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Demanding a Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives

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DEMANDING A VOICE IN OUR OWN BEST INTEREST: A CALL FOR A DELEGATE OF THE CHEROKEE NATION TO THE UNITED STATES HOUSE OF REPRESENTATIVES

*Jack Blair**

> *[H]old fast to the faith of treaties which by mutual consent have been solemnly pledged between our Nation and the United States. [T]he laws and treaties for the security and protection of our rights [are] the only weapons with which we must defend them. [I]f it has been our misfortune to suffer wrongs from the hands of our white brethren we should not despair of having justice still extended to us by the United States.*
>
> — Chief John Ross, in a letter dated Oct. 18, 1837, one year before removal.[1]

Introduction

Over the course of two hundred years, the United States has subjected the Cherokee Nation to a most subtle and relentless form of conquest: an infinitely complex web of legal doctrine. The law first subordinated the Cherokee Nation, then brought it to the edge of political extinction, and now leaves it merely dependent. The one consistency in federal policy has been the reluctance to allow the Cherokee Nation to govern itself. In assuming its paternal role, the United States has neglected the basic principles of representation upon which this country itself was founded. Despite promises to the contrary, the Cherokee Nation is left without a voice in its own best interest.

The current relationship between Indian nations, generally, and the United States government has evolved into a unique conglomeration of customs, cases, treaties, and statutes. Perhaps in no other area of the law is the precedent so diverse and the doctrine so fluid.[2] The evolution of American Indian law has been an attempt to reconcile several conflicting interests:

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1. 1 PAPERS OF CHIEF JOHN ROSS 523 (Gary Moulton ed. 1985).

2. *See* PETER MATTHIESEN ET AL., EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE CONSTITUTION (1992).

conquest and sovereignty; uniformity and diversity; paternalism and autonomy. Today, Indian nations are asserting their rights to self-determination with renewed vitality, but they do so only at the allowance of the federal government. As the law stands, Congress has assumed plenary authority over the governance of Indian nations, and the courts have generally affirmed that authority.[3] The scope of Congress' authority is limited only by the Due Process and Just Compensation Clauses of the Constitution, as well as a broadly defined "trust" responsibility.[4] In defining the breadth of Congress' plenary power, the Supreme Court has stated that tribal autonomy exists "only at the sufferance of Congress and is subject to complete defeasance."[5] Despite the questionable bases for Congress' plenary power, it is, for now, a practical reality.

If Congress has the power to dictate the terms of the governance of the Cherokee Nation, or to disband it altogether, why does the Cherokee Nation have no representation in that body to speak for its interests? This question is especially perplexing considering the solemn covenants made by the United States that provisions would be made for such representation.[6] Congress' plenary authority over the Cherokee Nation without representation contradicts every traditional American principle of fairness in government. The most basic of these principles is that Government's authority arises from the consent of the governed. The Declaration of Independence clearly outlines the foundation of a representative democracy: "Governments are instituted among Men, deriving their just Powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles . . . ."[7]

The current Administration has expressed a desire for greater cooperation with tribal governments when Indian policy decisions are made. In a recent address to Native American leaders, President Clinton stated: "The important thing is to create policies that give every tribe a chance to have a strong economy in the long run; to develop the will and the consistency to stick with those policies over time; and to keep working and talking together."[8] As the

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3. *Id.* at 318.

4. *See, e.g.*, Antoine v. Washington, 420 U.S. 194 (1975); U.S v. Kagama, 118 U.S. 375 (1886).

5. United States v. Wheeler, 435 U.S. 313, 323 (1978).

6. These promises are outlined in two separate treaties between the United States government and the Cherokee Nation. Treaty with the Cherokees, Nov. 28, 1785, U.S.-Cherokee Nation, art. 12, 7 Stat. 18, 20 [hereinafter Treaty of Hopewell], *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., photo. reprint 1975) (1904) [hereinafter KAPPLER'S]; Treaty with the Cherokees, Dec. 29, 1835, U.S.-Cherokee Nation, art. 7, 7 Stat. 478, 482 [hereinafter Treaty of New Echota], *reprinted in* KAPPLER'S, *supra*, at 442-43.

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

8. *President Bill Clinton's Address to Native American Leaders*, NATIVE PEOPLES, Summer

President makes known his desire for a mutually respectful, long term relationship between Indian nations and the federal government, the United States Congress has the ability to insure cooperation for years to come. A provision for a delegate from the Cherokee Nation to the House of Representatives would be a tangible step toward putting the President's words into action. Not only would Congress be insuring a new relationship of advice and consent, it would be fulfilling a 200-year-old promise to the Cherokee Nation.[9] The right to representation in Congress was bargained for and won in two separate treaties with the United States.[10] Congress has yet to act on the promises, and the Cherokee Nation has yet to demand action. It is the obligation of Congress to uphold these solemn covenants of the United States and to insure a consensual governing relationship with the Cherokee Nation. Likewise, it is the obligation of the Cherokee Nation to demand a voice in the political process that presumes authority over it.

Legal History

Following the Revolutionary War, the United States regarded the Cherokee Nation as a powerful sovereign.[11] The newly formed United States pursued a relationship of friendship and cooperation with Indian nations, rather than conquest.[12] As the balance of power was relatively equal, treaties which were entered into at this time were freely assumed and beneficial to both parties.[13] Contrary to popular belief, the United states did not bestow any gifts to the Cherokee Nation through early treaties, nor was the Cherokee Nation terribly disadvantaged in the negotiations.[14] It was only later, as the United States began to expand westward and grow more powerful, that the treaty relationship became tainted by an unwritten policy of conquest.[15]

A Cherokee delegate to Congress was first bargained for and secured in the Treaty of Hopewell, November 28, 1785.[16] This marked the first treaty

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1994, at 5. [hereinafter *President Clinton's Address*].

