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

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

On August 22, 2019, Cherokee Nation Principal 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 New Echota Treaty, 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 COVID-19 pandemic reportedly delayed congressional considerations for seating Ms. Teehee, and as of January 2023, no action had been taken to seat her, though the House Committee on Rules held a November 18, 2022, hearing to discuss the matter.

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 it were to seat a Cherokee Delegate, including whether such challenges would be justiciable in court.

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The issue of seating a Cherokee Delegate in the House rose to prominence on August 22, 2019, when Cherokee Nation Principal Chief Chuck Hoskin Jr. announced his tribe’s intention to nominate a delegate to represent the Cherokee Nation. This announcement invoked a provision of the 1835 treaty between the Eastern Cherokee Tribe of Georgia (“Cherokee Tribe” or “Cherokee”<sup>1</sup>) and the U.S. government (New Echota Treaty).<sup>2</sup> 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.<sup>3</sup> Efforts to seat her were reportedly delayed due to the COVID-19 pandemic.<sup>4</sup> On November 18, 2022, the House Committee on Rules held a hearing to discuss legal and procedural matters related to Ms. Teehee’s nomination.<sup>5</sup>

If seated, the Cherokee Delegate could not be a full voting participant in the House under Article I, Section 2 of the Constitution, which sets forth requirements for the composition of the House and qualifications of its Members. Among these is the requirement that “Members [be] chosen every second Year by the People of the several States,”<sup>6</sup> a requirement that a Cherokee Delegate would not meet. Accordingly, the Cherokee Delegate could not vote on the House floor to pass legislation. However, the chamber could authorize a Cherokee Delegate to vote in committee and to address Members from the floor. This is similar to the current role of delegates for the U.S. territories and the District of Columbia,<sup>7</sup> which changes in its particulars (such as voting in the Committee of the Whole) from time to time. In the 118th Congress—and previously in the 103rd, 110th, 111th, 116th, and 117th Congresses—delegates are permitted to vote in and preside over the Committee of the Whole, although their votes are not permitted to be decisive.<sup>8</sup>

This report identifies and analyzes an array of legal and procedural factors Congress may consider when evaluating possible congressional action in response to the Cherokee Nation’s nomination of a delegate to the House. These include certain principles of treaty interpretation;

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<sup>1</sup> For purposes of this report, when discussing historical documents and agreements, “Cherokee Tribe” or “Cherokee” is used to distinguish the tribe that was a signatory to the New Echota Treaty and other historical agreements from any modern-day descendant groups recognized by the federal government, including the Cherokee Nation. CRS does not determine the successors in interest to any treaty.

<sup>2</sup> Treaty with the Cherokees, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478 [hereinafter New Echota Treaty].

<sup>3</sup> For additional background on Ms. Teehee’s nomination, see Stephanie Akin, *Delegate-in-Waiting (for 184 Years)*, CQ WEEKLY 27–29 (Oct. 15, 2019). While congressional interest over the delegate provision of the New Echota Treaty has focused mainly upon its invocation by the Cherokee Nation, the treaty has also been cited in other claims brought by descendants of the historical Cherokee Tribe that was a signatory to that treaty. See, e.g., Molly Young, *A Tribal Delegate in Congress? Cherokee Campaign Ramps Up under Treaty Promise*, OKLAHOMAN (Sept. 24, 2022), <https://www.oklahoman.com/story/news/politics/government/2022/09/24/cherokee-delegate-in-congress-gains-support-amid-grassroots-campaign/69512293007/> (noting related claim asserted by United Keetoowah Band of Cherokee Indians). This report does not address the claims that have been or could be brought by different Cherokee tribes, or whether the New Echota Treaty might permit the seating of multiple delegates from descendants of the historical Cherokee Tribe). A brief history of the Cherokee Tribe may be found in *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 94 n.11 (D.D.C. 2017).

<sup>4</sup> E.g., Chuck Hoskin Jr., *Cherokee Nation’s Path to Seating Congressional Delegate*, HILL (Mar. 4, 2022), <https://thehill.com/blogs/congress-blog/politics/596946-cherokee-nations-path-to-seating-congressional-delegate>.

<sup>5</sup> HouseRules, *Legal & Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House*, YOUTUBE (Nov. 16, 2022), <https://www.youtube.com/watch?v=ACAlvZpA37A>.

<sup>6</sup> U.S. CONST. art. 1, § 2. For more legal analysis of this language, see Cong. Rsch. Serv., *Voter Qualifications for House of Representatives Elections*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artI-S2-C1-2/ALDE\\_00001032/](https://constitution.congress.gov/browse/essay/artI-S2-C1-2/ALDE_00001032/) (last visited Nov. 4, 2022).

<sup>7</sup> See generally 48 U.S.C. ch. 16 (territorial delegates to Congress); District of Columbia Self-Government and Governmental Reorganization Act (District of Columbia Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973).

<sup>8</sup> See infra note 123 and accompanying text; CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, by Jane A. Hudiburg.

analysis of the relevant treaty provisions and historical context; evaluation of events subsequent to treaty signing; procedural options for recognizing a Cherokee Delegate; and potential objections to such actions.

## **Principles for Interpreting Treaties with Indian Tribes**

Treaties with federally recognized tribes<sup>9</sup> are sui generis because of tribes' unique legal status under the Constitution.<sup>10</sup> Early in U.S. history, the U.S. Supreme Court characterized federally recognized tribes as “domestic dependent nations” with a relationship to the federal government akin to a ward’s relationship to its guardian.<sup>11</sup> As a consequence, the courts have held that a trust relationship exists between the United States and federally recognized tribes and have developed three distinct canons of construction for interpreting Indian treaties, known as the *Indian canons*.<sup>12</sup> First, treaties with Indian tribes should generally be interpreted in the sense in which the tribal signers would have understood them.<sup>13</sup> Second, ambiguities regarding tribal interests should be construed to the tribes’ benefit.<sup>14</sup> Third, if Congress intends to diminish tribal lands or abrogate a treaty, it must do so explicitly.<sup>15</sup> Notwithstanding this clear-intent requirement, Congress retains the authority to abrogate an Indian treaty by subsequent legislation.<sup>16</sup>

## **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.<sup>17</sup> Several other treaties from approximately the same time

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<sup>9</sup> 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(a) (directing the Secretary of the 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”).

<sup>10</sup> 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., *Scope of Commerce Clause Authority and Indian Tribes*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artI-S8-C3-1-3/ALDE\\_00012976/](https://constitution.congress.gov/browse/essay/artI-S8-C3-1-3/ALDE_00012976/) (last visited Nov. 4, 2022).

