Representation for Removal? The Cherokee's Claim to a Congressional Delegate Assessed Under the Canons of Construction*

The Treaty of New Echota is the pact between the Cherokee Nation and the United States which served as the legal basis for Cherokee removal via the infamous Trail of Tears. The Treaty of New Echota contains several promises made by the United States in exchange for the Cherokee ancestral land in North Carolina and several other southern states. One of these promises, found in Article 7, states 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." Article 7 has been the recent subject of controversy due to its textual ambiguity and historical implications of possible Native American representation at the federal level. These potential ramifications, coupled with the mounting pressure from the Cherokee Nation claiming that Article 7 grants the Tribe an affirmative right to a delegate, warrants an investigation into Article 7's effect.

From its robust body of precedent on Native American treaty interpretation, the U.S. Supreme Court has developed a set of rules called the Indian law canons of construction which federal courts apply when the effect of a treaty involving Native Americans is at issue. This Recent Development sets out to shed light on the implications of Article 7's delegate promise by applying the canons to its text to ultimately determine whether the United States is legally bound to grant the Cherokee Nation's request for a delegate in the U.S. House of Representatives, just as a federal court would do if this issue came before the judiciary.

INTRODUCTION**

On August 22, 2019, speaking to a crowd of people in front of the Cherokee National History Museum in Tahlequah, Oklahoma, Chuck Hoskin

** Currently, there is an ongoing discussion surrounding what terminology is correct and most respectful to the preferences of individuals of Native American descent regarding how such individuals prefer to be referenced, and there is no simple answer to this question. *Frequently Asked Questions*, SMITHSONIAN NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/faq/did-you-know [https://perma.cc/TU8K-4XCT]; *see also* Amanda Blackhorse, *Blackhorse: Do You Prefer 'Native American' or 'American Indian'?*, INDIAN COUNTRY TODAY (May 22, 2015), https://indiancountrytoday.com/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPJqIGU6X3FTVdMi9EQ [https://perma.cc/CAD5-UJTH]. In this Recent Development, I have decided to use the term "Native American" when referencing individuals of Native American descent because, while some tribes of Native American descent disfavor this term, "Native American" remains widely accepted and used. Blackhorse, *supra*; *Frequently Asked Questions*, *supra*. Although many individuals of Native American descent refer to themselves as

Jr., the Principal Chief of the Cherokee Nation ("Principal Chief Hoskin"), announced that he planned to place a Cherokee Nation ("Cherokee") delegate in the U.S House of Representatives as part of his "First 100 Days in Office" initiative.[1] If Principal Chief Hoskin's initiative comes to fruition, it would be a monumental moment for the Cherokee. Though the delegate would likely be nonvoting,[2] this would still give the Cherokee an opportunity to voice their opinions in a meaningful way—something that has been sorely lacking since the eighteenth century.[3] Principal Chief Hoskin subsequently nominated Kim

"Indian," the term "Native American" better encompasses the preferences of indigenous people as a whole. However, much of the U.S. legal system's jurisprudence uses the term "Indian." Therefore, this Recent Development will use the term "Native American" throughout to reference indigenous people and will use "Indian" only when citing legal doctrines or directly quoting language from sources.

1. Lindsey Bark, *Teehee Nominated as Cherokee Nation's Delegate to Congress*, CHEROKEE PHOENIX (Aug. 23, 2019), https://www.cherokeephoenix.org/Article/index/103477 [https://perma.cc/BNV8-QVSR]; *see also Cherokee Nation Announces Appointment of Teehee as Delegate to Congress*, CLAREMORE DAILY PROGRESS (Aug. 22, 2019), https://www.claremoreprogress.com/news/cherokee-nation-announces-appointment-of-teehee-as-delegate-to-congress/article_9ae2a6f0-c52b-11e9-8797-2f3a2ee6b3ba.html [https://perma.cc/8FNU-CFVZ]. While it has recently been set in motion, Principal Chief Hoskin's plan to place a delegate in the U.S. House of Representatives is not exactly new; several Cherokee tribal members have had this goal in mind for decades now. In fact, Principal Chief Hoskin ensured that a delegate provision was included in the 1999 Cherokee Constitution so the Cherokee would unanimously support the plan. Chuck Hoskin Jr., *Cherokee Nation's Historic Delegate to Congress*, TAHLEQUAH DAILY PRESS (Sept. 19, 2019), https://www.tahlequahdailypress.com/news/cherokee-nation-s-historic-delegate-to-congress/article_69ebc83b-f5fb-5f88-be5f-b6fddc1e02fc.html [https://perma.cc/ZN6E-ZD7Y?type=image] ("As a young man, I was a delegate at the 1999 Cherokee Constitutional Convention and made sure a delegate provision was included in our Constitution . . . .").

2. *See* Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 127–31 (2005) (discussing how the Cherokee delegate would be similar to the nonvoting representatives of American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands). The delegate, if arranged like the delegates of American Samoa, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, would be able to introduce legislation and voice opinions but not vote outside of individual committees. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS 1, 6 (2015), https://fas.org/sgp/crs/misc/R40555.pdf [https://perma.cc/XK9D-DUJL].

3. *See* Jack Blair, *Demanding a Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives*, 20 AM. INDIAN L. REV. 225, 225–33 (1995). The Cherokee have been severely underrepresented and oppressed by the U.S. government in the past. For an account of the federally-authorized Cherokee removal from ancestral lands via the Trial of Tears, enslavement of tribal members, and government-sanctioned wars against the Cherokee, see generally THEDA PERDUE & MICHAEL D. GREEN, THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS (1995). Additionally, the Cherokee have only ever had seven of its tribal members participate in the federal legislature. There has been one U.S. senator—Robert Latham Owen. JERRY D. STUBBEN, NATIVE AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK 171 (2006). There have been six U.S. House representatives—William Wirt Hastings; Will Rogers, Jr.; Clem McSpadden; Richard H. Cain; Brad Carson; and Markwayne Mullin. *Id.*; *Carson, Brad*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=CA062 [https://perma.cc/Q4AB-KKEC]; *Mullin, Markwayne*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=MU026 [https://perma.cc/57RV-E9VH]; *Cain, Richard*

Teehee[4] as his choice for the congressional delegate, and Teehee's nomination was approved by the Council of the Cherokee Nation at a special meeting on August 29, 2019.[5]

Therefore, Principal Chief Hoskin has a plan, he has his choice of delegate, and he has the approval of the Cherokee—but does he have a legal basis for this strategy? Principal Chief Hoskin certainly thinks so and references the Treaty of New Echota[6] as support for this perceived right.[7] The Treaty of New Echota is a pact between the United States and the Cherokee, which served as the legal basis for the Cherokee's removal westward, known as the Trail of Tears.[8] As part of the Treaty of New Echota, the United States made several promises in exchange for Cherokee lands in the Southeast.[9] Article 7 of the Treaty of New Echota ("Article 7" or "delegate clause"), which Chief Hoskin specifically referenced,[10] 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."[11] Thus, the question becomes, does this 185-year-old treaty provision *require* the modern Congress to honor the Cherokee's request for a delegate in the U.S. House of Representatives?