9. Treaty of Hopewell, *supra* note 6, at art. 12, 7 Stat. at 20, *reprinted in* KAPPLER'S, *supra* note 6, at 10.

10. Treaty of Hopewell, *supra* note 6, at art. 12, 7 Stat. at 20, *reprinted in* KAPPLER'S, *supra* note 6, at 10; Treaty of New Echota, *supra* note 6, at art. 7, 7 Stat. at 482, *reprinted in* KAPPLER'S, *supra* note 6, at 442-43.

11. "The early journals of Congress exhibit the most anxious desire to conciliate the Indian nations. . . . The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided." Worcester v. Georgia, 31 U.S. 515, 548 (1832).

12. "The utmost good faith shall always be observed towards Indians." Act of Aug. 7, 1789 (Northwest Ordinance), 1 Stat. 50.

13. Worcester v. Georgia, 31 U.S. 515, 548 (1832).

14. *Id.*

15. *See* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986).

16. Treaty of Hopewell, *supra* note 6.

agreement between the Cherokee Nation and the United States government.[17] In exchange for land and peaceful relations, the United States made several provisions including the promise of a deputy from the Cherokee Nation to Congress: "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.*"[18]

At this point in the history of U.S./Indian relations, Indian nations were regarded as sovereign entities, subject only to any treaty cessions they made.[19] At Hopewell, certain interests were ceded by the Cherokee Nation, and the United States assumed certain responsibilities of protection and trust.[20] The language of Article XII of the Treaty of Hopewell shows that the United States clearly recognized the Cherokee Nation's need to be advised of and consent to those actions of the Federal government which affected it. Unfortunately, that cooperative relationship never evolved as Congress' role expanded.

In the 1830s, the United States Supreme Court was called upon to define the relationship between Indian nations and the federal and state governments. In *Cherokee Nation v. Georgia*,[21] the Court held that the tribes were "domestic, dependant nations" within the United States and not deserving of the same sovereign status, under the United States Constitution, as foreign nations.[22] The Court recognized, however, the continued exercise of self-determination by the Cherokee Nation.[23] In *Worcester v. Georgia*,[24] the Court held that governance of the tribes was within the province of the federal government and not the individual states.[25] The *Worcester* decision solidified the federal role in Cherokee affairs, but the promise of representation in Congress remained unfulfilled.

On December 29, 1835, the Treaty of New Echota[26] was signed by agents of the federal government and individuals purporting to represent the Cherokee Nation as a whole. This treaty ceded the last tract of Cherokee land east of the Mississippi River and was the final step toward removal of the

17. Before the Treaty of Hopewell established a treaty relationship with the United States in 1785, the Cherokee Nation made several treaty agreements with individual colonies and with Great Britain. *See* CHARLES C. ROSS, THE CHEROKEE NATION OF INDIANS 16-24 (1975).

18. Treaty of Hopewell, *supra* note 6, at art. 12, 7 Stat. at 20 (emphasis added), *reprinted in* KAPPLER'S, *supra* note 6, at 12.

19. MATTHIESEN, *supra* note 2, at 126.

20. Treaty of Hopewell, *supra* note 6, at pmbl. & art. 1-11, 7 Stat. at 18-20, *reprinted in* KAPPLER'S, *supra* note 6, at 8-10.

21. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

22. *Id.* at 19-20.

23. *Id.* at 16.

24. 31 U.S. (6 Pet.) 515 (1832).

25. *Id.* at 531.

26. Treaty of New Echota, *supra* note 6.

Cherokee Nation to Indian Territory.[27] In exchange, the Cherokee Nation was to receive certain considerations, including permanent lands west of the Mississippi River, peaceful relations, and monetary compensation.[28] In addition, another provision was made for the establishment of a Cherokee delegate to Congress.[29] This provision stipulated that the Cherokee Nation would be entitled to a delegate, specifically in the House of Representatives.[30] There was one caveat in the provision, however, that Congress must first make provision for the Cherokee delegate.[31] Following accepted canons of construction, this part of the provision should be read in favor of the Cherokee Nation as meaning Congress *would* make provision for the same.[32] While several Cherokees would lobby in Washington for specific interests (as will be discussed later), it is straining credibility to argue that Congress ever granted the Cherokee Nation a fully empowered delegate in the House of Representatives.[33]

The signing of the Treaty of New Echota was the subject of several bitter disputes within the Cherokee Nation itself. Those not a party to the signing felt betrayed, and those who signed felt they acted in the interest of survival.[34] Regardless of these disputes, the federal government acted on the Treaty of New Echota where its interests were served. The land was ceded and the Cherokee Nation was forcibly removed to Indian Territory.[35] The

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27. *Id.* at art. 1, 7 Stat. at 479, *reprinted in* KAPPLER'S, *supra* note 6, at 440.

28. *Id.* at art. 1-15, 7 Stat. at 479-85, *reprinted in* KAPPLER'S, *supra* note 6, at 440-46.

29. *Id.* at art. 7, 7 Stat. at 482, *reprinted in* KAPPLER'S, *supra* note 6, at 442-43.

> 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 to them in this treaty, and with a view to illustrate the liberal and enlarged policy 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.

Id.

30. *Id.*

31. *Id.*

32. Tulee v. Washington, 315 U.S. 681, 684-85 (1942) (holding that Indian treaties are to be construed liberally in favor of the Indians).