<sup>11</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10, 13 (1831).

<sup>12</sup> “[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. (6 Pet.) 515 (1832).

<sup>13</sup> *Worcester*, 31 U.S. (6 Pet.) 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).

<sup>14</sup> *Worcester*, 31 U.S. (6 Pet.) 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 marks omitted)).

<sup>15</sup> *Worcester*, 31 U.S. (6 Pet.) 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))).

<sup>16</sup> 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.

<sup>17</sup> Other potential sources, such as those that may have been maintained orally or otherwise by tribal elders or

period, including one between the Cherokee 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**

The first treaty with a tribal nation signed 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.<sup>18</sup> Thus, the Cherokee Tribe 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.<sup>19</sup>

Contemporaneously with the signing of the New Echota Treaty 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).<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup>

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.<sup>23</sup> 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

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historians, are beyond the scope of this report.

<sup>18</sup> Article VI of the 1778 Treaty with the Delawares 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.

Treaty with the Delawares, Del. Nation-U.S., art. VI, Sept. 17, 1778, 7 Stat. 13 [hereinafter *Delawares Treaty*].

<sup>19</sup> For a discussion of historical practices involving tribal delegations to Congress, see HERMAN J. VIOLA, *DIPLOMATS IN BUCKSKINS: A HISTORY OF INDIAN DELEGATIONS IN WASHINGTON CITY* 25–26 (1995). 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 thirteen Cherokee delegates to the U.S. Congress).

<sup>20</sup> *See* H.R. REP. NO. 23-474, at 18 (1834) (House Committee on Indian Affairs report stating: “Our inability to perform our treaty guaranties [sic] arose from the conflicts between the rights of the States and of the United States.”).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *See generally id.*

compensations as are possessed by the Delegates of the respective Territories.”<sup>24</sup> The Committee approved of this provision, among other reasons, for 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.<sup>25</sup>

The Committee further expounded its reasons for recommending such a delegate and concluded that the “right to a delegate in Congress” was “a subject of the deepest solicitude for the Indians,” and “the strongest assurance” that the United States would fulfill its promises. The Committee wrote, “it is believed public sentiment will sustain the concession as an act of justice as well as of sound policy.”<sup>26</sup> The committee report also provided a history of other treaties calling for Indian delegates to Congress.<sup>27</sup>

### **Treaty Between the Cherokee and the Confederacy**

On October 7, 1865, the Cherokee 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.”<sup>28</sup> This provision was intended “to enable the Cherokee Nation to claim its rights and secure its interests without the intervention of counsel or agents.”<sup>29</sup>

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 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 and the United States**

Prior to the Cherokee’s treaty with the Confederate States of America, two treaties between the Cherokee Tribe and the United States mentioned a tribal deputy or delegate to the national legislature. A third treaty reaffirmed the relationship between the Cherokee and the United States after the Confederacy surrendered, but it does not explicitly mention a delegate.<sup>30</sup>

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<sup>24</sup> *Id.* at 37.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 21–22. The Committee noted that the 1830 Treaty with the Choctaws indicated the executive branch negotiators’ doubt in their ability to bind Congress in the matter of an Indian delegate. Article XXII of the 1830 Treaty with the Choctaw 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.” Treaty of Perpetual Friendship, Cession, and Limits art. XXII, Choctaw Nation-U.S., Sept. 27, 1830, 7 Stat. 333, 338 [hereinafter Choctaw Treaty].

<sup>28</sup> Treaty of Friendship and Alliance, Cherokee Nation-Confederate States of Am., Oct. 7, 1861, art. XLIV, Official Records, Series 7, vol. 1, pt. 1, 669, *reprinted in* STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 394 (James M. Matthews ed., 1864) [hereinafter Treaty With the Confederacy].

<sup>29</sup> *Id.*

<sup>30</sup> Treaty with the Cherokee Nation, Cherokee Nation-U.S., July 19, 1866, 14 Stat. 799 [hereinafter 1866 Cherokee Treaty].



### ***Treaty of Hopewell (1785)***

Article XII of the 1785 Hopewell Treaty with the Cherokee Tribe (Hopewell Treaty)<sup>31</sup> provides: “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 Hopewell Treaty predates the U.S. Constitution.<sup>32</sup> At that time, the Confederation Congress’s<sup>33</sup> goals were to make peace with tribes that had sided with the British in the Revolutionary War; to establish boundaries with Indian nations; and to consolidate power over Indian affairs in the national government.<sup>34</sup> 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.<sup>35</sup>

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 or at the commissioners’ suggestion.<sup>36</sup> According to the minutes, the commissioners produced a draft treaty, which was read to the Cherokee Tribe and translated, at which point the Cherokee agreed that they understood and would sign the treaty.<sup>37</sup>

Nonetheless, because (1) the Cherokee Nation purports to act on the New Echota Treaty, rather than the Hopewell Treaty, in nominating a delegate; (2) the Confederation 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.

### ***New Echota Treaty (1835)***

Article 7 of the New Echota Treaty between the United States and the Cherokee Tribe provides that the Cherokee “shall be entitled to a delegate in the House of Representatives of the United

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<sup>31</sup> Treaty with the Cherokees art. XII, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18, 20 [hereinafter Hopewell Treaty].

<sup>32</sup> Article VI, Clause 2 of the Constitution recognizes treaties made by the United States prior to adoption of the Constitution. See *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>33</sup> The national legislature that convened in 1781 after the adoption of the Articles of Confederation 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 HIST. 411, 411 (1997).

<sup>34</sup> See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 58–62 (1982).

<sup>35</sup> Hopewell Treaty, *supra* note 31, at arts. I–IX.

<sup>36</sup> 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 40–43 (William S. Hein & Co. 1988) (1832).

<sup>37</sup> *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.

*Id.* at 43. Though minimal, this mention of the Confederation 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.



States whenever Congress shall make provision for the same.”<sup>38</sup> An examination of the Treaty’s terms and historical context could provide additional perspective on that provision.

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 River. Ultimately, tens of thousands of Cherokee members underwent a forced trek westward known as the Trail of Tears.<sup>39</sup> The Treaty signing occurred during an era when one of the federal government’s policy goals was removal of Indian tribes to unsettled lands in the West, freeing eastern lands for non-Indian settlers.<sup>40</sup> The parties entered into the Treaty<sup>41</sup> three years after the Supreme Court, in *Worcester v. Georgia*,<sup>42</sup> rejected Georgia’s attempt to exercise authority within Cherokee country.<sup>43</sup> 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”<sup>44</sup> among the Cherokees. However, because the

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<sup>38</sup> New Echota Treaty, *supra* note 2, art. 7, 7 Stat. 482. That Article 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 guaranteed [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.

