

## WITHOUT DOORS: NATIVE NATIONS AND THE CONVENTION

*Mary Sarah Bilder\**

Wednesday last arrived in this city, from the Cherokee nation, Mr. Alexander Droomgoole, with Sconetoyah, a War Captain, and son to one of the principal Chiefs of that nation. They will leave this place in a few days, for New-York, to represent to Congress some grievances, and to demand an observance of the Treaty of Hopewell, on the Keowee, which they say has been violated and infringed by the lawless and unruly whites on the frontiers.

We are informed that a Choctaw King, and a Chickasaw Chief, are also on their way to the New-York, to have a *Talk* with Congress, and to *brighten the chain* of friendship.

—*Pennsylvania Mercury*, June 15, 1787<sup>1</sup>

### INTRODUCTION

The Constitution's apparent textual near silence with respect to Native Nations is misleading. As this Article reveals, four representatives of Native Nations visited Philadelphia in the summer of 1787. Their visit ensured that the Constitution secured the general government's treaty authority with Native Nations and decisively barred state claims of authority. But, the visits also threatened to disrupt Congress's passage of the Northwest Ordinance and the vision of nationally sanctioned white settlement. In the process of successfully preventing the representatives from reaching Congress, Secretary at War Henry Knox developed the central tenets of what would

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\* Founders Professor of Law, Boston College Law School. This Article was prepared for the Symposium entitled *The Federalist Constitution*, hosted by the *Fordham Law Review* on October 2, 2020, at Fordham University School of Law. I am particularly grateful to Colin G. Calloway, whom I met at Mount Vernon when I was curious about 1787 visits to Philadelphia. Colin wrote, "A delegation of Choctaws led by a chief called Taboca visits Philadelphia and NY in the summer of 1787. There may be more." Email from Colin G. Calloway, Professor of Hist. & Native Am. Stud., Dartmouth Coll., to author (Sept. 16, 2016) (on file with the *Fordham Law Review*). My thanks to Gregory Ablavsky, Colin G. Calloway, David Nichols, Greg O'Brien, Charles Weeks, and the Symposium participants, and in particular, to Avi Soifer for his careful reading and suggestions and to Vanessa Bernard and Timothy Conklin for reading an early draft. For assistance with materials, I thank the William L. Clements Library at the University of Michigan, the Oklahoma Historical Society, Archivo General de Indias, the Mississippi Department of Archives & History, and Laurel Davis, Deena Frazier, Helen Lacouture, and Caitlin Ross.

1. *Philadelphia, June 15.*, PA. MERCURY & UNIVERSAL ADVERTISER, June 15, 1787.

become the George Washington administration's early Indian policy: an acceptance of Native Nation sovereignty, disapproval of unauthorized white encroachment, and an attempt to discourage Native Nations from sending additional representatives. In addition to emphasizing the strong national federal government role and Native Nation sovereignty, this history provides evidence that the Framers' generation without doors—outside the Convention—critically affected the creation of the Constitution as an instrument and a system of government.

*Figure 1: Back of the State House<sup>2</sup>*



### I. A CONSTITUTION OF TREATIES

On June 18, 1787, four deputies of the Cherokee, Chickasaw, and Choctaw Nations were in Philadelphia. At the time, their presence was widely reported. They met George Washington and other Philadelphia Convention members, as well as congressional delegates and the secretary at war, Henry Knox. Although their visits have received some discussion by historians, accounts of the Convention entirely overlook their presence.<sup>3</sup>

2. William Russell Birch, *Back of the State House, Philadelphia* (illustration) (1800).

3. See, e.g., COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON* 306–07 (2018); STANLEY W. HOIG, *THE CHEROKEES AND THEIR CHIEFS: IN THE WAKE OF EMPIRE* 70–71 (1998); GREG O'BRIEN, *CHOCTAWS IN A REVOLUTIONARY AGE, 1750–1830* (2005); U.S. NAT'L PARK SERV., *SIGNERS OF THE CONSTITUTION* 53 (Robert G. Ferris ed., 1976) (including an illustration of a newspaper article); Greg O'Brien, *The Conqueror Meets the Unconquered: Negotiating Cultural Boundaries on the Post-revolutionary Southern Frontier*, 67 *J.S. HIST.* 39, 67 (2001); Daniel Flaherty, "People to Our Selves": Chickasaw Diplomacy and Political

The erasure of these deputies has resulted in what is taken to be the relative silence of the Convention on the constitutional relationship with Native Nations. The basic components of the Constitution's drafting history have been well documented.<sup>4</sup> Historian Francis Paul Prucha, for example, wrote that "very little attention was paid to the issue in the Constitutional Convention, and there was no extensive statement about Indians in the Constitution itself."<sup>5</sup> As legal scholar Gregory Ablavsky recently wrote, "[h]istories of the Constitution, even very recent ones, assume this absence reflects Indians' irrelevance, and so almost entirely omit Natives."<sup>6</sup> The major treatise about Native Nations covers the Convention in one paragraph.<sup>7</sup> The absence of Indigenous people from the Convention's history means that even scholarship emphasizing the broader contextual history of Native Nations is nevertheless relegated to a focus on white political figures.<sup>8</sup>

This Article shifts traditional analysis. First, I believe that in the summer of 1787, the "Constitution" remained a concept referring to a system of government. The instrument drafted that summer reconfigured the constitution but the instrument was not yet *the* Constitution itself. The Constitution as an instrument should therefore be interpreted within the larger concept of the Constitution as a system of government. Second, with respect to this Constitution as a system of government, the drafters were hardly the only relevant actors. A larger framing generation drafted the Constitution as a system of government.<sup>9</sup> To refer to this context, the delegates used the phrase "without doors"<sup>10</sup> and I employ that phrase here.

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Development in the Nineteenth Century 75–87 (2012) (Ph.D. dissertation, University of Oklahoma) (ProQuest).