33. Reasonable expectations of a delegate from 1835-1881 included service on committees, debating on the floor and in committees, and (as of 1841) voting in committee. There is no evidence that any Cherokee representative enjoyed these rights in the House. *See* Thomas M. Holm, The Cherokee Delegates and the Opposition to the Allotment of Indian Lands (1974) (unpublished M. Hist. thesis, University of Oklahoma). These issues are explored further in the sections titled *The Delegate to Congress, Generally, see infra* text accompanying notes 71-91, and *The Cherokee Lobbyist, Historically, see infra* text accompanying notes 92-103.

34. CHEROKEE REMOVAL — BEFORE AND AFTER 70 (William L. Anderson ed., 1991) [hereinafter CHEROKEE REMOVAL].

35. GRACE WOODWARD, THE CHEROKEES 192 (1963).

promises made to the Cherokee Nation, however, were either compromised or ignored altogether.[36]

In its new home west of the Mississippi, the Cherokee Nation reconciled its internal differences and began an era of great progress which lasted until the outbreak of the Civil War.[37] As the war began, the Cherokee Nation was all but abandoned by Union forces and inclined to ally itself with the Confederate States.[38] In 1861, the Cherokee Nation established a treaty of friendship and alliance with the Confederacy which included a provision for a Cherokee representative in the legislative body of the Confederate States.[39] This provision was very specific as to the rights and obligations of the Cherokee delegate.[40] It outlines the purpose of the provision, the term of office, the qualifications of a delegate, and the rights and privileges such a delegate would enjoy.[41] The provision vests in the Principal Chief the power to determine the means of election for such a delegate.[42] While this provision was more detailed than any previously written with the United States, its execution, of course, was never an issue.

The Civil War brought with it catastrophic loss of both property and lives for the Cherokee Nation.[43] After the war ended, a treaty was drafted with the United States which declared void the previous alliance with the Confederacy and renewed the relationship with the federal government.[44] Because the Cherokee Nation maintained important ties with the Union during the War, this new agreement was not as retributive as it might have been. In article 31

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36. For example, the land west of the Mississippi proved to be less than permanent, as it was eventually incorporated into the State of Oklahoma. MORRIS WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION 312-39 (1977).

37. This era is commonly referred to as the "Golden Age" of the Cherokee Nation. *See* ANDERSON, *supra* note 34, at 114.

38. W. CRAIG GAINES, THE CONFEDERATE CHEROKEES 6 (1989).

39. Treaty with the Cherokees, Oct. 7, 1861, Cherokee Nation-Confederate States of America, *in* RONALD V. GIBSON, JEFFERSON DAVIS AND THE CONFEDERACY: CHRONOLOGY-DOCUMENTS-BIBLIOGRAPHICAL AIDS 193-94 (1977).

40. *Id.* at art. 44, *in* GIBSON, *supra* note 39, at 193-94.

> In order to enable the Cherokee Nation to claim its rights and secure its interests without the intervention of counsel or agents, it shall be entitled to a Delegate to the House of Representatives of the Confederate States of America, who shall serve for the term of two years, and be a native born citizen of the Cherokee Nation, over twenty-one years of age, and laboring under no legal disability by the law of said nation; and each delegate shall be entitled to the same rights and privileges as may be enjoyed by delegates from any territories of the Confederate States to the said House of Representatives.

Id.

41. *Id.*

42. *Id.*

43. *See* GAINES, *supra* note 38.

44. Treaty with the Cherokee Indians, U.S.-Cherokee Nation, July 19, 1866, 14 Stat. 799, *reprinted in* KAPPLER'S, *supra* note 6, at 942.

of the Treaty of 1866,[45] the United States reaffirmed all past treaty provisions not inconsistent with those enacted therein.[46] The article is specific in its express intention to uphold the claims and obligations of past Indian treaties.[47] Included in this treaty affirmation are the two separate provisions for a Cherokee delegate to Congress.

In 1871, Congress determined to end the treaty relationship with Indian nations. Legislation was passed to pave the way for later efforts to assimilate the Indians into the dominant society. Title 25 U.S.C. § 71 forbids the recognition of Indian nations as entities with whom the United States may contract by treaty.[48] Although future treaties between Indian nations and the United States government were forbidden, the law was not made retroactively. Therefore, treaty provisions which were agreed to prior to March 3, 1871, including the Cherokee delegate provisions, were once again reaffirmed. While no action had been taken to honor the promises of a Cherokee delegate to Congress, the promises themselves remained intact.[49]

The decades following the enactment of 25 U.S.C. § 71 saw a shift from the treaty relationship with Indian nations to a policy of allotment and assimilation.[50] It was determined that Indian lands would be better utilized through individual ownership, and that the Indians themselves would be better served by assimilation into the dominant, "civilized" culture.[51] Toward these ends, Congress assigned Indian lands to individual owners and attempted to dissolve the authority of the Five Tribes, including the Cherokee Nation. The Curtis Act of 1898 and subsequent acts concerning the Five Tribes forced

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45. *Id.* at art. 31, 14 Stat. at 806, *reprinted in* KAPPLER'S, *supra* note 6, at 950.

46. The article stated:

> All provisions of treaties, heretofore ratified and in full force, and not inconsistent with the provisions of this treaty, are heretofore reaffirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgement by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties, except as herein provided.

Id.

47. *Id.*

48. The statute states:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but 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.