<sup>39</sup> 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.”).

<sup>40</sup> In 1830, Congress enacted what is known as the Removal Act “[t]o 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.” Act of May 28, 1830, ch. 148, 4 Stat. 411.

<sup>41</sup> New Echota Treaty, *supra* note 2, pmb., 7 Stat. 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 Head Men and People of the Cherokee tribe of Indians.”).

<sup>42</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 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 [C]ongress.”).

<sup>43</sup> 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*, the Supreme Court essentially upheld the United States’ authority, ruling that 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), and FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 156–82 (1994).

<sup>44</sup> Cohen, *supra* note 34, § 1.03(4)(a).

signatories did not include Cherokee leaders,<sup>45</sup> the New Echota Treaty appears to have lacked the support of the majority of the Cherokee Tribe.<sup>46</sup>

Those who signed the New Echota Treaty assented to a Preamble stating that they desired to move west and establish a permanent homeland for their entire nation.<sup>47</sup> Under Article 16 of the Treaty, the Cherokee Tribe signatories agreed “to remove to their new homes within two years from the ratification of this treaty.”<sup>48</sup> Provisions on claims for former reservations<sup>49</sup> and for accommodating Cherokees who wished to remain<sup>50</sup> 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.”<sup>51</sup>

Article 1 of the New Echota Treaty ceded Cherokee lands east of the Mississippi to the United States in consideration of \$5 million.<sup>52</sup> 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.<sup>53</sup> Article 5 provided that the ceded lands would not “be

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<sup>45</sup> *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 39 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.”).

<sup>46</sup> *See* H.R. 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, e.g.*, Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836-1838*, 73 GA. HIST. Q. 540, 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 . . .”).

<sup>47</sup> New Echota Treaty, *supra* note 2, pmbl., 7 Stat. 478, 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 . . .”).

<sup>48</sup> *Id.* art.16, 7 Stat. 485.

<sup>49</sup> *Id.* art. 13, 7 Stat. 484–85 (“[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 . . .”).

<sup>50</sup> *Id.* art. 12, 7 Stat. 483 (“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 preemption right to one hundred and sixty acres of land or one quarter section . . .”).

<sup>51</sup> *Id.* supp. arts. pmbl., supp. art. I, 7 Stat. 488.

<sup>52</sup> *Id.* art. 1, 7 Stat. 479.

<sup>53</sup> *Id.* art. 2, 7 Stat. 480 (“[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,

included within the territorial limits or jurisdiction of any State or Territory” without the Cherokee Tribe’s consent.<sup>54</sup> Other provisions of the Treaty addressed establishing forts;<sup>55</sup> guaranteeing peace;<sup>56</sup> extinguishing Osage title to lands within the area guaranteed to the Cherokees;<sup>57</sup> covering expenses for Cherokee removal;<sup>58</sup> appointing agents to value improvements on ceded land;<sup>59</sup> investing Cherokee funds;<sup>60</sup> transferring the Cherokee school fund;<sup>61</sup> granting pensions to Cherokee warriors for aid in the War of 1812;<sup>62</sup> and dividing funds among the various Cherokee groups.<sup>63</sup> Finally, the Treaty included provisions authorizing the commissioners to settle the claims specified in the Treaty<sup>64</sup> and providing for advances of annuities to meet pre-removal conditions.<sup>65</sup>

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 signatories 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 one small part of a wide-ranging treaty, so that no inferences should be drawn from the broader negotiations. Because no court has construed the New Echota Treaty’s delegate provision, it is difficult to predict which interpretive arguments would be most persuasive.

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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.”).

<sup>54</sup> *Id.* art. 5, 7 Stat. 481.

<sup>55</sup> *Id.* art. 3, 7 Stat. 480–81.

<sup>56</sup> *Id.* art. 6, 7 Stat. 481 (“The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine [sic.] wars between the several tribes.”).

<sup>57</sup> *Id.* art. 4, 7 Stat. 481.

<sup>58</sup> *Id.* art. 8, 7 Stat. 482 (“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 medicines shall accompany each detachment of emigrants removed by the Government.”).

<sup>59</sup> *Id.* art. 9, 7 Stat. 482 (“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 . . .”).

<sup>60</sup> *Id.* art. 10, 7 Stat. 482 (“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 . . .”).

<sup>61</sup> *Id.* art. 11, 7 Stat. 483 (“[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 . . .”).

<sup>62</sup> *Id.* art. 14, 7 Stat. 485 (“[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 . . .”).

<sup>63</sup> *Id.* art. 15, 7 Stat. 485 (“[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 . . .”).

<sup>64</sup> *Id.* art. 17, 7 Stat. 485–86.

<sup>65</sup> *Id.* art. 18, 7 Stat. 486 (“[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 . . .”).

## Current Status of the Delegate Provision

Both before and after the Hopewell Treaty, representatives from the Cherokee Tribe were present in Washington, D.C.<sup>66</sup> 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.”<sup>67</sup> Similarly, following the New Echota Treaty and throughout the 19th century, Cherokee representatives were present in Washington, D.C. to interact with the federal government.<sup>68</sup>

Notwithstanding this historical practice, the delegate provision of the New Echota Treaty, on its face, appears to contemplate additional congressional action—“whenever Congress shall make provision”—before a Cherokee Delegate could be seated in the House. Congress has never affirmatively provided for a Cherokee Delegate in the House pursuant to the Treaty.

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*.<sup>69</sup> The Supreme Court has long recognized a distinction between self-executing treaties, which “automatically have effect as domestic law,” and non-self-executing treaties, which “do not by themselves function as binding federal law.”<sup>70</sup> A self-executing treaty is “‘equivalent to an act of the legislature’ . . . when it ‘operates of itself without the aid of any legislative provision.’”<sup>71</sup> A non-self-executing treaty, however, may be enforced only “pursuant to legislation to carry [it] into effect.”<sup>72</sup> 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.”<sup>73</sup> 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 one of its chambers.<sup>74</sup>

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<sup>66</sup> A Cherokee representative was present in Philadelphia to sign the treaty between the Cherokee Tribe and the United States in 1794. Treaty with the Cherokee Indians, Cherokee-U.S., June 26, 1794, 7 Stat. 43.