Answering this question requires interpreting Article 7. Over the course of more than two centuries of ruling on Native American tribal issues, the

Harvey, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Detail/10470 [https://perma.cc/GU5Y-3X5A].

4. Bark, *supra* note 1. Kim Teehee was President Obama's advisor on Native American relations, the director of the bipartisan Congressional Native American Caucus, and is currently the Cherokee's vice president of government relations. *Id.* In February 2020, she was selected by *TIME Magazine* as one of sixteen activists fighting for equality in the United States because of her nomination to this historic position. *These 16 People and Groups Are Fighting for a More Equal America*, TIME (Feb. 20, 2020, 7:30 AM), https://time.com/5783951/equality-activists/?fbclid=IwAR2oP-NJeV5sNc8LPrvsIm_6hRL9kn5IVrmNGM0aQDePUZN4ruBxKgNvatM [https://perma.cc/HLA6-6YJA].

5. P.R. Lockhart, *The Cherokee Nation Says It Has a Right to a Congressional Delegate. Now It Wants Congress To Fulfill Its Promise*, VOX (Sept. 4, 2019), https://www.vox.com/identities/2019/9/4/20849711/cherokee-nation-congress-kimberly-teehee-native-americans [https://perma.cc/DFD8-6BBD].

6. Treaty with the Cherokees, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478, 478–88 [hereinafter Treaty of New Echota], *reprinted in* 2 CHARLES J. KAPPLER, SENATE COMM. ON INDIAN AFFS., INDIAN AFFAIRS: LAWS AND TREATIES 439–49 (Charles J. Kappler ed., 1904).

7. Chuck Hoskin Jr., Opinion, *The 184-Year-OId Promise to the Cherokee Congress Must Keep*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/cherokee-house-of-representatives.html [https://perma.cc/5WY7-R364].

8. PERDUE & GREEN, *supra* note 3, at 20–21. For general information on the historical removal of the Cherokee from their ancestral lands in the eastern United States to the western United States, see generally JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1st ed. 1988).

9. *See* Treaty of New Echota, *supra* note 6, at 478–86, *reprinted in* 2 KAPPLER, *supra* note 6, at 439–47.

10. *See* Hoskin, *supra* note 1.

11. Treaty of New Echota, *supra* note 6, at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 442–43.

Supreme Court has developed a body of law called the "Indian law canons of construction" ("canons of construction" or "canons").[12] The Court uses these canons to interpret Native American treaty provisions, and thereby determine their legal force.[13] The canons of construction dictate that any ambiguous provisions in Native American treaties must be liberally construed in the Native Americans' favor and interpreted as the Native Americans who signed the treaty would have understood the provisions, unless clearly-countering congressional intent exists.[14] This Recent Development examines the delegate clause under these canons of construction to determine the likely legal status of the Cherokee's claim to congressional representation. Ultimately, it concludes that the Treaty of New Echota gives the Cherokee the affirmative right to a delegate.[15] Part I of this Recent Development describes the history of the Treaty of New Echota. Part II describes the Treaty of New Echota's terms. Part III briefly explains why the Treaty of New Echota is modernly enforceable. Part IV details the canons of construction, applies them to the delegate clause, and argues that interpretation under the canons guarantees the Cherokee an unconditional right to a delegate in the U.S. House of Representatives.

I. HISTORY OF THE TREATY OF NEW ECHOTA

The 1835 Treaty of New Echota—often called the "Cherokee Removal Treaty"—is a pact between the United States and the Cherokee, under which the Cherokee ceded their ancestral lands to the United States in exchange for money, western lands, and protection.[16] While the history of the Treaty of New Echota is not central to the legal argument herein, it is important to understand the context in which this document was drafted in order to discern both how the Native Americans who signed the Treaty of New Echota understood the document and why some of its provisions are ambiguous—two subjects that are crucial to the canons' application in Part IV.

The Treaty of New Echota is the product of a southern state's stubbornness.[17] In 1828, the Georgia legislature passed laws that stripped the

12. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221–25 (Rennard Strickland, Charles F. Wilkinson, Reid P. Chambers, Richard B. Collins, Carole E. Goldberg, Robert N. Clinton, David H. Getches, Ralph W. Johnson & Monroe E. Price eds., 1982 ed.) (discussing the Indian law canons of construction).

13. *See id.* at 221.

14. *See id.* at 221–23.

15. To read discussions of the Cherokee's right to a delegate beyond a strictly legal analysis, see generally Blair, *supra* note 3 (explaining the legal history of the right to a delegate as well as congressional delegates in general and the implications of establishing a Cherokee delegate); Rosser, *supra* note 2 (describing the historical context of the Treaty of Echota as well as arguments for and against the Cherokee right to a delegate).

16. Treaty of New Echota, *supra* note 6, at 478–79, *reprinted in* 2 KAPPLER, *supra* note 6, at 439–40.

17. *See* Rosser, *supra* note 2, at 96 n.4.

Cherokee of all their Georgian lands, including the land that the United States had expressly recognized in the Treaty of Hopewell[18] as Cherokee property.[19] Four years later, the U.S. Supreme Court struck down these laws as unconstitutional in *Worcester v. Georgia*,[20] stating that regulation of the Native American lands in Georgia was under the jurisdiction of the federal government, not the state.[21] In an act of unprecedented defiance, Georgia blatantly ignored the Supreme Court's decision and continued to enforce its legislation.[22]

Recognizing this tension between the state and federal governments as an opportunity to effect the change he desired, President Andrew Jackson—a notoriously staunch supporter of Native American removal—met with John Ridge, an influential Cherokee tribal member, and convinced Ridge to endorse removal via treaty.[23] However, many Cherokee did not support removal negotiations, including the Principal Chief of the Cherokee, John Ross ("Principal Chief Ross").[24] Principal Chief Ross and the majority of the Cherokee despised the idea of acquiescing to the removal demands of the United States.[25]

18. *See* Treaty with the Cherokee, Cherokee-U.S., Nov. 28, 1785, 7 Stat. 18, 19 [hereinafter Treaty of Hopewell], *reprinted in* 2 KAPPLER, *supra* note 6, at 8–11. The Treaty of Hopewell was the original treaty with the Cherokee and granted federal recognition of the Cherokee's southeastern lands in Georgia, Tennessee, North Carolina, and South Carolina. *Id.*, *reprinted in* 2 KAPPLER, *supra* note 6, at 9.

19. PERDUE & GREEN, *supra* note 3, at 61–62. These laws were passed partly due to the pressure exerted by the Georgia Gold Rush, which vastly increased the potential price of Cherokee land and the determination of white Georgians to see the Cherokee removed from gold-rich soil. *See generally* DAVID WILLIAMS, THE GEORGIA GOLD RUSH: TWENTY-NINERS, CHEROKEES, AND GOLD FEVER (1993) (describing the Georgia gold rush and its effect on the Cherokee).

20. 31 U.S. (6 Pet.) 515 (1832). This is the opinion which prompted one of the most interesting constitutional struggles between the executive and judicial branches in U.S. history. In response to the holding in *Worcester*, President Andrew Jackson is infamously rumored to have stated, "John Marshall has made his decision; let him enforce it now if he can." *See* THURMAN WILKINS, CHEROKEE TRAGEDY: THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE 236 (2d ed. 1986).