25 U.S.C. § 71 (1988).

49. The Supreme Court has held that Congress may abrogate a treaty with an Indian nation, but its intent to do so must be "clear and plain," United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 353 (1941). Treaty abrogation cannot be inferred, Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

50. *History of the Allotment Policy, Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73rd Cong., 2d Sess., pt. 9, at 428-89 (1934).

51. *Id.*

allotment of Indian lands, abolished tribal courts, and made tribal law unenforceable.[52] By 1906, Oklahoma and Indian Territories were free to be organized for admission to the Union as a state.[53]

In 1906, official termination of the government of the Cherokee Nation seemed imminent.[54] As a result of section 28 of the Five Tribes Act of 1906, however, the Cherokee Nation was specifically continued in legal existence.[55] The Five Tribes Act continued the governments of the Five Tribes until otherwise provided by law, facilitating the federal government's oversight of allotment and assimilation policies mandated by Congress. As a practical matter, however, the Cherokee Nation, was dormant as a governing entity for several years.[56] The prevailing attitude was that the Cherokee Nation did not have legal standing to assert its governing autonomy.[57]

Assimilation policies continued throughout the early 1900s. By the 1920s, it was becoming painfully obvious that these policies were having a devastating effect on the American Indian population.[58] A renewed call for tribal sovereignty and self-determination grew out of the ashes of the failed policies of this period in U.S./Indian relations. In 1934, Congress passed the Indian Reorganization (Wheeler-Howard) Act (IRA).[59] The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[60] The Act prohibited further allotment of Indian lands, provided economic incentives to tribes, and allowed for Indian preference in hiring at the Bureau of Indian Affairs.[61]

In the 1950's, however, Congress abruptly retreated from Indian reorganization and instituted a new policy, ominously referred to as termination.[62] This policy completely severed the federal relationship with hundreds of Indian tribes.[63] The Cherokee Nation was not among those

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52. Act of June 28, 1898, ch. 517, 30 Stat. 495.

53. WARDELL, *supra* note 36, at 333-34.

54. *Id.*

55. Act of April 26, 1906, ch. 1876, 34 Stat. 137.

56. This is evidenced by the fact that there were practically no governing officials of the Cherokee Nation elected after 1906, until the later revitalization. For an exhaustive list of Cherokee elected officials (and the years in which they served), see EMMET STARR, STARR'S HISTORY OF THE CHEROKEE INDIANS 261-96 (Jack Gregory & Rennard Strickland eds., 1967).

57. "Since 1907, when Oklahoma became a state, the Cherokee Nation as a political entity ceased to exist." W.W. Keeler, *Foreword, in* JAMES MOONEY, HISTORICAL SKETCH OF THE CHEROKEE at ix (1975).

58. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 232 (1977) [hereinafter FINAL REPORT].

59. 25 U.S.C. §§ 461-479 (1983).

60. H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934).

61. STEPHEN L. TYLER, A HISTORY OF INDIAN POLICY 112-22 (1973).

62. *Id.* at 168-81.

63. *Id.*

terminated before federal policy shifted again, nor was its jurisdiction usurped by the State of Oklahoma as later allowed by Congress.[64] So, while the government of the Cherokee Nation was not reestablished until the termination era was officially abandoned,[65] technically, its political and legal status was uninterrupted by wavering federal policies.

Only recently has the Cherokee Nation reasserted its authority to govern through a freely elected Council and Principal Chief, as well as through an independent tribal court system.[66] Today, the Cherokee Nation is fully asserting its sovereign right to self-governance, and the federal government is at least superficially supportive of its right to do so.[67] While the Cherokee Nation may be in a position of renewed strength and self-determination, however, its continued vitality is still subject to the ever-changing political climate in Congress.

The treaty obligations calling for a Cherokee delegate to Congress may be dormant in the modern relationship between the federal government and the Cherokee Nation, but they remain intact.[68] They have survived the dramatic evolution of federal Indian relations. The breach of one or one thousand treaty provisions does not invalidate the treaty as a whole, nor does it relieve the parties of their obligations. The solemn covenants of representation have never been abrogated by any specific act of Congress; in fact, they have been reaffirmed on several occasions.[69] Absent a specific act, abrogation or modification of a treaty is not to be lightly imputed to Congress.[70] If Congress intends to deny its obligations, it must clearly state its intention to do so.[71] As it stands, there can be little doubt that the promises of representation in Congress have survived the tumultuous shifts in U.S./Indian policy; the question becomes, will the federal government uphold its bargain?

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64. *See* Act of Aug. 8, 1956, Pub. L. No. 83-280, 67 Stat. 588 (Public Law 280) (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

65. In 1968, President Johnson called for Indian self-determination: "We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination." 4 WEEKLY COMP. PRES. DOC. 10 (1968). Congress and subsequent Presidents have affirmed this policy.

66. This revitalization is outlined in the third Cherokee Constitution. CHEROKEE NATION CODE ANN. art. 4-6 (1975).

67. *See President Clinton's Address*, *supra* note 8, at 5.

68. *See* United States v. Dion, 476 U.S. 734, 739 (1986) ("Indian treaty rights are too fundamental to be easily cast aside.").

69. *See, e.g.*, 25 U.S.C. § 71 (1871) ("[N]o 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.").

70. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968).

71. *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Menominee Tribe v. United States, 391 U.S. 404 (1968).