<sup>67</sup> VIOLA, *supra* note 19, at 79.

<sup>68</sup> *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, D.C. See GARY E. MOULTON, JOHN ROSS: CHEROKEE CHIEF (1978).

<sup>69</sup> CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan.

<sup>70</sup> *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

<sup>71</sup> *Id.* See also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part* by *United States v. Percheman*, 32 U.S. (7 Pet.) 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 any legislative provision”).

<sup>72</sup> *Medellin*, 552 U.S. at 505.

<sup>73</sup> *Foster*, 27 U.S. (2 Pet.) 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”).

<sup>74</sup> 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 CONG. 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.”).

At least one court found compelling an argument that “Indian treaties are virtually always self-executing” and that “no case has ever held an Indian treaty to be non-self-executing.”<sup>75</sup> However, that case did not involve a treaty provision that expressly contemplated congressional action to execute it. Moreover, that court acknowledged two points of long-standing precedent from an 1894 case: (1) “no distinction is there made between a treaty with a foreign nation and with an Indian tribe,” and (2) “where such treaty prescribes a rule by which private rights can be determined, the court will resort to such rule; otherwise *the court must look to the legislation of Congress for the enforcement of its provisions.*”<sup>76</sup>

In the New Echota Treaty, the phrase “whenever Congress shall make provision for the same” appears on its face to render the Cherokee delegate provision non-self-executing, requiring congressional action to enforce it. The United States, at least, seemed to believe that congressional action would be required to seat a Cherokee delegate.<sup>77</sup> 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 could raise significant constitutional issues if the President and Senate were able to bind the House to seat a delegate by way of a treaty commitment without implementing legislation approved by that chamber.<sup>78</sup> As a result, it appears unlikely that a court would find that the New Echota Treaty created an enforceable (self-executing) right in the absence of further action by Congress.

In addition to the self-execution question, Congress may consider whether the New Echota Treaty’s delegate provision is *precatory* in nature—meaning it might reflect the hope that Congress take steps to allow a delegate without obligating it to do so.<sup>79</sup> Congress may be empowered to apply elements of its views on this and other matters of interpretation because, although U.S. courts often have final authority to interpret treaties’ meanings and requirements, Congress plays a unique role in treaty interpretation when it implements treaties through domestic legislation.<sup>80</sup>

Ultimately, the likely non-self-executing nature of the Cherokee delegate provision matters only insofar as it means an affirmative act by Congress is likely required to seat a Cherokee delegate. If Congress were inclined to consider congressional action in relation to the New Echota Treaty’s delegate provision, whether that provision is self-executing or not makes no difference.

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<sup>75</sup> *Tsosie v. United States*, 11 Cl. Ct. 62, 73 (1986), *aff’d and remanded*, 825 F.2d 393 (Fed. Cir. 1987).

<sup>76</sup> *Tsosie*, 11 Cl. Ct. at 73 (emphasis added) (quoting *Leighton v. United States*, 29 Ct. Cl. 288, 307 (1894)).

<sup>77</sup> See generally Rosser, *supra* note 39, at 119–29 (discussing context surrounding the delegate provision in the New Echota Treaty). For example, the 1834 articles of agreement between U.S. Commissioner John H. Eaton and a Cherokee delegation, which predate 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.” S. EXEC. DOC. NO. 23-7, at 4.

<sup>78</sup> See, e.g., *Edwards*, 580 F.2d at 1058 (observing the need for legislation to implement treaty obligations that require authority exclusively vested in the House). See also U.S. CONST. art. I, §§ 1 (vesting legislative power in the House and Senate), 2 (providing that the House “shall chuse their Speaker and other Officers”), 5 (establishing that each chamber “may determine the Rules of its Proceedings”).

<sup>79</sup> See *Precatory*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining precatory as “requesting, recommending, or expressing a desire rather than a command”). Treaties and international agreements sometimes contain precatory or hortatory provisions that express aspirational or anticipated goals but do not create legal obligations. For background on non-legal provisions in international agreements, see CRS Report RL32528, *supra* note 69, at 12–15.

<sup>80</sup> See, e.g., Cong. Rsch. Serv., *Interpreting Treaties*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C2-1-6/ALDE\\_00012957/](https://constitution.congress.gov/browse/essay/artII-S2-C2-1-6/ALDE_00012957/) (last visited Nov. 10, 2022).



When deciding whether or not to act, Congress may also consider its views on whether the treaty and its delegate provision continue in force. The canons of treaty interpretation discussed above, though generally viewed as guidelines for judicial interpretation and not binding on Congress, may inform Congress's interpretation. As discussed below, those interpretive canons may tend to counsel in favor of finding that the New Echota Treaty generally, and the Cherokee delegate provision particularly, continue in force.

## **The Possibility of Ineffectiveness or Abrogation**

The New Echota Treaty's delegate provision, even if not self-executing, remains relevant to the extent that 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.<sup>81</sup>

**Effectiveness.** Although Congress has never enacted legislation to establish and fund an Office of the Cherokee Delegate to the House, it also has never explicitly abrogated the New Echota Treaty's delegate provision. One could argue that the Cherokee Tribe 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.<sup>82</sup> However, the President does not appear to have expressly abrogated the Treaty following that action, and the Treaty of July 19, 1866 (1866 Treaty) subsequently restored relations between the Cherokee and the United States.<sup>83</sup> The 1866 Treaty did not explicitly refer to a Cherokee Delegate, but it did explicitly reaffirm "[a]ll provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty"<sup>84</sup>—a broad statement that seemingly reaffirmed that the New Echota Treaty's delegate provision.

Accordingly, one view of the Treaty's delegate provision is that it represents an obligation to seat a delegate nominated by the Cherokee (even if that obligation might require implementing legislation<sup>85</sup>), rather than merely a pledge that Congress might consider whether to seat such a delegate if nominated.<sup>86</sup> Another view, finding support in differences between the New Echota Treaty's provision and other treaties executed by the Cherokees,<sup>87</sup> might suggest that the New

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<sup>81</sup> 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).

<sup>82</sup> Treaty with the Confederacy, *supra* note 28, Treaty with the Cherokees, Confederate States of Am.—Cherokee Nation of Indians, Oct. 7, 1861, *reprinted in* STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 394 (James M. Matthews ed., 1864), <https://docsouth.unc.edu/imls/19conf/19conf.html#p394>; 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.").

<sup>83</sup> 1866 Cherokee Treaty, *supra* note 30.

<sup>84</sup> *Id.* art. 31, 14 Stat. 806.