21. *Id.* at 561–63. Chief Justice Marshall's opinion explained how Native American affairs cannot be controlled by an individual state, as the relationship with Native Americans is one based on international treaties and deals with issues of sovereignty. *See id.* at 561–63. Perhaps most interestingly, Chief Justice Marshall also noted that the federal government's right to deal with Native Americans did not include a right to possession of their lands or a say in their laws. *Id.* This ruling became one of the bases for tribal sovereignty law. *See* PERDUE & GREEN, *supra* note 3, at 69.

22. *See* WILKINS, *supra* note 20, at 236.

23. *See id.* at 236–37.

24. *See* PERDUE & GREEN, *supra* note 3, at 144–45; Rosser, *supra* note 2, at 94–95.

25. *See* PERDUE & GREEN, *supra* note 3, at 144–45 (discussing Ross's efforts to abrogate the Treaty of New Echota after it was made, which are indicative of his overall feelings toward a pact for removal and the Cherokee support of his position); Rosser, *supra* note 2, at 94–95.

Regardless of the majority's disapproval, Ridge organized a party of twenty influential Cherokee men—known as the Treaty Party—and secretly met with President Jackson's appointed envoy for treaty removal, John Schermerhorn, at the Cherokee capital of New Echota.[26] Without the presence and knowledge of Principal Chief Ross or a majority of the Cherokee National Council,[27] the Treaty Party and Schermerhorn penned the Treaty of New Echota on December 29, 1835, and President Jackson's representatives signed it on March 1, 1836.[28] Despite protest from the Cherokee, Congress ratified the Treaty of New Echota by one vote in May of 1836.[29] Principal Chief Ross pled with Congress to nullify the Treaty of New Echota because he believed it was not negotiated by the true legal representative of the Cherokee.[30] Principal Chief Ross even sent Congress petitions against the Treaty of New Echota, signed by 15,000 Cherokee in total,[31] which was almost the entire Cherokee Tribe at that time.[32] Principal Chief Ross's efforts were ignored, and the forcible removal process—the Trail of Tears—began in 1838.[33]

II. TERMS OF THE TREATY OF NEW ECHOTA

The core agreement of the Treaty of New Echota is that the Cherokee would relinquish their ancestral lands in the southeastern United States to the federal government in return for money and land in Oklahoma.[34] The specific terms of this exchange are found in Articles 1 and 2 of the Treaty of New Echota.[35]

26. *See* STANLEY W. HOIG, THE CHEROKEES AND THEIR CHIEFS 152–54 (1998).

27. *See id.*; Rosser, *supra* note 2, at 116–17.

28. Treaty of New Echota, *supra* note 6, at 478, 486, *reprinted in* 2 KAPPLER, *supra* note 6, at 439, 447.

29. Rosser, *supra* note 2, at 107.

30. *See* HOIG, *supra* note 26, at 155; Rosser, *supra* note 2, at 116–17. This situation raises questions of validity on the Treaty of New Echota's formation. Was the Treaty of New Echota signed by true legal representatives of the Cherokee that had the power to create a binding treaty or was it simply signed by a rogue group of Cherokee? Was Congress right to ratify the Treaty of New Echota, even when it knew that Principal Chief Ross had not signed it? And was Congress justified in enforcing the Treaty of New Echota after Principal Chief Ross conclusively demonstrated that nearly the entirety of the Cherokee did not agree to or support the Treaty of New Echota? These questions are all interesting and important but outside the narrow scope of this Recent Development. For historical information on the possible illegitimacy of the Treaty of New Echota, see generally Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836–1838*, 73 GA. HIST. Q. 540 (1989).

31. PERDUE & GREEN, *supra* note 3, at 145; HOIG, *supra* note 26, at 155.

32. Rosser, *supra* note 2, at 130.

33. *See generally* JOHN P. BOWES, THE TRAIL OF TEARS: REMOVAL IN THE SOUTH (2007) (describing the forced removal of the Cherokee).

34. Treaty of New Echota, *supra* note 6, at 478–81, *reprinted in* 2 KAPPLER, *supra* note 6, at 439–42.

35. *Id.* at 479–80, *reprinted in* 2 KAPPLER, *supra* note 6, at 440–41.

Article 1 states that the Cherokee agree to convey "all their lands and possessions east of the Mississippi river" to the United States.[36] This Cherokee ancestral land contained large parts of Virginia, West Virginia, North Carolina, South Carolina, Tennessee, Kentucky, Georgia, and Alabama,[37] comprising most of the southern section of the Appalachian Mountains and its Piedmont region.[38] The remainder of Article 1 states that the Cherokee would receive a sum of $5,000,000 in consideration for these lands.[39]

Article 2 describes in detail the Oklahoma land given to the Cherokee, in addition to $5,000,000, in exchange for the Cherokee's relinquishment of land in Article 1.[40] The Oklahoma tract totaled 7,000,000 acres, but was subject to a proviso allowing the United States to grant easements permitting other Native Americans to gather salt on the land.[41] Article 2 also contains two interesting provisions relating to additional land grants: (1) a guaranty of "free and unmolested" use of all U.S. land west of the Oklahoma reservation lands (which would include the entire western United States); and (2) an option for an additional estimated 800,000 acres of land at the price of $500,000.[42]

Aside from Articles 1 and 2, the most important article of the Treaty of New Echota, for purposes of this Recent Development, is Article 7,[43] which has become known as the delegate clause. Unlike Articles 1 and 2, which address immediate cession and compensation, Article 7 provides subsequent compensation to the Cherokee in the form of future representation in the federal legislative branch.[44] The entirety of the delegate clause reads:

> The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the

36. *Id.* at 479, *reprinted in* 2 KAPPLER, *supra* note 6, at 441.

37. *See* GREGORY D. SMITHERS, THE CHEROKEE DIASPORA 5 (2015).

38. *See id.*

39. Treaty of New Echota, *supra* note 6, at 479, *reprinted in* 2 KAPPLER, *supra* note 6, at 440. Adjusting for modern inflation, this amount comes to $106,600,000. Ian Webster, *Value of $5,000,000 from 1871 to 2020*, CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/1871?amount=5000000 [https://perma.cc/K8PN-HE6J].

40. Treaty of New Echota, *supra* note 6, at 479–80, *reprinted in* 2 KAPPLER, *supra* note 6, at 440–41.

41. Treaty of New Echota, *supra* note 6, at 480, *reprinted in* 2 KAPPLER, *supra* note 6, at 441.

42. *Id.* While neither of these provisions are central to the argument of this Recent Development, both are rather interesting in their own right. These clauses seem to potentially grant the Cherokee a right to a great deal of additional land in the western United States (perhaps even as far as the Pacific coast), yet to the extent of my knowledge and research, the United States has not addressed either provision.

43. *Id.* at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 442–43.

44. *Id.*

> 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.[45]

The critical part of the delegate clause states 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."[46] The remainder of this Recent Development seeks to determine whether this language guarantees the Cherokee a right to a delegate.

