

**LEGAL AND PROCEDURAL FACTORS RELATED TO
SEATING A CHEROKEE DELEGATE IN THE
U.S. HOUSE OF REPRESENTATIVES**

HEARING
BEFORE THE
COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTEENTH CONGRESS
SECOND SESSION

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WEDNESDAY, NOVEMBER 16, 2022
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LEGAL AND PROCEDURAL FACTORS RELATED TO SEATING A CHEROKEE NATION DELEGATE IN THE U.S. HOUSE OF REPRESENTATIVES

WEDNESDAY, NOVEMBER 16, 2022

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, DC.

The committee met, pursuant to call, at 10:04 a.m., in Room H-313, The Capitol, Hon. James P. McGovern [chairman of the committee] presiding.

Present: Representatives McGovern, Torres, Raskin, Scanlon, Morelle, DeSaulnier, Ross, Cole, Burgess, Reschenthaler, and Fischbach.

The CHAIRMAN. All right. The Rules Committee will come to order.

America's history with the indigenous people that are native to this land is atrocious. There is no other way to put it. It is appalling. Thankfully, it is becoming common to acknowledge this publicly, whether that means recognizing Native American Heritage month every November or pointing out that this Capitol is built on the stolen land of the Nacotchtank and Piscataway people who lived along the Potomac River long before this country existed, but the truth is that simply acknowledging this truth is not enough.

Words alone don't absolve us of the horrific injustices brought on American Native communities at the hands of the U.S. Government. Actions do. And that is why I am hopeful that today's historic hearing opens a new door towards building greater understanding and the possible inclusion of these communities in Congress.

You know, in 1835, the U.S. Government and individuals from the Cherokee Nation negotiated the Treaty of New Echota, an agreement with this government that was ratified by the United States Senate. The treaty which led to the forced removal of the Cherokee from their homelands included a provision that says that the Cherokee Nation, I quote, shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same, end quote.

It has been nearly 200 years, but I am proud that this committee on this day at this hearing for the first time ever is exploring procedural options for the potential implementation of seating a Cherokee Nation Delegate. This is a complicated issue, which is why we

have experts with us today to help answer questions and help us to find a way to move forward.

And several other Tribes have also come forward to say that they are entitled to a delegate as well. So while the conversations we are having pertain solely to the Cherokee Nation, we know that more work will have to be done to examine this issue further.

I personally believe we need to find a way to honor our treaty obligations with the Cherokee Nation, even though it will be a potentially challenging road to get there, but we need to honor those treaty obligations. And Congress should find a way to make this happen.

And now let me turn to our ranking member, Mr. Cole, a member of the Chickasaw Nation of Oklahoma and one of only a few Native Americans serving in Congress right now, for his remarks. I am proud to serve alongside of him every day but especially today as he helps this institution navigate this important issue.

Mr. COLE. Probably some days more than others, Mr. Chairman, but this is a good day. And I want to thank you very much, Mr. Chairman, and I want to thank my friend, Chief Hoskin, for being here.

We are here today for an original jurisdiction hearing examining the legal and procedural factors related to seating a delegate from the Cherokee Nation in the House of Representatives.

Before I continue my remarks, I want to personally thank you, Mr. Chairman, for holding this hearing today. I am hopeful that the discussions that we have today help lay the groundwork for other committees of jurisdiction to examine this issue in more detail. Regardless, today marks an important first step toward examining the questions and the process surrounding the seating of a delegate from the Cherokee Nation.

As a member of the Chickasaw Nation and co-chair of the Congressional Native American Caucus, I have always voiced my support for the Federal Government to honor its treaty obligations. For far too long in our Nation's history, the Federal Government accumulated a sorry record of making promises to Tribes and then breaking those promises as soon as it was expedient to do so. Only in recent years has the record improved.

With today's hearing, we begin examination of a specific promise made in the Treaty of New Echota in 1835, and I certainly welcome the examination of this question by Congress. But it seems clear from the language of the treaty that this right is not self-executing and would require action by Congress to implement. As we consider this, members of the House have real questions about this issue, and the purpose of today's hearing is to begin examining those questions in detail.

In addition to basic procedural questions, these questions will include: Are there other Tribes that have this right? Why did the Tribe choose to select its delegate by council vote rather than by vote of the Tribe? Are there concerns about double representation resulting in constituents being represented both by their geographic Member of Congress and by a delegate from the Tribe? Is this arrangement constitutional, and if so, what factors must be considered? How would the seating of a delegate change the character of the House if it did at all? And many more.

I list out these questions for our witnesses to discuss, along with others that will assuredly come up during today's hearing.

It is important to note that the right contained in the treaty may be clear, but the resolution of those rights and how they may be applied still require great examination and consideration. If the House ultimately decides to move forward, it will only do so after a bipartisan recognition of the claim and a bipartisan process going forward. We should remember that the Cherokee Nation is not the only Tribe that has or may have this right, and the process we ultimately follow for this claim may apply to others as well.

I am glad to see Tribes advocating for their treaties with such conviction, and today's hearing represents a starting point in that bipartisan process of recognizing Tribal treaty rights. However, additional work and consideration is needed, particularly by the other committees of jurisdiction. I hope the work begun here today continues to carry the process forward, ideally examining all such claims by Tribes that possess them.

Finally, I wish to clean up a common misunderstanding about the nature of today's hearing that I have seen reported in the media. This is a hearing to give Congress an opportunity to understand the issue of seating a delegate to represent the Cherokee Nation. There is no vote on that issue today. Indeed, at present, no legislation has been introduced on this issue. Today's hearing is a good first step, but we have a long way to go in the process. Indeed, until legislation is proposed and the issue is taken up by all committees of original jurisdiction, Congress is unlikely to act.

I thank our witnesses for appearing before us today in what I think of is an historic hearing, and I look forward to their testimony.

With that, Mr. Chairman, I yield back.

The CHAIRMAN. Thank you. And I thank the ranking member for his opening statement. And I now want to introduce our distinguished witnesses.

Chuck Hoskin, Jr., serves as the principal chief of the Cherokee Nation. Prior to being elected to his role in 2019, Chief Hoskin was Cherokee Nation's secretary of state and also served as a member of the Council of the Cherokee Nation.

Lindsay Robertson is a professor at the University of Oklahoma College of Law and an indigenous law center visiting professor. He teaches classes in Federal Indian law, constitutional law, and international and comparative indigenous people's law, among other topics.

Mainon A. Schwartz is a legislative attorney in the American Law Division of the Congressional Research Service. In that capacity, Ms. Schwartz provides nonpartisan, legal, and constitutional analysis to Congress on a range of matters, including Federal Indian law and congressional authority over the United States territories.

We are delighted that all three of you are here. And, Chief Hoskin, we will begin with you. And just make sure your light is on.

**STATEMENT OF CHUCK HOSKIN JR., PRINCIPAL CHIEF,
CHEROKEE NATION**

Mr. HOSKIN. Certainly. Chairman McGovern, Ranking Member Cole, and distinguished members of the committee, Osiyo. That is hello. And I bring you greetings from the Cherokee Nation Reservation.

And before I go into my remarks, I want to acknowledge that representatives of our government, other than myself, are here today. We have our speaker of the Council of the Cherokee Nation, Mike Shambaugh is here; Councilman Keith Austin is here; Counselor Joe Deere is here; a member of my cabinet, the marshal of the Cherokee Nation, Shannon Buhl is here; and, of course, our delegate to the United States House of Representatives, Kim Teehee is here with us.

The CHAIRMAN. We are honored that you are all here.

Mr. HOSKIN. This is, Mr. Chairman, an historic day for the Cherokee Nation and an historic day for the United States. We are reexamining something that is of critical importance to both the United States and the Cherokee Nation, and I thank you for holding the hearing.

I speak to you today on behalf of not only the more than 440,000 citizens of the Cherokee Nation, but millions of Cherokee citizens who have waited for this day to come since 1835.

This morning we will examine a promise made to the Cherokee Nation. The Treaty of New Echota, Mr. Chairman, is our removal treaty. This was the agreement that directly led to the deaths of thousands of Cherokees on the Trail of Tears.

In this treaty, the Cherokee Nation conveyed the entirety of our lands east of the Mississippi, about 7 million acres, to the United States. In exchange, the Government of the United States made certain promises. One of those promises was that it is, quote, stipulated that the Cherokee Nation shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same. And that is Article 7 of the Treaty of New Echota.

The carefully constructed promise found in that article was, in fact, critical to secure the agreement of the Cherokee people. Quote, the Indians will never approve that bill without the delegate. That was from a negotiator from the Cherokees, John Ridge. Quote, if you fail to obtain for us the right of being heard on the floor of Congress by our delegate, let the bill perish here.

The bill did not perish. The Federal Government agreed to the delegate. The parties entered into the Treaty of New Echota, and the Senate of the United States ratified that treaty.

Our right to a delegate was brought forward in our last treaty with the United States in 1866, and it remains the supreme law of the land. Cherokee Nation and Cherokee Nation alone is the tribe that is the party to the Treaty of New Echota and the Treaty of 1866.

Cherokee Nation has, in fact, adhered to our obligations under these treaties. I am here to ask the United States to do the same. It is time for this body to honor this promise and seat our delegate in the House of Representatives. No barrier, constitutional or otherwise, prevents this.

As you consider this issue, I believe it is important that you remember the following: First, the Treaty of New Echota is a living, valid treaty, and the delegate provision is intact. Lapse of time cannot abrogate a treaty. That is settled law. To abrogate a treaty, Congress must do so expressly and clearly, and it has not done so here.

Article 7 uses classic mandatory language that creates a right for the Cherokee Nation and imposes a duty on the United States. The provision twice uses the word "shall." It uses terms "stipulated" and "entitled."

This right is unique to the Cherokee Nation. Seating our delegate would not open up the flood gates to other Tribes seeking their own representation. Only three Tribal treaties contemplate some voice in the House of Representatives. Of these, the Cherokee Nation right in the Treaty of New Echota is by far the clearest and most direct.

Fairness as always, Mr. Chairman, is important, but denying Cherokee Nation our right to a delegate simply because this is not a universal right shared by all Tribes is not fairness. Our ancestors prioritized this right in the negotiation of the Treaty of New Echota. We have no right to claim the treaty of other Tribes; they have no right to claim ours.

Concerns over dual representation have been voiced, and they are not warranted. It is well settled since the founding era that the term "representative" in the constitutional sense requires that the representative have a vote on the House floor for final passage. A delegate in this body has no such right.

Indian treaties, unlike international treaties, are self-executing, and the Congressional Research Service asked whether this treaty right is self-executing, but CRS points to cases addressing international treaties, and there is, Mr. Chairman, a distinction.

And I acknowledge the Supreme Court has repeatedly concluded that an international treaty must be domesticated through a Federal statute; however, Indian treaties are inherently domesticated. All of the cases that have considered this have held that Indian treaties are self-executing.

And, Mr. Chairman, I would point the committee to the 1986 Supreme Court case of *Tsosie v. The United States*. The Court summed it up this way, quote, the government has simply failed to counter the argument that no case has ever held an Indian treaty to be nonself-executing.

Mr. Chairman, the House has ample authority to unilaterally seat a treaty-backed Cherokee Nation Delegate. Under the Constitution's Supremacy Clause, treaties and statutes create the supreme law. Since a treaty established the delegate position, there is no need for a separate statute to create the delegate position. This would render the treaty right in article 7 of our treaty meaningless. We agree with the CRS that the House could seat our delegate by adjusting its standing rules through a House resolution.

Mr. Chairman, Tribes, Tribal organizations, and Tribal citizens across the country strongly support our effort. They understand that fulfilling this promise would be an historic victory for treaty rights and sovereignty. The Treaty of New Echota requires, re-

quires, Mr. Chairman, the House to seat our delegate. I urge you to seat Kim Teehee without delay.

Finally, Mr. Chairman, I am a proud American, and I am a proud citizen of the Cherokee Nation. I have great respect for the United States' House of Representatives. Because of all of this, it is my firm belief and expectation that the House of Representatives will take swift action to seat our delegate to Congress, honor our treaty right, and, therefore, make the United States good on its promise to our Cherokee ancestors.

Wado, thank you, and I am happy to answer any questions.
[The statement of Mr. Hoskin follows:]



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Bryan Warner
 Deputy Principal Chief
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November 16, 2022

**Submitted Testimony of Cherokee Nation Principal Chief Chuck Hoskin, Jr.
 House Committee on Rules hearing on “Legal and Procedural Factors Related to Seating a
 Cherokee Nation Delegate in the U.S. House of Representatives”**

Chairman McGovern, Ranking Member Cole, and distinguished members of the committee:

In the lead up to the signing of the Treaty of New Echota, the agreement that led to the deaths of thousands of Cherokees on the Trail of Tears, lead Cherokee negotiator John Ridge wrote a letter to George R. Gilmer, the former governor of Georgia. In this letter Ridge emphasized the critical importance of a promise that was to be made to Cherokee Nation through this document.

*The Indians in the west as I am correctly informed very much desire that in this Bill the delegate might be allowed. We of the east who are desirous to emigrate are also anxious that this privilege should be granted to our people. If congress cannot swallow the word “Delegate”, we do not desire they should give us the agent. **The Indians will, I am very confident never approve that Bill without the Delegate.** From myself sir, I shall oppose its reception if any other word is inserted. . . If you fail to obtain for us the right of being heard on the floor of Congress, by our Delegate, let the Bill perish here, without the trouble of submitting it to our people only to be rejected. . . But how can I find words to convince my people of the liberality and friendship of the U.S., to them, when at the outset this right, which would have rendered them a great people, is denied by Congress.*

Article 7 of the treaty entitles Cherokee Nation to “a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same,” and Ridge’s plea speaks to the absolute centrality of Article 7 to the Cherokee Nation. Article 7 was carefully crafted in traditional mandatory language and its meaning is perfectly clear—as a condition of this treaty, which conveyed all Cherokee land east of the Mississippi River to the United States, Cherokee Nation shall be granted the right to a delegate.

Today, I come before you to remind you of the promise the Federal Government made to our ancestors. I ask the House of Representatives to honor this treaty right, fulfill its obligation under the treaty, and seat our Delegate. No constitutional or prudential barrier prevents the House from

complying with its treaty obligation, and seating the delegate would be consistent with the text of the Constitution, with House’s precedents, and historical practice dating back to the Founding era.

There are a few key things I’d like to get across this morning. First, **the Treaty of New Echota is a living, valid treaty, and the Delegate provision is intact because it has never been abrogated.** As the Supreme Court has made clear on multiple occasions, and as the landmark *McGirt* decision reaffirmed, lapse of time cannot divest Indian nations of their treaties and treaty rights. To end a treaty right Congress must abrogate the right in clear and unmistakable terms. And that Congress has not done. As CRS concludes “Congress ... does not appear to have explicitly abrogated the New Echota Treaty’s delegate provision. ... [N]o specific statutory language abrogating the Cherokee Delegate pledge has been identified to date.”

Federal courts hold the same view, and continue to reference the Treaty of New Echota and our subsequent Treaty of 1866—which expressively reaffirmed all prior treaty provisions not inconsistent with the 1866 agreement—as whole and binding agreements upon Cherokee Nation and the United States.

Second, **the Treaty imposes a mandatory duty to seat our Delegate.** Article 7 of the Treaty of New Echota grants a clear legal right to a delegate in the House of Representatives.

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 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.

Article 7 plainly uses classic mandatory language that creates a **right** for Cherokee Nation and imposes a **duty** on the United States. It does not allow Congress to decide whether to fulfill this obligation. In the 1830s, as now, the word “entitled” meant “having a right to certain benefits or privileges.” A “stipulation” is an “agreement or covenant” that “settle[s] terms.” Additionally, Article 7 twice uses the mandatory “shall”—*i.e.*, that the Cherokee “shall be entitled to a delegate” and that Congress “shall make provision for the same.” “The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person or institution instructed to carry out the directive[.]”

The treaty right’s sole condition concerns timing of implementation—“whenever Congress shall make provision for the same.” The treaty’s drafters recognized that Congress needed to act before the Cherokee Nation delegate could be seated. The Senate had to ratify the treaty and the House (given its authority to “determine the Rules of its Proceedings”) had to “make provision” for the Nation’s delegate.

The Senate has upheld its end of the bargain by ratifying the Treaty of New Echota. Now all that remains is for the House to do its duty by seating the Nation's delegate.

Again, I go back to how our ancestors negotiating the Treaty viewed this provision. Cherokee Nation representatives refused to sign a treaty unless it provided the right to a full delegate, with the same privileges to speak on the floor as territorial delegates enjoyed. The United States relented and granted the Nation the right it had demanded. Given this history, the Delegate right cannot be understood as creating an option that the House may or may not implement as it deems fit.

Third, **the Treaty right is unique.** Seating our Delegate would not open the floodgates for other Tribes seeking similar representation in the House. Only three Tribal treaties contemplate representation—the Treaty of New Echota, the Treaty of Dancing Rabbit Creek, and the Treaty with the Delawares. Of the three, Cherokee Nation's delegate right is by far the clearest and most direct.

Fourth, **the term "Delegate" was carefully chosen and had a clear meaning.** It's important to note that Cherokee Nation's delegate right is a progeny of a previous right found in the Treaty of Hopewell (1785), and the Federal government's unwillingness to honor this right directly led to stronger language being included in the Treaty of New Echota. Article 12 of the Treaty of Hopewell said Cherokee Nation "shall have the right to send a deputy of their choice, whenever they think fit to Congress." That right was not honored however. Knowing this, when President Jackson and his negotiators sought to negotiate a treaty with the Cherokee as a basis for removal in the 1830s, they used the promise of a Cherokee delegate to Congress as a bargaining chip.

Everyone involved in the negotiations understood that a delegate meant something different than an agent or deputy, and negotiations confirm that the Cherokee negotiators understood the Treaty of New Echota to create a mandatory right to a delegate. Article 7 became stronger over time as the parties worked toward a final agreement. In 1832, the Department of War offered the Cherokee the right to appoint an "agent" to "communicate [the tribe's] claims and wishes to the Government." A separate proposed term stated, "if Congress assent to the measure, you shall be allowed a delegate to that body, and shall also, when your improvement and other circumstances will permit, and when Congress think proper, be placed in the relation of a Territory." The government's 1834 proposal included both a promise to "refer their application" to Congress for a Cherokee delegate and a promise to let an agent represent the tribe's interests in Washington.

The parties negotiated an unratified treaty in March 1835. That treaty eliminated the provision for an "agent" but maintained a provision creating a "delegate." The right to a delegate, rather than the mere referral President Jackson had originally offered to make to Congress (akin to the language found in the Treaty of Dancing Rabbit Creek), was a critically important term of the treaty, and guaranteed Cherokee Nation a voice in the House of Representatives.

Fifth, I am aware that questions have been raised regarding whether seating the delegate would provide dual representation. These **concerns over dual representation are unwarranted.** It is well settled since the founding era that the term "Representative" is a unique position in our constitutional system of government. To represent in the constitutional sense requires that the

representative has a vote on the House floor for final passage of legislation. Since it is contemplated that the Cherokee Nation delegate – like other delegates – would not be able to vote for final passage of a bill on the House floor, the delegate would not enjoy this critical ingredient to “represent” any constituency.

For this reason, seating a delegate cannot possibly impact the “one person, one vote” constitutional maxim. CRS reached the same conclusion earlier this summer: “It should be noted that the Cherokee individual would likely not be represented by two full-voting members because the Cherokee Delegate would likely not have full-voting privileges.”

Congress has periodically authorized nonvoting delegates to give voice to particular perspectives that Congress has deemed appropriate to recognize, pursuant to the House’s plenary power over its rules and proceedings and the plenary federal power to regulate federal territories, enter treaties, and manage relations with Indian nations. Accordingly, the provision of the Treaty of New Echota that mandates a delegate to represent the Cherokee Nation is a permissible exercise of those powers and creates no dual representation problem or other constitutional issue.