<sup>85</sup> *See supra* pp. 9–11 (discussing whether the delegate provision may require implementing legislation).

<sup>86</sup> *See* Rosser, *supra* note 39, 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.").

<sup>87</sup> Treaty with the Confederacy, *supra* note 28, at 394. The Treaty with the Confederacy contains a preliminary recital declaring it was "[m]ade and concluded . . . between . . . the 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

Echota Treaty was *not* understood to constitute a pledge to seat a Cherokee Delegate. Under that view, the Treaty with the Confederacy’s more explicit description of a Cherokee Delegate’s powers<sup>88</sup> suggests that the Cherokee delegation negotiating with the Confederacy recognized and sought to correct a perceived inadequacy in the New Echota Treaty’s language. From this perspective, a comparison of the delegate provisions in three Cherokee treaties may be instructive:

1. The 1785 Hopewell Treaty, the first Cherokee treaty with the United States, speaks of “the right to send a deputy of their choice, whenever they think fit to [the Confederated] Congress,” possibly referring to an agent or the equivalent of a lobbyist, rather than a right of representation in the Articles of Confederation-era national legislature.<sup>89</sup>
2. The 1835 New Echota Treaty provides for “a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same,”<sup>90</sup> arguably incorporating some notion of representation.
3. The 1861 Treaty with the Confederacy specifies a method of electing and compensating the Cherokee Delegate to the Confederate House of Representatives while also detailing the included powers: “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.”<sup>91</sup>

**Abrogation.** One could argue 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 not providing for a separate Indian Territory, as envisioned by Congress in the 1830s, or by including

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enter into this treaty by a General Convention of the Cherokee People.” *Id.*

<sup>88</sup> The Treaty with the Confederacy’s delegate provision reads:

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.

Treaty with the Confederacy, *supra* note 28, art. XLIV, at 403–04, 411 (amending original text). The original text would have provided the delegate authority equal to that of territorial delegates to the Confederate States. *Id.* at 403–04.

<sup>89</sup> Hopewell Treaty, *supra* note 31, art. XII, 7 Stat. 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. (5 Pet.) 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 deputy provision in *Cherokee Nation v. Georgia*, see Rosser, *supra* note 39, at 121–22 nn.156–61 and accompanying text.

<sup>90</sup> New Echota Treaty, *supra* note 2, art. 7, 7 Stat. 482.

<sup>91</sup> Treaty with the Confederacy, *supra* note 28, at 404.



the Indian Territory in the State of Oklahoma. However, such arguments appear to be hampered by the lack of specific evidence of a congressional intent to abrogate.<sup>92</sup> As noted, Supreme Court jurisprudence generally<sup>93</sup> rejects treaty abrogation by implication and instead seeks legislative precision and clarity. Nonetheless, that this possible purpose or context for the delegate provision may no longer be relevant could factor into Congress’s policy considerations today.

Although Congress considered various bills to remove Indian tribes to the West and to create an Indian Territory separate from any state,<sup>94</sup> 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.<sup>95</sup> That bill included a delegate provision, but not for a Cherokee Delegate specifically.<sup>96</sup> 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.”<sup>97</sup> 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.<sup>98</sup>

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<sup>92</sup> See generally *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (rejecting the argument that Oklahoma statehood and assorted statutory actions sufficed to diminish or disestablish a reservation).

<sup>93</sup> See *supra* notes 15–16 and accompanying text; see also, e.g., *Washington v. Wash. State 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)).

<sup>94</sup> 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.”).

<sup>95</sup> *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.”).

<sup>96</sup> *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.”).

<sup>97</sup> *Id.* at 21.

<sup>98</sup> 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 bill included provisions for a territorial governor, appointed by the President; a confederation of the Tribes settled in the Territory,<sup>99</sup> 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.<sup>100</sup>

**Oklahoma Statehood.** Another argument may be that the Cherokee Delegate provision did not survive the Oklahoma Statehood Act of 1906<sup>101</sup> because Indian Territory was no longer outside any state. However, the New Echota Treaty does not include language characterizing the Cherokee Delegate provision as temporary (i.e., as terminating upon an event such as statehood), and 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 impliedly terminated upon statehood."<sup>102</sup> Likewise, the Court in 2020 affirmed that Oklahoma statehood did not disestablish a reservation that had been established in Indian Territory by treaty.<sup>103</sup>

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 questions in determining a treaty's status are whether (1) Congress expressly abrogated the treaty or (2) the treaty terminated under its own provisions.<sup>104</sup> If neither of those can be answered affirmatively, the treaty continues in force. Statehood thus appears to be 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.

None of the chief laws leading to Oklahoma statehood—the Oklahoma Organic Act of 1890,<sup>105</sup> the Dawes Commission Act,<sup>106</sup> the Curtis Act of 1898,<sup>107</sup> and the Five Tribes Act<sup>108</sup>—includes any specific mention of a Cherokee Delegate or the relevant New Echota Treaty provision.

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the matter of an Indian delegate. *Id.* at 21–22. Article XXII of the 1830 Choctaw Treaty 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 27, art. XXII, 7 Stat. 338.

<sup>99</sup> H.R. REP. NO. 23-474, at 36.

<sup>100</sup> *Id.* at 34–37.

<sup>101</sup> Act of June 16, 1906, 34 Stat. 267. A Presidential Proclamation of Oklahoma Statehood followed. Proclamation No. 60, 35 Stat. 2160 (Nov. 16, 1907).

<sup>102</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999).

<sup>103</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).

<sup>104</sup> *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019).

<sup>105</sup> Act of May 2, 1890, ch. 182, 26 Stat. 81. 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.

<sup>106</sup> Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645–46.

<sup>107</sup> Act of June 28, 1898, ch. 504, 30 Stat. 495.

<sup>108</sup> Act of Apr. 26 1906, ch. 1875, 34 Stat. 137.

In light of the above, Congress could reasonably conclude that it had not acted to abrogate the Cherokee Delegate provision. As such, it would appear that Congress could still take action to effectuate the provision and seat a nonvoting Cherokee Delegate in the House.

## Procedural Options to Seat a Cherokee Delegate

Congress could continue to take no action on the Cherokee Nation’s nomination of a delegate. However, if Congress were to consider seating a Cherokee Delegate in the House, it could evaluate the following procedural options. Of these options, a legislative enactment has historically been the exclusive method to seat delegates, albeit in territorial rather than tribal contexts, and therefore may be the option least likely to raise constitutional concerns.