Articles 3 through 5 and Article 8 contain provisions that are important to this Recent Development's analysis of the delegate clause and are detailed in Section IV.B. Article 6 and Articles 9 through 19, while interesting and impactful in their own rights, are not crucial to this Recent Development's discussion and, therefore, will not be addressed.

III. IS THE TREATY OF NEW ECHOTA MODERNLY ENFORCEABLE?

For the Cherokee to successfully claim a delegate in the U.S. House of Representatives under the authority of Article 7, the Treaty of New Echota and its terms must have current and binding legal effect on the United States. To establish the magnitude of this contemporary effect, we must determine (1) whether ancient treaties between Native Americans and the United States are considered valid in general, and (2) whether the Treaty of New Echota itself was valid when drafted in 1835.[47] The sections below address these issues respectively.

A. *Are Native American Treaties Valid in General?*

The threshold question is whether the United States today generally recognizes its treaties with Native American tribal governments as valid. Both the legislative and judicial branches have responded affirmatively.

45. *Id.*

46. *Id.*

47. An additional question that could be asked is whether the Treaty of New Echota has been terminated by superseding state or federal law or by other grants. However, to my knowledge, no research or case law has suggested that the Treaty of New Echota has been terminated under the modern termination test articulated in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–03 (1999), and a deep analysis of this question is beyond the limited scope of this Recent Development.

The Senate has been ratifying treaties with sovereign Native American nations pursuant to its constitutional duty[48] since the 1700s.[49] In fact, the Senate ratified as many as fifty-nine treaties between the United States and Native American tribes in the 1860s alone.[50] Though the Indian Appropriations Act of 1871[51] forbids future treaties between the United States and Native Americans,[52] it also guarantees that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."[53] Thus, while treaty making with Native Americans is now formally prohibited, Congress has ensured that such treaties existing before 1871 still carry full legal authority.[54]

The judicial branch has also consistently upheld treaties between the United States and Native American tribes as valid and legally binding. For centuries, the Supreme Court has ruled on legal issues arising from treaties with Native American tribes, recognizing the treaties' validity.[55] In *Worcester*, a landmark opinion that became the foundation for Native American tribal sovereignty jurisprudence, Chief Justice Marshall acknowledged the Native Americans' ability to make treaties with the United States by stating that "[t]he constitution . . . has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who

48. U.S. CONST. art. 2, § 2, cl. 2 ("[The President] shall have Power . . . to make Treaties, provided two thirds of the Senators present concur . . . .").

49. The first treaty between the United States and a Native American tribe was ratified in 1778. Treaty with the Delawares, Delaware-U.S., Sept. 17, 1778, 7 Stat. 13, *reprinted in* 2 KAPPLER, *supra* note 6, at 3.

50. Mark G. Hirsch, *1871: The End of Indian-Treaty Making*, AM. INDIAN MAG. (2014), https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making [https://perma.cc/3MJA-RMZZ].

51. Act of Mar. 3, 1871, Pub. L. No. 41-120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999); United States v. Sioux Nation of Indians, 448 U.S. 371, 384–86, 421–24 (1980); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 541, 561–63 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 59–61, 74–75 (1831) (Thompson, J., dissenting). However, there is plenty of debate as to whether the Supreme Court has always ensured that the rights guaranteed to Native Americans under these treaties are protected. For example, in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court determined that the United States had breached its obligations under the Fort Laramie Treaty of 1868 by illegally stealing land in the Black Hills from the Sioux Tribe. *Sioux Nation of Indians*, 448 U.S. at 421–22. The United States was required to compensate the Sioux Tribe for the illegal taking. *Id.* at 424. However, as of this date, the Sioux Tribe has refused to accept the reparations, which are now valued at more than one billion dollars, because the Sioux Tribe wants the United States to instead honor the Fort Laramie Treaty of 1868 and return their stolen lands. *See, e.g.*, Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/ [https://perma.cc/CZL7-B9Z4].

are capable of making treaties."[56] In *United States v. Forty-Three Gallons of Whisky*,[57] the Court recognized that "[f]rom the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties."[58]

B. *Was the Treaty of New Echota Valid when It Was Drafted in 1835?*

The Treaty of New Echota satisfies all of the constitutional requirements for a treaty to be legitimate. Under Article II, Section 2 of the U.S. Constitution, a valid treaty must be drafted by the President and ratified by two-thirds of the Senate. The Treaty of New Echota was executed by President Andrew Jackson's representatives, signed by his hand, and ratified by the Senate (albeit by one vote).[59] Thus, there is no issue with the Treaty of New Echota potentially failing to meet the constitutional prerequisites for its validity.

Additionally, the judicial branch has recognized the legitimacy of the Treaty of New Echota for over a century.[60] The Court expressly recognized the Treaty of New Echota's authority a few decades after its creation when Justice Harlan stated the following in *Cherokee Nation v. Southern Kansas Railway Co.*[61]:

> By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them' . . . .[62]

Since *Cherokee Nation*, the federal judiciary has consistently ruled on Cherokee matters and has never questioned the United States' ability to enforce

56. *Worcester*, 31 U.S. (6 Pet.) at 519.

57. 93 U.S. 188 (1876).

58. *Id.* at 196.

59. *See* Treaty of New Echota, *supra* note 6, at 478–79, 486, *reprinted in* 2 KAPPLER, *supra* note 6, at 439–40, 447; Rosser, *supra* note 2, at 107.

60. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 620 (1970); *In re* E. Cherokees, 220 U.S. 83, 84–85 (1911); United States v. Cherokee Nation, 202 U.S. 101, 128 (1906); Stephens v. Cherokee Nation, 174 U.S. 445, 484–86 (1899); E. Band of Cherokee Indians v. United States, 117 U.S. 288, 310 (1886); E. Band of Cherokee Indians v. Lynch, 632 F.2d 373, 375 (4th Cir. 1980); United States v. Boyd, 83 F. 547, 553 (4th Cir. 1897); Cherokee Nation of Okla. v. United States, 782 F.2d 871, 874–75 (10th Cir. 1986); Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 92–94 (D.D.C. 2017); Cherokee Nation of Indians in Okla. *ex rel.* W. Cherokee Indians v. United States, 109 F. Supp. 532, 534 (Ct. Cl. 1953). Each of these cases includes the Treaty of New Echota in its discussion and references it as legitimate.

61. 135 U.S. 641 (1890).

62. *Id.* at 654.

the provisions of the Treaty of New Echota. To the best of my knowledge, there is not a single case where a federal court has questioned the United States' claim to the lands taken from the Cherokee by the Treaty of New Echota, and modern courts continue to enforce the Treaty of New Echota as binding. Most recently, in the 1970 case of *Choctaw Nation v. Oklahoma*,[63] the Court reaffirmed the Treaty of New Echota's binding legal authority.[64] The 4–3 decision to grant the Cherokee property rights to the river bed of the lower Arkansas River was reached by recognizing the Treaty of New Echota as authoritative on the question of what property rights were afforded to the Tribe and determining that "the United States intended to and did convey title [to the river bed]" through the Treaty of New Echota.[65]

Because the federal judiciary has uniformly enforced the rights guaranteed by the Treaty of New Echota and it satisfies the technical treaty requirements in the U.S. Constitution, there is little question as to the Treaty of New Echota's status as a valid and official treaty between the United States and the Cherokee. Thus, the Treaty of New Echota's terms were fully binding on its parties in the nineteenth century and remain binding in the twenty-first century.