4. See, e.g., FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 68–70 (1994); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021 (2015) [hereinafter Ablavsky, *The Indian Commerce Clause*]; Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1147–58 (1995); Timothy J. Preso, *A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court, and the Indian Commerce Clause*, 19 AM. INDIAN L. REV. 443, 452–54 (1994). See generally Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *The Savage Constitution*].

5. PRUCHA, *supra* note 4, at 68.

6. Ablavsky, *The Savage Constitution*, *supra* note 4, at 1002.

7. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[3], at 22–23 (Nell Jessup Newton ed., 2012).

8. See generally Robert J. Miller, *American Indian Constitutions and Their Influence on the United States Constitution*, 159 PROC. AM. PHIL. SOC'Y 32 (2015).

9. See Mary Sarah Bilder, *The Emerging Genre of The Constitution: Kent Newmyer and the Heroic Age*, 52 CONN. L. REV. 1263, 1265–69 (2021).

10. For usage of the phrase, see, for example, Letter from James Madison to William Short (June 6, 1787), in 10 THE PAPERS OF JAMES MADISON 31, 31 (Robert A. Rutland et al. eds., 1977) ("But the labor is great indeed; whether we consider the real or imaginary difficulties within doors or without doors."); 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1787–1870, at 330 (1900) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION] ("Butler. The security the South[ern] States want is that their negroes may not be taken from [them] which some gentlemen within or without doors, have a very good mind to do." (second alteration in original)).

The framing generation without doors was as responsible for the creation of the Constitution as the white men inside the Convention hall.<sup>11</sup>

Analyzing the framing generation of the Constitution is a particularly useful approach in relationship to people whose paths became inextricably entwined with the development of the United States as a political and territorial state but who were not formally represented by the white deputies in the room. Robert Clinton points out that “for Indian Nations, forging a treaty initially did not constitute, as in Europe, a process of forming a temporary alliance memorialized in a written document; it involved instead the formation of metaphoric, organic kinship ties.”<sup>12</sup> Treaty making did not create a “static document” but “an organic and dynamic kinship between the treaty partners.”<sup>13</sup> For Native Nations, the 1787 instrument did not abolish prior relationships with Congress and these relationships continued, albeit significantly reformulated. Likewise, the new instrument did not repudiate but in fact reconfirmed prior treaty relationships. A focus on the framing generation incorporates the influence of Native Nations on the Constitution without denying their sovereignty.<sup>14</sup> Attention to the 1787 visits is a corrective measure to the classic use of the text of the 1787 Constitution as a starting point for constitutional analysis of federal Indian law.<sup>15</sup>

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11. See generally MARY SARAH BILDER, *FEMALE GENIUS: THE LADY, GEORGE WASHINGTON, AND THE AGE OF THE CONSTITUTION* (forthcoming 2022) (recounting the influence of Eliza Harriot Barons O’Connor, a female lecturer, on the Convention).

12. Robert Clinton, *Treaties with Native Nations: Iconic Historical Relics or Modern Necessity?*, in *NATION TO NATION: TREATIES BETWEEN THE UNITED STATES AND AMERICAN INDIAN NATIONS* 15, 17 (Suzan Shown Harjo ed., 2014).

13. *Id.*

14. For a similar approach with respect to the influence on the revolutionary period, see generally KATHLEEN DUVAL, *INDEPENDENCE LOST: LIVES ON THE EDGE OF THE AMERICAN REVOLUTION* (2015); WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* (1999); ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804* (2016); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815* (20th anniversary ed. 2011).

15. Several word choices are of particular importance. In contrast with many scholars, I use the terms “general government” and “Congress” (without “Continental” or “Confederation”) to refer to the political institutions of the United States. Whether the reconstituted government was to be national or federal was a key debate and the meaning of those terms was shifting. “General government” simply describes a government broader than that of the states. “Congress” underscores the institution’s continuity throughout this period, particularly as far as Native Nations were concerned. I refer to the Native Nations representatives as “deputies.” I like this word because most of the delegates sent to Philadelphia from the states were described as deputies. 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 96, 199, 200, 203–04, 213, 222–23 (Merrill Jensen ed., 1976) [hereinafter *DHRC*] (describing the appointment of deputies in Virginia, Pennsylvania, North Carolina, Delaware, Georgia, South Carolina, Maryland, and New Hampshire). And, I am aware of the ironic fact that decades later, Justice William Johnson insisted that the Hopewell Treaties’ authorization of a deputy did not mean that such a person “was to be recognized as a minister, or to sit in the congress as a delegate.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 25 (1831) (Johnson, J., concurring). Because contemporary correspondence repeatedly referred to “Nations,” I have followed that practice. See DOROTHY V. JONES, *LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA* 20 (1982) (applying Emer de Vattel’s definition); Matthew L. M. Fletcher, *Treaties as Recognition of a*

An explanation of the prior constitutional relationship between the Native Nations and the United States will help situate readers.<sup>16</sup> During the decade between Congress's Declaration of Independence in 1776 and the calling of the Convention in 1786, treaties formed the foundation of the constitutional relationships between the many Native Nations and Congress, as well as their relationships with the former colonies.<sup>17</sup> Treaties underpinned the British government's prior constitutional relationship to Native Nations.<sup>18</sup> Of particular importance, the Proclamation of 1763 established the principle that Indian lands could only come into white possession through purchase or legal cession.<sup>19</sup> When twenty-four Native Nations gathered with copies of the Proclamation to exchange gifts and the two-row wampum belt with the British, this treaty agreement, based on "peace, friendship, and respect," reaffirmed "their preexisting rights to self-government."<sup>20</sup>

Before declaring independence a little over a decade later, Congress took the first steps to construct a similar constitution based on treaties with Native Nations. In July 1775, the self-described "general congress at Philadelphia" reached out to the Six Nations, "our brothers," and stated, "we wish you Indians may continue in peace with one another, and with us the white people."<sup>21</sup> The 1778 Treaty of Fort Pitt with the Delaware Nation guaranteed

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*Nation-to-Nation Relationship*, in *NATION TO NATION*, *supra* note 12, at 34, 34–35; O'Brien, *supra* note 3, at 42–43 (discussing the complexity of "nation" or "confederacy" with respect to the Choctaw Nation); Saikrishna Prakash, *Against Tribal Fungibility*, 89 *CORNELL L. REV.* 1069, 1082–86 (2004). The claim that "Nation" in this context was not meant to assert sovereignty does not appear to me to align with contemporary evidence. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 *DENV. U. L. REV.* 201, 259 (2007) (citing both Latin and English dictionary definitions). Similarly, correspondence from Native Nations uses the terms "American" or "white" in contrast with "Indians," in reference to control of territory and encroachment. See CALLOWAY, *supra* note 3, at xv; see also LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 6–7 (2d ed. 2012) (discussing the consequences of terms). I have followed suit.

16. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 7, § 1.02[1]–[3], at 16–23 (summarizing this history); see also PRUCHA, *supra* note 4, at 23–66.

17. See DAVID J. CARLSON, *SOVEREIGN SELVES: AMERICAN INDIAN AUTOBIOGRAPHY AND THE LAW* 35–37 (2006) (noting that "Indian treaties construct (and, over time, reproduce) the parties and sovereign communities that they bind together"); JONES, *supra* note 15, at 148; Richard W. Hill, *Linking Arms and Brightening the Chain: Building Relations Through Treaties*, in *NATION TO NATION*, *supra* note 12, at 37–42; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 *U. PA. L. REV.* 195, 200–01 (1984) (describing the treaty era). See generally Reginald Horsman, *The Indian Policy of an 'Empire for Liberty'*, in *NATIVE AMERICANS AND THE EARLY REPUBLIC* 37 (Frederick E. Hoxie et al. eds., 1999).

18. See JONES, *supra* note 15, at 93–119; DANIEL K. RICHTER, *FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA* 134–50 (2001).

19. See COLIN G. CALLOWAY, *THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA* 92–100 (2007).

20. *Id.* at 96–97; see John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, in *ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE* 155 (Michael Asch ed., 1997).

21. "Speech" to the Six Nations (July 13, 1775), *reprinted in* 1 *DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979*, at 25, 26, 28

“aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner.”<sup>22</sup> They could “form a state whereof the Delaware nation shall be the head, and have a representation in Congress.”<sup>23</sup> But the official end of the war with the British in 1783 redrew the map. As Colin Calloway notes, “There were no Indians at the Peace of Paris in 1783 when Britain handed over their lands to the United States and the new republic acquired an empire.”<sup>24</sup> Despite the general impotence of Congress, agreements with Native Nations were prioritized.<sup>25</sup> Between 1783 and 1786, Native Nations participated in twenty-one treaties; slightly more than half were with Americans—six with Congress and seven with the states.<sup>26</sup> The initial treaties established by Congress after 1783 involved the territory north of the Ohio River and have been characterized by historians as involving arrogance and demands by congressional representatives with “partial at best” Native Nation representation.<sup>27</sup>

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(Vine Deloria Jr. & Raymond J. DeMallie eds., 1999). See generally James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 197 (Jack P. Greene ed., 1987).

22. Treaty with the Delawares, Del. Nation-U.S., Sept. 17, 1778, 7 Stat. 13; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 7, § 1.02[2], at 18.

23. Treaty with the Delawares, *supra* note 22.

24. CALLOWAY, *supra* note 3, at 283. For more discussion on the absence of deputies at the Treaty of Peace, see COLIN G. CALLOWAY, *THE AMERICAN REVOLUTION IN INDIAN COUNTRY: CRISIS AND DIVERSITY IN NATIVE AMERICAN COMMUNITIES* 273 (1995).

25. See WALTER MOHR, *FEDERAL INDIAN RELATIONS, 1774–1788*, at 93–172 (1933) (discussing federal policy in the 1780s). See generally REGINALD HORSMAN, *EXPANSION AND AMERICAN INDIAN POLICY, 1783–1812* (1967) (discussing federal policy); Reginald Horsman, *American Indian Policy in the Old Northwest, 1783–1812*, 18 WM. & MARY Q. 35 (1961).

26. CALLOWAY, *supra* note 3, at 284–85; see JONES, *supra* note 15, at 188–95.

27. CALLOWAY, *supra* note 24, at 283; 18 EARLY AMERICAN INDIAN DOCUMENTS 278–81 (Alden T. Vaughan & Colin G. Calloway eds., 1994); DAVID ANDREW NICHOLS, *RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER* 24–36 (2008).

Figure 2: A New Map of North America, with the West India Islands<sup>28</sup>



But 1785–1786 seemed to signal a different approach, at least with respect to the significant Native Nations in the south. Congress sought to neutralize Spanish influence with the Cherokee, Choctaw, Chickasaw, and Creek Nations. Between late 1786 and early 1787, treaty commissioners, Benjamin Hawkins, Joseph Martin, and Andrew Pickens formed almost identical treaties with the Cherokee Nation, the Choctaw Nation, and the Chickasaw Nation. These treaties became known as the “Hopewell Treaties” because they were negotiated at Pickens’s home, Hopewell, on the Keowee River.<sup>29</sup>

Boundaries were at the center. In November 1785, Old Tassel (who was the First Beloved Man), thirty-six chiefs, and almost a thousand Cherokee citizens attended the treaty meeting at which Old Tassel drew the Cherokee boundaries on a map for the commissioners.<sup>30</sup> The Treaty described the boundary “between the said Indians and the citizens of the United States” and exiled from United States protection any citizen or “person not being an Indian” who remained within the boundaries after six months.<sup>31</sup> Congress was to possess the “sole and exclusive right of regulating the trade with the Indians, and managing all their affairs.”<sup>32</sup> The Treaty also provided a formal

28. Thomas Pownall, *A New Map of North America, with the West India Islands* (illustration) (1786), in THOMAS KITCHIN, *A GENERAL ATLAS DESCRIBING THE WHOLE UNIVERSE* 30–31 (London, Robert Sayer 1790) (portraying a continent dominated by Native Nations).