Sixth, the Cherokee Nation Constitution lays out a process whereby our Delegate is appointed by the Principal Chief and confirmed by our Tribal Council. The Treaty of New Echota is silent on a particular method of choosing a delegate, and **our process of appointing a delegate is perfectly permissible and should not pose a significant barrier to seating.** The initial delegates to the House of Representatives were often appointed, and Congress has always recognized appointment as a method of selection. Nonvoting delegates from the territories were exclusively appointed in the early days of our nation, and 1976’s Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America gave NMI a choice—to either appoint or to elect a delegate as it saw fit. (“The Constitution or laws of the Northern Mariana Islands may provide for the appointment or election of a Resident Representative to the United States.”) The Treaty of New Echota leaves the selection of a delegate to Cherokee Nation, and the people of Cherokee Nation, through a popularly ratified Constitution, have opted for this process for selecting a delegate.

Seventh, **the House has ample authority to unilaterally seat a Treaty-backed delegate.** Under the Constitution treaties and statutes create the “supreme law” of the United States. The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” A treaty established the delegate position. Therefore, there is no need for a separate statute to create the delegate position—this would be nonsensical and render the treaty right and the language of Article 7 meaningless.

We agree with CRS that the House could choose to seat a new delegate by adjusting its standing rules through a House Resolution, and this would be the simplest and most direct way to seat the Cherokee Nation Delegate in a timely manner and finally fulfill this treaty commitment.

Eighth, I am aware that CRS questioned whether this right to a delegate treaty provision is self-executing. Every court who has looked at the issue has concluded that **Indian treaties—unlike**

international treaties—are self-executing. CRS only cites authorities discussing international treaties. There, the Supreme Court has repeatedly concluded that an international treaty generally must be domesticated through a federal statute to be enforceable. However, Indian treaties are already domestic, between the United States and a tribe, what Chief Justice John Marshall called a “*domestic dependent nation*.” In the 1986 case *Tsosie v. United States*, the Federal Government contended that a provision in a Navajo Treaty was not self-executing. The court squarely rejected this contention, first stating that “[a]lthough the matter has only infrequently been considered by the courts; in those instances where it has been, the treaty has been held to be self-executing,” citing numerous Supreme Court cases. 11 Cl. Ct. 62 (1986) (citing, e.g., *Francis v. Francis*, 203 U.S. 233 (1906); *Jones v. Meehan*, 175 U.S. 1 (1899); *United States v. Forty-Three Gallons of Whiskey*, 3 Otto 188, 93 U.S. 188 (1876) The *Tsosie* court continued, the “Government has simply failed to counter the plaintiff’s cogent argument that *no case has ever held an Indian treaty to be non-self-executing*.” (Emphasis added).

And finally, **any suggestion that seating the Cherokee Nation Delegate would lead to an equal protection claim, from another Tribe or from an individual, is without merit.** Other Federally recognized Tribes would not be denied equal protection if our Delegate was seated, as treaties often provide promises to a Tribe or set of Tribes to the exclusion of other Tribes. Consider the Pacific Northwest, where numerous Tribes have fishing rights. We have no claim because they have those rights and we do not—when negotiating their treaties, those Tribes prioritized fishing rights. Similarly, we prioritized a voice in the House of Representatives. Treaties are bargained-for instruments based on the desires of the Federal government and the needs of the individual tribal nation. Virtually every treaty makes specific commitments that are only provided to the signatory tribe. If treaty rights were to breach equal protection, then virtually all Indian treaties would do so.

Tribes, Tribal organizations, and Tribal citizens across the country strongly support the seating of the Cherokee Nation Delegate because they understand the significance of what it would mean for the House to live up to the Federal government’s promise. It would be a historic victory for treaty rights and the sovereignty of all Indian Tribes. It would show Indian Country how much this chamber truly honors Tribes and strives to meet its solemn treaty obligations.

The Treaty of New Echota requires the House to seat our delegate, and no legal barrier prevents this chamber from carrying out this duty. Therefore, the House should and must fulfill this treaty obligation and seat our Treaty-mandated delegate.

Wado.

The CHAIRMAN. Thank you very much, Chief, for your powerful testimony.

I now would like to turn to Professor Robertson. You are recognized for your testimony.

STATEMENT OF PROFESSOR LINDSAY ROBERTSON, VISITING SENIOR SCHOLAR, UC HASTINGS COLLEGE OF THE LAW

Mr. ROBERTSON. Good morning, Chairman McGovern, Ranking Member Cole, and other distinguished members of the committee. My name is Lindsay Robertson. And as the chairman mentioned, I am a professor at the University of Oklahoma College of Law and currently Visiting Senior Scholar and Indigenous Law Center Visiting Professor at the UC Hastings College of the Law.

I have been a professor of Federal Indian law for more than 30 years, and taught constitutional law for more than 25. From 2000 to 2010, I served as Special Counsel on Indian Affairs for Oklahoma Governors Frank Keating and Brad Henry. It is an honor to have been invited to address this committee on this important topic.

My role today is to provide an overview of Federal Indian law for those committee members for whom the field is not familiar terrain.

Tribal governments in the United States are both preconstitutional and extraconstitutional; that is, they existed before European settlement and they operate apart from and not directly subject to the Constitution.

The power the Tribal governments exercise is inherent, not delegated, by the United States. Federal Indian law deals in large measure with sorting out which sovereign—Federal, State, or Tribal—has jurisdiction over activities that occur within Tribal lands, which the U.S. code calls Indian Country.

The United States recognizes more than 500 Tribal Nations, all of which the U.S. Supreme Court has characterized as domestic dependent nations; nations and not simply aggregations of individuals sharing a particular heritage, but domestic nations, not foreign nations, and, therefore, having a special relationship with the United States.

In the same decision in which it recognized the Tribes as domestic dependent nations, *Cherokee Nation v. Georgia* in 1831, the Court describes that relationship as being like that of, quote, a ward to his guardian, close quote.

In 1886, in *Kagama v. United States*, the Court recognized a substantive legal consequence to this relationship.

As guardian or trustee, the United States has power to legislate over Indian affairs, but also the responsibility to exercise that power to the ultimate benefit of the Tribes.

During most of the 19th century, following the British colonial model, the United States engaged with Tribal governments by treaty. These treaties often provided for cession of Tribal lands, but they covered many other areas as well; military and political alliance, trade relations, and criminal jurisdiction, for example. In one instance, the Treaty of New Echota of 1835, they provided for the sending of a delegate to the U.S. House of Representatives.

As the Federal courts long ago understood, during virtually all of the period of U.S.-Tribal treaty making, severe inequalities existed in the relative bargaining power of Tribes and the United States. Treaties were universally prepared in final form in English, employing American legal concepts often unfamiliar to Tribal signatories. Commonly, the U.S. Army was an active presence during negotiations, resulting in intimidation.

To reflect this reality, courts interpreting treaties with Tribes have employed canons of construction similar to those used in interpreting adhesion contracts. Ambiguities are interpreted in the Tribes' favor, treaties are liberally construed in favor of the Tribes, and treaty provisions are interpreted as the Tribes would have understood them.

Other treaty construction rules arise from the United States' role as guardian for the Tribes. Because the United States is guardian, for example, congressional abrogation of treaty rights requires clear evidence of intent to abrogate.

All Tribes, of course, have different treaty rights, their nature and scope based on individual circumstances. And although I suppose it is a theoretical possibility, to the best of my knowledge, there has never been an equal protection claim brought by one Tribe against another based on a treaty right.

Similarly, although it is clear that in international relations treaties may be either self-executing or non-self-executing, I know of no historical instance of an Indian treaty being held to require implementing legislation prior to the vesting of rights.

I thank you for holding this hearing and for allowing me the opportunity to appear. I would be happy to answer any questions. Thank you.

[The statement of Mr. Robertson follows:]

UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON RULES

HEARING ON
"LEGAL AND PROCEDURAL FACTORS RELATED TO SEATING A CHEROKEE
NATION DELEGATE IN THE U.S. HOUSE OF REPRESENTATIVES"

TESTIMONY OF

LINDSAY G. ROBERTSON

November 16, 2022

Good morning, Chairman McGovern, Ranking Member Cole, and other distinguished members of the Committee.

My name is Lindsay Robertson and I am a professor at the University of Oklahoma College of Law and currently Visiting Senior Scholar and Indigenous Law Center Visiting Professor at the UC Hastings College of the Law. I have been a professor of Federal Indian Law for more than 30 years and taught Constitutional Law for more than 25. From 2000-2010, I served as Special Counsel on Indian Affairs for Oklahoma Governors Frank Keating and Brad Henry. It is an honor to have been invited to address this committee on this important topic.

My role today is to provide an overview of Federal Indian Law for those committee members for whom the field is not familiar terrain.

Tribal governments in the United States are both pre-constitutional and extra-constitutional. That is, they existed before European settlement and they operate apart from and not directly subject to the Constitution. The power that tribal governments exercise is inherent, not delegated by the United States. Federal Indian Law deals in large measure with sorting out which sovereign - federal, state or tribal - has jurisdiction over activities that occur within tribal lands, which the U.S. code calls "Indian Country".

The United States recognizes more than 500 tribal nations, all of which the U.S. Supreme Court has characterized as "domestic dependent nations" – nations, and not simply aggregations of individuals sharing a particular heritage, but domestic nations, not foreign nations, and therefore having a special relationship to the United States. In the same decision in which it recognized the tribes as "domestic dependent nations" – *Cherokee Nation v. Georgia* (1831) – the Court described that relationship as being like that of "a ward to his guardian." In 1886, in *Kagama v. United States*, the Court recognized a substantive legal consequence to this relationship. As guardian, or trustee, the United States has power to legislate over Indian affairs, but also the responsibility to exercise that power to the ultimate benefit of the tribes.

During most of the Nineteenth Century, following the British colonial model, the United

States engaged with tribal governments by treaty. These treaties often provided for cession of tribal lands, but they covered many other areas as well: military and political alliance, trade relations, and criminal jurisdiction, for example. In one instance - the Treaty of New Echota of 1835 - they provided for the sending of a delegate to the U.S. House of Representatives.

As the federal courts long ago understood, during virtually all of the period of U.S.-tribal treaty-making severe inequalities existed in the relative bargaining power of tribes and the United States. Treaties were universally prepared in final form in English, employing American legal concepts often unfamiliar to tribal signatories. Commonly, the U.S. Army was an active presence during negotiations, resulting in intimidation. To reflect this reality courts interpreting treaties with tribes have employed canons of construction similar to those used in interpreting adhesion contracts: ambiguities are interpreted in the tribes' favor, treaties are liberally construed in favor of the tribes, and treaty provisions are interpreted as the tribes would have understood them. Other treaty construction rules arise from the United States' role as guardian for the tribes. Because the United States is guardian, for example, Congressional abrogation of treaty rights requires clear evidence of intent to abrogate.

All tribes of course have different treaty rights, their nature and scope based on individual circumstances, and although I suppose it is a theoretical possibility, to the best of my knowledge there has never been an equal protection claim brought by one tribe against another based on a treaty right. Similarly, although it is clear that in international relations treaties may be either self-executing or non-self-executing, I know of no historical instance of an Indian treaty being held to require implementing legislation prior to the vesting of rights.

I thank you for holding this hearing and for allowing me the opportunity to appear. I would be happy to answer any questions.

Thank you.

The CHAIRMAN. Thank you very much.
And now I want to recognize Ms. Schwartz for your testimony.

**STATEMENT OF MAINON A. SCHWARTZ, LEGISLATIVE
ATTORNEY, CONGRESSIONAL RESEARCH SERVICE**

Ms. SCHWARTZ. Thank you, Chairman McGovern, Ranking Member Cole, and distinguished members of the House Committee on Rules. I am, as you mentioned, a legislative attorney in the American Law Division of the Congressional Research Service, and I am here to discuss the legal and procedural factors related to seating a Cherokee Nation Delegate in the House of Representatives. I am honored to be here.

The issue of seating a Cherokee delegate in the House rose to prominence a few years ago when my copanelist today, 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 and the United States Government. That is the Treaty of New Echota.

For the purposes of this hearing, I am proceeding on the understanding that the Cherokee Nation is a modern-day successor in interest to the Eastern Cherokee Tribe of Georgia. CRS does not take a position on whether any other Tribes may make similar claims under the Treaty of New Echota.

As you are aware, CRS is a nonpartisan agency serving all parties in both houses of Congress. We do not take a position on whether Congress should or should not attempt to seat a Cherokee delegate. Our role is to offer legal and procedural analysis, enabling Congress and this committee to understand the options available to it, along with any attendant risks or uncertainties.

In this specific situation, because Congress has never previously given effect to the Cherokee delegate provision of the Treaty of New Echota, nor ever seated a delegate from a Tribal Nation in the House of Representatives, there are both legal and procedural uncertainties.

It is possible, though not certain, that any action to effectuate the Cherokee delegate provision could prompt constitutional challenges, whether on equal protection or other grounds. Whether courts would entertain such challenges depends on factors, such as who brings those challenges, what legal principles they invoke, and what harms they allege.

The likelihood of potential challenges may also depend on what action, if any, Congress chooses to take. Congress has never seated a delegate in the House other than by legislation going through bicameralism and presentment. A chart in my written testimony details the long history of seating territorial delegates in this manner. However, Congress has also never before seated a delegate in circumstances like those here where a treaty provision, ratified by the President with the advice and consent of the Senate, contemplates that delegate.

There is an argument that in this context, seating a Cherokee delegate requires only amendment or change to the House standing rules. That approach, which would rely primarily on the House's constitutional authority to, quote, determine the rules of its pro-

ceedings, close quote, would be novel and a break from the House's prior position with respect to seating territorial delegates.

Still, that approach does not appear to be explicitly prohibited by constitutional or a statutory text, so long as the delegate is a non-voting participant along the lines of the current territorial delegates. However, such an approach would also require reaffirmance every 2 years. It would not establish a permanent position.

There may also be counter arguments to that approach, including that the Treaty of New Echota itself says the Cherokee will be entitled to a delegate in the House whenever Congress, rather than one chamber, shall make provision for the same.

Ultimately, Congress may be empowered to apply elements of its views on this and other matters of interpretation. 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 domestically.

The canons of treaty interpretation applicable to Indian treaties, as discussed in my written testimony and by my copanelists, although generally viewed as guidelines for judicial interpretation and not binding on Congress, may inform Congress' interpretation.

I look forward to answering the committee's questions. Thank you.

[The statement of Ms. Schwartz follows:]



Statement of

Mainon A. Schwartz
Legislative Attorney

Before

Committee on Rules
U.S. House of Representatives

Hearing on

**“Legal and Procedural Factors Related to
Seating a Cherokee Nation Delegate in the
U.S. House of Representatives”**

November 16, 2022

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Chairman McGovern, Ranking Member Cole, and distinguished Members of the House Committee on Rules, my name is Mainon A. Schwartz, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to discuss legal and procedural factors related to seating a Cherokee Delegate in the U.S. House of Representatives.

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”¹) and the U.S. government (New Echota Treaty).² 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.³ This hearing offers an opportunity to consider potential legal and procedural matters related thereto.⁴

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”⁵—a requirement not met by the Cherokee Delegate. Accordingly, the Cherokee Delegate could not vote on the House floor to pass legislation. However, a Cherokee Delegate could be authorized by the Chamber 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,⁶ which changes in its particulars (such as voting in the Committee of the Whole) from time to time. In the 117th Congress—and previously in the 103rd, 110th, 111th and 116th Congresses—delegates have been permitted to vote in and preside over the Committee of the Whole.⁷

When evaluating possible congressional action in response to the Cherokee Nation’s nomination of a delegate to the House, Congress may consider an array of legal and procedural factors. These include

¹ For purposes of this testimony, when speaking of historical documents and agreements, “Cherokee Tribe” or “Cherokee” is used to distinguish the tribe that was a signatory to the Treaty of New Echota and other historical agreements from any modern-day descendant groups recognized by the federal government, including the Cherokee Nation.

² *Treaty with the Cherokees*, 7 Stat. 478 (Dec. 29, 1835) [hereinafter *New Echota Treaty*].

³ For additional background on Ms. Teehee’s nomination, see Stephanie Akin, *Delegate-in-Waiting (for 184 Years)*, CQ WEEKLY 27–29 (Oct. 15, 2019).

⁴ While congressional interest over the delegate provision of the New Echota Treaty has focused mainly upon its invocation by the Cherokee Nation, it 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*, THE 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 testimony 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 note 11 (D.D.C. 2017).

⁵ 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/art1-S2-C1-2/ALDE_00001032/ (last visited Nov. 4, 2022).

⁶ 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).

⁷ See CRS Report R40555, *Delegates to the U.S. Congress: History and Current Status*, by Jane A. Hudiburg.

certain principles of treaty interpretation, 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 tribes⁸ are *sui generis* because of tribes' unique legal status under the Constitution.⁹ 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.¹⁰ 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.¹¹ First, treaties with Indian tribes should generally be interpreted in the sense in which the tribal signers would have understood them.¹² Second, ambiguities regarding tribal interests should be construed to the tribes' benefit.¹³ Third, if Congress intends to diminish tribal lands or abrogate a treaty, it must do so explicitly.¹⁴ Notwithstanding this clear-intent requirement, Congress retains the authority to abrogate an Indian treaty by subsequent legislation.¹⁵

Treaty of New Echota (1835): the Cherokee Delegate Provision in Context

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 States whenever Congress shall make provision for the same."¹⁶ An examination of the Treaty's terms could provide additional context for that provision.

⁸ 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 Secretary of Interior to publish annually a list of all Indian tribes recognized as "eligible for the special programs and services provided by the United States to Indians because of their status as Indians").

⁹ U.S. CONST. art. I, § 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/ (last visited Nov. 4, 2022).

¹⁰ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10, 13 (1831).

¹¹ "[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).

¹² *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).

¹³ *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)).

¹⁴ *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))).

¹⁵ 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.

¹⁶ New Echota Treaty, 7 Stat. 478, 482, art. 7. 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

In the New Echota Treaty, the Cherokee signatories agreed to relinquish their eastern lands and remove their Nation to new territory west of the Mississippi. Ultimately, tens of thousands of members of the Cherokee underwent a forced trek westward known as the Trail of Tears.¹⁷ 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.¹⁸ The parties entered into the Treaty¹⁹ three years after the Supreme Court, in *Worcester v. Georgia*,²⁰ rejected Georgia's attempt to exercise authority within Cherokee country.²¹ 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"²² among the Cherokees. However, because the signatories did not include Cherokee leaders,²³ the New Echota Treaty appears to have lacked the support of the majority of the Cherokee Tribe.²⁴

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.²⁵ Under Article 16 of the Treaty, the Cherokee

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.

¹⁷ 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.")

¹⁸ 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.

¹⁹ New Echota Treaty, 7 Stat. 478, 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.")

²⁰ *Worcester*, 31 U.S. (6 Pet.) at 561 (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.")

²¹ The dispute over state jurisdiction within the Cherokee reservation has reached the Supreme Court twice. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court essentially upheld the United States' authority, ruling Georgia lacked authority to enforce its laws within the Cherokee territory. For a discussion of the dispute, see GRANT FOREMAN, *INDIAN REMOVAL 229-50* (1932); FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 156-82* (1994).

²² 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03, (4)(a).

²³ *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 14, 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.")

²⁴ 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 . . .").

²⁵ New Echota Treaty, 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

Tribe agreed “to remove to their new homes within two years from the ratification of this treaty.”²⁶ Provisions on claims for former reservations²⁷ and for accommodating Cherokees who wished to remain²⁸ 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.”²⁹

Article 1 of the New Echota Treaty ceded Cherokee lands east of the Mississippi to the United States in consideration of \$5 million.³⁰ 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 \$500,000.³¹ Article 5 provided that the ceded lands would not “be included within the territorial limits or jurisdiction of any State or Territory” without the Cherokee Tribe’s consent.³² Other provisions of the Treaty addressed establishing forts;³³ guaranteeing peace;³⁴ extinguishing Osage title to lands within the area guaranteed to the Cherokees;³⁵ covering expenses for Cherokee removal;³⁶ appointing agents to value improvements on ceded land;³⁷ investment of Cherokee funds;³⁸ commuting the Cherokee school fund;³⁹ granting pensions to Cherokee warriors for aid in the War of 1812;⁴⁰ and

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 . . .”).

²⁶ *Id.* at 485, art. 16.

²⁷ *Id.* at 484–85, art. 13 (“[T]o make a final settlement of all the claims of the Cherokees for reservations granted under former treaties to any individuals belonging to the nation . . . it is . . . expressly understood by the parties . . . that all the Cherokees and their heirs and descendants to whom any reservations have been made under any former treaties with the United States, and who have not sold or conveyed the same by deed or otherwise and who in the opinion of the commissioners have complied with the terms on which the reservations . . . and which reservations have since been sold by the United States shall constitute a just claim against the United States and the original reservee or their heirs or descendants shall be entitled to receive the present value thereof from the United States . . .”).