### 1. Enactment of Legislation

Historically, Congress has used legislation to add new delegates. No such position in Congress has been established except by law. To seat a Cherokee Delegate using this approach 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.<sup>109</sup>

Two territories acquired by the United States from Spain—Puerto Rico and the Philippines—were statutorily 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 Philippines are no longer a territory of the United States, and the representative from Puerto Rico is now known as the Resident Commissioner, a position functionally equivalent to “delegate,” except that the Resident Commissioner serves a four-year instead of two-year term.<sup>110</sup>

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 of the 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 <sup>a</sup>
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

<sup>110</sup> 48 U.S.C. § 891.

<b>Territory</b>	<b>Statute</b>	<b>Year</b>
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
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:** 124 CONG. REC. 33287 (October 3, 1978); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754.

- 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**

Although untested, the U.S. House of Representatives could potentially choose to seat a new delegate by adjusting its standing rules to accommodate a Cherokee Delegate, either at the outset

of a new Congress or at some point thereafter. A simple House resolution (H.Res.), which does not require bicameralism and presentment and therefore would not constitute binding law, 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 Committee on Rules. 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 Rules Committee and agreed to by the House.

Compared to the enactment of bills or joint resolutions, a change to the standing rules could be accomplished with support from a simple majority of 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. However, the House's standing rules expire at the end of each Congress. For a position established in this way to endure, it would need to be incorporated into the standing rules of each subsequent Congress.

The legality of seating a 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 the power to "determine the Rules of its Proceedings,"<sup>111</sup> this authority focuses on the internal procedures of each body, rather than who may be seated.<sup>112</sup> The power to determine rules is also bounded by the Constitution. As the Supreme Court has stated, "the Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights."<sup>113</sup>

There may be reasons to believe that seating a delegate requires exercise of legislative authority allotted by the Constitution. At least one federal court determined that Congress's constitutional authority to establish seats legislatively for nonvoting territorial delegates derives from the Constitution's Territories Clause and District Clause.<sup>114</sup> That 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 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."<sup>115</sup>

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 a Cherokee Delegate, that authority could theoretically come from the President's power to "make

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<sup>111</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>112</sup> *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).

<sup>113</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892).

<sup>114</sup> *Michel*, 817 F. Supp. at 134.

<sup>115</sup> *See Michel*, 14 F.3d at 628 (noting all parties agreed that statute was needed to seat delegates 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).

treaties”<sup>116</sup> and Congress’s authority to “make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by [the] Constitution in the Government of the United States.”<sup>117</sup> The House’s ability to seat the Cherokee Delegate, in other words, would derive from the terms of the New Echota Treaty. The terms of that treaty, in turn, could be read to require an act of Congress—that is, a statutory enactment—to authorize the delegation to be seated.<sup>118</sup> An alternative reading, though, could interpret the President’s ratification of the Treaty with the advice and consent of the Senate as requiring only House action to fulfill the treaty’s terms. Because no court has ruled on what is required to implement the Cherokee Delegate provision, Congress’s interpretation on this matter would be binding absent a legal challenge to the validity of that interpretation.

### 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*,<sup>119</sup> but in no case has such a proceeding been used to establish a delegate 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.”<sup>120</sup>

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.<sup>121</sup> Similarly, a question involving the seating of Ohio Delegate James White in 1794 was raised as a question of the privileges of the House.<sup>122</sup> Notably, in both cases, the delegate’s position within the House had already been established through legislation prior to the question of the privileges of the House being put to the House (see **Table 1**).

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<sup>116</sup> U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>117</sup> *Id.* art. I, § 8, cl. 18.

<sup>118</sup> 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.” New Echota Treaty, *supra* note 2, art. 7, 7 Stat. 482.

<sup>119</sup> CRS Report R44005, *Questions of the Privileges of the House: An Analysis*, by Megan S. Lynch.

<sup>120</sup> *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>.

<sup>121</sup> 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.

CONG. GLOBE, 35th Cong., 1st Sess. 165 (1857); *see also* ASHER C. HINDS, 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2594 (1907).

<sup>122</sup> ASHER C. HINDS, 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 400 (1907) (“In 1794 the House admitted a Delegate on the theory that it might admit to the floor for debate merely anybody whom it might choose.”).



## Potential Legal Challenges to Seating a Cherokee Delegate

Should the House act to seat a Cherokee Delegate in the future, opponents to that action may consider challenging it in federal court. Such potential challenges could include issues related to constitutional guarantees of equal protection under the law, as well as other issues such as those related to justiciability. The discussion below presumes that, if seated, the Cherokee Delegate would not have full voting privileges but might exercise many of the same privileges as territorial delegates.<sup>123</sup>

### Equal Protection Considerations

Legal challenges to seating a Cherokee Delegate could arise under the Constitution’s Equal Protection Clause. 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, Congress could attempt to seat a Cherokee Delegate through congressional action such as enacting a statute. Such a statute could prompt claims that Congress created a *classification-based* law or rule affecting voting rights.<sup>124</sup>

“[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,”<sup>125</sup> so the existence of a classification is not necessarily an equal-protection violation. 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.’”<sup>126</sup> If a law does not target a suspect class or burden a

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<sup>123</sup> As previously noted, conferring full voting privileges on the Cherokee Delegate would likely raise serious constitutional concerns. In 1993, some Members of the House brought suit challenging a change to House rules enabling the U.S. territories’ and District of Columbia’s delegates to cast votes in the Committee of the Whole. *See Michel v. Anderson*, 817 F. Supp. 126, 134 (D.D.C. 1993), *aff’d*, 14 F.3d 623 (D.C. Cir. 1994). The rule included a “savings clause” providing that when a vote in the Committee was decided by a margin within which the delegates’ votes were decisive, the issue was automatically referred to the full House for a vote in which the territorial delegates could not participate. *Id.* at 142. The U.S. District Court for the District of Columbia stated that although it would have been “plainly unconstitutional” for delegates to cast decisive votes in the Committee, the savings clause meant that, based on the record before it, those votes ultimately “had no effect on legislative power, and . . . did not violate Article I or any other provision of the Constitution.” *Id.* at 147–48. The U.S. Court of Appeals for the D.C. Circuit affirmed the lower court’s judgment but identified the constitutional question as whether the House rule improperly bestowed “the characteristics of membership on someone other than those ‘chosen every second Year by the People of the several States’” in violation of Article I, Section 2 of the Constitution. *Michel*, 14 F.3d at 630. While the court suggested it would be “blatantly unconstitutional” to confer full voting privileges to the delegates, *id.* at 627, the delegates’ voting authority was “largely symbolic” given the rule’s savings clause, and delegate participation in the Committee was akin to the House’s long-standing practice of allowing delegates to serving on standing committees. *Id.* at 632.