29. See CALLOWAY, *supra* note 24, at 209, 235, 284; NICHOLS, *supra* note 27, at 44–54.

30. See CALLOWAY, *supra* note 24, at 209; CALLOWAY, *supra* note 3, at 304.

31. Treaty with the Cherokee, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18.

32. *Id.*

mechanism to ensure the “justice of the United States.”<sup>33</sup> A provision authorized a deputy to be sent to Congress stating “[t]hat the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.”<sup>34</sup>

Immediately following this provision was the Treaty’s language stating that the peace and “friendship re-established” was to be maintained through the “utmost endeavors” of both sides.<sup>35</sup> Sending a deputy to Congress was to promote furtherance of the treaty relationship. The explicit provision relating to a deputy did not appear in the January 1786 Treaties with the Choctaw and Chickasaw Nations, but these treaties were otherwise prominently similar.<sup>36</sup> The three Hopewell Treaties were published together in newspapers as if they represented one larger constitutional treaty establishing an understanding with all three nations.<sup>37</sup>

In the wake of the Treaties, Congress began to take steps to consolidate its authority with respect to the states. Under the Articles of Confederation, Congress had the “sole and exclusive right and power” of “entering into treaties and alliances.”<sup>38</sup> The Articles explicitly barred the states, without consent of Congress, from entering into “any conference, agreement, alliance, or treaty, with any King, prince or state.”<sup>39</sup> In addition, Congress’s powers included that of “regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.”<sup>40</sup> The drafting history of this provision was complicated; particularly contested was the carveout: “not members of any of the states.”<sup>41</sup> Subsequently, in August 1786, Congress divided the United States into two geographic departments with respect to Indian affairs and created a superintendent position for the

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33. *Id.*

34. *Id.*; see ANNIE H. ABEL, PROPOSALS FOR AN INDIAN STATE, 1778–1878, at 89 (1970) (discussing this provision and concluding that “we are obliged to infer that no great departure from existing practices was in contemplation”); see also Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 120–29 (2005) (discussing the right to a deputy under the 1835 Treaty of New Echota); Ezra Rosser, *Promises of Nonstate Representatives*, 117 YALE L.J. POCKET PART 118, 119 (2007).

35. Treaty with the Cherokee, *supra* note 31, at 10.

36. See Treaty with the Chickasaw, Chickasaw Nation-U.S., Jan. 10, 1786, 7 Stat. 24; Treaty with the Choctaw, Choctaw-U.S Nation, Jan. 3, 1786, 7 Stat. 21.

37. See, e.g., *Articles of a Treaty Concluded at Hopewell*, FED. GAZETTE & PHILA. DAILY ADVERTISER, Sept. 15, 1790.

38. ARTICLES OF CONFEDERATION of 1781, art. IX; 1 DHRC, *supra* note 15, at 86, 89–90; see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 7, § 1.02[2], at 18–19; Ablavsky, *The Savage Constitution*, *supra* note 4, at 1012–13; Clinton, *supra* note 4, at 1098–106.

39. ARTICLES OF CONFEDERATION of 1781, art. VI; see also 1 DHRC, *supra* note 15, at 88.

40. ARTICLES OF CONFEDERATION of 1781, art. IX; see also 1 DHRC, *supra* note 15, at 91.

41. See William David Cummings, “The Indians May Be Led, but Will Not Be Drove”: The Creek Indians Struggle for Control of Its Own Destiny, 1783–1794, at 137–38 (Mar. 2016) (Ph.D. dissertation, North Dakota State University) (ProQuest) (discussing Georgia’s alleged interpretation of the Creek as “members” under earlier treaties).



southern section below the Ohio River.<sup>42</sup> In October, James White was appointed.<sup>43</sup> Virginia governor Edmund Randolph interpreted the appointment as an exercise of congressional authority bringing to an end the authority of Virginia's own agent, Joseph Martin.<sup>44</sup> For the three Native Nations, Congress, and Virginia, the Hopewell Treaties confirmed Congress's dominance over the states.

But, for North Carolina and Georgia—states that had not yet ceded their claimed western boundaries—the Treaties raised the possibility that the general government would stop unauthorized white encroachment.<sup>45</sup> A patchwork of cessions, many contested and based on various purchases and state treaties, created theoretical areas open to white settlement. Areas ceded by one group remained disputed by another.<sup>46</sup> At Hopewell, North Carolina's agent, William Blount, protested the Treaty and stated that it infringed on the state's "legislative rights."<sup>47</sup> The North Carolina governor and the legislature passed a law declaring that anything done by the treaty commissioners was "null and void."<sup>48</sup> Along with Georgia, North Carolina developed semantic interpretations of the Articles under which the two states refuted congressional authority. Treaty commissioner Benjamin Hawkins—himself a North Carolina congressional delegate—explained the arguments in a letter to Thomas Jefferson about the fate of the "aborigines."<sup>49</sup> Although the Treaties had been attentive to "the rights of these people," the two states launched protests.<sup>50</sup> Georgia "will not allow that the Indians can be viewed in any other light than as members thereof" of the state, thereby claiming authority under the carveout within the Articles.<sup>51</sup> North Carolina "allows a right of regulating Trade only without the fixing any boundary between the Indians and citizens, as they claim all the Land westward according to their bill of rights and that the Indians are only tenants at will."<sup>52</sup> In addition, the self-proclaimed State of Franklin under Governor John Sevier occupied

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42. Ordinance for the Regulation of Indian Affairs, in 31 JOURNALS OF THE CONTINENTAL CONGRESS, at 490, 491 (Gaillard Hunt ed., 1912).

43. 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 747 (Oct. 6, 1786).

44. See Stephen B. Weeks, *General Joseph Martin and the War of the Revolution in the West*, in AM. HIST. ASS'N, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1893, at 401, 459 (1894).

45. See generally Kathleen DuVal, *Independence for Whom?: Expansion and Conflict in the South and Southwest*, in THE WORLD OF THE REVOLUTIONARY AMERICAN REPUBLIC: LAND, LABOR, AND THE CONFLICT FOR A CONTINENT 97 (Andrew Shankman ed., 2014).