²⁸ *Id.* at 483, art. 12 (“Such heads of Cherokee families as are desirous to reside within the States of No. Carolina Tennessee and Alabama subject to the laws of the same; and who are qualified or calculated to become useful citizens shall be entitled, on the certificate of the commissioners to a preemption right to one hundred and sixty acres of land or one quarter section . . .”).

²⁹ *Id.* at 488 (Supplementary Articles to a Treaty).

³⁰ *Id.* at 479, art. 1.

³¹ *Id.* at 480, art. 2 (“[W]hereas it is apprehended by the Cherokees that . . . there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation.”).

³² *Id.* at 481, art. 5.

³³ *Id.* at 480–81, art. 3.

³⁴ *Id.* at 481, art. 6 (“The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine [sic.] wars between the several tribes.”).

³⁵ *Id.* at 481, art. 4.

³⁶ *Id.* at 482, art. 8 (“The United States also agree and stipulate to remove the Cherokees to their new homes and to assist 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.”).

³⁷ *Id.* at 482, art. 9 (“The United States agree to appoint suitable agents who shall make a just and fair valuation of all such improvements now in the possession of the Cherokees as add any value to the lands . . .”).

³⁸ *Id.* at 482, art. 10 (“The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee nation west of the Mississippi the following sums as a permanent fund for the purposes hereinafter specified and pay over the net income of the same annually . . .”).

³⁹ *Id.* at 483, art. 11 (“[T]o commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund . . .”).

⁴⁰ *Id.* at 485, art. 14 (“[S]uch warriors of the Cherokee nation as were engaged on the side of the United States in the late war with

division of the funds among the various Cherokee groups.⁴¹ Finally, the Treaty included provisions authorizing the commissioners to settle the claims specified in the Treaty⁴² and providing for advances of annuities to meet pre-removal conditions.⁴³

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

Current Status of the Delegate Provision

The delegate provision of the New Echota Treaty, on its face, contemplates additional congressional action 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.⁴⁴ The Supreme Court has long recognized a distinction between self-executing treaties—those that “automatically have effect as domestic law”—and non-self-executing treaties—those that “do not by themselves function as binding federal law.”⁴⁵ A self-executing treaty is “‘equivalent to an act of the legislature’ . . . when it ‘operates of itself without the aid of any legislative provision.’”⁴⁶ A non-self-executing treaty, however, may be enforced only “pursuant to legislation to carry [it] into effect.”⁴⁷ 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.”⁴⁸ 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.⁴⁹

Great Britain and the southern tribes of Indians, and who were wounded in such service . . .”).

⁴¹ *Id.* at 485, art. 15 (“[S]hall be equally divided between all the people belonging to the Cherokee nation east according to the census just completed, and such Cherokees as have removed west since June 1833 . . .”).

⁴² *Id.* at 485–86, art. 17.

⁴³ *Id.* at 486, art. 18 (“[W]hereas the nation will not, until after their removal be able advantageously to expend the income of the permanent funds of the nation it is therefore agreed that the annuities of the nation which may accrue under this treaty for two years, the time fixed for their removal shall be expended in provision and clothing for the benefit of the poorer class of the nation . . .”).

⁴⁴ CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Stephen P. Mulligan.

⁴⁵ *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

⁴⁶ *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”).

⁴⁷ *Medellin*, 552 U.S. at 505.

⁴⁸ *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”).

⁴⁹ See, e.g., *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) (per curiam) (“[E]xpense 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

In the New Echota Treaty, the phrase “whenever Congress shall make provision for the same” appears to render the provision for a Cherokee Delegate non-self-executing. The United States, at least, seemed to believe that congressional action would be required to seat a Cherokee Delegate.⁵⁰ 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 the need for implementing legislation approved by that chamber.⁵¹ As a result, a court would seem unlikely to 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 may anticipate that Congress could take steps to allow a delegate without obligating it to do so.⁵² 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.⁵³

In any event, if Congress were inclined to consider congressional action in relation to the New Echota Treaty’s delegate provision, it might first 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.

The Possibility of Ineffectiveness or Abrogation

The New Echota Treaty’s delegate provision, even if not self-executing, remains relevant to the extent Congress could still take action to effectuate it. That is, the delegate provision would generally remain in effect unless it has been abrogated or otherwise rendered invalid or unenforceable. Several considerations may be relevant to this analysis.⁵⁴

(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”).

⁵⁰ See generally Rosser, *supra* note 14, at 119–29 (discussing context surrounding the delegate provision in the New Echota Treaty). For example, the 1834 articles of agreement between John H. Eaton, U.S. Commissioner and a Cherokee delegation, predating negotiation over the 1835 New Echota Treaty, contemplated the seating of a Cherokee delegate by way of a statutory enactment, stating that “it is agreed that, as soon as a majority of the Cherokee people shall reach their western homes, the President will refer their application to the two Houses of Congress for their consideration and decision.” S. EXEC. DOC. NO. 23-7, at 4.

⁵¹ See, e.g., *Edwards*, 580 F.2d at 1058 (observing need for legislation to implement treaty obligations that require authority exclusively vested in the House). See also U.S. CONST. art. I, §§ 1, 2, 5 (vesting legislative power in the House and Senate; providing that the House “shall chuse their Speaker and other Officers”; and establishing that each chamber “may determine the Rules of its Proceedings”).

⁵² 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 Error! Bookmark not defined., at 12-15.

⁵³ See, e.g., *Interpreting Treaties*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-6/ALDE_00012957/ (last visited Nov. 10, 2022).

⁵⁴ 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).

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.⁵⁵ 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.⁵⁶ The 1866 Treaty did not explicitly refer to a Cherokee Delegate, but did explicitly reaffirm "[a]ll provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty"⁵⁷—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 Nation (even if that obligation might require implementing legislation⁵⁸), rather than merely a pledge that Congress might consider whether to seat such a delegate if nominated.⁵⁹ Another view, finding support in differences between the New Echota Treaty's provision and other treaties executed by the Cherokees,⁶⁰ might suggest that the New Echota Treaty was *not* understood to constitute a pledge to seat a Cherokee Delegate. Under that view, another treaty's more explicit description of a Cherokee Delegate's powers⁶¹ 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:

⁵⁵ Treaty with the Cherokees, Confederate States of America—Cherokee Nation of Indians, Oct. 7, 1861, 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> [hereinafter Treaty with the Confederacy]; 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.").

⁵⁶ Treaty with the Cherokees, 14 Stat. 799 (July 19, 1866).

⁵⁷ *Id.* at 806, art. 31.

⁵⁸ See *supra* notes 8–9 (discussing whether the delegate provision may require implementing legislation).

⁵⁹ See Rosser, *supra* note 14, 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.").

⁶⁰ Treaty with the Confederacy, *supra* note 51, 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 enter into this treaty by a General Convention of the Cherokee People." *Id.*

⁶¹ 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 51 at 403–04, Art. XLIV, and 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.

1. The first Cherokee treaty with the United States, the 1785 Treaty of Hopewell, speaks of “the right to send a deputy of their choice, whenever they think fit to [the Confederated] Congress,” possibly referring to an agent or the equivalent of a lobbyist, rather than a right of representation in the Articles of Confederation-era national legislature.⁶²
2. The 1835 Treaty of New Echota provides for “a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same,”⁶³ 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.”⁶⁴

Abrogation. Arguments might be made that the New Echota Treaty’s Cherokee Delegate provision was tied to the fate of Indian Territory, and that Congress abrogated the delegate guarantee either by not providing for a separate Indian Territory as envisioned by Congress in the 1830s, or by including the Indian Territory in the State of Oklahoma. However, such arguments would be hampered by the lack of specific evidence of Congress’s intent to abrogate.⁶⁵ As noted, Supreme Court jurisprudence generally⁶⁶ 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,⁶⁷ 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.⁶⁸ That bill included a delegate

⁶² Treaty with the Cherokees, 7 Stat. 18, 20, art. 12 (Nov. 28, 1785) (“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 New Echota Treaty’s delegate provision in *Cherokee Nation v. Georgia*, see Rosser, *supra* note 14, at 121–22 & nn. 156–61 and accompanying text.

⁶³ New Echota Treaty, 7 Stat. 478, 482, art. 7.

⁶⁴ Treaty with the Confederacy, *supra* note 51, at 404.

⁶⁵ See generally *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (rejecting argument that Oklahoma statehood and assorted statutory actions sufficed to diminish or disestablish a reservation).

⁶⁶ See *supra* note 12 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)).

⁶⁷ 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.”).

⁶⁸ *Id.* at 34 (“A Bill to provide for the establishment of the Western Territory, and for the security and protection of the emigrant

provision, but not for a Cherokee Delegate specifically.⁶⁹ 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.⁷⁰

Oklahoma Statehood. Another argument may be that the Cherokee Delegate provision did not survive the Oklahoma Statehood Act of 1906⁷¹ 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.⁷² Nor has any statutory language purporting to abrogate the Cherokee Delegate provision been identified to date.⁷³ None of the chief laws leading to Oklahoma

and other Indian tribes therein.").

⁶⁹ *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.").

⁷⁰ The Committee explained:

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

Id. The Committee Report also provided a history of other treaties calling for Indian delegates to Congress, noting the 1830 Treaty with the Choctaws revealed that the Executive Branch negotiators doubted their ability to bind Congress in the matter of an Indian delegate. *Id.* at 21–22. Article XXII of the 1830 Treaty 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." Treaty with the Choctaws, 7 Stat. 333, 338, art. XXII (Sept. 27, 1830).

⁷¹ Act of June 16, 1906, 34 Stat. 267. A Presidential Proclamation of Oklahoma Statehood followed. Proclamation No. 60, 35 Stat. 2160 (Nov. 16, 1907) (Theodore Roosevelt).

⁷² In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 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." 526 U.S. 172, 207 (1999). Likewise, the Court in 2020 affirmed that Oklahoma statehood did not disestablish a reservation that had been established in Indian Territory by treaty. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020). In a 2019 case involving whether the Crow Tribe's treaty-protected hunting rights survived Wyoming statehood, the Court explained that the crucial question in determining a treaty's status is whether Congress either (1) expressly abrogated the treaty or (2) the treaty terminated under its own provisions. If neither of those can be answered affirmatively, the treaty continues in force. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019). Statehood is thus irrelevant to 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.

⁷³ Because "the laws governing the Indians of Oklahoma are so voluminous," FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 425 (1942 ed.), CRS has not exhaustively examined them, but is not aware of any statutory mention of the New Echota Treaty's delegate provision.

statehood—the Oklahoma Organic Act of 1890,⁷⁴ the Dawes Commission Act,⁷⁵ the Curtis Act of 1898,⁷⁶ and the Five Tribes Act⁷⁷—includes any specific mention of a Cherokee Delegate or the relevant New Echota Treaty provision.

In light of the above, it seems unlikely that a reviewing court would find sufficient evidence that Congress has previously acted to abrogate the Cherokee Delegate provision. As such, it would appear that Congress could reasonably conclude that it may still take action to effectuate it 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 it were to consider seating a Cherokee Delegate in the House, Congress could evaluate the following procedural options. Of these options, a legislative enactment has historically been the exclusive method (albeit in territorial rather than tribal contexts) and therefore may be the option least likely to raise constitutional concerns.

1. Enactment of Legislation

Historically, the method for adding a new delegate to Congress has been through the enactment of legislation. No such position in Congress has been established except by law. 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.⁷⁸

Two territories acquired by the United States from Spain—Puerto Rico and the Philippines—were afforded representation by way of a “resident commissioner” rather than a “delegate.” Initially, the resident commissioners from Puerto Rico and the Philippines did not enjoy the same privileges as prior delegates (for instance, they were not allowed on the House floor). The 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.

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	I Stat. 50	1789 ^a
South of the River Ohio	I Stat. 123	1790

⁷⁴ Act of May 2, 1890, 26 Stat. 81. Section 16 of this legislation provided for an Oklahoma Territorial Delegate to the House. *Id.* at 89.

⁷⁵ Act of Mar. 3, 1893, § 16, 27 Stat. 612, 645–46.

⁷⁶ Act of June 28, 1898, 30 Stat. 495.

⁷⁷ Act of Apr. 26 1906, 34 Stat. 137.

⁷⁸ For instance, a delegate representing the Northern Mariana Islands, a U.S. territory, was added to the House through passage of S. 2739, the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754. The legislation defined attributes of the position such as the manner and timing of the delegate’s election (S. 2739 §§ 712, 714), qualifications required to hold the position (*id.* § 713), and the level of compensation afforded to the position’s occupants.

Congressional Research Service

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

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

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

2. Incorporation of Position into the Standing Rules

Alternatively, 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 are not 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 this Committee. If called up on the House floor, a resolution to seat the new delegate could be considered "in the House" under the one-hour rule, under suspension of the rules (clause 1 of Rule XV), or through terms set forth in a special rule reported by this Committee and agreed to by the House.

Compared to 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,"⁷⁹ this authority focuses on the internal procedures of each body, rather than who may be seated.⁸⁰ 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."⁸¹

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.⁸² 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."⁸³

⁷⁹ U.S. CONST. art. I, § 5, cl. 2.

⁸⁰ 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).

⁸¹ *United States v. Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 509 (1892).

⁸² *Michel*, 817 F. Supp. at 134.

⁸³ See *Michel*, 14 F.3d at 628 (noting all parties agreed that statute was needed to seat delegates in litigation brought by then-

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 treaties,"⁸⁴ and Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested in [the] Constitution in the Government of the United States."⁸⁵ The House's ability to seat the Cherokee Delegate, in other words, derives from the terms of the New Echota Treaty. The terms of that Treaty, in turn, appear to require an *act of Congress*—i.e., a statutory enactment—to authorize the delegation to be seated.⁸⁶ Accordingly, the seating of a delegate by way of a change to House rules, rather than by positive legislation passed by both chambers, could prompt a legal challenge to that action's validity.

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*,⁸⁷ but in no case has such a proceeding been used to establish the position in the first instance. These kinds of questions, which are put to the House in the form of a simple House resolution, are "those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings."⁸⁸

Possible 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 below discussion presumes that, if seated, the Cherokee Delegate would not have full voting privileges, but might exercise many of the same privileges as territorial delegates.⁸⁹

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).

⁸⁴ 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").

⁸⁵ *Id.* art. I, § 8 cl. 18.

⁸⁶ 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, 7 Stat. 478, 482, art. 7.

⁸⁷ CRS Report R44005, *Questions of the Privileges of the House: An Analysis*, by Megan S. Lynch. 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. 54 H.R. JOURNAL, 35th Cong., 1st Sess., at 112–115 (1857); see also ASHER C. HINDS, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2594 (1907).

⁸⁸ *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>.

⁸⁹ Conferring the Cherokee Delegate with full voting privileges could raise serious constitutional concerns. In 1993, some Members of the House brought suit challenging a change to House rules enabling allowed delegates of the U.S. territories and the District of Columbia to cast votes in the Committee of the Whole. See *Michel*, 817 F. Supp. at 134. 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, § 2 of the Constitution. *Michel*, 14 F.3d at 630.

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.⁹⁰

"[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,"⁹¹ 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.'"⁹² If a law does not target a suspect class or burden a fundamental right, the law is to survive an equal-protection challenge so long as "it bears a rational relation to some legitimate end."⁹³

Potential challengers may argue that recognizing a Cherokee Delegate violates the voting rights principle⁹⁴ known as the "one-person, one-vote" rule.⁹⁵ 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.⁹⁶ The Equal Protection Clause thus prohibits any voting restrictions that "value one person's vote over that of another."⁹⁷ 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."⁹⁸ *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."⁹⁹

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 longstanding practice of allowing delegates to serving on standing committees. *Id.* at 632.

⁹⁰ 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).

⁹¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁹² *Harvard v. Cevalis*, 973 F.3d 190, 205 (3d Cir. 2020) (citation omitted).

⁹³ *Romer*, 517 U.S. at 631.

⁹⁴ 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.

⁹⁵ 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.

⁹⁶ *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Bush*, 531 U.S. at 104.

⁹⁷ *Bush*, 531 U.S. at 104–05.

⁹⁸ *Reynolds*, 377 U.S. at 555.

⁹⁹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019); *see also Reynolds*, 377 U.S. at 590 (Harlan, J., dissenting) ("[T]he

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.¹⁰⁰ First, if only members of the Cherokee Nation vote for a Cherokee Delegate to Congress, and such members are also residents of one of the 50 states, those individuals could vote for both a full voting Member *and* a Cherokee Delegate, thus potentially giving them a “super-vote”¹⁰¹ and double representation in Congress. However, territorial delegates’ privileges have been held *not* to be unconstitutional legislative powers because they cannot affect the “ultimate result” of legislative votes.¹⁰² The extent to which a Cherokee Delegate’s privileges are limited in the same way as territorial delegates may bear on whether an unconstitutional “super-vote” is created.

Alternatively, 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.”¹⁰³ Thus, according to at least one commentator, “through the Cherokee delegate, non-Cherokees would see their representational rights diluted.”¹⁰⁴

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.¹⁰⁵ 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.”¹⁰⁶ Thus, the unique political 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.¹⁰⁷

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 would be considered “similarly situated,” because equal-protection principles require that similarly situated

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.’”)

¹⁰⁰ Rosser, *supra* note 14, at 145.

¹⁰¹ The Supreme Court has explained that the Equal Protection Clause “does not permit a small class of voters to be deprived of fair and equal voting power,” but also forbids “the elevation of a small class of ‘supervoters’ granted an extraordinarily powerful franchise.” *Brown v. Thomson*, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

¹⁰² *Id.* at 148.

¹⁰³ Rosser, *supra* note 14.

¹⁰⁴ *Id.* at 146.

¹⁰⁵ *Id.* at 149.

¹⁰⁶ *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974).

¹⁰⁷ 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.”).

individuals be treated alike.¹⁰⁸ Individuals are similarly situated when they are “alike in all relevant respects,” but this does not mean “identically situated.”¹⁰⁹ In the case of the Cherokee Tribe, the government arguably created a non-self-executing promise of a delegate through a treaty.¹¹⁰ A treaty between the United States and an Indian tribe is a “contract between two sovereign nations.”¹¹¹ Therefore 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, so no equal-protection violation exists.¹¹²

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.¹¹³ When applying rational-basis review, a court must only find that “the classification rationally further[s] a legitimate state interest.”¹¹⁴ 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 would hear the case only if it determined that the challenge is justiciable. Justiciability is a limitation established by the Supreme Court that refers to the types of matters a court may adjudicate.¹¹⁵ According to the Court, “it is the province and duty of the judicial department to say what the law is”; however, some claims of “unlawfulness” are either more properly entrusted to another political branch or involve no judicially enforceable rights.¹¹⁶ These questions are more commonly known as nonjusticiable “political questions.”¹¹⁷

Since the Supreme Court’s 1962 decision in *Baker v. Carr*,¹¹⁸ courts have debated the justiciability of equal-protection challenges to the one-person, one-vote principle, finding some claims are “political questions” beyond the reach of the federal court. In *Baker*, the Supreme Court first recognized the justiciability of malapportionment claims.¹¹⁹ There, the Court held that challenges to a Tennessee state legislative map that had not been redrawn in nearly 60 years, despite substantial population growth and

¹⁰⁸ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

¹⁰⁹ *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020).

¹¹⁰ See *supra* pp. 8-9 (discussing ways the pledge made under the delegate provision of the New Echota Treaty could be interpreted).

¹¹¹ *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979).

¹¹² 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).

¹¹³ E.g., *Agua Caliente Tribe of Cupeño Indians of Pala Rsr. v. Sweeney*, 932 F.3d 1207, 1220 (9th Cir. 2019).

¹¹⁴ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

¹¹⁵ 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).

¹¹⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

¹¹⁷ *Id.*

¹¹⁸ 369 U.S. 186, 237 (1962).