IV. DOES THE TREATY GUARANTEE THE CHEROKEE A RIGHT TO A CONGRESSIONAL DELEGATE?

So, the Treaty of New Echota and its terms are legally binding on the United States, but do those terms guarantee the Cherokee a right to a delegate in the U.S. House of Representatives? Answering this question requires interpreting the delegate clause. The following sections introduce the tools that the federal judiciary has used to interpret treaties with Native Americans for centuries—the canons of construction—and then apply the canons to the Treaty of New Echota to determine whether the Cherokee have an affirmative right to a delegate in the U.S. House of Representatives.

A. *The Indian Law Canons of Construction*

The canons of construction are the primary legal method for interpreting Native American treaty language.[66] For nearly two centuries, the Supreme Court has applied these canons of construction to treaties in which a Native American tribe is a party to interpret the treaties' terms and determine their legal effects.[67] From this jurisprudence, legal practitioners, scholars, and

63. 397 U.S. 620 (1979).

64. *Id.* at 620.

65. *Id.* at 635.

66. *See* COHEN, *supra* note 12, at 221–22.

67. Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 496 (2004) (citing

members of the judiciary have recognized and accepted four rules to use when interpreting Native American treaties: (1) treaties are to be construed as the Native Americans would have understood them; (2) treaties should be liberally construed in favor of Native Americans; (3) ambiguities in a treaty should be resolved in favor of Native Americans; and (4) Native American rights and sovereignty granted under a treaty are retained unless subsequent congressional intent to diminish them is clear.[68] Each of these rules is a canon in its own right, and together, they form the canons of construction. The proceeding sections explain each of the canons in greater detail.

1. The First Canon

The early formulations of the first canon of construction—that treaties should be read as the Native Americans would have understood them—arose from Chief Justice Marshall's opinion in *Worcester*.[69] In this opinion, he stated that a term about hunting grounds in the 1785 Treaty of Hopewell[70] should "be taken in the sense in which it was most obviously used" because the Cherokee "were not critical judges of our language . . . [and] might not understand the term employed . . . ."[71] Chief Justice Marshall's rationale for this decision is evidence that this canon arose to ensure fairness and equity for Native American tribes in their dealings with the United States.[72] These agreements between Native Americans and the United States were often formed with an underlying imbalance of power because the Native Americans were not masters of technical treaty language.[73] Subsequent courts quickly supported Chief Justice Marshall's decision and reasoning.[74] Decades after the *Worcester* decision, the Supreme Court used the first canon again in *Kennedy v. Becker*[75] to construe another treaty's clause concerning hunting rights—this time interpreting a treaty with the Seneca Nation.[76] The Supreme Court construed this clause as the Native Americans would have understood it: a shared privilege with the federal government and others to whom the federal government chose to grant hunting rights.[77] This canon has been developed in the centuries following *Worcester*,

COHEN, *supra* note 12, at 222 n.42); *see, e.g.*, *Choctaw Nation*, 397 U.S. at 631 (1970); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552–53 (1832).

68. Hall, *supra* note 67, at 495 (citing COHEN, *supra* note 12, at 222).
69. *Worcester*, 31 U.S (6 Pet.) at 552–53.
70. Treaty of Hopewell, *supra* note 18, at 19, *reprinted in* 2 KAPPLER, *supra* note 6, at 8–11.
71. *Worcester*, 31 U.S. (6 Pet.) at 552–53.
72. *See* COHEN, *supra* note 12, at 222.
73. *Worcester*, 31 U.S. (6 Pet.) at 552–53.
74. *See* COHEN, *supra* note 12, at 222.
75. 241 U.S. 556 (1916).
76. *Id.* at 557.
77. *Id.* at 563–64.

and the modern Court uses it whenever a question of Native American treaty interpretation arises.[78]

2. The Second and Third Canons

The second and third canons can be combined as a cohesive rule that requires liberal interpretation of treaties and their ambiguities in favor of Native Americans.[79] This rule also originated in the *Worcester* opinion in which Chief Justice Marshall "read the treaties protecting the Cherokees from Georgia's encroachment liberally" to the benefit of the Native Americans.[80] Additionally, in his concurrence, Justice McLean simply stated that "[t]he language used in treaties with the Indians should never be construed to their prejudice."[81] Justice Davis subsequently reiterated Chief Justice Marshall's yet-to-be-formalized second and third canons in *The Kansas Indians*.[82] Justice Davis interpreted certain ambiguous treaty terms concerning the taxation of the Miami Indian Tribe in the Tribe's favor and cited the *Worcester* opinion as his rationale for doing so.[83] Like the first canon, the second and third canons have been accepted by subsequent Courts and have become a bedrock principle for interpreting treaties to which Native Americans are a party. A modern example of this combination of canons comes from the 1985 case of *County of Oneida v. Oneida Indian Nation of New York State*.[84] Justice Powell's majority opinion states that "it is well established that treaties should be construed liberally in favor of the Indians . . . [and] ambiguous provisions interpreted to their benefit."[85] The Court used this principle as a lens to view the terms of treaties in the Oneida Tribe's favor, holding that the Oneida Tribe was entitled to damages for tribal land that New York occupied.[86]

3. The Fourth Canon

We now come to the most controversial canon. Unlike the first three canons of construction, which are usually beneficial to Native American treaty parties, the fourth canon is often quite detrimental to Native Americans. This canon dictates that rights guaranteed to Native Americans under a treaty are valid and enforceable only if Congress has not clearly expressed intent to strip

78. *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979).

79. *See* COHEN, *supra* note 12, at 222.

80. Hall, *supra* note 67, at 505.

81. Worcester v. Georgia, 31 (6 Pet.) U.S. 515, 582 (1832) (McLean, J., concurring).

82. 72 U.S. 737 (1866).

83. *Id.* at 760–61.

84. 470 U.S. 226 (1985).

85. *Id.* at 247.

86. *Id.* at 230, 247–48.

these rights away.[87] If congressional intent to extinguish the rights included in treaties is "plain and unambiguous,"[88] then the judiciary must defer to the congressional assertion and hold that the rights are no longer guaranteed, and the relevant treaty provisions are no longer in effect.[89] Think of this rule as a renege power. The United States, having made a fully valid and binding legal agreement with a Native American tribe, can relinquish its own contractual responsibilities and take away rights from the tribe, so long as Congress plainly and unambiguously expresses its intent to do so.