46. See, e.g., WILLIAM G. McLoughlin, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* 22–23 (1986) (discussing the Chickamauga Cherokee).

47. Letter from William Blount to Benjamin Hawkins, Andrew Pickens, Joseph Martin & Lachlan McIntosh (Nov. 28, 1785) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia); see Ablavsky, *The Savage Constitution*, *supra* note 4, at 1029.

48. Extract from the Minutes of the Georgia General Assembly (Feb. 11, 1786), in 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 27, at 427–28; see also CALLOWAY, *supra* note 3, at 304–05.

49. Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON 640, 641 (Julian P. Boyd ed., 1954).

50. *Id.*

51. *Id.*

52. *Id.*

western territory that the Articles presumed would be ceded to the United States but over which North Carolina had rescinded any cession.<sup>53</sup> The Franklinites used an “unscrupulous 1785 Treaty of Dumplin Creek” to claim land reserved to the Cherokee Nation at Hopewell.<sup>54</sup> Georgia maintained its claims—referred to as Yazoo lands—until 1802.<sup>55</sup> Indeed, in early August 1787, Georgia acquired a small strip of western land ceded from South Carolina.<sup>56</sup>

From the perspective of the southern Native Nations, these disputed western claims lay within their boundaries and the continued white encroachment raised questions about the reliability of the United States.<sup>57</sup> Indian communities disagreed over whether the United States or the Spanish was more dependable. The Hopewell Treaty with the Chickasaw Nation did not have the support of the pro-Spanish contingent.<sup>58</sup> The Creek Nation found itself divided. Alexander McGillivray led the largest contingent to sign the Treaty of Pensacola with the Spanish in 1784, and the U.S. commissioners were unsuccessful in achieving a treaty.<sup>59</sup> The Spanish remained committed to control of the Mississippi River—and the instability of the United States worked to the advantage of the Spanish governor-general in New Orleans. Throughout this period, the southern Native Nations entertained repeated invitations and overtures from Spanish diplomatic officials.<sup>60</sup> Further complicating matters, various political leaders associated with the white western settlements began to consider aligning themselves with Spain—referred to by nineteenth-century historians as the “Spanish Conspiracy.”<sup>61</sup> In 1786, James White—the soon appointed superintendent of Indian affairs for the southern district—began inquiries with the Spanish minister Don Diego de Gardoqui, suggesting that the southern states might leave the United States if the Mississippi were transferred to Spain.<sup>62</sup>

Thus 1786 marked a particularly fraught moment in the balance of power and territory. As historian Colin Calloway has emphasized, “there was a time when the outcome of the struggle seemed in doubt” and “Indian power . . .

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53. *Id.*

54. Kevin T. Barksdale, *The Spanish Conspiracy on the Trans-Appalachian Borderlands, 1786–1789*, 13 J. APPALACHIAN STUD. 96, 103 (2007).

55. Letter from Thomas Jefferson to the Gentlemen of the Senate and of the House of Representatives (Apr. 26, 1802), in 37 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 343.

56. R. S. Cotterill, *The South Carolina Land Cession*, 12 MISS. VALLEY HIST. REV. 376, 376–84 (1925).

57. *See generally* CHARLES A. WEEKS, *PATHS TO A MIDDLE GROUND: THE DIPLOMACY OF NATCHEZ, BOUKFOUKA, NOGALES, AND SAN FERNANDO DE LAS BARRANCAS, 1791–1795* (2005).

58. CALLOWAY, *supra* note 24, at 233–37.

59. *Id.* at 283–84; *see also* Randolph C. Downes, *Creek-American Relations, 1782–1790*, 21 GA. HIST. Q. 142, 159–61 (1937).

60. *See generally* Barksdale, *supra* note 54.

61. *Id.* at 97–119.

62. Resolution of Oct. 6, 1786, *reprinted in* 18 THE STATE RECORDS OF NORTH CAROLINA 756 (Walter Clark ed., 1900). *See generally* Anita S. Goodstein, *Leadership on the Nashville Frontier, 1780–1800*, 35 TENN. HIST. Q. 175 (1976).

remained strong, despite the inroads of disease, dispossession, and escalating warfare.”<sup>63</sup> Indeed, 1786 brought increased opposition by Native Nations. In January, a treaty at Fort Finney with the Shawnee Nation was “disavowed.”<sup>64</sup> In the northwest, Joseph Brant began to gather an Indian confederacy.<sup>65</sup> A northern confederacy threatened congressional and land company plans for the area north of the Ohio and east of the Mississippi. Since 1784, congressional declarations and plans had imagined conversion of northwestern territory into white-occupied and survey-defined new states.<sup>66</sup> But even after northern states ceded their paper colonial claims to the general government in 1784 and 1786, the requisite purchases “of the Indian inhabitants” remained largely in the future.<sup>67</sup> In late 1786, the northwest United Indian Nations declared that any “cession of our lands should be made” only “by the united voice of the confederacy” and they declared all “partial treaties” void.<sup>68</sup> The United Indian Nations suggested meeting in the spring of 1787 to pursue a general treaty.<sup>69</sup> Requiring Congress to deal with a united group of Native Nations and to pursue land cessions only through such a group would have radically rebalanced the power dynamic. With a barren treasury and a largely nonexistent military force—and with Spain and Great Britain controlling surrounding territories—the general U.S. government plausibly faced defeat in any war with Native Nations.<sup>70</sup>

In this moment, four representatives of Native Nations set forth for Congress. This Article recovers the story of their visits, including George Washington’s public handshake with Sconetoyah, the Cherokee chief. It then examines the consequences of the visits, focusing on Congress’s passage of the Northwest Ordinance, Secretary at War Henry Knox’s report on Indian Affairs, and the Convention’s drafting of clauses relating to Native Nations. The conclusion traces the aftermath of the visits for the major actors. This analysis largely supports Robert Clinton’s 1995 interpretation that the Convention presumed the general government’s authority in dealing with

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63. COLIN G. CALLOWAY, *THE VICTORY WITH NO NAME: THE NATIVE AMERICAN DEFEAT OF THE FIRST AMERICAN ARMY* 10 (2015) (describing the early 1790s).