The Delegate to Congress, Generally

In the House of Representatives today, there are delegates from five U.S. insular possessions. The representatives from Puerto Rico, American Samoa, Guam, the Virgin Islands, and the District of Columbia enjoy most of the same powers and privileges as House members from the individual states. These delegates are the successors of delegates from territories bound for statehood, who first took seats in Congress in the late 1700s.[72] As each territory gained statehood, the authority of its delegate merged into the authority of a full voting House member.[73] Until such time, the delegate represented the interests of the territory to the extent that House rules allowed.[74]

Early provisions for territorial delegates were unclear as to the duties and authorities each delegate would possess. In 1795, a significant step was taken toward defining the role of such representation when Congress debated the privileges and obligations of James White, the first congressional delegate from the Northwest Territory.[75] This debate established several precedents for the treatment of future delegates. In addition to providing for compensation and extending the franking privilege, it was decided that White, and all future delegates would sit in the House of Representatives. This practice was written into law in 1817.[76] The House later expanded White's power by appointing him to a select committee to investigate better means of promulgating the laws of the United States.[77] Future delegates would sit on both select and conference committees, and by 1841, they were allowed to vote in those committees.[78] By the 1880s, however, the right to vote in committee was lost.[79] Although this right would be heavily debated in subsequent Congresses, it was not to be regained until 1970.

In 1970, as more territories were granted delegates, territorial representation was refined once again. Congress enacted the Legislative Reorganization Act of 1970,[80] which amended the House rule on delegates to include the elusive right to vote in committee.[81] Beginning with the authorization for the

72. ANDORRA BRUNO, TERRITORIAL DELEGATES TO THE U.S. CONGRESS 1-3 (1993).

73. *Id.*

74. *Id.*

75. ROBERT M. TAYLOR, JR., THE NORTHWEST ORDINANCE, 1787, at 51-53 (1987).

76. Act of Mar. 3, 1817, ch. 42, 3 Stat. 363 ("[S]uch delegate shall be elected every second year, for the same term of two years for which members of the house of representatives of the United States are elected; and in that house each of the said delegates shall have a seat with a right of debating, but not voting.").

77. 4 ANNALS OF CONGRESS 1082 (Jan. 1795).

78. H.R. REP. No. 10, 27th Cong., 1st Sess. 865 (1841).

79. BRUNO, *supra* note 72, at 6.

80. Pub. L. No. 91-510, 84 Stat. 1140.

81. *Id.* § 129, 84 Stat. at 1161 ("The Resident Commissioner to the United States from

Delegate from the District of Columbia in 1970, each of the current delegations was created with the same expanded authority as the Resident Commissioner from Puerto Rico.[82]

In 1993, the House rule on delegates was once again amended to allow delegates to vote in the Committee of the Whole. The Committee of the Whole is a parliamentary device used to expedite the legislative process by calling for a preemptive vote.[83] After consideration of legislation in the Committee of the Whole, final passage on the House floor is usually a perfunctory exercise.[84] A group of Republican lawmakers soon filed a lawsuit challenging the constitutionality of extending this authority to Delegates. In *Michel v. Anderson*,[85] the Court held that, because of a qualification in the new rule which disallows any result in which a delegate's vote is decisive, the amended House rule is constitutional.[86] The Court made it clear, however, that any amendment which allowed a delegate's vote to be decisive in the Committee of the Whole would be barred by the Constitution, which extends final voting privileges exclusively to the individual states.[87]

The holding in *Michel v. Anderson* defines the current limit of the official representative authority of congressional delegates: they can speak and introduce bills and resolutions on the floor of the House; they can speak and vote in House committees; and they can speak and vote in Committees of the Whole, providing their vote is not decisive.[88] Delegates are not, however, full members of Congress. They cannot vote in the full House, where final passage of legislation occurs; they cannot make a motion to reconsider a vote, and they are not counted for quorum purposes.[89]

In addition to the official authority of a delegate, there are certain "unofficial" powers that all congressional representatives enjoy. In the late 1800s, territorial delegates began to assert themselves in a non-legislative role.[90] They began to assume some of the prestige and influence that is

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Puerto Rico shall be elected to serve on standing committees in the same manner as Members of the House and shall possess in such committees the same powers and privileges as the other Members.").

82. District of Columbia, S. REP. No. 1122, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3833; Guam and Virgin Islands, S. REP. No. 709, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2226; American Samoa, H.R. REP. No. 1458, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 4767.

83. *See* Michel v. Anderson, 817 F. Supp. 126, 130-31 (D.C. Cir. 1993).

84. *See* 139 CONG. REC. H28 (daily ed. Jan. 5, 1993).

85. 817 F. Supp. 126 (D.C. Cir. 1993).

86. *Id.* at 140-41.

87. *Id.* at 141.

88. *Id.*

89. *Id.* at 139-141.

90. Describing this newly assumed function, Earl S. Pomeroy wrote:

> The territorial delegate increased in stature appreciably between 1861 and 1890. Without the formal powers of a congressman, he acquired more of a congressman's

customarily afforded to members of Congress.[91] This expanded influence has carried over to the current, unincorporated territorial delegates as well. Today, delegates have access to key administrative and legislative leaders, they have assignments on crucial committees, they are members of significant caucuses and alliances, and they are the chief lobbyists in Washington for their territories.[92] In both their official and unofficial capacity, territorial representatives are able to further the agendas of their local constituencies as well as serve the broader public interests.

The Cherokee Lobbyist, Historically

Although Congress has never formally seated a Cherokee delegate, there have been many Cherokees who have lobbied in Washington for tribal interests. From 1839 until approximately 1900, in fact, the Cherokee government sent several men to Washington each year under the somewhat deceptive title of delegate to Washington.[93] These men had no role in the legislative process, however, beyond their ability to persuade those who did. They may more accurately be described as lobbyists for specific interests on behalf of the Cherokee Nation.