<sup>124</sup> 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 Court has analyzed federal equal protection claims under the Fifth Amendment “precisely the same” as those 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). U.S. CONST. art. 1, § 2. For more legal analysis of the Equal Protection Clause, see Cong. Rsch. Serv., *Equal Protection and Rational Basis Review Generally*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-8-1-2/ALDE\\_00000817/](https://constitution.congress.gov/browse/essay/amdt14-S1-8-1-2/ALDE_00000817/) (last visited Dec. 15, 2022).

<sup>125</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>126</sup> *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020) (citation omitted).



fundamental right, the law will survive an equal-protection challenge so long as “it bears a rational relation to some legitimate end”—a test known as *rational-basis review*.<sup>127</sup>

Potential challengers may argue that recognizing a Cherokee Delegate violates the voting rights principle<sup>128</sup> known as the “one-person, one-vote” rule.<sup>129</sup> The Supreme Court has long held that once the government grants the electorate the right to vote, the right must be exercised on equal terms.<sup>130</sup> The Equal Protection Clause thus prohibits any voting restrictions that “value one person’s vote over that of another.”<sup>131</sup> 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.”<sup>132</sup> *Vote dilution* refers to “the idea that each vote must carry equal weight,” or that “each representative must be accountable to (approximately) the same number of constituents.”<sup>133</sup>

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 ways.<sup>134</sup> First, if only members of the Cherokee Nation are represented by a Cherokee Delegate to Congress, and such members are also residents of one of the fifty states, those individuals could be represented by both a full voting Member *and* a Cherokee Delegate, thus potentially giving them a “super-vote”<sup>135</sup> and double representation in Congress.<sup>136</sup> However, courts have ruled that territorial delegates’ privileges are *not* unconstitutional legislative powers because, under internal House rules, they cannot affect the “ultimate result” of legislative votes.<sup>137</sup> The extent to which a Cherokee Delegate’s privileges are

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<sup>127</sup> *Romer*, 517 U.S. at 631.

<sup>128</sup> 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.

<sup>129</sup> 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*, 578 U.S. 54, 59 (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.

<sup>130</sup> *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Bush*, 531 U.S. at 104.

<sup>131</sup> *Bush*, 531 U.S. at 104–05.

<sup>132</sup> *Reynolds*, 377 U.S. at 555.

<sup>133</sup> *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.’”).

<sup>134</sup> Rosser, *supra* note 39, at 145.

<sup>135</sup> The Supreme Court has explained that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.” *Reynolds*, 377 U.S. at 562. Accordingly, “the Equal Protection clause requires the equalization of voter representation, not interest representation.” *Morris v. Bd. of Estimate*, 831 F.2d 384, 392 (2d Cir.), opinion corrected, 842 F.2d 23 (2d Cir. 1987). As one Justice phrased it, the Equal Protection Clause forbids “the elevation of a small class of ‘supervoters’ granted an extraordinarily powerful franchise.” *Brown v. Thomson*, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

<sup>136</sup> The Cherokee Nation’s constitution provides that a Cherokee Delegate (such as Ms. Teehee) shall be “appointed by the Principal Chief and confirmed by the Council [tribal legislative body]” rather than elected. Constitution of the Cherokee Nation, art. VI, § 12 (2003), <https://www.cherokee.org/media/lusafaj1/constitution-of-the-cherokee-nation-1999-online.pdf> (last visited Dec. 15, 2022).

<sup>137</sup> Rosser, *supra* note 39, at 148.

limited in the same way as territorial delegates may bear on whether an unconstitutional “super-vote” is created.

Second, if a tribal member were told to vote in *either* the election for a full voting Member *or* in the election for the Cherokee Delegate, this could still result in a form of “super-vote” because non-Cherokee voters would not have the same opportunity to “shop for the election in which their vote would be most powerful.”<sup>138</sup> Thus, according to at least one commentator, “through the Cherokee delegate, non-Cherokees would see their representational rights diluted.”<sup>139</sup>

Some legal scholars suggest that the unique nature of tribal law and the historical context of the treaties and past disenfranchisement practices toward Indians may factor into the constitutional analysis.<sup>140</sup> The Supreme Court has upheld legislation that “singles out Indians for particular and special treatment” against equal-protection challenges “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”<sup>141</sup> 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.<sup>142</sup> The Court determined that the employment preference was not based on race, but rather the unique political status of Indians and the relationship between tribes and the government.<sup>143</sup> Although *Morton* involved racial discrimination challenges in the employment context, the unique legal status of federally recognized tribes and their members—and, in this case, the unique situation of the Cherokee Tribe and the provision it negotiated in the New Echota Treaty—may factor into a court’s analysis of an equal-protection challenge.<sup>144</sup>

A similar but distinct challenge could arise from other federally recognized 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 members of the Cherokee Nation were granted superior voting and representational power in Congress. These tribes may contend this results in arbitrary and disparate treatment among Indian voters.

In analyzing such a challenge, a court would likely first determine whether the various tribes are “similarly situated,” because equal-protection principles require that similarly situated individuals be treated alike.<sup>145</sup> Individuals are similarly situated when they are “alike in all relevant respects,” but this does not mean “identically situated.”<sup>146</sup> In the case of the Cherokee Tribe, the government arguably created a non-self-executing promise of a delegate through a treaty.<sup>147</sup> A treaty between the United States and an Indian tribe is a “contract between two sovereign nations.”<sup>148</sup> Therefore,

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<sup>138</sup> *Id.* at 145.

<sup>139</sup> *Id.* at 146.

<sup>140</sup> *Id.* at 149.

<sup>141</sup> *Id.* at 555.

<sup>142</sup> *Id.* at 537.

<sup>143</sup> *Id.* at 551.

<sup>144</sup> See *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (“It is settled that ‘the unique legal 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.”).

<sup>145</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>146</sup> *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020).

<sup>147</sup> See *supra* p. 8 (discussing ways the pledge made under the delegate provision of the New Echota Treaty could be interpreted).

<sup>148</sup> *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979).

it could be argued that successors-in-interest to the Cherokee signatories are not similarly situated to other tribes because other tribes are not parties to the New Echota Treaty and possess no similar treaty rights. Under that reasoning, no equal-protection violation would exist.<sup>149</sup>

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.<sup>150</sup> When applying rational-basis review, a court must only find that “the classification rationally further[s] a legitimate state interest.”<sup>151</sup> In this context, Congress might assert that it has a legitimate interest in executing treaty provisions.