¹¹⁹ *Id.*

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."¹²⁰ In so holding, the Court set forth six tests to help determine when a claim is a nonjusticiable political question, including:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards for resolving it;
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potential for embarrassment from divergent pronouncements by various departments on the same question.¹²¹

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."¹²²

Beyond population deviations resulting in malapportionment, such as those presented in *Baker*,¹²³ the Court has also found that claims of racial gerrymandering—or districting plans that unconstitutionally diminish the votes of racial minorities—present a justiciable equal-protection claim.¹²⁴ 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,"¹²⁵ present political questions that are beyond the reach of the federal courts.¹²⁶ 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."¹²⁷ 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 rule¹²⁸—courts nevertheless retain "responsibility to say what rules Congress may not adopt because of constitutional infirmity."¹²⁹ In sum, 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

¹²⁰ *Id.*

¹²¹ *Vieth*, 541 U.S. at 277 (quoting *Baker*, 369 U.S. at 217).

¹²² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

¹²³ *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).

¹²⁴ *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*, *Rucho*, 139 S. Ct. at 2484.

¹²⁵ *Vieth*, 541 U.S. at 271–72 n.1.

¹²⁶ *Rucho*, 139 S. Ct. at 2484.

¹²⁷ *Id.* at 2501.

¹²⁸ *Michel*, 817 F. Supp. at 138.

¹²⁹ *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1982).

characterized.¹³⁰ For example, some matters involving treaties may preclude judicial review.¹³¹ On the other hand, courts sometimes “interpret . . . treaties and . . . enforce domestic rights arising from them.”¹³² In *United States v. Decker*, the Ninth Circuit Court of Appeals held that the political question doctrine did not apply in an equal protection challenge to regulations established pursuant to an Indian treaty.¹³³ 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.¹³⁴ In *Michel v. Anderson*, the D.C. Circuit Court of Appeals 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.¹³⁵

Conclusion

The treaty provision envisioning that the Cherokee may provide a delegate to the House is in some respects a novel one, especially in the context of modern-day applicability. The historical background is complex, and it is not perfectly clear what role such a delegate would have been understood to take in the House. 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.

¹³⁰ 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”).

¹³¹ 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.”).

¹³² *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979).

¹³³ *Id.* at 738.

¹³⁴ See *Rucho*, 139 S. Ct. at 2496 (noting population inequality claims could be decided based on “basic equal protection principles”).

¹³⁵ *Michel*, 14 F.3d at 625-628 (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 85 (discussing the *Michel* litigation).

The CHAIRMAN. Well, thank you.

Thank you all for your testimony, and I now will go to questions.

I should tell you that since we announced this hearing, you know, I have heard a number of concerns about appointing a Cherokee Nation Delegate from colleagues in the House, as well as, you know, other Tribes, other groups, but I am very sympathetic, Chief—with the way Chief Hoskin outlined this.

I mean, I really—I think there is a strong case here. And that doesn't mean that we don't consider the other issues that other Tribes have raised on its merits, and we ought to do that, but nonetheless, I want to raise some of the questions that people have asked, you know, not to be adversarial but to get the answers on the record, because I support this effort.

And so I think we can use these answers to kind of figure out how best we can move forward and how we can address some of the concerns that people have raised. So let me go through a few questions here.

So, Chief Hoskin, the Cherokee Nation Constitution calls for the delegate to be appointed, not elected. In this Chamber here, the people's House, you know, I am not sure there is precedent in modern times for the House to seat an appointed delegate with equal status to someone elected by all the voters in Washington, D.C., or Puerto Rico, for example.

So what is the reason for an appointment rather than an election? And what would the delegate's constituency be? And do you view it as absolutely necessary that the delegate be appointed?

Mr. HOSKIN. Well, the Cherokee people determined that the delegate should be appointed, and this is where the United States could show deference to the Cherokee Nation as a sovereign Indian nation. The Constitution of the Cherokee Nation prescribes the manner in which the delegate is selected, through an appointment by the principal chief, confirmation by the council. In this instance, I appointed Kim Teehee August of 2019, unanimously confirmed by the council, our legislative branch. And the first response is deference to the Cherokee Nation's sovereign act of determining how the delegate is selected.

The terms of the treaty itself say that the Cherokee Nation shall have a delegate. It doesn't prescribe the manner in which it is selected. I suppose the Framers could have done that. I suppose the United States is probably the party that had the pen on this treaty, and they didn't choose to prescribe how the delegate was selected.

Thirdly, I would say, if you look back in history to the early days of this Republic, in fact, territorial delegates were appointed. We have some specific citations we can bring to the committee's attention, but that is, in fact, in the historic record as part of the House of Representatives.

The CHAIRMAN. Thank you. And you addressed this a little bit in your opening, but, again, I want to get this on the record. I want to address the super-vote issue, which is a frequent objection that I have heard as Congress considers this matter. I am sure the constitutionality piece will be covered further in this hearing, so I specifically want to talk about representation on committees.

When the treaty was signed, Oklahoma wasn't a State and its residents had no representation in Congress, and Native Americans

could not vote. Obviously, now members of the Cherokee Nation do have congressional representation. Delegates don't vote on legislation, as you pointed out, on the House floor, but they do vote in committee, as well as introducing bills and amendments.

So the idea is that, for example, if a delegate from the Cherokee Nation gets a seat on the Ways and Means Committee and a member from Oklahoma is already on the committee, many Oklahoma citizens would get two representatives on the Ways and Means Committee, so the argument goes.

So, Chief Hoskin, how would you respond to people arguing that members of the Cherokee Nation would be doubly represented on committees?

Mr. HOSKIN. Well, the argument misses that the Cherokee Nation is the sovereign nation whose interests are represented by the delegate. I mean, the treaty itself was a treaty between two sovereign nations—the United States and the Cherokee Nation—and the parties determined that the Cherokee Nation governmental interest would be uniquely represented in the House of Representatives. So, in that sense, I don't see the double representation.

Pointing back to my earlier testimony, the ultimate action of this body, in terms of the representative action, in terms of me as a citizen of the Second District of Oklahoma, Congressman Mullin is my Congressman. His action of voting on final passage is him taking my voice and the voice of thousands, hundreds of thousands of other Oklahomans to the House floor, but not before then. Before then, it is a matter of Congress' committee structure.

And so in the case of Kim Teehee, a delegate, she would not vote on final passage. So in that respect, there would not be double representation for a single Oklahoman.

Cherokee people are all over this country, 441,000 citizens, every State in this country. But, again, the governmental interest of the Cherokee Nation were what the parties contemplated when they crafted the treaty of 1835.

The CHAIRMAN. Well, thank you very much for clearing that up, because this is helpful for us to be able to rebut people who, you know, bring some of these arguments forward. So I think it is important for the record.

You know, we are very interested in process here at the Rules Committee, so I want to discuss the mechanics of seating a delegate.

Ms. Schwartz, how were current delegates like those from Guam, Washington, D.C., the Mariana Islands seated? And what did that process look like, generally speaking?

Ms. SCHWARTZ. Thank you. Every delegate, including the current territorial delegates, have been seated through the operation of a statute that passed both houses of Congress and then was signed by the President. So that is—you know, the list of those delegates and the attendant statutes are listed in my written testimony, and that has historically been the way that delegates were seated in the House.

The CHAIRMAN. And that would require the House to vote, the Senate to vote, the President to sign the bill?

Ms. SCHWARTZ. Correct. Or, of course, a overturn—a vote by a super majority to override a veto of the President.

The CHAIRMAN. Yeah. It is just really hard dealing with the Senate. So I am just—

Mr. COLE. I think you have bipartisan agreement on that.

The CHAIRMAN. Professor Robertson, in your view, should a Tribal delegate be seated through a statute versus a simple resolution or would the treaty impact that process?

Mr. ROBERTSON. I think the treaty has to impact the process. I think that the treaty is written in the way it is for a reason. You know, it might have provided for representation in Congress, it expressly seated the delegate in the House, I think with the contemplation that the House of Representatives would make the final call. The Senate had the opportunity to weigh in and did at the time of ratification.

As I suggested earlier, and Chief Hoskin, I think, made the same point, as had CRS, the fact that it is an Indian treaty is important because we don't have Indian treaties that aren't self-executing. And, in fact, in this instance as well, there was no hesitation on the part of the United States, even in the absence of further legislation, in implementing Federal rights under the Treaty of New Echota, which included the removal of the Cherokee people.

So one side was happy acting as if there were no need for further implementing legislation, and I think what is happening now is this body is considering whether it is time for the United States to finish fulfilling the obligations that it made under this treaty.

I think it is also—so in a sense, I guess what I am suggesting is, simply deferring to the language of the treaty.

The other deference that I think may be appropriate, and this relates a bit to your earlier question, Mr. Chairman, is deference to the Cherokee Nation, both on the choice between whether Congress should pass a statute, which would benefit them in the sense that was alluded to earlier, in that it would be of greater duration than 2 years, or through unilateral House action, which would have to be renewed. And they have clearly, as I understand it, opted in favor of the latter course, despite the potential termination of that right or the need to renew it.

They are the party that is going to be impacted most directly, and so I think that deference may be appropriate here, particularly given the long time it has taken to get around to allowing them to exercise the right. But I also think that it is important, as I said earlier, that we don't have a history of requiring implementing legislation and deference to the language of the provision.

The CHAIRMAN. And, Chief Hoskin, do you have any concern with the prospect of the Cherokee delegate position being up for debate every 2 years if it were created through a resolution versus a statute?

Mr. HOSKIN. Well, certainly, if it was through a statute, you could make the argument that there is a durability to that.

The CHAIRMAN. Right.

Mr. HOSKIN. But in my view, the United States Senate has acted, the President of the United States has acted. It is incumbent upon the House to act. I acknowledge that that means a every 2 year proposition of coming back to the House.

My feeling is this, as chief of the Cherokee Nation: If the United States at long last after nearly two centuries agrees to honor this

promise in this Congress, and it could happen this year, I would—I would think it would be breathtaking for the next Congress to say we are going to then break this promise.

Now, I am a Tribal leader. I know my history. I know the United States has broken a promise or two. In fact, it had broken every treaty it has ever had with the United States. But I think in the 21st century, when this House of Representatives seats Kim Teehee, there won't be another Congress that will dare break that promise to the Cherokee Nation.

The CHAIRMAN. Thank you.

So the Rules Committee has received letters and statements from several other federally recognized Tribes requesting that Congress consider seating their delegates as well. We received a statement from the chief of the Choctaw Nation supporting the Cherokee Nation's request and requesting that a Choctaw Nation Delegate also be seated on the basis of the 1830 Treaty of Dancing Rabbit Creek. I ask unanimous consent to insert the statement in the record, without objection.

We also received a letter from the President of the Delaware Nation requesting that if any Tribal delegates were seated, the House also seat a delegate from the Delaware Nation on the basis of the 1778 Treaty for Fort Pitt, or if the three successors of the historic Delaware Nation cannot agree on the delegate, to seat a delegate from each Tribe. I ask unanimous consent to insert that letter in the record, without objection.

We also received a letter from the assistant chief of the United Keetoowah Band of Cherokee Indians in Oklahoma arguing that they are a successor to the historic Cherokee Nation. I ask unanimous consent to insert the letter in the record, along with their resolution appointing a delegate, without objection.

And finally, we received a letter from the Eastern Band of Cherokee Indians arguing that they are a successor to the historic Cherokee Nation. I ask unanimous consent to insert the letter in the record, without objection.

[The information follows:]

The CHAIRMAN. Look, we are here today to discuss the Cherokee Nation's request to seat a delegate, but as we continue to work to honor our treaty obligations, I think it is important that Congress also look into these other requests.

And so, Ms. Schwartz, I know the Cherokee Nation treaty was the focus of your report, but has CRS looked into whether other Tribes may have treaty-based claims for some form of congressional representation? And if not, is that something that CRS could do?

Ms. SCHWARTZ. Thank you. We have looked at the treaty provisions in the treaties that you have mentioned. The treaty with the Delawares of 1778, if it would be helpful, I would like to read the way that that provision is worded.

The CHAIRMAN. Sure.

Ms. SCHWARTZ. The agreement in that treaty was 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.

So that treaty provision, first, is slightly more dependent on congressional approval than the wording of the New Echota Treaty, and it also more expressly contemplates the creation of a State that, of course, was never created and that this body could not create on its own.

The treaty with the Choctaw, which is sometimes referred to as the Treaty of Dancing Rabbit Creek of 1830, 5 years before the Treaty of New Echota. I am going to quote from that as well. That Tribe, quote, 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, presented in the treaty, that Congress may consider of and decide the application, end quote.

So that treaty, in contrast to the Treaty of New Echota, did not include a stipulation for a delegate but mentioned a desire of the Tribe to have a delegate. That does not mean that Congress could not take an action, but it does mean that the claim is somewhat weaker than the Treaty of New Echota provides.

The CHAIRMAN. And just to put a final point on this, I mean, so the Treaty of New Echota is pretty clear about what was agreed to and what our obligations are. I mean, and I guess—I say that—and I just want to make sure that you agree with me on that. I say that—you agree with me on that, right?

Ms. SCHWARTZ. I agree that the language of the Treaty of New Echota is the clearest of the treaties between the United States and various Tribes.

The CHAIRMAN. Yes. And I say that because what I hope does not happen is that, as we—you know, everybody—we need to look into everything, right, but me looking into everything doesn't mean that we have to wait, you know, on taking action on something that, to me, is pretty clear as what we are talking about here today.

So we respect all of the input that we have received from everybody, and we need to—we need to consider all of this stuff. However, I think the case that the chief is bringing before us today is pretty specific and pretty clear, at least the way I look at it.

And so—but I thank you for your—I now yield to Mr. Cole.

Mr. COLE. Well, first, let me begin where I started off. Thank you, Mr. Chairman, for holding this hearing. And I want to thank you and the witnesses for the demeanor of the hearing and the manner in which we are looking at issues, because the issues you raised in your questions, I will have some of my own to raise, are exactly what I hear from other members. It is really not a partisan issue; it becomes an institutional issue. And so this is extraordinarily helpful in discussing, you know, the institutional matters in front of us and also, you know, indirectly looking at the merits of the claim.

And let me say, I agree with the chairman, each one of these should consider separately. They are not linked together in any way. Each document we should look at, each decision we should make individually. And the fact that others have a claim should not affect the claim that the Cherokee Nation is advancing. I very much agree with that.

Chief Hoskin, I would like to ask you in a more practical way, actually, how do you view the role of the delegate to Congress? Would he or she—and in this case I think we can say she. Kim is a very good friend of mine, and somebody I respect greatly. Would that member be treated in the same manner as other delegates that we currently have or would he or she have different duties, rights, and responsibilities and like the delegate from Puerto Rico and Guam and Samoa?

Mr. HOSKIN. Well, Congressman, thank you for the question. I think they would be similarly situated to the delegates that serve alongside you today. So the opportunity to serve on committee, have committee assignments, vote on committee, propose legislation, debate, all the way to the House floor, of course, not voting on final passage. Otherwise, I think it is the entire depth and breadth of the delegates that serve in this body today.

Mr. COLE. I think that is really important for other members to understand. We are not talking about anything different here than we already do in multiple cases in this regard in terms of how that delegate would act and the authority and responsibilities they would have as a Member of Congress.

Second, and I get this question a lot, so I want to pose it to you. Obviously, this is an old treaty, right, 1835. Why was it not addressed or impressed immediately? And I would also take that on advisement. I mean, I am delighted to hear your answer, but if you have additional information later from historians or whomever. I mean, that is a question I get. Well, gosh, if this was there and it was a treaty, why wasn't it done immediately at the time? Why didn't the Cherokee Nation, and maybe it did, advance the claim at the time?

Mr. HOSKIN. Congressman, I love this question because it gives me an opportunity to talk about Cherokee history of which there is not enough knowledge in this country.

Mr. COLE. That is why I opened the door.

Mr. HOSKIN. You certainly did that, and I won't miss the opportunity.

The history since 1835 with the Cherokee Nation has been one of rebuilding and then being suppressed again, being oppressed again, being dispossessed. We seem to be in rebuilding modes over the last two centuries. Think about what happened. The Trail of Tears, came after the Treaty of New Echota, nearly destroyed the Cherokee Nation. Lost a quarter of our population, ripped apart our institutions, was the near destruction of the Cherokee Nation.

We rebuilt. That story, Mr. Chairman, ought to be an entire story that every American understands, because our rebuilding is incredible, but it took a great deal of resources. So when we get to our new homeland in what would later become Oklahoma, we are simply trying to survive and rebuild a great society.

Decades go by, the Civil War visits the Cherokee Nation, and brings even more destruction and division than the Trail of Tears, if you can imagine that. We go into another period of rebuilding in the post-Civil War era late in the 19th century.

At the turn of the 20th century, as we know, the State of Oklahoma is created by the Congress of the United States, a number of Federal Indian laws are passed, which, again, dispossess Cher-

okee people of our collective possessions, our land. Nearly dispossesses us of our government. I think, Congressman, a lot about my grandfather in this role.

Let's get into the 20th century, my grandfather's century, a full blood Cherokee, World War II veteran. The United States suppressed the democracy of the Cherokee Nation to such a degree that he could not vote for a chief of the Cherokee Nation during most of his lifetime. I don't imagine he ever thought his grandson would be the elected chief of the Cherokee Nation. But in the 1970s, we start to rebuild, and we have been on a trajectory, as has other Tribes in Oklahoma and across this country, of building economic strength, prosperity back home.

And so we are now, I think, in a position where we can, as a practical matter, assert this right; whereas, my predecessors in the two centuries before, frankly, we were just trying to hang on to our way of life and rebuild. So that is the explanation.

Mr. COLE. Well, just to offer a personal comment in support. I know exactly what you are talking about. My great-grandfather was treasurer of the Chickasaw Nation at that very same time, and he had to sit there in our capital on the second floor and figure out how to dispose of our property, which was taken from us inappropriately, you know, both in terms of individual plots and then, frankly, what we gave back to the United States Government to try and protect, like what is the heart of now the Chickasaw National Recreational Area was literally sacred springs to us, and we didn't want them in private hands. So we literally gave it back to the Federal Government, so it is now the core of a national park. But believe me, I understand the difficult decisions that your forebearer made.

Ms. Schwartz, I want to ask you—and I invite the other panelists to also weigh in on this—your thoughts as to whether the Treaty of New Echota is still in force and to explain whether you believe the Cherokee Nation is a successor in interest to the treaty or whether that is still an open question, because obviously we have some issues raised by others about that.

Ms. SCHWARTZ. If I can briefly address the latter part of your question first. The Congressional Research Service does not take a position on whether the Cherokee Nation or other Tribes are successors in interest to the Cherokee Tribe that signed the treaty. We are participating in this hearing essentially on the understanding that the Cherokee Nation is a successor in interest. And there has been case law determining that the Cherokee Nation is a successor in interest to the historic Cherokee Tribe, particularly in the context of the 1866 Treaty, which did reaffirm the previous treaties, including the Treaty of New Echota.

But we do not take a position on whether other Cherokee Tribes of today are also successors in interest at this point.

Mr. COLE. Thank you very much.

I would invite Chief Hoskin and then Professor Robertson to answer the same question.

Mr. HOSKIN. Representative, I do have an opinion on this.

Mr. COLE. I suspected you might.

Mr. HOSKIN. And I think plainly, the historic record and the law demonstrates that the Cherokee Nation, of which I have got the

honor of being the elected principal chief today, is the Cherokee Nation, the same Cherokee Nation that is party to every treaty with this country since its founding and that predated this country. I have great respect for the two other Cherokee bands that have been mentioned, the Eastern Band of Cherokee Indians in North Carolina and the United Keetoowah Band of Cherokee Indians in Oklahoma.

The issue with the Eastern Band was disposed of by the United States Supreme Court in a decision in which they determined that they were not the successor in interest. That question has been asked and answered.

The United Keetoowah Band of Cherokee Indians in Oklahoma was authorized by this Congress in 1946 and recognized in 1950, more than a century after the treaty of 1835 certainly, and well after the last treaty that this nation, the Cherokee Nation, signed with this country in 1866. The Cherokee Nation of which I have the honor of being the chief is the same Cherokee Nation that signed those treaties.

Mr. COLE. Professor Robertson.

Mr. ROBERTSON. Yeah. I am not sure I have much to add to what has been said by my copanelists. I do understand that the Interior Department is looking into some of the questions that you raised, Congressman Cole, and I believe that process is ongoing. So it may be that there are answers coming from Interior.

Mr. COLE. Okay. Professor Robertson, let me ask you this question: Both the Constitution and Supreme Court precedent have highlighted the equality principle, the idea that one person's vote is equal to another person.