The expectations of a delegate to Congress from 1839 to 1900 included an actual seat in the House of Representatives and committee membership.[94] Furthermore, from 1841 until the 1880s, delegates enjoyed the right to vote in committee.[95] The Cherokee "delegates" never held these or any formal rights as participants in the legislative process. Their influence, such as it was, was limited to pleas, memorials, and protests to administrative agencies, members of Congress, and the President.[96] Occasionally, the lobbyist's applications to testify in front of congressional committees were granted as

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> influence and general functions. He was disseminator of information, lobbyist, agent of territorial officers, of the territorial legislature, and of his constituency, self-constituted dispenser of patronage. He interceded at times in almost every process of control over the territories, and generally no one challenged his right to intercede.

EARL S. POMEROY, THE TERRITORIES AND THE UNITED STATES: STUDIES IN COLONIAL ADMINISTRATION, 1861-1890, at 80 (1947).

91. *Id.*

92. For example, Robert Underwood, the current Delegate from Guam serves on the House Committee on Natural Resources, the House Armed Services Committee, and the House Committee on Education and Labor. He is also affiliated with the Congressional Hispanic Caucus, the Congressional Arts Caucus, the Human Rights Caucus, the Arms Control Caucus, and the Travel and Tourism Caucus. Congressional Directory, Committees in U.S. Congress, 103rd Congress 338 (1994).

93. STARR, *supra* note 56, at 295-96.

94. *See supra* text accompanying notes 78-91.

95. *Id.*

96. *See* Thomas M. Holm, The Cherokee Delegates and the Opposition to the Allotment of Indian Lands (1974) (unpublished M. Hist. thesis, University of Oklahoma).

well.[97] In essence, lobbyists from the Cherokee Nation had no more access or influence than lobbyists for the railroad companies they opposed in the allotment debate.

There are many other indications that these Cherokee lobbyists were not the delegates contemplated by the treaties of 1785 and 1835. First of all, the Cherokee government sent several (as many as eleven) lobbyists to Washington each year, often including the Principal Chief.[98] The language of the treaties contemplates a single, separately empowered delegate.[99] Secondly, such lobbyists were sent to Washington by each of the Five Tribes,[100] but the Cherokee Nation was the only one with treaty provisions for an actual delegate. Thirdly, Cherokee lobbyists were sent to Washington by the Cherokee government regardless of any action (or lack thereof) by Congress.[101] Seating a delegate would have required congressional action. Finally, Cherokee lobbyists traveled to and from Washington without regard to Congress' schedule, indicating that they were not bound to the sessions of Congress.[102] A full delegate would have followed Congress' schedule.

It might be argued that the federal government never intended that a Cherokee delegate would be seated in Congress and given the same authority as territories bound for statehood. It might be argued that "territoriality" is, in fact, a requisite for such representation.[103] Admittedly the Cherokee Nation is not a territory of the United States, nor is it an "insular possession," as such. This argument disregards, however, that the agents of the federal government who executed the treaties understood that the Cherokee Nation was never to be included within a territory or state without later consent. A provision exclaiming as much accompanies the delegate provision in the Treaty of New Echota.[104] Although this provision would be disregarded, its presence indicates that the federal government intended to provide for a full Cherokee delegate regardless of the fact that such a delegate (presumably) would never represent a territory bound for statehood.

Once it is understood that agents of the federal government never contemplated (at least openly) a Cherokee territory or state, the intent of the

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97. *Id.* at 42.

98. STARR, *supra* note 56, at 295-96.

99. Treaty of Hopewell, *supra* note 6, at art. 12, 7 Stat. at 20, *reprinted in* KAPPLER'S, *supra* note 6, at 12; Treaty of New Echota, *supra* note 6, at art. 7, 7 Stat. at 482, *reprinted in* KAPPLER'S, *supra* note 6, at 442-43.

100. Holm, *supra* note 95, at 34.

101. *Id.* at 15.

102. *Id.* at 49.

103. It is unlikely that imminent statehood was ever a requisite for a delegate as it can hardly be said that the territories that are currently represented by a delegate in the House of Representatives are, or ever were, bound for statehood.

104. Treaty of New Echota, *supra* note 6, at art. 5, 7 Stat. at 19, *reprinted in* KAPPLER'S, *supra* note 6, at 9.

delegate provisions becomes clearer: a fully empowered delegate was contemplated for the Cherokee Nation. The only alternative theory would be that the delegate provisions are mere recitations of the right to lobby Congress enjoyed by anyone who can secure access. It strains credibility, however, to assert that the federal government intended to make an affirmative statement of a right shared by everyone, including Indian Nations who have similar treaties with no analogous provisions. The reasonable interpretation is that the federal government intended to provide for a Cherokee delegate with the same authority as territorial delegates in the House of Representatives at the time. The Cherokee Nation has yet to seat such a delegate.

The Political Status of the Cherokee Nation

Unlike the territories currently represented by delegates in the House of Representatives, the Cherokee Nation is not an isolated land mass. Indeed, a Cherokee delegate would be a unique representative in Congress. She would represent over 170,000 constituents, concentrated in eastern Oklahoma, but existing across the country and the world.[105] Although the Cherokee Nation asserts its jurisdiction over fourteen counties in eastern Oklahoma, it is not a tract of land that provides the Cherokee Nation with its political identity. If there is one fact that the relationship between the American Indian and the United States has revealed, it is that the occupation of land is transitory; it is cultural and political strength and unity of purpose which truly define the Cherokee Nation.