The complexity of this rule arises in determining whether there has been a plain and unambiguous expression of congressional intent to renege on its contractual guarantees to a Native American tribe. The Court usually requires that congressional intent be expressed through legislation that directly contradicts a right previously guaranteed by a treaty. For example, in *United States v. Dion*,[90] the Supreme Court upheld a Native American defendant's conviction for hunting bald eagles in violation of the Bald Eagle Protection Act of 1940,[91] which outlawed the killing of bald eagles.[92] The defendant argued that he had the right to hunt these animals under the 1858 Treaty with the Yankton Sioux,[93] which granted the Native American Tribe broad hunting rights on the reservation where he was hunting at the time.[94] However, the Court held that the Bald Eagle Protection Act, passed almost a century after the defendant's tribe had been given the right to hunt these animals, subsequently abrogated the defendant's right to hunt bald eagles, even on his own tribe's reservation lands, because the legislation evidenced that Congress clearly expressed its intent to revoke the Yankton Sioux's right to hunt bald eagles.[95]

Cases revoking Native American treaty rights had traditionally been limited by the principle that congressional intent should not be "lightly implied"[96] and instead must be clear, plain, and unambiguous. However, since the 1970s, the Supreme Court has become more willing to find congressional intent to abrogate Native American rights granted via treaty or otherwise.[97] For example, in *Federal Power Commission v. Tuscarora Indian Nation*,[98] the Court

87. Hall, *supra* note 67, at 495 n.3, 521.

88. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1946).

89. *See* COHEN, *supra* note 12, at 222; Hall, *supra* note 67, at 495 n.3.

90. 476 U.S. 734 (1986).

91. An Act for the Protection of the Bald Eagle, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668–668c).

92. *Dion*, 476 U.S. at 736, 740, 746.

93. Treaty with the Yankton Tribe of Sioux, U.S.-Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, 743–39, *reprinted in* 2 KAPPLER, *supra* note 6, at 776–81.

94. *Id.* at 735, 737, 744–46.

95. *Id.* at 737–38, 744–46.

96. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1946).

97. *See* Hall, *supra* note 67, at 521.

98. 362 U.S. 99 (1960).

found that Congress's intent in the Federal Power Act[99] to allow the Federal Power Commission's licensees to take needed land via eminent domain, including land belonging to Native Americans, was clear; thus, the Federal Power Commission's licensees were permitted to diminish the Tuscarora Native American Tribe's property rights to their reservation lands, even though the Federal Power Act did not explicitly mention the Tuscarora and only broadly mentioned the Federal Power Commission's right to take land from citizens using eminent domain powers.[100] There have been multiple cases since *Tuscarora Indian Nation* that similarly diminish the traditionally hefty burden of clear congressional intent.[101]

However, regardless of the uptick in decisions consistent with *Tuscarora Indian Nation*, which make it easier for Congress to abrogate the treaty rights of Native Americans, the Court's burden of finding clear congressional intent remains relatively weighty, as shown by *Minnesota v. Mille Lacs Band of Chippewa Indians*.[102] In *Mille Lacs*, Minnesota argued that the Mille Lacs Band of Chippewa Native Americans lost their rights to hunt, fish, and gather on the land that was given to them by a federal treaty in 1837.[103] The state cited an 1850 executive order, an 1855 treaty, and the granting of Minnesota's statehood in 1858 as evidence of congressional intent to diminish the Chippewa Tribe's rights.[104] The Court, however, roundly rejected all of these contentions, holding that each source cited was devoid of an express abrogation of usufructuary rights.[105]

In totality, the canons of construction operate as a cohesive body of law that generally favor an expansive interpretation of treaties, so long as Congress has not expressed otherwise. Under these canons, if there is legitimate question as to whether a right granted by a treaty is more or less inclusive, the answer is always the former. These canons will not create rights that are not mentioned clearly in a treaty's text, but if there is ambiguity as to the effect of the rights that are included in the treaty, the canons require that the resolution of the interpretation inquiry is pro-Native American.

99. Act of June 10, 1920, Pub. L. No. 66-280, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791–830).

100. *See Tuscarora Indian Nation*, 362 U.S. at 115–24; Hall, *supra* note 67, at 521–22.

101. *See* Hall, *supra* note 67, at 521.

102. 526 U.S. 172 (1999).

103. *Id.* at 175–76.

104. *Id.* at 176, 190–92, 195–96, 202–03.

105. *Id.*

B. *Application of the Canons of Construction to the Treaty of New Echota*

Interpreting the delegate clause under the canons of construction demonstrates that the Cherokee have a legitimate entitlement to a delegate in the U.S. House of Representatives.

1. The Canons Apply Because Textualism Is Inadequate

For the canons of construction to apply, there must be an issue of interpretation—a conflict about the meaning of the terms in a treaty. Otherwise, the first three canons would be unnecessary. If the meaning of a treaty's terms were clear, then there would be no need to read the treaty as the Native Americans would have understood it, no room for liberal construction, and no ambiguity to resolve. Under a textualist approach, historically the first step in the interpretation of any legal document, including treaties, the terms as written often adequately explain their meaning.[106] However, the delegate clause cannot be adequately interpreted by a strictly linguistic reading, and thus, we must turn to the canons of construction for guidance.

The relevant portion of Article 7 states 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."[107]

The problem with a purely textual reading of the delegate clause is the use of the word "whenever." This word creates too much ambiguity for a strictly textualist approach to be sufficient. In the first half of the delegate clause—starting with "shall" and ending with "States"—there is an express mention of a delegate in the U.S. House of Representatives and an "entitle[ment] to [that] delegate . . . ."[108] This lines up well with Principal Chief Hoskin's claim that the Cherokee are entitled to a delegate.[109] So far, so good. However, the latter portion of the delegate clause—namely the word "whenever"—appears to place a contingency on the former. The use of "whenever" between these two phrases makes it unclear whether the Cherokee's delegate entitlement has full legal authority as a congressional *mandate* or is merely *permissive*. Does the use of "whenever" mean that the Cherokee are entitled to a delegate only after affirmative congressional action? Or are they entitled to a delegate now but must wait for Congress to act? Is Congress even required to act at some point in the future? Maybe "whenever" means that the Cherokee are not truly entitled to a delegate at all because Congress can choose to act whenever it so desires, implying that Congress could thus never act?

106. *See generally* Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT'L L. 283 (2014) (explaining that the Framers and early Supreme Court "employ[ed] highly textual treaty interpretation not just as a matter of consensus, but as a matter of law").

107. Treaty of New Echota, *supra* note 6, at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 441.

108. *Id.*

109. *See* Hoskin, *supra* note 7.

The crucial question is whether the delegate clause *requires* Congress to make a provision for a Cherokee delegate, and if so, when Congress must do so? Textualism cannot answer this question. The modifying word "whenever" can be reasonably understood as meaning (1) Congress is required to grant the Cherokee a delegate at some point soon after the Treaty of New Echota, (2) Congress must grant the delegate but can choose to delay its actions, or (3) Congress is not required to act at all but may do so on its own accord. The first and second options seem legitimate when considering that the drafters of the Treaty of New Echota chose the active words "whenever Congress *shall make provision*," not passive words such as "if Congress *decides to make provision*" or "*dependent* on congressional approval." The use of the Treaty of New Echota's specific active language suggests that Congress must, at some point in time, affirmatively act to grant the Cherokee a delegate but can choose the time at which to act. However, the third option also seems plausible, given that the phrase could certainly mean the Cherokee only gain the right to the delegate at the point in time that Congress, of its own volition, makes a provision. From the linguistic construction of the sentence, it could be said that a delegate right is wholly contingent on legislative action, and if no action takes place, no right exists. Because of these conflicting interpretations, the meaning of the delegate clause is too unclear for a strictly textualist approach to provide a concrete answer. Therefore, we must use the canons of construction because, as Supreme Court precedent has dictated, they are the main judicial tools for interpreting Native American treaties.