With the potential of appointing a delegate who would already have congressional representation, would you have any concerns about the constitutionality of the delegate? And I would invite others to respond as well.

Mr. ROBERTSON. Yeah. I think the argument that I find persuasive is the distinction between—that has been raised in some of the materials presented is the distinction between a member/representative and a delegate. The power of delegates is—well, there may be some practical advantages to or represented constituency to having a delegate in terms of opportunities on committees. The denial of the power to vote for final passage of legislation I think is a severe limitation. And I think the Constitution uses the phrases “member” and “representative” deliberately, you know, to assure, and the constitutional law cases relate to those positions because they have a final say over the laws that govern the land and there, I think, equal protection concern is most severe.

So, you know, without having dived into the issue in-depth, my initial thought is that that distinction is material. And so I don't know that I would have any particular concerns.

Mr. COLE. Okay. I will turn to you, Ms. Schwartz, and then Chief Hoskin, I would love to get your opinion as well.

Ms. SCHWARTZ. So the instruction that we have from the courts is not directly applicable to this case. We do have determinations about the constitutionality of the current delegates, the territorial delegates, but there is a distinction in that none of the territorial delegates represent citizens or residents who already have rep-

resentation in the House. So the particular situation that we are facing here is not one that the courts have weighed in on.

That said, simply because something has not been done before does not necessarily mean that it cannot be done. It is simply a consideration that this body should take into account when it is making its decisions.

There is the possibility that someone could try to raise an equal protection claim. It is not clear whether the courts would hear that claim or, indeed, how they would rule on it if it were raised.

Mr. COLE. Thank you.

Chief Hoskin.

Mr. HOSKIN. Well, I would just reiterate an earlier statement that I made that the power, the voice of the representatives of this body is on final passage. The delegate would not possess that right and so would not be exercising that final authority on the part of a Member of Congress.

And let's remember, the United States crafted this provision and said that the Cherokee Nation shall have a delegate. That is the Cherokee Nation's governmental interest. The Cherokee Nation has read that and that informed our decision as Cherokee people to fashion our Constitution to appoint the delegate to represent the Cherokee Nation's government. I think that the United States would need to err on the side of making this provision effective rather than—I don't want to suggest finding a way to make it ineffective, but I would say, let's find a way to make it effective just looking at the plain terms of the treaty—the Cherokee Nation shall have this right.

Mr. COLE. Okay. Let me ask one final question, and I will address it initially to you, Dr. Robertson, but I also would, you know, open it up to the panel. You know, in this body, we all have our differences, but we are generally pretty united on we are not very fond of the United States Senate. You know, there seems to be a bipartisan consensus on that, and it really doesn't matter who happens to be in control at a given moment. We have our problems with the Senate.

So we have a treaty that was obviously, you know, concluded by representative of the President of the United States, approved by the Senate of the United States, but affects the membership of the House of Representatives. And, obviously, we are not party to that decision.

So to proceed, does the House expressly have to act, number one? And number two—or could you go to court for instance, and, okay, this is a treaty right. But does the House, number one, have to act?

And we have addressed this a little bit, but I want to be very clear about it, your opinions collectively between the virtue, again, of a statute and a resolution, depending on how we acted—I think you have all addressed this one way or the other, but I think it would be very helpful to have it very specific. So if I can start, Professor Robertson, with you.

Mr. ROBERTSON. Sure. Well, I think on the latter question, you know, the path of least resistance, especially if it comported with emotional predispositions, might be the best way to go, which is to say, to act with the Senate, let's just do this ourselves because we decide that it is the right thing to do, to follow through with obliga-

tions that the United States undertook to follow through with ages ago.

And, by the way, I might add, my mother was a Senate staffer during the whole of my childhood, so I understand institutional inter-house rivalry—

Mr. COLE. We all shouldn't be ashamed of our past.

Mr. ROBERTSON [continuing]. Very well.

So your first question—I am sorry, can you remind me? It was whether you have to act—

Mr. COLE. Basically, could this right be enforced in a court without action by the House? In other words, does this require action by the House, be it resolution or statute? And then second, the merits of either one of those approaches.

Mr. ROBERTSON. Yeah. I think as a—my guess is—I just taught the political question doctrine cases last week, and my gut is that this is precisely the sort of question that a Federal court would decide it did not want to mess with. So my guess is that this would likely be something that the courts wouldn't want to deal with, although, theoretically, I imagine they would have jurisdiction and could. So that is just sort of my guess based on having done this stuff for a long time.

As to the merits, again, of a statute or the House acting unilaterally, I guess I would repeat what I said earlier. I don't think there is any requirement for a statute. I think that under the terms of the treaty and just the way the courts have dealt with Indian treaties forever, I think this is something you could do on your own. I think that the objective disadvantage is, again, the one that has been alluded to earlier, which is that it would be a terminal right in the sense—or a renewable right. But that is a cost that would be paid by the Cherokee Nation, and it sounds as though they are more than willing to pay it.

And so it just seems to me, again, circling back to the beginning of my answer, that, you know, it would be easier for you guys to do this on your own, if you believe that it is the right thing to do. And I believe it is the right thing to do, then I would say go ahead and do it. And then, you know, see how it works out, see if there are challenges.

I am not sure that there would be challenges. I agree with CRS that courts would find justiceable (ph) or that they wanted to involve themselves with. And then in 2 years, you know, see where everybody was, and renew it or maybe at that time pursue a statute.

Mr. COLE. Okay. Ms. Schwartz.

Ms. SCHWARTZ. Thank you.

So to the first part of your question, does the House have to act, I think the best answer is yes. I think it would raise serious constitutional questions if the Senate and the President acting through a treaty could bind the House to take an action that so inherently affected the internal workings of the House. That would be unprecedented. It would be very different from any other operation of treaties that I am aware of.

To the second part, could this be enforced in court if the House did not act. I, again, think the best answer is no. And, again, we

don't have case law directly on this, so the answer is not certain. But there are two things that I think are problematic there.

First, it is really unclear who would have the ability to bring that suit to try to enforce it and whether they would have standing.

Secondly, as my copanelist alluded to, it may present a political question that the courts would not want to engage with under principles of comity.

And, thirdly, I think if they did address it, that the separation of powers principles would really come into play, that they would be unlikely to order the House to do something that, again, so intricately affects the internal workings of the House on the authority of something that the House had no say in.

Mr. COLE. Thank you very much.

Chief Hoskin.

Mr. HOSKIN. Congressman, as to the question of the courts, I will probably think a bit more on the answer before giving this body a final one, in part because I am going to think about what my fellow panelists have said; in part because the Cherokee Nation has spent quite a bit of time across the street in a lot of cases lately, and maybe we have had our full of the judiciary.

But in any case, I think that this body—as to the second question, this body absolutely could take action, should take action. And I think that from the perspective of the Cherokee Nation—and I don't mean to be overly dramatic—but we have waited two centuries. We believe the Senate has acted. We believe the President has acted. And now we think the House acting, even though it is not a durable instrument, that a resolution should pass this body. And I think it would send a powerful message to the country for the United States to keep its promise in that fashion.

Mr. COLE. Thank you very much.

I thank all of you, again, for appearing. And, again, Mr. Chairman, thank you very, very much for holding this hearing. I am very, very appreciative. Yield back.

The CHAIRMAN. And I just want to be clear. I mean, we actually do both, right? I mean, we could actually pass a resolution to seat a delegate and, at the same time, if we wanted to, work on a more durable statute, which will take a lot more time. I mean, there is nothing that says you can't do both, right?

Ms. SCHWARTZ. That is correct. I am not aware of any prohibition on doing both.

The CHAIRMAN. Mrs. Torres.

Mrs. TORRES. Thank you, Chairman and Ranking Member. I think a lot of my questions were proposed by both of you.

I do want to go back to Ms. Schwartz. You started to quote a bit of Article 7. Are you able to read the entire Article 7 to us here today?

Ms. SCHWARTZ. Yes, I am.

Mrs. TORRES. Great. Then I don't have to read this little tiny writing on my iPad.

Ms. SCHWARTZ. Article 7: "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 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.”

Mrs. TORRES. Provision. When I look up the word “provision,” its true meaning, it is preparation. It does not say by Congress passing a law. It simply says provision. We need in order for you to be a Member of Congress, a delegate or a commissioner, you need to have your name on a ledger. You need to have an office. You need to have a budget. You need to have staff.

When I read through Article 7, and it specifically speaks to improving conditions for the Cherokee Nation and that Congress is left with its duty to provide room for another Representative in the people’s House. It does not say that Congress should pass a resolution.

There were 20 signers, 10 witnesses. This treaty was very clear in defining the word to improve conditions, and preparation, in my opinion. I am not an attorney, nor do I pretend to be today. But I do believe that the preparation that they were talking about here in the treaty was not for the vote of Congress, because the treaty had already been agreed in consent with the Senate. It is unfortunate that the Senate did not agree to have a delegate in their house, but this is the people’s House.

So, you know, I think that that is where we need to look at how do we honor that.

Chief Hoskin, has the Federal Government improved conditions of the Cherokee Nation? Has the Federal Government, aside from Article 7, upheld its duty to provide and protect?

Mr. HOSKIN. Thank you, Congresswoman.

It I look at the last two centuries, I would say the balance is in favor of the United States having diminished the Cherokee Nation, suppressed the Cherokee Nation, dispossessed us from things that are precious, and put us on the receiving end of things that I think this country now regrets.

If you look more recently in history, our relationship with the United States is much improved. I mentioned earlier the period of the 1970s to the present. That was a change in Federal Indian policy that restored the civic institutions of the Cherokee Nation and other Tribes, put us on a path that, frankly, we would be on before European contact, which is self-determination, charting our own course.

So in that respect, in the last 40, 50 years, we have been on a trajectory of improvement. The United States has a great deal of work to do. I mean, when it comes down to it, the next time the United States fulfills a solid promise to the Cherokee Nation will be the first time it has done it. The next time—and with all due respect to the Congress, the next time the Congress fulfills its trust obligations with respect to funding and other types of resources will be the first time it is done.

So there is more work to do. In the balance of two centuries, the United States is far behind in improving conditions. However, we are on a path of progress. What an amazing mark of progress

would be it to fulfill a two-century old treaty that up to this point—and I want to stress this to the committee—up to this point, if you ask a Cherokee what does the Treaty of New Echota mean to you, it means pain, indignity, and injustice. We can turn that into justice and a measure of restoration for the Cherokee people and a measure of progress.

Mrs. TORRES. In looking at whether the government, the Federal Government, has provided even basic needs, water?

Mr. HOSKIN. Well, if you look across Indian country, there is still a great deal of deficits. It is true in the Cherokee Nation—I think about in this role what Kim Teehee may do in this Congress as a champion for all of Indian country. And we know that there are parts of Indian country where the circumstances are completely desolate when it comes to basic infrastructure. There are parts of Cherokee Nation where it is lacking. And I think the United States can do a great deal more to close that gap. Having a voice in this Congress will help that, but there is more work to do.

Mrs. TORRES. And I think that is what is key here is having a voice in this Congress. Representation truly does matter, in my opinion.

As I close, I haven't had an opportunity to speak with you before today to thank you about the work that you have done in my district to ensure that the shelter, the migrant shelter for children, tender-age children, was run by you. You received the Federal contract on that. And while my weekly visits might have not been as welcome to some, to the Cherokee Nation, they were very welcome. Holding the Cherokee Nation accountable for keeping to the contract, the specific contract of what was called out to protect these children, I was there every week to make sure that you were doing that, and you were there every week at the table ensuring that my questions were answered.

So when we look at other shelters and we look at the abuses from forcing children to take narcotics—you can call them medication, I call them drugs—sexual violence against tender-age children, physical violence against children, none of that happened under your watch and my watch because we were both diligent.

So thank you for, you know, meeting the needs of that contract, and I hope that someday the Federal Government will also meet you eye to eye on this treaty.

And I yield back.

The CHAIRMAN. Dr. Burgess.

Dr. BURGESS. Thank you, Mr. Chairman.

And, again, I will also stipulate that Ranking Member Cole asked a great number of the questions that I was contemplating, but thank you all for being here today.

And, Chief, can I just ask you, because it is a deficit in my historical knowledge, you keep referring to an 1866 re—was it a reformatting or re-signing of the treaty at that time? Is that correct?

Mr. HOSKIN. That is correct.

If I could, in 1866, of course, was—coincided with the end of the American Civil War, of which the Cherokee Nation figures in in terms of splitting our Nation and our various alignments with the Confederacy and with the Union, and it is, itself, an interesting history, an important history.

If the post-Civil War era, there were a series of treaties that the United States came to the Tribes at that era and renegotiated, and so there were changes. The key provision—and I am glad you brought this—is that in the 1886 Treaty, the Framers were careful to say that any provision in a prior Cherokee Nation Treaty not inconsistent with the new terms were carried forward.

So in that respect Article 7 of 1835 was explicitly carried forward as part of that clause.

Dr. BURGESS. So it would have been reaffirmed as a result of the 1866 Treaty?

Mr. HOSKIN. Yes, sir.

Dr. BURGESS. And, Ms. Schwartz, thank you for reading Article 7 for us. It is—as I listened to you reading that, in my mind’s eye, it was describing a people that were relocated outside of the then-existing United States to an area that was, in fact, a territory, not a State.

Does that have any implication for what we are discussing today now that statehood, whether we have agreed with it or not—just kidding, because Texas-Oklahoma has a certain rivalry. But after statehood was conferred upon Oklahoma, does that change the equation now that Oklahoma is a State?

Ms. SCHWARTZ. It is certainly something that this body can take into consideration when it is deciding its interpretation of the treaty language. The words immediately preceding the delegate provision do say, “in their removal beyond the territorial limits of the States.”

So certainly at the time the treaty was signed, the Cherokee did not have other representation in Congress because the area to which they were removed was not a State.

However, it does then say, “It is stipulated that they shall be entitled to a delegate in the House of Representatives whenever Congress shall make provision for the same.”

And that provision is not explicitly contingent on the territory remaining not a State. And because at least in courts, one of the canons of construction is that treaties are not abrogated by implication, meaning that a court is probably unlikely to find that the delegate provision was implicitly abrogated by statehood because Congress when they made Oklahoma a State, did not say, And now the delegate provision of the Treaty of New Echota is abrogated.

Dr. BURGESS. Let me ask you a question then. Say, for example, the Dakota territory when statehood was achieved by North and South Dakota, presumably they had territorial representatives—or did they have territorial representatives in the House of Representatives at that time?

Ms. SCHWARTZ. I am going to refer to my chart for Dakota. There was a territorial representative established in 1861.

Dr. BURGESS. So when statehood was achieved, it was no longer necessary to have the territorial representative? Is that—would be that be a correct understanding of what—

Ms. SCHWARTZ. Correct. So the Statehood Act or enabling act itself generally took care of arranging those procedural matters.

Dr. BURGESS. And then when Oklahoma became a member of the United States—and we are grateful that you became a member of

the United States, even though you rate our high school football ranks for your football team. But, seriously, what—

Mr. COLE. I will stipulate usually, this year excepted, our Texas players are better than your Texas players.

Dr. BURGESS. Does this figure into the discussion at all, is the only question I am asking. Because just like Chairman McGovern and Ranking Member Cole, we all get questions about this. And I just want to be sure we have our facts correct when we present this information on the floor of the House.

Ms. SCHWARTZ. So because there was not a Cherokee delegate in the House at the time of Oklahoma statehood, the legislation enabling Oklahoma statehood did not mention a Cherokee delegate. So it was neither acknowledged as a continuing promise nor eliminated.

Dr. BURGESS. Okay. So it was silent on the fact?

Ms. SCHWARTZ. Right.

Dr. BURGESS. Okay. Well, then I will just ask the same question you have now been asked probably three or four different times. If you detect a theme of concern about the other body here in the Capitol, I mean, it is earned because we have all had experience. But the concept of the Senate requiring an action of the House seems a little bit strange to some of us, recognizing the separation of powers, they can't raise taxes, we can't do treaties, but then they can rename House passed bills and insert entire new provisions in them that are revenue raisers. So the Senate effectively gets around the fact that the House is the site of the origin of all revenue bills, but we never enter into treaties on the House side.

So this is something that, from an institutional perspective, I think we need to address, the ability of the Senate to require us to do something as a result of one of the treaties that the Senate has entered into.

Ms. SCHWARTZ. So I think that is why my answer to the question of whether this could be enforced in court, absent any action by the House, is likely not. I think a court would be very reluctant to find that the Senate and the President could essentially bind the House to do something.

Dr. BURGESS. Well, Chief, let me just ask you, has it ever been tried? Has the process ever gone through the courts to try to enforce the Senate's provision on the House?

Mr. HOSKIN. The answer is no. The first act of asserting this right was when I took the United States up on its offer and appointed Kim Teehee and coming here today.

Dr. BURGESS. Okay. Well, thank you all for your input this morning. It has been very educational. I have learned a number of things.

It is—what can I say? I mean, it is obviously an honor to serve with Ranking Member Cole. He and I came into Congress at the same time. I have learned a great deal from his wisdom here on the committee and, obviously, will continue to do so.

But thank you all for your participation this morning.

And I yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. RASKIN.

Mr. RASKIN. Mr. Chairman, thank you.

I need to start by asking unanimous consent to submit a statement for the record. Last year, Secretary Haaland approved a new Constitution for the Cherokee Nation, which explicitly ensures the production of the political rights of all Cherokee citizens, including the Tribe's Black members. These individuals are descendants of the Cherokee Freedmen who were enslaved by the Tribe before the Civil War and were emancipated afterwards.

Echoing Secretary Haaland, I want to applaud the Cherokee Nation for its decision to honor its moral and legal obligations to the Freedmen and their descendants. It is a crucial step towards racial equality, justice, and reconciliation, and it is worthy of our appreciation and our emulation.

Mr. Chairman, therefore, I ask unanimous consent to insert into the record a statement from Mr. Damario Solomon-Simmons of Tulsa, Oklahoma, which commends the Cherokee Nation for taking this step and expresses hope that it will herald a new era of openness and inclusivity in the Nation.

The CHAIRMAN. Without objection.

Mr. RASKIN. Thank you.

Mr. Chairman, it is an extraordinary moment that you and Mr. Cole have allowed us to have here, and none of us should be unaware of the history-making nature of this proceeding.

I wanted to start by asking whether Delegate Teehee is actually present?

Delegate Teehee is here. Well, I want to welcome Delegate Teehee, at least on behalf of the good people of Maryland's 8th Congressional District, and it is great to see you here representing the Cherokee Nation.

And I want to ask a few questions, which I think will lead up to my basic point, but I want to make sure I believe in my basic point, so that is why I want to ask some questions. But based on what I have heard, I think there is a very easy—one easy question and one hard question before us.

The easy question is, do we have a legal, and I would say a moral, obligation to seat Ms. Teehee? And the answer to that seems to me clearly to be yes. This is just a matter of reading the 1835 Treaty of New Echota, and then establishing its meaning and then acting upon it. That doesn't strike me as difficult at all, but I do want to ask a few more questions related to it.

The difficult question is, what does it mean to be a delegate from a nation to the House of Representatives, which we have never done before? Because the delegates we have are either from territories, American Samoa, Guam, Virgin Islands, Puerto Rico, or they are from the District of Columbia, which inhabits still a different sub constitutional jurisdictional plane. And so, this would be new for us. And it is not a foreign nation that we would be seating a delegate for. It is a domestic nation. And so, I think that that is the question we need to look at.

But let me quickly try to go through some questions to make sure that I have got confidence in these conclusions.

To begin with, have there been delegates elected before by the Cherokee Nation, or is Delegate Teehee the first one?

Mr. HOSKIN. Delegate Teehee is the first one. If you look in the historic record, there may be references to a delegation going to

Washington, D.C., but they were not elected in the formal sense, and they were not done pursuant to this treaty.

Mr. RASKIN. And do you have within your records any correspondence historically between the Tribe and the House of Representatives or Congress asking to be seated before?

Mr. HOSKIN. I am not aware of any contemporaneous documents on that.

Mr. RASKIN. Okay. Fair enough. So there is no adverse authority that the Congress said no, or the House said no, okay, that is out there.

