognition of a Cherokee Delegate, a court would likely have to first determine whether the various tribes would be considered "similarly situated." Individuals are similarly situated when they are "alike in all relevant respects," but this does not mean "identically situated."[149] Similarly situated merely requires that the challenged government action "classify or distinguish between two or more relevant persons or groups."[150]

Although recognizing a Cherokee Delegate may seem like unequal treatment among other federally recognized tribes, it is worth considering whether all federal tribes are similarly situated. In the case of the Cherokee Nation, the government granted a right to representation through a treaty. A treaty between the United States and an Indian tribe is a "contract between two sovereign nations."[151] Therefore, it could be argued that the Cherokee Nation is not similarly situated to other tribes because they retain a right to (some form of) congressional representation through the New Echota Treaty, and therefore no equal protection violation exists.[152]

In other equal protection contexts regarding disparate treatment among Indian tribes, such as in the federal tribal recognition process, courts have found that the recognition of Indian tribes is a political rather than racial determination, and rational-basis review—rather than heightened scrutiny—applies.[153] When applying rational-basis review, a court must only find "the classification rationally further[s] a legitimate state interest."[154] In the Cherokee Delegate context, the government could demonstrate this by arguing it has a legitimate interest in upholding Indian treaty provisions.

Whether the recognition of a Cherokee Delegate would violate the Equal Protection Clause is a novel issue, and one that cannot be easily analogized to other existing equal protection scenarios. These circumstances, paired with the unique status of Indians under federal law, makes the constitutionality of the Cherokee Delegate potentially open to legal challenge. These considerations are not an exhaustive list of those that could arise in a potential challenge to the seating of a Cherokee Delegate, and little precedent exists that can definitively predict the outcome of such a challenge.

Justiciability

Even if a party raises an equal protection claim challenging the constitutionality of the Cherokee Delegate, a federal court would hear the case only if it determined the challenge is justiciable. Justiciability is a limitation established by the Supreme Court that refers to the types of matters a

[149] Harvard v. Cesnalis, 973 F.3d 190, 205 (3d Cir. 2020).

[150] Hines v. Quillivan, 982 F.3d 266, 272 (5th Cir. 2020).

[151] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

[152] The U.S. Court of Appeals for the D.C. Circuit engaged in a similar analysis in the context of federal recognition, finding that one tribe may not be similarly situated to others on the basis of government-to-government interactions. Muwekma Ohlone Tribe v. Salazar, 708 F.3d 209, 215 (D.C. Cir. 2013) (applying rational-basis scrutiny).

[153] *E.g.*, Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney, 932 F.3d 1207, 1220 (9th Cir. 2019).

[154] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

court may adjudicate.[155] According to the Court, "it is the province and duty of the judicial department to say what the law is"; however, some claims of "unlawfulness" are either more properly entrusted to another political branch or involve no judicially enforceable rights.[156] These questions are more commonly known as nonjusticiable "political questions."[157]

Since the Supreme Court's 1962 decision in *Baker v. Carr*,[158] courts have debated the justiciability of equal protection challenges to the one-person, one-vote principle, finding some claims are "political questions" beyond the reach of the federal court. In *Baker*, the Supreme Court first recognized the justiciability of malapportionment claims.[159] There, the Court held that challenges to a Tennessee state legislative map that had not been redrawn in nearly 60 years, despite substantial population growth and redistribution, was a challenge to the plaintiff's equal protection rights that was "within the reach of judicial protection under the Fourteenth Amendment," and a "justiciable constitutional cause of action."[160] In so holding, the Court set forth six tests to help determine when a claim is a nonjusticiable political question, including

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards for resolving it;
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potential for embarrassment from divergent pronouncements by various departments on the same question.[161]

At bottom, the question often hinges on whether a claim is one involving a "*legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere."[162]

Beyond population deviations resulting in malapportionment, such as those presented in *Baker*,[163] the Court has also found that claims of racial gerrymandering—or districting plans that unconstitutionally diminish the votes of racial minorities—present a justiciable equal protection claim.[164] Recently, however, the Court determined that questions of political gerrymandering, or

[155] *See generally* Flast v. Cohen, 392 U.S. 83, 94 (1968) (explaining that *justiciability* is a "term of art" used to describe the limitations placed on federal courts by the Constitution's case-and-controversy doctrine).

[156] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

[157] *Id.*

[158] 369 U.S. 186, 237 (1962).

[159] *Id.*

[160] *Id.*

[161] *Vieth*, 541 U.S. at 277 (quoting *Baker*, 369 U.S at 217).

[162] Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (emphasis in original).

[163] *Baker*, 369 U.S. at 193–95. *See also* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[164] Davis v. Bandemer, 478 U.S. 109, 119 (1986), *abrogated on other grounds*, *Rucho*, 139 S. Ct. at 2484 ("Our past decisions also make clear that even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim. In the multimember district context, we have reviewed, and on occasion

"the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength,"[165] present political questions that are beyond the reach of the federal courts.[166] According to the Court, the one-person, one-vote principle does not extend to political parties or require that "each party must be influential in proportion to its number of supporters."[167]

In sum, whether a court would find a challenge to the Cherokee Delegate justiciable may depend on several competing considerations. First, a court may consider the justiciability of seating the Cherokee Delegate because it is the product of a treaty between the federal government and the Cherokee Nation. On one hand, the Supreme Court has held that the nature of some matters involving treaties, such as their abrogation, may preclude judicial review.[168] Other courts, however, have determined that it is within a court's role to "interpret . . . treaties and to enforce domestic rights arising from them."[169] For example, in *United States v. Decker*, the Ninth Circuit Court of Appeals held that the political question doctrine did not apply in an equal protection challenge to regulations established as part of an Indian treaty.[170]

Beyond treaty considerations, a court may also evaluate a challenge to the Cherokee Delegate considering justiciability factors utilized in apportionment cases. In such an analysis, a court may find that a traditional one-person, one-vote question may be decided under basic equal protection principles.[171]

Conclusion

The treaty provision envisioning that the Cherokee Nation may provide a delegate to the House of Representatives is in some respects a novel one, especially in the context of modern-day applicability. The historical background is complex, and it is not perfectly clear what role such a delegate would have been understood to take in the House. However, it seems likely that some action by Congress is necessary if it were to choose to implement the provision today. Ultimately, it is possible that legal questions as discussed above could arise if a delegate is seated—such as whether seating the Cherokee Delegate may present equal protection "one-person, one-vote" challenges—but it is unclear how a court would decide the issues of first impression, or whether it would find the claims justiciable at all.

rejected, districting plans that unconstitutionally diminished the effectiveness of the votes of racial minorities.").

[165] *Vieth*, 541 U.S. at 272.

[166] *Rucho*, 139 S. Ct. at 2484.

[167] *Id.* at 2501.

[168] *See* Ping v. United States, 130 U.S. 581, 602 (1889) ("The validity of this legislative release from the stipulations of the treaties was, of course, not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.").

[169] United States v. Decker, 600 F.2d 733, 737 (9th Cir. 1979).

[170] *Id.* at 738.

[171] *See Rucho*, 139 S. Ct. at 2496 (noting population inequality claims could be decided based on "basic equal protection principles").

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