Even though a Cherokee citizen may reside within the boundaries of a state, the representation for that state does not adequately serve his needs. For example, the Representative from the Second District of Oklahoma does not serve a Cherokee citizen residing in Tahlequah. He serves the Second District, which happens to include Cherokee citizens. He is answerable to the people of his district, and if they demand action to the detriment of the Cherokee Nation, he is obligated to do his best to see it through. If not, the people of his district have the ability to replace him within two years. History has shown that state interests inevitably collide with Cherokee interests. A recent example is the fight over the Arkansas Riverbed. In 1970, the Supreme Court was called upon to decide whether title to the riverbed belonged to the State of Oklahoma or several Indian Nations, including the Cherokee Nation.[106] The Court found in favor of the Cherokee Nation on this issue,[107] but the Cherokee Nation has yet to collect its award. The inclination toward conflicts

105. Cherokee Nation Communications Memorandum, Cherokee Nation Today (1994) [hereinafter Cherokee Nation Memorandum] (on file with Cherokee Nation Tribal Complex, Tahlequah, Okla.).

106. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1969).

107. *Id.*

of interest between the states and the Cherokee Nation demands separate representation, as the Constitution will allow.

This is not to say that every group with a common interest is deserving of separate representation in Congress. From the earliest contacts, the Cherokee Nation has been uniquely defined by the federal government. From the treaty relationship, through the *Cherokee Nation* cases, to the present day, the United States has treated Indian nations differently than non-Indian groups. This differentiation is not based on race, it is based on political status.[103] The fact that most members of the Cherokee Nation would be considered to be of a racial minority is irrelevant for the purposes of political recognition under the Constitution. It has been held that the Commerce and Treaty Clauses of the Constitution authorize Congress to treat Indian nations differently, and Congress has consistently done so.[109] In addition, the federal government has assumed a trust relationship toward Indian nations, which may, at times, demand special treatment.[110] The Supreme Court has stated, "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the federal government's relations with the Indians."[111] More succinctly, the Court has stated that the Constitution gives Congress the power to treat Indians "as separate people with their own political institutions."[112] No special interest group has ever signed a solemn treaty with the United States government providing for a delegate to Congress. Congress has the authority to place a Cherokee delegate, regardless of the representative interests of any other group. Furthermore, the unique relationship between the United States and the Cherokee Nation, regardless of any racial issues, gives Congress all the political justification it would need to do so.

Within the scope of its authority, Congress has sometimes excepted Indian nations in ways that benefit the Indians. For example, the government funds various programs which provide housing, health care, and education specifically to Indian people. More often, however, the federal government has used this authority to take land and property and to extinguish Indian rights of sovereignty. As a recent Senate report stated, "The Bureau of Indian Affairs . . . has used the trust doctrine as a means to develop a paternalistic control over the day to day affairs of Indian tribes and individuals."[113] Because of its unique political status, the Cherokee Nation has been allowed certain rights of self-determination, but the same status is cited to keep the

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108. *See* Morton v. Mancari, 417 U.S. 535 (1974).

109. *See id.*

110. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983).

111. United States v. Antelope, 430 U.S. 641, 645 (1977); *see also* Morton v. Ruiz, 415 U.S. 199 (1974); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01 (1979).

112. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

113. FINAL REPORT, *supra* note 58, at 106.

Cherokee Nation vulnerable to the plenary authority of Congress. While the current Cherokee government works to meet the needs of its population through an elaborate network of services and industry,[114] it is within the current scope of congressional authority to discontinue federal recognition and funding, and to renew the termination and assimilation policies of the past.

This paradoxical relationship illustrates the hybrid status of the Cherokee Nation in the eyes of the law. On one hand, the Cherokee Nation is a sovereign entity, responsible for its own well-being. On the other, it is a dependant nation, protected and overseen by the federal government. As Chief Justice Marshall wrote in *Cherokee Nation v. Georgia*, "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."[115] Marshal recognized the historic exercise of self-determination by the Cherokee Nation, but cited a new relationship of protection and trust.[116] This hybrid status still exists today, and demands rather unique representation. In order to fulfill the needs of the Cherokee Nation in its relationship with the federal government, a Cherokee delegate must be both a representative and, in essence, a diplomat. She would have to address the needs of individual Cherokee citizens as they are affected by the actions of the federal government. In addition, she would have to deal with the federal government in her capacity as an agent of a sovereign nation.

Many times, these functions would overlap, but the distinction is important. The limited sovereignty that the Cherokee Nation enjoys today was maintained throughout a turbulent history, despite the efforts of the federal government to extinguish it. A certain level of the self-determination that the Cherokee Nation exercised from time immemorial has survived in the face of conquest. It was paid for with millions of acres of ancestral homeland and thousands of lives.[117] Any representative from the Cherokee Nation in Washington must be recognized as holding the status of diplomat as well as that of representative. Neglecting to do so would be an affront to the sovereignty of the Cherokee Nation.

Qualifications and Functions of a Cherokee Delegate

The dual status of a Cherokee delegate presents a problem as to whether a delegate should be appointed by the Cherokee government or elected directly by the Cherokee people. It might be argued that, since a delegate would serve a function as a diplomat and agent of the Cherokee government, she should be appointed by that government, as are ambassadors and envoys from other sovereigns. In this way, the Council and Principal Chief would

114. Cherokee Nation Memorandum, *supra* note 105, at 13-21.
115. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22 (1831).
116. *Id.* at 17.
117. *See* CHEROKEE REMOVAL, *supra* note 34, at 75.

have the ability to select a delegate who would best serve to further the Cherokee Nation's federal agenda. Since the work of Congress is so vital to the Cherokee Nation, it is important that the Cherokee government have an intimate working relationship with any delegate. If appointed, a delegate would be obliged to consort with the Council and Principal Chief when establishing the priorities of the office. Individual Cherokee citizens would still have a voice in the selection process, although indirect. They could debate and present their concerns at Council meetings and through other outlets for public opinion. Being elected officials, the Council members and the Principal Chief would have a duty to respond.