People talked about the language in Section 7 of the treaty about whenever Congress shall make provision for the same. Of course, Congress is defined in our Constitution under Article 1, which says that each House shall define the rules of its own proceeding. And we also decide upon our own members, and we certainly decide on our own delegates. It is true that there have been statutes passed before, but they are seated by the House. And this one comes to us in a somewhat different posture because it comes by virtue of treaty. And, of course, the supremacy clause of the Constitution says the treaties exist on the exact same level as Federal statutes do. So it is a binding law upon us. A treaty is binding upon us, just like any other Federal law would be.

So right now, Delegate Teehee came to her official position by virtue of an appointment? Is that right?

Mr. HOSKIN. That is correct.

Mr. RASKIN. And is that under some bylaw that you have written?

Mr. HOSKIN. That is pursuant to the constitution of the Cherokee Nation which was ratified by the Cherokee people.

Mr. RASKIN. The new constitution?

Mr. HOSKIN. Correct. The constitution—the new constitution includes that

language, yes.

Mr. RASKIN. Gotcha. Okay.

All right. So all of this would be self-executing. I guess my question is—what we would have to figure out only is rival claims to being the successor to the Cherokee Nation that entered into the 1835 Treaty. And I haven't had a chance to scrutinize that the letters, like from the United Keetoowah Band of Cherokee Indians in Oklahoma. I don't know—how many other claimed rivals are there? Is it just that one?

Mr. HOSKIN. Congressman, what I heard earlier from the chairman is there were letters received from two bands of Cherokees: the Eastern Band of Cherokee Indians, and the United Keetoowah Band, and I addressed earlier that those claims to successorship, in my opinion, don't withstand any scrutiny.

Mr. RASKIN. All right. And so I do think, Mr. Chairman, that is something we would have to figure out. You know, when we say—when the court says that is a political question, that means we have to figure it out. It is up to us. Our decision and judgment on that would be binding. It certainly seems from everything I have seen that you guys are the logical successor, but obviously, we would have to do our due diligence on that before we, you know, rendered a final decision on it.

All right. So then I want to shift to this other question of what actually it would mean to send a delegate here. My understanding of the delegate positions falls into a couple of different categories. If you look at the Northwest Ordinance and the delegate positions that were created then, Jefferson basically had the idea that the delegates would be representing territories that are essentially States in waiting, or States in training, States in tutelage to become States. Right? And so they would send delegates, and those representatives would learn more about the Federal Government, and also take back information from the Federal Government to the Territories. That is, obviously, not applicable because you are not on the pathway to being admitted as a State, and that is not part of the understanding, at least as I get it.

The other, of course, is the District of Columbia delegate, Washington, D.C., has itself petitioned for statehood, but that is for the non-Federal areas. That is for the residential areas which they want to be seated to a new State. The existing Capitol Federal District would still be directly under Congress. I don't know whether or not there would still be a nonvoting delegate there, but that is also seen as, like, a permanent part of the country.

But so, you would arrive at something between a delegate and, like, an ambassador, right? And I just wonder, that would have implications in terms of how we seat you and what you do or what Delegate Teehee would do once she gets here. She obviously can't vote on final passage. The Supreme Court and the D.C. Circuit Court have been clear about that, even with respect to these delegates. In a case called *Michel v. Anderson*, I think it was in 1994, they said these people cannot vote on final passage, even though it is okay for them to vote in committee because that, you know, can be reversed on the floor. So it wouldn't be that.

We would want to make sure presumably that there be every equal dignity and ceremony attendant to the office that the other delegates get. I guess the big question is serving on committee.

And then there is that question of is there a kind of double representation that, you know, the Cherokee Nation is, obviously, all over the country—how many States are included?

Mr. HOSKIN. All 50 States.

Mr. RASKIN. All 50 States, okay. So, yeah, in that sense, I guess the members of your nation would be double-represented if they had a Representative on the committee from their district and then they also had the Cherokee Nation representative there. I don't know how big a deal that is because presumably Delegate Teehee or her successors would be looking out for the interests of the nation as a Nation. Is that understanding right?

Mr. HOSKIN. That is my understanding. That is how I read the treaty. That is how I understand her role.

Mr. RASKIN. Yeah. So would there only be certain committees that you think she would want to serve on or you would want your delegate to serve on? Do you not want to serve on committees? And what is your thinking about that?

Mr. HOSKIN. This is my view of it, Congressman, is at the time, I think the Framers of this treaty plainly were concerned about the governmental interests of the Cherokee Nation having a place in this body. If you look at what our governmental interests are today,

they really cross every committee that you have. The Cherokee Nation today—here's the shorthand way I would describe our government—we do everything the United States does except maintaining a standing Army and print money. Sometimes I wish we printed money, but we don't print money. But we do a great deal of things.

And so if you look at what we do in terms of our governmental interest, I think it spans the entire depth and breadth of this body, and so I would think that any committee assignment would be fair game. Perhaps there are some exceptions to that, but I think primarily, if you focus on what our main day-to-day issues are, certainly natural resources, certainly our engagement with the Bureau of Indian Affairs, and certainly everything that touches upon sovereignty would be important. But, again, healthcare, human services, infrastructure, it is broad.

Mr. RASKIN. Yeah. Well, and so I—

The CHAIRMAN. The Rules Committee is a good committee to serve on.

Mr. RASKIN. Yes, the Rules Committee is a great committee.

Mr. Chairman, just on this point, I think that we should be creative in our thinking about it. There might be, you know, a certain committee that the member could be a standing member of, or would be—you know, like Natural Resources or Interior, something like that, or we could also say, because all of the work of the Congress affects the Cherokee Nation, perhaps the Member could just waive on to any committee when there is a hearing of interest to her or to him. I don't know. I think we could think about it differently because I do think for us we have to distinguish between the role of territorial and district delegates from the role of a delegate of a nation, even if it is a domestic nation.

In any event, I want to thank you for your patience. That should be a massive understatement, obviously. But I don't think we should be very patient in the final days of this Congress, and I think we should act with dispatch to make this happen. I think there are some final things we have got to figure out, but we should move as quickly as possible.

I yield back to you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Reschenthaler.

Mr. RESCHENTHALER. Thank you, Mr. Chairman. I appreciate it.

Most of my—actually not most—all of my questions have already been asked and answered at this point. But I think it is a really fascinating discussion. I can't help but to think how different our history might have been had we brought the Tribes more into the fold from the very beginning.

But with that, I am looking forward to having offline discussion with my good friend from Maryland, because I have got some questions. I was going to ask you to yield for a question, but I don't want to put you on the spot, so I will talk to you offline about some of my thoughts to see your opinion.

So thanks to everybody for testifying.

And I yield back.

The CHAIRMAN. Thank you.

Ms. Scanlon.

Ms. SCANLON. Thank you.

Thank you all for your testimony today. And thank you, Chairman McGovern and Ranking Member Cole for holding this hearing.

I is certainly not often we have such a unique opportunity to really probe into history and a lot of really fundamental questions.

I guess one thing I was really struck by Chief Hoskin's quoting from John Ridge's letter, and it really made it explicit that the Cherokee agreement to the treaty was really—that the issue of the delegate was really central.

And I was curious—and I would ask this of each of our witnesses—are there other key elements from the contemporaneous—the folks who negotiated the treaty that you would point to as being particularly instructive as to what people intended with respect to the delegate?

And I can start with you, Chief Hoskin.

Mr. HOSKIN. Well, Representative, thank you for that. I wish I could be more responsive to your question.

That was a very powerful passage from John Ridge, and that entire history of how that treaty was negotiated is itself fascinating. If there is more to add to the record, we will supplement. I am not, though, prepared here to provide anything further, but I do think that drove the point home nicely.

Ms. SCANLON. Okay.

Ms. Schwartz, is there anything, including you can point us to the particular parts of the CRS history—or CRS report if that is easiest?

Ms. SCHWARTZ. It is not directly contemporaneous with the New Echota Treaty, but in a later treaty that was negotiated actually with the Confederacy, there is a similar delegate provision that goes into a little bit more detail about the expectation that the delegate would have the same rights and privileges of other representatives in that body. Of course, that is not a treaty with the United States, and it was about 30 years after the Treaty of New Echota. But I do think that Congress could look to that for some assistance in understanding the New Echota Treaty provision in the way that the Tribe likely would have understood it.

Ms. SCANLON. Thank you.

And, Professor Robertson, anything?

Mr. ROBERTSON. Yeah. I am not sure I can add much to that except in terms of—I think your point is absolutely on the money, and I think in terms of the importance, it is maybe helpful to look back to the 1830 Dancing Rabbit Creek Treaty with which the New Echota negotiators would, of course, have been familiar. And I think the difference in language must reflect their intention that this right be more precisely articulated, and I think that is a reflection—must be, again, a reflection of the Nation's—or the negotiating teams', at any rate, commitment to securing the delegate right.

Ms. SCANLON. Thank you.

One more question. Chief Hoskin, I guess, can you just tell us a little bit about why now, why the push now? What is the importance to the Cherokee people of seating a delegate at this time, and what you think that can accomplish?

Mr. HOSKIN. Well, personally I feel duty-bound to assert every single right of every single treaty we have because I know that our

ancestors paid a dear price for it. I can't imagine leaving this Office of Principal Chief without doing everything I can to hold the United States accountable for that as a measure of justice. The council members are here behind me, and I don't want to speak for them, but they have echoed this in my conversations with them.

The "why now" gets back to the question of why not 100—or two centuries ago? And, of course, I went through the history of the Cherokee Nation. This is what I want Americans to understand. Yes, two centuries we had this right, but did we possess it in a real way. We didn't possess it in a real way when the government of the United States suppressed our institutions almost out of existence.

We are now—again, I am thinking back to my grandfather. He would be awestruck that his grandson is in the Rules Committee of the House of Representatives asserting a treaty right that his ancestors that were at least around for and suffered for.

And so, I think why now, why not now?

Ms. SCANLON. Okay. Thank you.

Mr. COLE. Question, my friend, really quickly, just to make a point.

This is not unusual. I mean, we have had settlements with the United States of America and various Indian Nations about the United States' failure to sustain its treaty rights decades after, you know, Tribe after Tribe have asserted. And historically, politically, for reasons that ought to be embarrassing to all of us, those were not kept at the time, but later was recognized, yeah, we did the wrong thing.

You know, we have had litigation in Oklahoma involving Cherokees, Choctaws, Chickasaws on water rights and riverbeds. And, yeah, we didn't do what we were supposed to do. You are not asking for this back, but here's the settlement or something, or you are getting this back, because we just did the wrong thing.

So, you know, I don't think you can guilt people for not doing something in a time period that was impossible to do, but maintaining the right to do it when they had the opportunity to do it. And I think that is what we are wrestling with here.

But, again, I certainly understand asserting rights after the fact because they were there, but people just knew, okay, we are not going to get that. You know, they agreed to it, but they are not going to keep their word. But now, it is a different time, and the government of the United States, as my good friend, the Chief, said, in recent years has done a lot in various areas to correct some of the inequities of the past. And I think of that in our own constitutional history. You know, all men are created pretty equal are pretty clear, but when they wrote in 1787, didn't apply to women, didn't apply to Black men, Yellow men, Red men. We figured out over time, Hey, that is what we wrote, and that is the implication.

And I think that is what you are looking at here. But, again, that is just my opinion. I thank my friend for allowing me to insert myself.

Ms. SCANLON. Certainly. And really appreciate everyone's testimony on helping us figure out a path forward because it certainly seems like we need to take that path.

Thank you.

Yield back.

The CHAIRMAN. Well, thank you very much.

You know, let me ask the panel—I think everybody has asked their questions, but let me go to Professor Robertson and Ms. Schwartz and the Chief again, if there is any final things that you want to say for the record before I yield to Mr. Cole for his closing remarks, and I will make a final statement as well.

So, Professor Robertson, anything that you want to add for the record of the hearing?

Mr. ROBERTSON. Yes. Thank you, Congressman.

I just would like to add maybe a little bit by way of response to a couple of questions that members of the committee asked a minute or so ago, including this most recent comment by Congressman Cole and to sort of reinforce the point that he made.

I think it is important to remember that one avenue that was closed in pursuing this right to Tribes in general, but to the Cherokee Nation in particular was the judicial route. It is important to remember that the case that gave us the phrase “domestic dependent nation” was a jurisdictional case in which the Supreme Court said squarely to the Cherokee Nation, you can’t bring Federal lawsuits. And that case gets dismissed. And then Georgia’s imposition of its laws gets challenged by a non-Indian who is imprisoned and there is sort of a way around it. But it is unclear to me how this claim would have been pursued had the Cherokee Nation chose to prior to the modern era when the Federal Government has been much more open to claims by native Tribes.

In response to a couple of questions that Dr. Burgess raised, one having to do with Senate imposition of obligations on the House of Representatives, I think it is important to note that that was actually in the Native American law sphere commonplace prior to 1871. Every time the Senate negotiated—or rather ratified a treaty that the executive had negotiated, virtually without exception there was some funding obligation, and the House would have to sit down and figure out where to find the money. This won’t sound surprising to you all. But in 1871, in the Indian Appropriations Act, Congress insisted on the inclusion of a provision saying we are not doing treaties anymore. From now on we will continue to negotiate with Tribes, but we are going to call them statutes so that we can have a say in what the terms are.

The Treaty of New Echota from 1835 falls squarely in the middle of the period when it was commonplace for obligations like this to be placed on the House by the Senate. And I think it is important to sort of have that historical context when figuring out how to implement that right today, and maybe put ourselves back into that early 19th century framework because, you know, the Tribes shouldn’t be penalized because the Congress operates differently today. They should, it seems to me, be able to benefit from whatever the status quo was at the time that the treaty was negotiated.

The last point I will make has to do with the question from Congressman Burgess about the representatives and delegates from the Dakotas. I think the point is a fair one, but there is a difference when dealing with the Cherokee Nation and Oklahoma. When North and South Dakota became States, they essentially replaced the territory, and so it made sense for the position of dele-

gate to terminate and for the position of representative to replace it.

When Oklahoma became a State, that had no impact on the continuing existence of the Tribes. They continued to exist as governments. They continued to function through the 20th century. And so, because it is a different situation, it seems to me that it makes—it really doesn't make sense to look to an example like the transition of the Dakotas from territory to State to figure out what the right answer is vis-à-vis Tribal—the continuing access or right to a Tribal delegate.

And then, I suppose one final thing I will say is to echo something that many have said which is to thank the committee again for holding this hearing. I agree with everyone who said this is enormously important historically.

I might briefly make a nod to the international community, which I am sure is watching closely for whatever you may make of that. Most of you will know that the United Nations adopted, in 2007, and the U.S. signed on in 2010, a declaration of rights of indigenous peoples. A move like this to provide representation, to recognize a treaty right and to enforce a treaty right from the 1830s would, I think, be something that people would pay attention to. And the U.S., as Congressman Cole well knows, in recent years and as, I think, Chief Hoskin alluded to, has been a global leader in the recognition of indigenous rights despite some shortfalls and slip backs. And I think that it would speak well to the integrity of the Congress to engage in this sort of bipartisan activity on behalf of indigenous peoples at a time in world history when this is an issue of which humanity is becoming increasingly aware.

The CHAIRMAN. Thank you very much.

Ms. Schwartz.

Ms. SCHWARTZ. Thank you.

I would like to make just a couple of points.

First, with your permission, I would like to read into the record a portion of the court case that my co-panelist recommended to this body, the *Tsosie v. United States* case of 1986. "A treaty is primarily a compact between independent nations, and our Constitution declares this Constitution and the laws made in pursuance thereof and all treaties made shall be the supreme law of the land and no distinction is there made between a treaty with a foreign nation and with an Indian Tribe. A treaty with an Indian Tribe, therefore, is a law of the land as an act of Congress is, and where such treaty prescribes a rule by which private rights can be determined, the court will resort to such a rule. Otherwise, the court must look to the legislation of Congress for the enforcement of its provisions."

I think this stands for the proposition that in this instance, a court would be likely to look to Congress for the enforcement of this treaty provision.

Although my co-panelist said that at the time this treaty was signed, it was commonplace for obligations like this to be placed on the House without its involvement in the treaty negotiations, it is important to distinguish that this is an obligation that relates to the internal workings of the House, that that sort of obligation was not commonplace and is the reason that this is being considered

really for the first time, and we don't have much in the way of case law to guide us.

So, in the end, the decision really rests with Congress and with this body to interpret those treaty provisions.

The CHAIRMAN. Thank you.

Chief Hoskin, any final thoughts?

Mr. HOSKIN. First of all, Mr. Chairman, wado again for holding this hearing and to all of the Members, including the ranking member, my friend, Congressman Cole.

Specifically, Congressman Cole mentioned earlier something very important in the broad scheme, and specifically to Congressman Raskin's questions but successor in interest, the Arkansas Riverbed case, which I think you were referencing, is an example of Congress doing the right thing to resolve an issue.

I would, though, use that to direct you to an opportunity to resolve the successor in interest issue, that Congress dealt with that in the preamble, the early part of that statute. It is a good resource to resolve this issue in the favor of the Cherokee Nation.

More broadly, Mr. Chairman, members, if we start from the idea that the United States always intended to keep this promise, that it always intended what it meant, then we have to get Kim Teehee seated. And I think—I would think there is universal recognition of that.

In that is the case, and if we recognize that the treaty is the supreme law of the land, it carries the weight of law, then I think the Congress is duty-bound to seat Kim Teehee. I know there is questions about the manner in which she is seated, very good questions raised today, but I think the conclusion is inescapable. And I think that conclusion can be reached in this calendar year, and it is my hope as Chief of the Cherokee Nation that we achieve that.

And I appreciate that. Wado.

The CHAIRMAN. Thank you.

And before I close, I want to yield to my friend, Mr. Cole, for any final comments.

Mr. COLE. Well, thank you very much, Mr. Chairman. And, again, I want to thank you personally. This hearing would not have happened without you making the decision for it to happen, and certainly working with us on our side of the aisle, and I am extraordinarily grateful. And I think sometimes it is difficult to drag people into these issues because they are complex, and we didn't have to drag you in. You volunteered to step in all on your own. And I think you set an example, and I hope other committees of jurisdiction follow your lead. That is number one.

I want to thank our witnesses. I thought this was exceptionally good testimony. And as I think I remarked early, I hope all of you, you know, spoke to Congress because the questions that were asked by everybody up here are the questions that our Members are asking, and they do it—it is not a—I always say Native American issues aren't and never should be partisan issues. They are—in this case, it is an institutional issue, it is an issue of sovereignty, it is an issue of trust obligation. There is a lot of things here, and I think the questioning really reflected that today.

I do think it was a historic hearing, and I don't know if you realized how historic it would be when you agreed to do it, but I am

glad you did, because I think these are issues that we ought to grapple with. They are very tough issues in some ways about our past, but they are very important issues for us to deal with.

For one, I tend to think that this does require congressional action of some sort. You know, I am open to statute, I am open to resolution. I think the Cherokees have expressed their willingness to let's just move down the road and see where we end up and—but whatever.

You know, I am often—I have wrestled with a lot of these issues in the course of my career here, and seen a lot of things, mistakes we have made in the past, but—and I appreciate this hearing because I think we have approached it were it is never too late to do the right thing. It is not as if something that happened 150 or 170 years ago can't be addressed and corrected now. And sometimes that is the right thing to do.

Sometimes maybe circumstances have changed. And I don't question anybody's motives wherever they come down on this issue. There are some really complex things here. There are some things that deal with the nature of the institution itself. The election provision is a big one for a lot of House Members. Nobody has ever stepped on our floor that hasn't been elected, except, as the Chief pointed out, appointed Territorial delegates who have.

And I think one of the things that has been very helpful is making it very clear that we are talking about a delegate situation here. We are not talking about final passage. We are not talking about something that can't be overruled on the floor. We are talking about something we are all very accustomed to in terms of having delegates. And we have delegates that represent both parties on both sides of the aisle. All of our caucuses are familiar with this and how we handle it.

So I just think this has been an extraordinarily helpful hearing in clarifying the issues. And, most importantly—and I know this was one of your main aims, Mr. Chairman—making sure that the Cherokee Nation had a forum where its claim could be presented and heard and evaluated in a thoughtful way. That would not have happened without you. And, you know, others have had the opportunity to do it and have chosen not to. You seized the opportunity, and I appreciate that very much.