2. Application of the First Canon

Analyzing the delegate clause under the first canon of construction suggests that the Cherokee would likely have understood the delegate clause to be a guaranteed right that was not meant to be delayed indefinitely by congressional inaction.

Structurally, the delegate clause is included within the portion of the Treaty of New Echota that *guarantees* rights to the Cherokee people in return for their relinquishment of ancestral land.[110] It is reasonable to assume that, because of the location of the delegate clause within the overall Treaty of New Echota, the Cherokee at the time of the Treaty of New Echota's ratification (and the Cherokee involved in its creation and signing) would have understood the delegate clause to be a guaranteed right.

Most convincing on this point is the fact that every other clause in the Treaty of New Echota that has been analyzed in the federal court system has been upheld as a *guaranteed* right. This includes clauses close in proximity and similar in construction to the delegate clause.

110. *See supra* Part II.

For example, Article 8, the clause directly after the delegate provision, discusses the United States' obligation to support the Cherokee during the removal process.[111] The Supreme Court inferentially recognized the legitimacy of Article 8 as a guaranteed right in the 1841 case of *Minis v. United States*[112] when it referenced the Treaty of New Echota as a valid legal basis for the plaintiff's reimbursement claim.[113]

Article 9 of the Treaty of New Echota, also close in proximity to Article 7, in part guarantees that the United States will uphold its Article 8 promise to provide subsistence for the Cherokee during removal by doling out the appropriate amount of funds to the Cherokee "at the discretion of the President of the United States . . . ."[114] The Cherokee's right to the Article 8 funds was inferentially upheld as an unconditional right in *Eastern Band of the Cherokee Indians v. United States*,[115] when the Court stated that the funds were "intended by the treaties with the United States, for the benefit of the united [Cherokee] Nation."[116] In *Eastern Band*, the Court determined that, while the Cherokee tribal members remaining in North Carolina were not individually entitled to any amount of the funds set aside by the federal government, these funds were undoubtedly property of the Cherokee Tribe as a whole.[117]

Additionally, the stipulations in Article 9 are similar to the delegate clause in the sense that both are conditioned upon federal government action. Article 7 requires that Congress make a provision for the Cherokee delegate, whereas Article 9 states that funds collected for their assistance will be dispersed to them at the President's discretion. But again, in *Eastern Band*, the Court held that the Cherokee were entitled to these Article 8 funds,[118] from which we can infer that the contingency of presidential discretion in Article 9 did nothing to alter the Cherokee's unconditional entitlement to the funds.

Article 5 guarantees that the lands granted to the Cherokee in the Treaty of New Echota shall remain Cherokee land for all "future time" and that the land should never be included within the territorial limits or jurisdiction of any state.[119] This particular promise is key to the Cherokee's quasi-sovereign status. The authority of Article 5 was inferentially supported as unconditional in

111. *See* Treaty of New Echota, *supra* note 6, at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 443.

112. 40 U.S. 423 (1841).

113. *See id.* at 427–28, 434–35, 448 ("[H]e was called upon, by the government, to disburse . . . large sums of money in fulfilling the stipulations of the treaty of New Echota . . . .").

114. *See* Treaty of New Echota, *supra* note 6, at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 443.

115. 117 U.S. 288 (1886).

116. *See id.* at 307–12.

117. *Id.* at 311–12 ("Those funds and that property were dedicated by the constitution of the Cherokees . . . for the benefit of the united Nation . . . held by the United States in trust for the Cherokee Nation . . . .").

118. *Id.*

119. Treaty of New Echota, *supra* note 6, at 481, *reprinted in* 2 KAPPLER, *supra* note 6, at 442.

Choctaw Nation when the Court recognized that Article 2 of the Treaty of New Echota granted the Cherokee rights to a riverbed in Oklahoma that even superseded claims to the property by the Oklahoma state government.[120] The Court supported its Article 2 conclusion by quoting Article 5 in stating that,

> the United States accompanied its grants to petitioners with the promise that 'no part of the land granted to them shall ever be embraced in any Territory or State.' In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.[121]

Since these other clauses guarantee unconditional rights, there is little support for an alternative interpretation of the delegate clause when considering proximity and similarity. If the federal judiciary, comprised of experts in interpretation of English as well as legal language, has consistently upheld rights expressed in the Treaty of New Echota that are similar in style and close in proximity to the delegate provision as guaranteed rights, it is exceedingly plausible to argue that the Cherokee, who likely had a far more rudimentary understanding of the Treaty of New Echota's technical language, would have understood the delegate clause as affirmatively granting an unconditional right to a delegate.

Another important note is that the core provisions of the Treaty of New Echota—Articles 1 and 2—have always been respected as guaranteed rights and have no mentions of contingencies in their text. Article 2 has been consistently upheld by the judiciary as granting the Cherokee property rights to Oklahoma land[122] and has not been interpreted as needing additional legislative action to become a fully-realized right.[123] And there has never been any indication that Article 1, the provision detailing the Cherokee lands to be ceded to the United States, granted the United States only a conditional right to those lands. The federal government certainly did not think that their ownership of Georgia, Tennessee, Alabama, North Carolina, and South Carolina was conditional on further Cherokee action, and the federal government surely thinks the same today. So why would the Cherokee of the time, giving the United States unconditional control of their ancestral lands, think that the rights they received in exchange were conditioned on further actions of the United States?

120. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 620, 634–36 (1970); *id.* at 636–38 (Douglas, J., concurring).

121. *Id.* at 635 (majority opinion).

122. *See, e.g.*, *id.* at 634–38.

123. *See id.*

Lastly, Article 3 of the Treaty of New Echota states that the Cherokee's new land in Oklahoma "shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States . . . ."[124] Though there is no language expressly requiring *when* the President was to issue the patent, similar to how there is no language setting a timeline for Congress to "make [a] provision" for the Cherokee delegate, the patent was promptly executed by President Van Buren in 1838—soon after the execution of the Treaty of New Echota.[125] This furthers the idea that the considerations in the Treaty of New Echota were understood at the time not only as guaranteed rights but also as rights to be carried out by their respective parties in a diligent fashion, not left untouched for centuries.

3. Application of the Second and Third Canons

When applying the second and third canons of construction, it is also evident that the Cherokee have a right to a delegate in the U.S. House of Representatives. These canons dictate that, if there is ambiguity in the text of a treaty, it should be resolved by a liberal interpretation in favor of the Native Americans.[126]

There is certainly ambiguity in the delegate clause.[127] Much of this argument has already been discussed in Section IV.B.1, but it is important to reiterate here for purposes of analysis under the canons. The most obvious ambiguity is the confusion created by the word "whenever."