64. Horsman, *supra* note 25, at 40.

65. WHITE, *supra* note 14, at 433.

66. Richard P. McCormick, *The “Ordinance” of 1784?*, 50 WM. & MARY Q. 112, 112–13 (1993). See generally PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 3–58 (Univ. of Notre Dame Press, 2019) (1987); *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY* (Frederick D. Williams ed., 1989) (collecting essays on the ambiguous implications of the ordinance); Robert F. Berkhofer Jr., *Americans Versus Indians: The Northwest Ordinance, Territory Making, and Native Americans*, 84 IND. MAG. HIST. 90 (1988).

67. The Ordinance of 1784, *reprinted in* 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 613; see also Reginald Horsman, *The Northwest Ordinance and the Shaping of an Expanding Republic*, 73 WIS. MAG. HIST. 21, 25–32 (1989).

68. Speech of the United Indian Nations to Congress (Dec. 18, 1786), *in* 18 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 27, at 347, 356; see Jeffrey Ostler, *‘Just and Lawful War’ as Genocidal War in the (United States) Northwest Ordinance and Northwest Territory, 1787–1832*, 18 J. GENOCIDE RSCH. 1, 5–6 (2016).

69. Speech of the United Indian Nations to Congress, *supra* note 68, at 357.

70. Horsman, *supra* note 25, at 40.

Native Nations, accepted the autonomous legal status of the tribes, and incorporated its broad “Commerce . . . with the Indian Tribes”—including affairs and trade—as a fail-safe to end illegitimate and dangerous claims of state authority at long last.<sup>71</sup>

I believe that continually unfolding history is relevant to modern constitutionalism and therefore am not an originalist. Indeed, significant structural transformations in the relationship of Native Nations and the United States since 1787 make selective use of this history particularly tenuous as the sole basis for contemporary constitutional interpretation.<sup>72</sup> Over more than two centuries, U.S. constitutional jurisprudence channeled and legitimized the dispossession of Native Nations’ land, sovereignty, and identities through a series of doctrines that shifted repeatedly.<sup>73</sup> The most important aspect of the history recounted in this Article is drawn from a moment when Native Nations constituted a significant threat and controlled most of the territory now considered part of the United States. The system of government framed in the Constitution presumed the sovereignty of Native Nations. Deputies to Congress reflected one aspect of this recognition. Eventually, however, the provisions for a deputy to Congress in the Fort Pitt and Hopewell Treaties were forsaken. It would be fitting and just if the United States would now ensure representation of Native Nations in Congress.<sup>74</sup>

## II. A DEPUTATION TO CONGRESS

At the end of May 1787, newspapers began to report the progress of three chiefs of Native Nations as they traveled to Congress; they were members of the Cherokee Nation, the Choctaw Nation, and the Chickasaw Nation.<sup>75</sup> Several months earlier, Governor Randolph of Virginia had learned of a “deputation” to Congress from Native Nations.<sup>76</sup> Newspaper reports of the visits by the deputies circulated throughout the summer, intermingled with reports on the Creek Nation, the murder of Cherokee hunters by Kentuckians,

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71. Clinton, *supra* note 4, at 1147, 1156–57 (quoting U.S. CONST. art. I, § 8, cl. 3); *see also* Ablavsky, *The Indian Commerce Clause*, *supra* note 4, at 1022.

72. *See* United States v. Lara, 541 U.S. 193, 200 (2004); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 160 (2002). *See generally* N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* (2013); KOU SLAA T. KESSLER-MATA, *AMERICAN INDIANS AND THE TROUBLE WITH SOVEREIGNTY: STRUCTURING SELF-DETERMINATION THROUGH FEDERALISM* (2017); Matthew L. M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIA. L. REV. 53 (2006); Frank Pommersheim, *Constitutional Shadows: The Missing Narrative in Indian Law*, 80 N.D. L. REV. 743 (2004).

73. *See* WILLIAM C. CANBY JR., *FEDERAL INDIAN LAW IN A NUTSHELL* 15–37, 81–149 (7th ed. 2020) (providing an overview).

74. *See generally* SMITH, *supra* note 15 (discussing obligations of research); SHAWN WILSON, *RESEARCH IS CEREMONY: INDIGENOUS RESEARCH METHODS* (2008).

75. *See, e.g.,* *Frederick-Town, May 30. Extract of a Letter from Winchester, May 26, 1787*, MD. CHRON. OR UNIVERSAL ADVERTISER, May 30, 1787.

76. Letter from Arthur Campbell to Edmund Randolph (Mar. 9, 1787), in 4 *CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS* 254 (William P. Palmer ed., Richmond, W. M. Ellis Jones 1884) [hereinafter *CALENDAR OF VIRGINIA STATE PAPERS*].

rising tensions over Franklin's land office, and alleged Spanish intervention in the west. Secretary at War Henry Knox left New York for Philadelphia in June to meet specifically with the deputies. Outside of the Convention, George Washington also met them, as did the governors of Virginia, North Carolina, and Pennsylvania. Although Congress reconvened in early July to adopt the Northwest Ordinance, the deputies would not appear, having been persuaded to return home. But their visit had repercussions that changed the Constitution and relationship of the United States to Native Nations.