So I look forward to continuing and working with my friends. As I was listening to my friend, Mr. Raskin, who I always learn something, but when he asked, was Delegate Teehee here, I thought she has been here a lot longer than you have, partner. Because I worked with her when she was our colleague, late Dale Kildee's top staffer on Indian Affairs. And, of course, I had the opportunity to work with her when she was President Obama's advisor on Native American Affairs. If anybody thinks she is not qualified to be here, doesn't know her way around the buildings, we could have her leading tours to the new freshmen that are coming up and advise them on what committees they should be on.

I was a fascinating discussion about committees, but I tend to come down where Chief Hoskin is. Almost everyone—I sit on the Appropriations Committee, and we have an enormous impact on Indian country, you know, and I guess if you had to rule something out, you could say Foreign Affairs, or whatever, but the reality I

wouldn't rule anything out. You know, I think that is a decision of—you know, any delegate that comes here can sit on any committee. They just have to go through, you know, the process. They might not get the committee assignments they want at first, but eventually you might, so, I mean, we all live in that world.

But, again, last point, again, the witnesses I thought were exceptional, and I appreciate the professionalism and the very, very even-handed approach and the education that you provided to all of us on the dais, and hopefully through us, through our colleagues, and the rest of Congress.

So, again, Mr. Chairman, thank you very much for holding the hearing. I appreciate it. And I think you will look back on it, once your career is done, which I hope is no time soon, as something you can be very proud of having done.

The CHAIRMAN. Thank you.

Mr. COLE. And appreciate it. Yield back to my friend, the chairman.

The CHAIRMAN. Well, thank you.

And I want to also pay my friend, Mr. Cole, a compliment. You know, we have worked together for a long time on a lot of issues. Sometimes we are in agreement; sometimes we are not. But even when we are not in agreement, you know, the discussion up here is actually, you know, the way it should be, respectful of one another. And when it comes to these issues, there is nobody who is more dedicated and more of an advocate than he is. And so I—it really is a privilege and honor to serve with him. He is a really good friend.

And I appreciate—I want to echo what he said. I want to thank the panelists. You were excellent. And, you know, we do a lot of hearings. We sit through a lot of hearings. Some hearings are, like, not particularly useful because nobody ever answers the questions. You all answered the questions, and they were tough questions that we were being asked before this hearing. I think you have, you know, set the record straight, you know.

And this is where I kind of come down on this. I personally believe that Delegate Teehee ought to be seated. You know, I mean, if I—you know, I think this is the right thing to do. As I have studied this issue, you know, I believe this is the right thing to do. It is the moral thing to do, and for a lot of the reasons, Chief, that you have highlighted in your testimony.

So we have got to find a way to get this done. And, you know, there are some complications here. Mr. Raskin raised some issues. You know, colleagues have raised some issues, but they are not so complicated they can't be worked out, right? I mean, this is stuff that we can work it out and to get to a point where everybody, I think, feels relatively comfortable.

And so I think we have to figure out how fast we can move, and that depends on, quite frankly, a consensus of this body. Do we have the votes to do this? You know, and we are going to have to—and we want to do this in a bipartisan way because this is not a—these issues should not be partisan. And so, we have to figure this out. We are going to have to reach out to some of the other committees of jurisdiction to get their input on some of this stuff. But I don't want that to be an excuse to, you know, like, 5 years down

the road, we have another meeting and you are, like, what happened? I mean, this should—this can and should be done as quickly as possible. I mean, that is my view.

Look, you know, the history of this country is a history of broken promise after broken promise to Native American communities. This cannot be another broken promise. And so you have my word—and I am sure I speak for my friend, Mr. Cole, as well—that we are going to continue to work with you and to figure out a way to get, you know, to the finish line here. And, you know, I don't know what's going to happen in our elections. You know, I may not be chair of this committee, you know, in the next year, or maybe a miracle will happen and I will still be. Who knows?

But if he is, you are in good hands. But it shouldn't matter. I think we are at—the tone of this hearing today was such that this was—this is not a partisan issue at all.

I should also add the delegates don't get to vote on Speaker either, so that is the other thing, you know. So nobody should—

Mr. COLE. They might get faster action if they did.

The CHAIRMAN. Right, right.

But I guess my view at this point is that, you know, you can pursue two avenues here. One is, you know, a simple resolution to change the rules to seat a delegate as soon as possible, even though that is subject to renewal every 2 years; but at the same time, you can pursue a longer-term statute so that that no longer is the case. But whatever it is, we have got to figure out a way to move this quickly.

So I want to thank all of our witnesses for being here today and for sharing your expertise.

I want to thank all of the members of this committee who participated in this productive conversation, and I look forward to seeing what comes next.

So without objections, the Rules Committee stands adjourned.

[Whereupon, at 12:00 p.m., the committee was adjourned.]



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November 14, 2022

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H-312—U.S. Capitol
Washington, DC 20515

Re: Written testimony of the Choctaw Nation of Oklahoma submitted for the record of the November 16, 2022 Committee hearing - Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives

Dear Chairman McGovern, Ranking Member Cole, and Committee Members:

Halito! Thank you for the opportunity to submit this testimony for the record of this important hearing. The Choctaw Nation of Oklahoma renews its treaty-based request to have its own Choctaw Nation Delegate seated in the U.S. House of Representatives and asks this Committee to support early consideration and approval by the U.S. House of the renewed Choctaw Nation Delegate request.

Further, and as the basis for this hearing, the Choctaw Nation joins with the Cherokee Nation in supporting the renewed treaty-based request of the Cherokee Nation to have its Cherokee Nation Delegate seated in the U.S. House of Representatives.

The Choctaw Nation's 1830 Treaty of Dancing Rabbit Creek, Article XXII language is similar to the Cherokee Nation's 1835 Treaty of New Echota, Article VII language being examined in this hearing. Both are part of the consideration the United States separately owes the Choctaw Nation, and the Cherokee Nation, in exchange for the United States has forced each Tribe to give up the last portions of their valuable homelands in different parts of what is now known as the south and southeastern United States. These two treaties compelled two brutally tragic removals that have become known as each Tribe's "Trail of Tears."

The minor difference between Choctaw's 1830 Treaty Article XXII and Cherokee's 1835 Treaty Article VII can be explained as follows – in both cases, the federal negotiators represented only the Executive Branch of the United States government and said they could not commit the Legislative Branch to seat a delegate. Hence the Choctaw provision embodied a treaty agreement, agreed to by the United States, to "request" a Choctaw Delegate seat in the House of

Representatives, so "that Congress may consider of and decide the application." And the Cherokee's provision five years later embodied a treaty agreement that the Cherokees are "entitled" to a Cherokee Delegate seat in the House of Representatives "whenever Congress shall make provision for the same." Both treaty requests embodied a promise by the United States, that if these provisions are to be given any meaning, require consideration and implementation by the House of Representatives.

The Choctaw Nation has had a long and complicated history with the United States and other foreign nations, dating back to the mid-1500s when the Spanish came to Choctaw Shores. The Choctaw Nation signed nearly two dozen treaties with five foreign nations over a span of approximately 130 years. But none of these treaties was more consequential for the Choctaw Nation than the 1830 Treaty of Dancing Rabbit Creek between the United States and the Choctaw Nation.

"Though the 1820's and 1830's saw the negotiation and ratification of many Indian removal treaties, the Choctaw [Treaty of Dancing Rabbit Creek] was particularly significant. The Choctaw were not a fierce uncivilized people which had declared war on the United States or ravaged undefended frontier communities. They did not have to be banished as a punishment for aggressive action or political duplicity... The Choctaw were a peace-loving nation which could boast of political stability, economic prosperity, and friendly relations with the United States government. Furthermore, these Indians had rendered great service to the United States and covered themselves with military glory fighting alongside American soldiers in the Creek War and the War of 1812. Yet, despite the praise heaped upon them by grateful Americans and the vows of perpetual friendship, they were eventually rewarded by removal from their beloved homeland."¹

The federal negotiators for the 1830 Choctaw Treaty were Colonel John Coffee and Secretary of War John Eaton, men appointed by President Andrew Jackson after the Choctaw Chiefs refused to negotiate with him because of his prior misconduct. President Jackson went on to personally attend the initial negotiations with the Cherokee that led to the 1835 Treaty of New Echota, after ignoring U.S. Supreme Court Chief Justice Marshall's 1832 opinion in Worcester v. Georgia that state law seizing Cherokee lands where gold had been found violated federal treaties, purportedly saying "John Marshall has made his decision, now let him enforce it." In hindsight, the Choctaw Chiefs would appear to have been right about President Jackson.

The Choctaw Nation was facing insurmountable pressure from settlers and the United States Government to cede the last of its remaining land holdings and move west across the Mississippi River to establish a new Choctaw Nation in a newly established Indian Territory. Under the threat of violence and potential extinction, the Choctaw Nation reluctantly signed the Treaty of Dancing Rabbit Creek and began the journey to establish a new Choctaw Nation, a journey of grit, determination, and survival that has been ongoing for more than 190 years.

¹ <https://www.jstor.org/stable/24442605>, Arthur H. DeRosier, Jr., "Andrew Jackson and Negotiations for The Removal of the Choctaw Indians."

That experience was captured in what a young Chief of the Choctaws at the time, George W. Harkins, called his December 1831 "Farewell Letter to the American People":

We go forth sorrowful, knowing that wrong has been done. Will you extend to us your sympathizing regards until all traces of disagreeable oppositions are obliterated, and we again shall have confidence in the professions of our white brethren. Here is the land of our progenitors, and here are their bones; they left them as a sacred deposit, and we have been compelled to venerate its trust; it dear to us, yet we cannot stay, my people are dear to me, with them I must go. Could I stay and forget them and leave them to struggle alone, unaided, unfriended, and forgotten, by our great father? I should then be unworthy the name of a Choctaw, and be a disgrace to my blood. I must go with them; my destiny is cast among the Choctaw people. If they suffer, so will I; if they prosper, then will I rejoice. Let me again ask you to regard us with feelings of kindness.²

The Choctaw Treaty of Dancing Rabbit Creek contains several provisions relevant to this hearing, the first being Article XXII:

"The Chiefs of the Choctaws who have suggested that their people are in a state of rapid advancement in education and refinement and have impressed 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. Done and signed and executed by the commissioners of the United States, and the Chiefs, Captains, and head men of the Choctaw Nation, Dancing Rabbit Creek, this 27th day of September, eighteen hundred and thirty."

The request of the Choctaw Nation in 1830 to have a delegate seat in the United States was extraordinary. The Choctaw Chiefs had the foresight to know that the relationship with the United States was not going away, and to secure a more prosperous future and the survival of the Choctaw people, they needed to think of things in a much larger, long-range context. In addition to Article XXII, the Chiefs of the Choctaw Nation believed it imperative to secure themselves from state encroachment like they had been experiencing from Mississippi, Alabama, Louisiana, and Florida. It is for this reason, they negotiated Article IV which was agreed to by the United States:

"The government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west so that no territory or state shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any territory or state; but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time,

² <https://web.archive.org/web/20150402191200/http://ualr.edu/sequoyah/index.php/george-w-harkins-to-the-american-people-december-1831/>

may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States..."

These treaty provisions not only provide insight into the minds of the tribal negotiators and how the canons of construction should dictate the interpretation of these provisions, but it also provides some insight into the minds of the federal treaty negotiators and their willingness to agree to the requests of the Choctaw Nation at the time. Treaty negotiators agreed that the Choctaw Nation would retain their freedom from external control, and they agreed to present to Congress the Choctaw Nation's request to have a Delegate seated in the U.S. House of Representatives.

The fulfillment of the Choctaw Nation treaty request, agreed to by the United States, is both a moral and a legal obligation that has been assumed by the United States. The U.S. Constitution reserves treaty negotiating power to the President of the United States. It reserves to the Senate the power to ratify in whole or in part those treaties. In this case, the Senate chose to ratify the treaty with Article XXII in place. This shifted the moral and legal responsibility for a response to the U.S. House of Representatives which, after 192 years, should move with dispatch to consider and approve the request of the Choctaw Nation to seat its Choctaw Nation Delegate in the U.S. House of Representatives. On behalf of the Choctaw Nation of Oklahoma, I renew that request today and ask the House to execute the obligation of the United States to uphold this treaty provision with the Choctaw Nation.

The Choctaw Nation has been fighting for our survival outside of and within the United States for more than 200 years. We are grateful for the positive directions taken by federal Indian law and policy during the course of our lifetime, and we remain hopeful for the day when our Choctaw Nation will no longer be forced to fight so desperately for our political, economic, and cultural survival.

We are appreciative of the Committee for holding this hearing today. Thank you for shedding more light on the unfulfilled obligations of the United States it accepted under the Cherokee and Choctaw treaties it executed and promised to honor.

Sincerely,



Gary Patton, Chief
Choctaw Nation of Oklahoma

Delaware Nation

P.O. Box 825
Anadarko, OK 73005
405 / 247-2448
Fax: 405 / 247-9304

October 31, 2022

The Honorable James P. McGovern
Chairman
Committee on Rules
United States House of Representatives
H-312 The Capitol
Washington, DC 20515

RE: Hearing on Cherokee delegate(s) to the House of Representatives

Dear Honorable James P. McGovern:

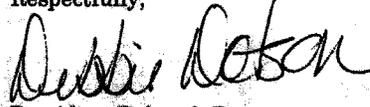
I write as the President of the Delaware Nation, a federally recognized Indian tribe located in Anadarko, Oklahoma. My Nation descends from the Lenape people who occupied areas of several states in what is today the northeastern United States. I thank you for holding a hearing on the seating of a tribal delegate to the House of Representatives. However, if any tribal delegates are seated it is important for the House to also seat a delegate from the Delaware Nation.

The historical Delaware Nation signed the first treaty between an Indian tribe and the United States in 1778, the Treaty of Fort Pitt. This treaty promised the seating of a Delaware delegate to Congress. Article VI of the treaty expressly provided for the Delaware to "have representation in Congress." To date, Congress has never fulfilled its promise to the Lenape people.

Today, there are three federally recognized successors in interest to the Delaware Nation as it existed in 1778: (a) the Delaware Nation (Oklahoma), (b) the Delaware Tribe (Oklahoma), and (c) the Stockbridge Munsee Community (Wisconsin). While we plan to work together with each of these other Lenape tribes to select one delegate to Congress, we also reserve the right to each have a delegate seated if the three tribes cannot agree on a single delegate. It is time for the House of Representatives to live up to its treaty promises and seat a Lenape delegate immediately.

Thank you for your tireless efforts as Chairman of the Committee on Rules. We offer our prayers in support of your leadership.

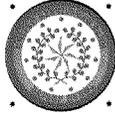
Respectfully,



President Deborah Dotson
Delaware Nation

cc: The Honorable Norma Torres
The Honorable Ed Perlmutter
The Honorable Jamie Raskin
The Honorable Mary Gay Scanlon
The Honorable Joe Morelle
The Honorable Mark DeSantis
The Honorable Deborah K. Ross
The Honorable Joe Neguse
The Honorable Tom Cole, Ranking Member
The Honorable Michael Burgess
The Honorable Guy Reschenthaler
The Honorable Michelle Fischbach





Federally Recognized
October 3, 1950

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United Keetoowah Band of Cherokee Indians in Oklahoma

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P.O. Box 746 Tahlequah, OK 74465
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November 10, 2022

Hon. James P. McGovern Chairman,
Committee on Rules United States House of Representatives H-312,
The Capitol Washington, D.C. 20515

Dear Chairman McGovern:

I write to you on behalf of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB"), a federally recognized Cherokee Indian tribe located on the Oklahoma Cherokee Reservation and headquartered in Tahlequah, Oklahoma on lands held in trust by the Secretary of the Interior for the UKB.

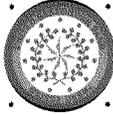
I write regarding efforts by the Cherokee Nation of Oklahoma ("CNO") to seat a Cherokee delegate to the U.S. House of Representatives and the recent report of the Congressional Research Service ("CRS") regarding the legal and procedural issues related to seating a Cherokee Nation delegate in the U.S. House of Representatives. Due to the importance of this issue and the Committee's upcoming hearing on this matter, it is necessary that I provide you with a brief breakdown of Cherokee history from treaty times until today.

The Historic Cherokee Nation

The historic Cherokee Nation, comprised of ancestors of both the UKB and the CNO, executed treaties with the United States in 1785 and 1835 which promised to the Cherokees a representative in the U.S. House of Representatives. Each of these treaties was executed at a time where, so the treaties provided, the United States guaranteed to the Cherokees a territory separate and distinct from the States. The treaty provisions sought to afford Cherokees, at the time non-citizens of the United States, representation in the U.S. House that was akin to the representation provided for citizens of the United States. However, through a series of subsequent actions, Congress abolished the historic Cherokee Nation and her courts, casting U.S. citizenship upon her citizens and paving the way for Oklahoma statehood.

Successors-In-Interest

The rights and territory of the historic Cherokee Nation did not die with her. Instead, in 1936, Congress enacted the Oklahoma Indian Welfare Act ("OIWA"), creating a path for



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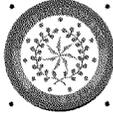
Oklahoma Indians to reorganize their tribal governments and retain the rights secured by their ancestors. Ten years later, Congress passed the Act of August 10, 1946, (the "Keetoowah Status Act") "relating to the status of the Keetoowah Indians of the Cherokee Nation in Oklahoma." This act recognized the UKB as a tribe of Indians residing in Oklahoma for purposes of the OIWA. The UKB moved forward under the OIWA and secured federal recognition as a reorganized Cherokee government. To date, only the UKB has followed this process prescribed by the Congress to reorganize the Cherokee tribal government in Oklahoma. The ancestors of the Eastern Band of Cherokees, mentioned later, were still a part of the larger historic Cherokee Nation at the time of the 1785 and 1835 treaties.

In 1975, nearly 40 years after enactment of the OIWA, non-UKB descendants of the historic Cherokee Nation gathered and, a year later, adopted a tribal constitution under the name "Cherokee Nation of Oklahoma." The 1976 constitution was adopted without regard to and not in accordance with the amendment provisions contained in the 1839 Constitution of the historic Cherokee Nation – the last governing document of the historic Cherokee Nation – nor was the 1976 CNO constitution adopted in accordance with the provisions of the OIWA. Nonetheless, the Bureau of Indian Affairs approved this first CNO constitution and listed the new organization in the federal register as "Cherokee Nation of Oklahoma." In 1999, the CNO proposed a new constitution wherein the group changed their name from "Cherokee Nation of Oklahoma" to "Cherokee Nation," in an attempt to create confusion and masquerade themselves as the historic Cherokee Nation.

The Department of the Interior, the UKB, and the CNO are currently engaged in an administrative process to determine which rights the UKB may assert over the historic Cherokee Reservation as a successor-in-interest to the historic Cherokee Nation nonexistent.

Congressional Research Service Report

The CRS report is flawed from its inception because it fails to consider which federally recognized tribes, including successors-in-interest to the historic Cherokee Nation, may claim rights arising from those historic Cherokee treaties. In fact, in evaluating whether certain provisions of the Treaty of New Echota remain intact for the historic Cherokee Nation, the CRS report at 13 cites to *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir.1980). *Lynch* itself is based upon the continued existence of historic Cherokee treaty rights, arising from the same treaties which provided for the Cherokee



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October 3, 1991

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CANADIAN

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Cliff Wofford
COOWESCOOWEE

DIOA
Caleb Grinnett
DELAWARE

LOOSGT
Frankie Still
FLINT

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delegate, for a federally recognized Cherokee tribe other than the CNO. Lynch suggests that federally recognized Cherokee tribes other than the CNO derive rights from the historic Cherokee treaties.

Congress must not seat a Cherokee delegate unless and until Congress conducts a comprehensive review to identify which present-day tribal governments may claim rights to the same treaties, including those successors to the historic Cherokee Nation. We are confident that such a comprehensive independent review will reaffirm that the UKB retains a treaty right to seat a Cherokee delegate in Congress as a successor-in-interest to the historic Cherokee Nation. Then, if Congress seats a Cherokee delegate, it must seat the delegates named by each of those present-day tribal governments who are successors-in-interest to the historic Cherokee Nation.

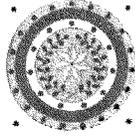
Seating a Keetoowah Cherokee Delegate

On June 5, 2021, the UKB named Victoria Holland as the Cherokee delegate to Congress (resolution attached). Because the UKB is a successor-in-interest to the historic Cherokee Nation, the UKB's delegate must be afforded at least as much consideration as any other delegate named by any other successor and no Cherokee delegate should be seated without the support and consent of the UKB.