Ultimately, the recognition of a Cherokee Delegate is a novel issue and one that cannot be easily analogized to other existing equal-protection scenarios. As a result, current precedent cannot 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 could hear the case only if it determined that the challenge is *justiciable*. Justiciability is a constitutional limitation established by the Supreme Court that refers to the types of matters a court may adjudicate.<sup>152</sup> 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” either involve no judicially enforceable right or are more properly entrusted to another political branch.<sup>153</sup> Questions in this latter category are more commonly known as nonjusticiable “political questions.”<sup>154</sup>

Since the Supreme Court’s 1962 decision in *Baker v. Carr*,<sup>155</sup> 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 courts. In *Baker*, the Supreme Court first recognized the justiciability of malapportionment claims.<sup>156</sup> There, the Court held that a Tennessee state legislative map that had not been redrawn in nearly sixty 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.”<sup>157</sup> In so holding, the Court set forth six circumstances under which a claim might constitute a nonjusticiable political question:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;

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<sup>149</sup> 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).

<sup>150</sup> *E.g.*, *Agua Caliente Tribe of Cupeño Indians of Pala Rsr. v. Sweeney*, 932 F.3d 1207, 1220 (9th Cir. 2019).

<sup>151</sup> *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

<sup>152</sup> *See generally* *Flast v. Cohen*, 392 U.S. 83, 94–95 (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).

<sup>153</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

<sup>154</sup> *Id.*

<sup>155</sup> 369 U.S. 186, 237 (1962).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

2. a lack of judicially discoverable and manageable standards for resolving the claim;
3. the impossibility of deciding the claim without an initial policy determination of a kind clearly for nonjudicial discretion;
4. the impossibility of a court's undertaking independent resolution of the claim 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.<sup>158</sup>

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.”<sup>159</sup>

Beyond population deviations resulting in malapportionment, such as those presented in *Baker*,<sup>160</sup> the Court has also found that claims of racial gerrymandering—districting plans that unconstitutionally diminish the votes of racial minorities—present a justiciable equal-protection claim.<sup>161</sup> Recently, however, the Court determined that questions of *political* gerrymandering, or “[t]he 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,”<sup>162</sup> present political questions that are beyond the reach of the federal courts.<sup>163</sup> 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.”<sup>164</sup> In a similar vein, although the separation of powers principle limits the justiciability of challenges to House rules—and a court may not order the House to adopt any particular rule<sup>165</sup>—courts nevertheless retain “responsibility to say what rules Congress may not adopt because of constitutional infirmity.”<sup>166</sup>

Whether a court would find a challenge to the Cherokee Delegate justiciable may depend on several competing considerations, including who brings the challenge and how it is

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<sup>158</sup> *Vieth*, 541 U.S. at 277 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>159</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

<sup>160</sup> *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).

<sup>161</sup> *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (“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 rejected, districting plans that unconstitutionally diminished the effectiveness of the votes of racial minorities.”), *abrogated on other grounds by Rucho*, 139 S. Ct. at 2484.

<sup>162</sup> *Vieth*, 541 U.S. at 271 n.1.

<sup>163</sup> *Rucho*, 139 S. Ct. at 2484.

<sup>164</sup> *Id.* at 2501.

<sup>165</sup> *Michel v. Anderson*, 817 F. Supp. 126, 138 (D.D.C. 1993), *aff’d*, 14 F.3d 623 (D.C. Cir. 1994).

<sup>166</sup> *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1982).

characterized.<sup>167</sup> For example, some matters involving treaties may preclude judicial review.<sup>168</sup> On the other hand, courts sometimes “interpret . . . treaties and . . . enforce domestic rights arising from them.”<sup>169</sup> In *United States v. Decker*, for example, the U.S. Court of Appeals for the Ninth Circuit held that the political question doctrine did not apply in an equal protection challenge to regulations established pursuant to an Indian treaty.<sup>170</sup>

Beyond treaty considerations, a court could also consider justiciability factors utilized in apportionment cases. Under such an analysis, a court may find that a traditional one-person, one-vote question is justiciable under basic equal-protection principles.<sup>171</sup> In *Michel v. Anderson*, the U.S. Court of Appeals for the D.C. Circuit determined that a suit brought by House Members and private voters raised a justiciable claim challenging House rule changes allowing territorial and district delegates to vote in the Committee as a Whole.<sup>172</sup>

## Conclusion

The New Echota Treaty’s Cherokee Delegate provision is in some respects novel, especially in the context of its modern-day applicability. The historical background is complex, and it is not clear how the signatories would have understood such a delegate’s role in the House. It seems likely that some action by Congress would be necessary if it desires to implement the provision today. Ultimately, it is possible that legal challenges could arise if a delegate is seated—such as whether seating the Cherokee Delegate may present equal-protection challenges—but it is unclear how a court would decide the issues of first impression, or whether it would find the challenges justiciable at all.

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<sup>167</sup> The 1997 decision of *Raines v. Byrd*, which was issued after the D.C. Circuit’s decision in *Michel*, is likely to inform the standing analysis of any potential legal challenge brought by Members of Congress. See *Raines v. Byrd*, 521 U.S. 811, 825 (1997) (holding that Member plaintiffs lacked standing to challenge an “abstract dilution of institutional legislative power”). Even if a Member may otherwise have standing, courts have at times relied on the prudential doctrine of equitable or remedial discretion to dismiss challenges to internal House matters brought by an individual Member when the Member could “obtain substantial relief from his fellow legislators.” See *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). The current applicability of this doctrine is uncertain. See *Campbell v. Clinton*, 52 F. Supp. 2d 34, 40 (D.D.C.1999) (observing that “the separation of powers considerations previously evaluated under the rubric of ripeness or equitable or remedial discretion now are subsumed in the standing analysis”).

<sup>168</sup> 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.”).

<sup>169</sup> *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979).

<sup>170</sup> *Id.* at 738.

<sup>171</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (noting population inequality claims could be decided based on “basic equal protection principles”).

<sup>172</sup> *Michel v. Anderson*, 14 F.3d 623, 625–28 (D.C. Cir. 1994) (deciding that the challenge did not raise a nonjusticiable political question and that doctrines counseling against adjudication of claims raised by Members did not apply to claims brought by private citizens). See generally *supra* note 123 (discussing the *Michel* litigation).

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