#### A. *The Choctaw Nation*

Within months of the Hopewell Treaties, the Choctaw Nation decided to hold the United States to the treaty commitments. The southwestern Native Nations faced an increasingly volatile situation. Matters between Georgia and the Creek Nation, led by Alexander McGillivray, reached a point of collision. By 1786, "Creek Country [was] torn but also on the verge of all-out war."<sup>77</sup> The Spanish supported McGillivray as part of their strategy to ensure control of the Mississippi. The Oconee War broke out by November, with the Spanish providing ammunition to Creek raiding parties.<sup>78</sup> The other Native Nations found themselves under pressure to choose a side. Indian agent William Davenport wrote to Georgia's governor that the Choctaw Nation was being courted by the Spanish.<sup>79</sup> The Spanish governor of Louisiana and West Florida, Esteban Miró, sought the allegiance of Franchimastabé, the head of the Choctaw Nation.<sup>80</sup>

At the end of November 1786, therefore, Franchimastabé sought reassurance as to the friendship of the United States.<sup>81</sup> In a talk for Congress, he questioned whether the United States was disposed to preserve treaties, focusing in particular on boundaries.<sup>82</sup> In addition, the economic impoverishment of the United States raised concerns about whether the general government could carry through on promised trade.<sup>83</sup> Congress needed to demonstrate its enforcement of treaties made with Native Nations. Underlying the talk was the implication that the Choctaw Nation could turn to Spain if the United States failed to honor its treaties. Indeed, four months

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77. KEVIN KOKOMOOR, *OF ONE MIND AND OF ONE GOVERNMENT: THE RISE AND FALL OF THE CREEK NATION IN THE EARLY REPUBLIC* 102 (2018).

78. *Id.* at 83, 104–14; Cummings, *supra* note 41, at 102–25.

79. Letter from William Davenport to the Governor of Georgia (Nov. 1, 1786) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

80. See WEEKS, *supra* note 57, at 155–59; James L. Hill, *Muskogee Internationalism in an Age of Revolution, 1763–1818*, at 91–92 (May 2016) (Ph.D. dissertation, College of William and Mary) (ProQuest).

81. Letter from Henry Knox to Frenchmastubié (June 27, 1787) (available at the William L. Clements Library, University of Michigan, Ann Arbor) (responding to Franchimastabé's talk; the talk has not been located); see O'Brien, *supra* note 3, at 68.

82. See Letter from Henry Knox to Frenchmastubié, *supra* note 81.

83. See *id.*

later, in March 1787, after hearing nothing from Congress, Taski Etoka (the Chickasaw “king”) and Franchimastabée sent a talk to Miró.<sup>84</sup>

In focusing on Congress and the Treaty, the Choctaw Nation explicitly rejected state authority and that of Georgia in particular. In the fall of 1786, Georgia sent an agent, John Woods, to the Choctaw Nation with instructions that ran counter to the Articles and the Treaties. The appointment of Woods from Georgia was recent.<sup>85</sup> Previously, he had traveled with Choctaw delegations: in 1784, to Savannah, Georgia,<sup>86</sup> and in January 1786 as an escort and witness at the Hopewell Treaties.<sup>87</sup> In March 1786, shortly after the treaty meeting, the Georgia legislature gave Woods instructions asserting the state’s sovereignty over the Choctaw Nation.<sup>88</sup> In an effort to claim authority under the Articles’ carveout, Georgia asserted control over the Choctaw Nation as members of the state. Wood’s instructions declared: “You are to consider the different Nations, Tribes or Towns of Indians within the Jurisdiction aforesaid as Members of this State.”<sup>89</sup> Georgia’s legal stance put the state in direct conflict with Congress.

Not surprisingly, the Choctaw Nation rejected Georgia’s claim. As Woods explained to the Georgia governor, the Choctaw Nation did not consider Woods “Vested, with proper Authority, to transact the business of their Nation, by virtue of [a] Commission, from the State of Georgia.”<sup>90</sup> The Hopewell Treaty represented a decision to treat with the “Continental Commissioners.”<sup>91</sup> The Choctaw Nation was “determined, to hold fast the Treaty” and “they Would pay No regard to Any Authority, which did not Originate, And derive, from Congress.”<sup>92</sup> The Hopewell Treaty represented the reciprocal commitment of the Choctaw Nation and Congress.<sup>93</sup> Indeed, Woods’s letter subtly emphasized the Choctaw Nation’s territorial sovereignty: he had returned “into their land” and met at the “seat of government” with “the King, and Great leading Chief, of that Nation.”<sup>94</sup> Moreover, in referring to the “treaty . . . at Seneca”—the river, rather than

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84. See Hill, *supra* note 80, at 91–92 (discussing a March 19, 1787, letter from the Chickasaw king and Franchimastabé to Miró); Charles A. Weeks, *Franchimastabé*, MISS. ENCYC. (Apr. 14, 2018), <http://mississippiencyclopedia.org/entries/franchimastabe> [<https://perma.cc/9H7G-E7MN>].

85. See Brenden Edward Kennedy, *The Yazoo Land Sales: Slavery, Speculation, and Capitalism in the Early American Republic* 46 (2015) (Ph.D. dissertation, University of Florida) (ProQuest); Frances Bailey Kolb, *Contesting Borderlands: Policy and Practice in Spanish Louisiana, 1765–1803*, at 270 (Aug. 2014) (Ph.D. dissertation, Vanderbilt University) (ProQuest).

86. See Letter from John Habersham to Georgia Governor (June 19, 1784) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

87. See O’Brien, *supra* note 3, at 61, 67.

88. See Letter from Georgia Governor & Council to John Woods (Mar. 1, 1786) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

89. *Id.*

90. Letter from John Woods to Edward Telfair (Jan. 14, 1787) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

91. *Id.*

92. *Id.*

93. See O’Brien, *supra* note 3, at 60–66 (describing its interpretation by the Choctaw).

94. See Letter from John Woods to Edward Telfair, *supra* note 90.

Hopewell—the white settlement was erased, at least semantically.<sup>95</sup> As the Choctaw Nation “[n]either Would hear, Or send, any More talks to the State of Georgia,” Woods returned the state’s commission, nonetheless requesting payment for four lost horses and other expenses.<sup>96</sup>

In accordance with the recognition of Congress and the Treaty, one of the “great leading chiefs” of the Choctaw Nation, Tobocah, set off for Congress.<sup>97</sup> American newspapers repeatedly identified him as a Choctaw king.<sup>98</sup> Tobocah had been a signer at Hopewell but had spoken last, allegedly “disgraced” for having taken a Spanish medal.<sup>99</sup> Commissioner Joseph Martin described Tobocah as having “always been sent by the Nation as their representative in all their important Negotiations.”<sup>100</sup> At Hopewell, Tobocah described himself as “a headman in my Nation to receive and to give out talks” and expressed the desire “to see Congress some days.”<sup>101</sup> Freed from Georgia’s authority, Woods accompanied him to Philadelphia.<sup>102</sup>

Also accompanying Tobocah was a woman described by white observers as the “Queen” or “his Lady.”<sup>103</sup> Her presence underscored the importance of the diplomatic mission.<sup>104</sup> Although women did not hold formal leadership roles in the Choctaw Nation, their presence legitimized diplomatic negotiations. On the two-month journey to Hopewell, ten women had accompanied Tobocah and other chiefs and warriors.<sup>105</sup> The Queen may have been one of the women at Hopewell and, in any event, her presence strengthened the official nature of the visit.