Thank you for your tireless efforts in the United States House of Representatives. We offer our prayers in support of your leadership and are happy to discuss this matter at your convenience.

Respectfully,

Jeff Wacoche, Assistant Chief
United Keetoowah Band of Cherokee Indians
in Oklahoma



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RESOLUTION

COUNCIL

June 5, 2021

21-UKB-85

- Joe Bunch
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- Jeff Wacoche
Assistant Chief
- Joyce Hawk
Secretary
- Sonja Gourd
Treasurer
- Eddie Sacks
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- Cliff Wofford
Cooweescoowee District
- Caleb Grimmert
Delaware District
- Frankie Still
Flint District
- Willie Christie
Goingsnake District
- Peggy Girty
Illinois District
- Charles Smoke
Safine District
- Junior Catron
Sequoyah District
- Alvin Hicks
Tahlequah District

APPROVE THE SEATING OF VICTORIA HOLLAND AS THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES

WHEREAS, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA (hereafter "UKB" or "Band") is a federally recognized band of Indians, organized and incorporated pursuant to the Oklahoma Indian Welfare Act (49 Stat. 1967), the Act of August 10, 1946 (60 Stat. 976), and the Indian Reorganization Act (48 Stat. 984), insofar as that Act applies to Oklahoma Indians, and is a Self-Governance tribe; and

WHEREAS, Article III, Section 1 of the Constitution of the UKB provides that the objective of said Band shall be to secure the benefits, rights, privileges, and powers as provided for by the above-cited laws of the United States of America; and

WHEREAS, Article III, Section 2 of the Constitution of the UKB provides further that the objective of the Band shall be to secure the benefits, rights, privileges and powers as provided for by any laws of the United States now existing or that may hereafter be enacted for the benefit of Indians or other citizens of the United States and administered by various government agencies; and

WHEREAS, Article V, Section 1 of said Constitution provides that the supreme governing body of the Band shall be the Council of the UKB; and

WHEREAS, Article XII of the Treaty with the Cherokee, 1785 provides "[t]hat 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;" and

WHEREAS, Article 7 of the Treaty with the Cherokee, 1835, provides "they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same;" and

United Keetoowah Band of Cherokee Indians in Oklahoma
Resolution #21-UKB-85
June 5, 2021
Page 2

WHEREAS, As a successor of the historical Cherokee tribe, signatory to the 1785 and 1835 treaties, the United Keetoowah Band of Cherokee Indians in Oklahoma has an equal right to those promises made in said treaties; and

WHEREAS, the United Keetoowah Band of Cherokee Indians in Oklahoma would like to invoke its right to a delegate in the U.S. House of Representatives; and

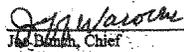
WHEREAS, the United Keetoowah Band of Cherokee Indians in Oklahoma have designated tribal member Victoria Holland by Council Resolution to serve as its delegate to the U.S. House of Representatives.

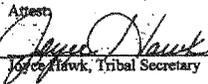
NOW THEREFORE BE IT RESOLVED, that the UKB Council supports the seating of Victoria Holland as the United Keetoowah Band of Cherokee Indians in Oklahoma delegate to the U.S. House of Representatives as soon as reasonably possible in accordance with the Treaties of 1785 and 1835.

BE IT FINALLY RESOLVED, that this Resolution hereby rescinds any and all preceding resolutions that may be inconsistent with the matter.

CERTIFICATION

I hereby certify that the foregoing Resolution # 21-UKB-85 was approved by the Council of the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) during a regular Council meeting convened for business on the 5th day of June 2021, with 12 members present to constitute a quorum by a vote of 12 Yes, 0 No, and 0 abstentions.

 Assistant Chief
Joe Bunch, Chief

Attest

Joyce Hawk, Tribal Secretary



The Eastern Band of Cherokee Indians

Principal Chief Richard G. Sneed

Vice Chief Alan B. Ensley

November 16, 2022

Richard French
Chairman
Big Cove Township

Albert Rose
Vice-Chairman
Birdtown Township

Tribal Council Members

TW Saunooke
Yellowhill Township

David Wolfe
Yellowhill Township

Bucky Brown
Snowbird &
Cherokee Co. Township

Adam Wachacha
Snowbird &
Cherokee Co. Township

Teresa McCoy
Big Cove Township

Bo Crowe
Wolfown Township

Bill Taylor
Wolfown Township

Tommye Saunooke
Paintown Township

Dike Sneed
Paintown Township

Boyd Owle
Birdtown Township

The Honorable James P. McGovern
Chairman
House Committee on Rules
U.S. House of Representatives
H-312, The Capitol
Washington, D.C. 20515

The Honorable Tom Cole
Ranking Member
House Committee on Rules
U.S. House of Representatives
H-152, The Capitol
Washington, D.C. 20515

RE: Cherokee Delegate to the House of Representatives

Dear Chairman McGovern and Ranking Member Cole:

On behalf of the Eastern Band of Cherokee Indians, a federally acknowledged Tribal Nation based in the Great Smoky Mountains of Western North Carolina, I write to express our appreciation to the Rules Committee for holding a hearing on the "Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives." I also write to respectfully submit our interpretation of Article 7 of the Treaty of New Echota, and the demand of the Cherokee Nation of Oklahoma to seat the person of its exclusive choosing as a delegate to the U.S. House of Representatives. We disagree with the position of the Cherokee Nation that it is the only Cherokee sovereign to which Article 7 applies.

The report of the Congressional Research Service (CRS) dated July 21, 2022, and also titled "Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives" provides useful information about the Treaty of New Echota. Unfortunately, it does not address one of the central issues in this debate, that is, to which group of federally acknowledged Cherokee sovereigns does Article 7 apply?

The Treaty of New Echota is dated December 29, 1835. It was created and signed in New Echota, Georgia, which was part of the aboriginal territory of the Cherokee people. The treaty uses the term "Cherokee nation" (note that the word "nation" is in lower case) multiple times to refer to all of the Cherokee people. This includes the Cherokee people who were later recognized as the Cherokee Nation (in what is now Oklahoma), the Eastern Band of Cherokee Indians (in what is now North Carolina), and the United Keetoowah Band (in what is now Oklahoma). It seems that this treaty's reference to the Cherokee nation (meaning all the Cherokee people) has been conflated to mean only the Cherokee Nation of Oklahoma.

88 Council House Loop • P.O. Box 455 • Cherokee, NC 28719
Telephone: (828) 359-7000

The CRS did not contact the Eastern Band of Cherokee Indians about the fact that it was researching and preparing a report on this complicated and very important aspect of U.S. and Cherokee law and history, and the report does not consider our views. In sum, it is our position that Article 7 of the Treaty of New Echota entitles the historical "Cherokee nation" as comprised in 1835 to a delegate in Congress, and such provision also applies to the Eastern Band of Cherokee Indians. Any action by the House Rules Committee, the House of Representatives, or the Congress to establish an Article 7 Cherokee delegate should include a delegate from the Eastern Band.

Background on the Eastern Band of Cherokee Indians

At the time of European arrival to this continent, Cherokee people lived in the southeastern part of what is now the United States, in the states of North Carolina, Tennessee, South Carolina, Alabama, Georgia, Kentucky, and Virginia. In spite of Cherokee efforts to coexist with non-Indians in our territory, the Cherokee Nation and Cherokee people faced unending threats to our existence. As the result of now-repudiated federal policies, the Cherokee people endured the Trail of Tears, a violent forcible removal of more than 15,000 Cherokee Indians by the U.S. Army from Cherokee ancestral homelands to the Indian Territory. Thousands of Cherokees died. The Cherokee came to call the event *Nunahi-Duna-Dio-Hilu-I*, or Trail Where They Cried.

Approximately 1,200 Cherokees sought refuge in the mountains of North Carolina and managed to avoid removal. The citizens of the Eastern Band of Cherokee Indians are the descendants of Cherokees who escaped forced removal by taking refuge in the mountains and those who returned to the mountains after surviving the Trail of Tears. The Cherokees in the mountains reorganized as a separate Tribal Nation in 1868, and the United States acknowledged the Eastern Band of Cherokee Indians as a separate sovereign.

The Eastern Band today continues to live in the Cherokee aboriginal homelands in Western North Carolina. Our "reservation," known as the Qualla Boundary, consists of approximately 56,000 acres of land in the southern Appalachian mountains, held in trust by the United States for our Tribe. Just this year, after approximately 175 years of non-Indian ownership, we were able to put approximately 300 acres of land, known as "Kituwah," into trust. Kituwah is near the Qualla Boundary and is acknowledged by all three federally acknowledged Cherokee tribes as the mother town for all Cherokee people. The Eastern Band Cherokees continue to carry out Cherokee traditional and cultural practices directly associated with our lands, such as traditionally gathering foods and medicines in the mountains. Faced with federal efforts to exterminate the Cherokee people, we have fought to ensure that our way of life, our beliefs, the Cherokee language, and the sovereignty of the Eastern Band, will survive.

Federal policies and actions caused great harm to Cherokee governance and the Cherokee people. As a reflection of kinship and common interest, the three federally recognized Cherokee sovereigns—the Eastern Band, the Cherokee Nation, and the United Keetoowah Band of Cherokee Indians—meet in Tri-Council to discuss issues of common concern. Cherokee language speakers also gather to discuss matters related to the survival of the Cherokee language. The three Cherokee sovereigns coordinate on matters related to the exercise of cultural sovereignty when Cherokee remains, or cultural patrimony are discovered. We share a common pre-removal history, Cherokee language and culture, and dedication to protecting our common history, culture, and patrimony when challenged.

The Eastern Band and the Treaty of New Echota

Article 7 of the Treaty of New Echota says:

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 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.

The Treaty of New Echota has not been extinguished or repealed, and the United States should honor the promise it made in the Treaty of New Echota to provide representation in the House of Representatives for the Cherokee people, not just the Cherokee Nation.

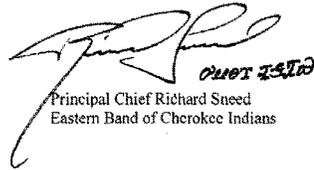
With regard to right of the Eastern Band of Cherokee Indians to have a delegate in the House, the U.S. Supreme Court in *Eastern Band of Cherokee Indians v. United States* in 1886 expressly construed the Treaty of New Echota to apply to the Eastern Band.

[I]n 1845, with reference to the treaty of New Echota, "The executive of the United States," he said, "must therefore regard the treaty of New Echota as binding on the whole Cherokee tribe; and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions. As a necessary consequence, they are entitled to its advantages. The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights. They cannot take its benefits without submitting to its burdens. The executive must

regard the treaty as the supreme law, and as a law construe its provisions.”

Other court decisions that interpret the Treaty of New Echota say that certain land and economic benefits of the Treaty do not apply to the Eastern Band. However, the Treaty itself and the delegate provision do apply to the Eastern Band. As the Treaty and judicial precedent make clear, any action by the House Rules Committee, the House of Representatives, or the Congress to establish an Article 7 Cherokee delegate should include a delegate from the Eastern Band.

Sgi,



Principal Chief Richard Steed
Eastern Band of Cherokee Indians

The Honorable Nancy Pelosi, Speaker of the House
The Honorable Kevin McCarthy, Republican Leader
The Honorable Raul Grijalva, Chair, Natural Resources Committee
The Honorable Bruce Westerman, Ranking Republican, Natural Resources Committee
The Honorable Zoe Lofgren, Chair, Committee on Administration
The Honorable Rodney Davis, Ranking Member, Committee on Administration



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Written Statement of

Damario Solomon Simmons, Esq., M.Ed.,
Managing Partner of **SolomonSimmonsLaw**, General Counsel **Muscogee Creek Indian
Freedmen Band, Inc.**, Founder and Executive Director of **Justice For Greenwood**, and a direct
descendant of Muscogee Creek **Chief Coweta Micco a/k/a Cow Tom**

Before the U.S. House of Representative Committee on Rules

Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House
of Representatives

Wednesday, November 16 , 2022

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Justice for Greenwood is a national network of volunteers, advocates, attorneys, academics, experts, massacre survivors, descendants, & others agitating for reparations & justice on behalf of survivors and descendants of the 1921 Tulsa Race Massacre and its continued harm. Our work aims to revitalize the Greenwood community and to address the major areas of racial inequality and injustice directly caused by the massacre -health, education, real estate, and business. Unknown to many, half of Greenwood and its famous "Black Wall Street" commercial district that was destroyed during the massacre, was located in the Cherokee Nation and many of the victims were Cherokee citizens.

That is why I am writing to express support for the Cherokee Nation for the appointment of a congressional Cherokee delegate. I and other Black Creeks take a proud stand for democracy for the Cherokee Nation, as they have been leaders in honoring their promise to recognize their Black members. Their leadership respects democracy, racial justice, and the intrinsic values of access and equity, in ways many other Oklahoma-based Tribal Nations have not. This most notably includes, the Muskogee (Creek) Nation¹, which has overtly practiced race-based discrimination against Black Creek Indians² since 1979.

The Treaty of Echota was signed In 1835, which led to the expulsion of the Cherokee tribes from their territory east of the Mississippi River in a mass exodus known as the Trail of Tears to Oklahoma. This treaty unequivocally grants the Cherokee Nation a delegate to the House of Representatives, which has not yet been recognized. This delegate would provide a voice in Congress for Cherokee Nation and possibly other tribes, to effectively advocate for support and resources in the areas of health and human services, education, employment, housing, economic and infrastructure development, environmental protection, and civil rights.

It is our responsibility to ensure that underrepresented communities know their rights and this appointment would initiate ongoing public promises owed to the Cherokee community. It is, of course, only just for us to recognize our treaty agreements with the Cherokee nation. That is doubly true because the Cherokee have taken seriously their duty to recognize all of their descendants, including the descendants of those who were formerly enslaved.

In my experience, the Cherokee nation has made a significant commitment to the nation, to Oklahoma, the Tulsa community; to Greenwood; and to their descendants. While none of these commitments are a prerequisite for our country to honor a treaty, they all demonstrate the positive investment that the Cherokee make to our shared future. Thank you for your consideration to support the appointment of a representative for the Cherokee nation in Congress.

¹ As a direct descendant of Muskogee (Creek) Nation chief Coweta Micco who was one of five individuals that negotiated and signed the Treaty of 1866, which among other things outlawed slavery in the MCN and granted citizenship to those formerly enslaved by the Creek Nation, I have spent the past 23 years advocating for the reversal of the Creek Nation's disenrollment of freedmen like my relatives. I and other "Black Creeks" have tried for years through legal action, advocacy, and a public communications campaign to be properly recognized and dignified by the Creek Nation. Thus far, to no avail.

² Many of the victims of the Massacre were Black Creek Indians. Indeed without the Black Cherokees and Black Creeks, Greenwood and its Black Wall Street would have never existed.

Principal Chief Chuck Hoskin, Jr.

Chuck Hoskin Jr. serves as the Principal Chief of the Cherokee Nation, the largest tribe in the United States with more than 440,000 citizens. Prior to being elected in 2019, he was Cherokee Nation's Secretary of State and also served as a member of the Council of the Cherokee Nation. As Principal Chief, he increased minimum wage at Cherokee Nation and Cherokee Nation Businesses and secured the largest language investment in the tribe's history to expand Cherokee cultural preservation. He appointed the tribe's first delegate to the U.S. Congress. He prioritized health and wellness initiatives, including record investments in behavioral health and addiction treatment. Chief Hoskin has also expanded tribal workforce training programs, sustainable housing, protections for natural resources, and educational opportunities for Cherokees of all ages. He, along with First Lady January Hoskin, has elevated the voices of women and children, and their safety, within the Cherokee Nation Reservation.

Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)* of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Rules

Subcommittee: _____

Hearing Date: 11/16/2022

Hearing Title :

Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives

Witness Name: Chuck Hoskin, Jr.

Position/Title: Principal Chief

Witness Type: Governmental Non-governmental

Are you representing yourself or an organization? Self Organization

If you are representing an organization, please list what entity or entities you are representing:

Cherokee Nation

FOR WITNESSES APPEARING IN A NON-GOVERNMENTAL CAPACITY

Please complete the following fields. If necessary, attach additional sheet(s) to provide more information.

Are you a fiduciary—including, but not limited to, a director, officer, advisor, or resident agent—of any organization or entity that has an interest in the subject matter of the hearing? If so, please list the name of the organization(s) or entities.

Please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent have received in the past thirty-six months from the date of the hearing. Include the source and amount of each grant or contract.

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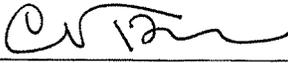
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(B) In the case of a witness appearing in a non-governmental capacity, a written statement of proposed testimony shall include— (i) a curriculum vitae; (ii) a disclosure of any Federal grants or contracts, or contracts, grants, or payments originating with a foreign government, received during the past 36 months by the witness or by an entity represented by the witness and related to the subject matter of the hearing; and (iii) a disclosure of whether the witness is a fiduciary (including, but not limited to, a director, officer, advisor, or resident agent) of any organization or entity that has an interest in the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B)(ii) shall include— (i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and (ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form 24 hours before the witness appears to the extent practicable, but not later than one day after the witness appears.

False Statements Certification	
Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.	
	11/14/22
_____ Witness signature	_____ Date

Lindsay G. Robertson is a professor at the University of Oklahoma College of Law and Visiting Senior Scholar and Indigenous Law Center Visiting Professor at the UC Hastings College of Law. He teaches classes in Federal Indian Law, Constitutional Law, International and Comparative Indigenous Peoples Law, Legal History, and the History of Federal Indian Law and Policy.

Professor Robertson was Private Sector Advisor to the U.S. Department of State delegations to the Working Groups on the U.N. Declaration of the Rights of Indigenous Peoples (2004-06) and the American Declaration on the Rights of Indigenous Peoples (2004-07) and from 2010-12 was a member of the U.S Department of State Advisory Committee on International Law. In 2014, he served as advisor on indigenous peoples law to the Chair of the U.N. Committee on the Elimination of Racial Discrimination. He has spoken widely on international and comparative indigenous peoples law issues in the United States, Europe, Latin America and Asia.

In 2014, he was the recipient of the first David L. Boren Award for Outstanding Global Engagement. He is an elected member of the American Law Institute and the American Bar Foundation and serves as a justice on the Supreme Court of the Cheyenne and Arapaho Tribes. Professor Robertson is the author of *Conquest by Law* (Oxford University Press 2005).

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Hearing Date: 11/16/2022

Hearing Title :

Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives

Witness Name: Lindsay G. Robertson

Position/Title: Professor

Witness Type: Governmental Non-governmental

Are you representing yourself or an organization? Self Organization

If you are representing an organization, please list what entity or entities you are representing:

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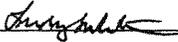
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Witness signature

11/13/22

Date

Rules

11/16/2022 — Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives

Mainon A. Schwartz is a Legislative Attorney in the American Law Division of the Congressional Research Service. In that capacity, Ms. Schwartz provides nonpartisan legal and constitutional analysis to Congress on a range of matters, including federal Indian law and congressional authority over the United States' territories.

Before joining the Congressional Research Service in 2018, Ms. Schwartz worked as a federal appellate prosecutor in the Office of the United States Attorney for the District of Puerto Rico, as senior corporate counsel at Arctic Slope Regional Corporation (an Alaska Native Corporation), and as a litigation associate in the New York office of Cravath, Swaine & Moore. She graduated magna cum laude from the University of Notre Dame in 2004 and obtained her J.D. from Columbia Law School in 2008, where she was named a Harlan Fiske Stone scholar and designated a Tony Patiño Fellow. After law school, she clerked for the Honorable Daniel E. Winfree on the Alaska Supreme Court. Ms. Schwartz earned an M.F.A. from New York University in 2019. She is a member in good standing of the New York state and United States Supreme Court bars.

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Subcommittee: _____

Hearing Date: 11/16/2022

Hearing Title :

Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives

Witness Name: Mainon A. Schwartz

Position/Title: Legislative Attorney

Witness Type: Governmental Non-governmental

Are you representing yourself or an organization? Self Organization

If you are representing an organization, please list what entity or entities you are representing:

Congressional Research Service

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Mairon A. Schwartz

Witness signature

11/10/2022

Date