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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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