The phrase "whenever Congress shall make provision for the same" could be read as suggesting that the entitlement to a delegate in the U.S. House of Representatives is contingent upon Congress making such a provision. The Treaty of New Echota does not say "[*when*] Congress shall make provision for the same," but rather uses the word "whenever," possibly implying that Congress can make the provision at any time without care for timeliness or obligation to act. Then again, a different interpretation could be that the use of "whenever" is simply to solidify that no matter how long it takes Congress to make a delegate provision, the Cherokee are entitled to that delegate, and Congress is required to act accordingly at some point, whether now or in the future. Both interpretations seem entirely plausible, especially when considering the conflicting active and passive word choices that the drafters of the Treaty of New Echota used in "whatever" and "shall." Because of this linguistic conflict, the effect of the delegate clause is quite ambiguous.

124. Treaty of New Echota, *supra* note 6, at 480, *reprinted in* 2 KAPPLER, *supra* note 6, at 441–42.
125. *Choctaw Nation*, 397 U.S. at 630.
126. *See supra* Section IV.A.2.
127. *See supra* Section IV.B.1.

Moreover, the notion that a clause providing for a nonguaranteed right to a delegate would be included in the Treaty of New Echota is nonsensical. Why would the delegate clause be placed in the Treaty of New Echota at all if the only way the Cherokee could get a delegate would be to simply wait for Congress to unilaterally create that delegate on its own time? If that were the case, the delegate clause is simply a redundant and unnecessary statement of congressional power to grant the Cherokee a delegate if it ever so desired. It would be nonsensical for the drafters to waste time and effort to include the delegate clause if it was a redundant expression of a nonguaranteed possibility, especially considering that, in an official treaty of the United States, every word is important, consequential, and has an operative effect.[128]

Structure also plays an important role in the ambiguity argument. As previously discussed, the location and language suggest that the delegate clause is a guaranteed right.[129] So, why would this particular clause provide a conditional right when all the surrounding clauses grant the Cherokee unconditional rights? At the very least, it is plausible to say that, considering courts have held many other rights in the Treaty of New Echota to be unconditional, it is unclear whether the delegate provision is conditional. The fact that this Recent Development and several other articles[130] all dive into the linguistic nuances and meaning of the delegate clause almost two hundred years after the Treaty of New Echota was drafted and ratified suggests there is ambiguity. If the issue is a topic of debate after nearly two centuries, that seems indicative of uncertainty.

The second and third canons require that a court interpret the ambiguity in favor of the Cherokee. This combination of canons leans heavily toward a pro-Cherokee interpretation of the delegate clause. Seeing as there is considerable confusion as to the operation of the words "whenever Congress shall make provision for the same," precedent suggests that a federal court would likely find the right to a delegate under Article 7 was not meant to be stifled by congressional inaction for centuries. This would resolve the existing ambiguity in favor of the Cherokee by holding the United States accountable for the promise it made and which the Cherokee likely understood to be unconditional.

128. Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1487 n.9 (2018); *Statutory Interpretation: Theories, Tools, and Trends*, EVERYCRSREPORT.COM (Apr. 5, 2018), https://www.everycrsreport.com/reports/R45153.html [https://perma.cc/4MVV-BPU9] ("Courts should 'give effect, if possible, to every clause and word of a statute' so that 'no clause is rendered "superfluous, void, or insignificant."'"). For application of the rule against surplusage to a treaty, see, for example, Tutt, *supra* note 106, at 350.

129. *See supra* Section IV.B.2.

130. *See generally* Blair, *supra* note 3 (arguing that that the canons of construction establish the intent of the United States to create a Cherokee delegate through the delegate clause); Rosser, *supra* note 2 (explaining the many historical interpretations of the delegate clause).

4. Application of the Fourth Canon

The fourth canon of construction, while important, lacks substantial application here. This canon states that rights provided by a treaty are retained absent any unambiguous expression to the contrary. However, there is no indication that Congress has clearly expressed an intent to abrogate the rights included in the Treaty of New Echota. There has been no federal legislative act, law, or codification that extinguishes the Treaty of New Echota or challenges its legality. Additionally, federal courts have consistently referenced the Treaty of New Echota as the controlling source of the current legal relationship between the United States and the Cherokee.[131] Moreover, it is clear that Oklahoma's statehood cannot be viewed as extinguishing the Cherokee's rights under the Treaty of New Echota (without some clear expression of that intent)[132] because the rights of state governments do not generally supersede the rights contained in treaties between the federal government and Native Americans unless irreconcilable.[133]

Not only do the aforementioned facts show there has been no express abrogation of the Treaty of New Echota but one could also argue that, because no superseding legislation has been passed after nearly two centuries, Congress actually intends the Treaty of New Echota's provisions to control. Congress has had ample time to abrogate the delegate clause but has not done so. The United States' reliance on the Treaty of New Echota as the basis for its ownership of the Cherokee's ancestral lands furthers the argument that if Congress intended to abrogate the Treaty of New Echota, it would already have done so. Since there is no evidence that Congress has abrogated or intends to abrogate the Treaty of New Echota, the delegate clause is not affected by the fourth canon of construction.

CONCLUSION

When analyzed through the lens of the canons of construction, the delegate clause grants the Cherokee a right to a delegate in the U.S. House of Representatives. While the full realization of this right requires a least some congressional action—to draft and pass a "provision for the same"[134]—Congress should be diligent in its fulfillment of the promise the United States made to the Cherokee nearly two centuries ago. The affirmative right to a delegate, which the Treaty of New Echota grants to the Cherokee, requires more than the glaring lack of legislative action it has received. Because the canons of construction clearly suggest that the Cherokee are guaranteed a delegate in the

131. *See supra* Part III.

132. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–03 (1999).

133. *See id.* at 202–05.

134. Treaty of New Echota, *supra* note 6, at 482, *reprinted in* 2 KAPPLER, *supra* note 6, at 441.

U.S. House of Representatives, the canons support the timely adoption and execution of this right, despite Congress's inexcusable inaction on the matter since 1835.

The United States has received the full benefit of the contract it made with the Cherokee, gaining title to the Cherokee's ancestral lands and a legal basis to forcibly expel Native Americans from their home in one of the greatest atrocities the United States has ever committed.[135] But the Cherokee have not received the full benefit of that contract. They are still being denied their rights guaranteed to them by the United States. It is high time that the Cherokee are given the full legal consideration to which they are entitled pursuant to the Treaty of New Echota that authorized their dispersion and desolation.

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135. *See supra* note 3 and accompanying text.

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I would like to thank Professors Theda Purdue and Keith Richotte, both of whom were patient in guiding me through the nuances of Cherokee history and Native American law. I would also like to thank the *North Carolina Law Review* Staff and Board Members who worked tirelessly on this piece to bring it to its current passable state. I am humbled to have my writing selected for publication by the executive boards of Volumes 98 and 99, and I am grateful for their support along the way, especially the encouragement of Eric Fisher, Darpan Patel, and Nathan Wilson. This Recent Development also greatly benefitted from the research conducted by Ellie Campbell at the University of North Carolina School of Law Library. Lastly, and most importantly, I would like to thank my Primary Editor, Jamison Wynn, who truly took this work on as his own and pushed this piece to become what it is.