It might be argued, however, that by appointing its delegate, the Cherokee Nation would be neglecting the same democratic principles it would demand of Congress. The representative role of the delegate might be seen as most important, and Cherokee citizens might elect their representative directly. If elected, it is reasonable to expect that the delegate would be chosen by, and from enrolled tribal members, eligible to vote in other tribal elections. In office, a delegate would answer to those same tribal members. Other qualifications might accord with those of other delegates, now in Congress. A candidate would have to be at least twenty-five years of age and not a candidate for any other office on the date of the election.[118] Regardless of whether she is appointed or elected, a delegate would likely serve a two year term, the same as any other member of the House of Representatives.[119]

Whether appointed or elected, a delegate would work to influence the legislative process in the interest of the Cherokee Nation and its citizens. While a dynamic Principal Chief may be able to focus national attention on issues affecting the Cherokee Nation, and even secure congressional support, there are certain functions within the legislative process that only a delegate could serve. A delegate could guide legislation through the House of Representatives, from writing and introducing the bill to casting a vote in the Committee of the Whole. A delegate would be able to serve on committees important to the Cherokee Nation, such as Appropriations and Natural Resources. The delegate would be one of a handful of representatives such a committee or subcommittee, where the real work of Congress is done.[120] A delegate's final action on a bill would be to vote in the Committee of the Whole. Once a bill clears the Committee of the Whole, a vote on the House floor becomes almost superfluous; final passage would be imminent.[121]

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118. S. REP. No. 709, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2226 (codified as amended at 48 U.S.C. § 1713 (1994)) (outlining the qualifications for delegates from Guam and the Virgin Islands).

119. *Id.* § 2 (codified as amended at 48 U.S.C. § 1712 (1988)).

120. JOHN P. ROCHE ET AL., THE CONGRESS 36 (1964).

121. *See* Michel v. Anderson, 817 F. Supp. 126, 131 (D.C. Cir. 1993).

To facilitate her role in the legislative process, the Cherokee delegate would have all of the prestige, access, and influence that accompanies the office of representative. She could use the extensive media coverage of Congress to encourage debate and to state positions of the Cherokee Nation. She would have access to administration officials, including cabinet officers and the President, who have more exclusive means of influencing the process. Additionally, she could trade votes on other issues for votes on issues vital to the Cherokee Nation. In short, the position of delegate would give the Cherokee Nation and its citizens an unprecedented level of influence over the real work of Congress which affects them.

Demanding a Voice

The benefits of having a Cherokee delegate in the House of Representatives far outweigh any potential costs, and these benefits extend well beyond the Cherokee Nation. If congressional leaders and administration officials are to be believed, they too desire a more consensual governing relationship. If by this they mean a relationship in which the Cherokee Nation would be better informed of unilateral decisions of the federal government, then their words are meaningless. If, on the other hand, they truly desire a cooperative relationship, providing for a delegate would be an efficient, substantial means of realizing that goal.

A Cherokee delegate in the House of Representatives would facilitate the transition toward a more self-sufficient Cherokee Nation. Cherokee involvement at the congressional level would focus Congress' erratic interest in Indian affairs and allow for more relevant, efficient legislation. In essence, a Cherokee delegate would help to solve the problems of the BIA from the top down. Furthermore, a delegate would help to avert future problems, which tend to erupt from misguided congressional action.

Bringing this issue to the attention of Congress will demand an extensive lobbying effort by the Cherokee Nation. The goal of such an effort must be to make the members of Congress and their constituents understand that everyone would benefit by Cherokee representation. A comprehensive investigation in 1987 by the *Arizona Republic* found that the Bureau of Indian Affairs has neglected its trust responsibilities to Indian Nations.[122] The *Republic* discovered that federal agencies are "costly, ineffective, and unresponsive" to Indian needs, and that the BIA "actually has thrived on the failure of Indian programs."[123] Cherokee input at the legislative level can only help to make these programs more efficient.

122. *Fraud in Indian Country, A Billion Dollar Betrayal*, ARIZ. REPUBLIC (Phoenix, Ariz.), Oct. 4, 1987, at 6.

123. *Id.* at 24.

Once the members of Congress realize that keeping the federal government's bargain of over 200 years is good for everyone, they will stop hiding behind hollow rhetoric and take action. If not, they must openly admit their refusal to do so and face the public consequences. The burden of forcing this issue lies with the Council, Principal Chief, and citizens of the Cherokee Nation. The process begins with an entreaty to the Congress in the form of a resolution from the Cherokee Council, followed by a unified and intensive lobbying effort. If the issue is clearly and forcefully presented, the members of Congress, the President, and the people of the United States will see that Cherokee representation is both a moral and legal right owed the Cherokee Nation, not a gift to be bestowed or withheld at Congress' whim.

Treaties are more than empty justifications for conquest. They are solemn, good-faith covenants among nations. A provision for a Cherokee delegate to the House of Representatives is perhaps the last, best chance for the United States to salvage the integrity of its word to the Cherokee people. It is also a crucial step toward a new relationship between the two inseparable entities; one of consensus, not conflict.