Tobocah and the Queen left the Choctaw Nation, likely by horseback, in late November 1786.<sup>106</sup> A king and queen traveling to Congress from the

95. *Id.*

96. *Id.*

97. *Id.*

98. See, e.g., *Philadelphia, June 15.*, *supra* note 1; *Philadelphia, June 19.*, PA. PACKET & DAILY ADVERTISER, June 19, 1787, at 3.

99. O’Brien, *supra* note 3, at 54 (quoting JOSEPH MARTIN, JOURNAL OF THE HOPEWELL TREATIES 64 (1786) (available at the Draper Manuscript Collection, State Historical Society of Wisconsin)).

100. *Id.* at 50 (quoting JOSEPH MARTIN, JOURNAL OF THE HOPEWELL TREATIES 64 (1786) (available in the Draper Manuscript Collection, State Historical Society of Wisconsin)).

101. *Id.* (quoting JOSEPH MARTIN, JOURNAL OF THE HOPEWELL TREATIES 90 (1786) (available in the Draper Manuscript Collection, State Historical Society of Wisconsin)).

102. Letter from John Woods to Edward Telfair, *supra* note 90; see Letter from Carlos de Grand-Pré to Esteban Miró (Oct. 26, 1787), in SPAIN IN THE MISSISSIPPI VALLEY, 1765–1794 pt. 2, at 236, 236–37 (Lawrence Kinnaird ed., 1946) (describing Fort Pitt travelers overhearing the chief’s name as Py Omuttahan).

103. See, e.g., 15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 228–29 (Samuel Hazard ed., Harrisburg, Theo., Fenn & Co. 1853) (listing expenses related to the “Choctaw King [and] his Queen”) [hereinafter COLONIAL RECORDS OF PENNSYLVANIA]; *Philadelphia, June 19.*, *supra* note 98; Letter from John Woods, Indian Interpreter (May 25, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 290 (“[A] Cheif [sic] of the Choctaw Indians, his Lady and a Chickasaw . . .”). Unfortunately, I have not yet found an identifying name for the Queen.

104. See Iti Fabussa, *Early Political Structures*, BISHNIK, Apr. 2010, at 9, 9.

105. See O’Brien, *supra* note 3, at 51.

106. See Letter from John Woods to Edward Telfair, *supra* note 90 (describing leaving in late November).

Choctaw Nation reinforced the exclusive authority of Congress over treaties with “any King, Prince or state.”<sup>107</sup> By January, when Woods wrote the Georgia governor, the group had traveled through “the Chickasaws, thence through the Creeks, thence into the Cherokees.”<sup>108</sup> Two of those Nations also had entered into Hopewell Treaty relationships. Tobocah sought other deputies who likewise wanted reassurance of Congress’s commitment.

### B. *The Chickasaw Nation*

The Chickasaw Nation chose a war captain named Muckleshamingo to journey to Congress with Tobocah.<sup>109</sup> Various descriptions of Muckleshamingo as a “Chickasaw captain” or “Chickasaw chief,” Muckleshamingo’s presence was approved by the two prominent heads of the Nation: Chinnubee and Piomongo.<sup>110</sup> Muckleshamingo carried a talk for Congress whose contents likely mirrored a similar talk sent by Piomongo.<sup>111</sup> The Chickasaw Nation worried about white encroachment in violation of the Treaty. They were “sorry to hear that the white People are settling all the lands Belonging to our Brothers, the Cherokees.”<sup>112</sup> The contrast between “white people” and “Brothers” underscored the universal problem of white expansion. Piomongo added, “I speak now for the Choctaws as well as my own People; we are all very uneasy about it, as we are told the Americans Intend[] to take all our Country Before they [are] Done.”<sup>113</sup> Piomongo consistently contrasted “we” with “the Americans.” Piomongo made clear that they hoped that “something will be Done to prevent it,” otherwise “when all their lands Is settled our Lands will go the same way.”<sup>114</sup> And the possessive emphasis of “lands Belonging to” and “our lands” insisted on territorial sovereignty. In addition, the Chickasaw Nation was worried about the failure to increase trade as promised under the Treaty.<sup>115</sup> Piomongo wondered if “[y]ou only ment to Jockey us out of our Lands.”<sup>116</sup> The Nation wished “to hold you Fast”—that is, commit to an exclusive relationship—but if Congress did not act, “necessity will

107. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

108. *Id.*

109. See Letter from Henry Knox to Chamby, Chickasaw Chief (June 27, 1787) (available at the William L. Clements Library, University of Michigan, Ann Arbor) (naming Muckleshamingo).

110. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 103, at 228–29 (reporting a bill of expenses referring to “a Chickasaw Captain”); Letter from Tobocah, Choctaw Chief & a Chickasaw Captain to Benjamin Franklin (June 19, 1787) (available at the American Philosophical Society Library). For previous speculations as to identity, see ARRELL M. GIBSON, THE CHICKASAWS 85–86 (1971) (Piomongo); Flaherty, *supra* note 3, at 77 (Chinubbee, brother to Taskitetoka).

111. A Talk for Colo. Joseph Martin—from Piomongo, One of the Chiefs of That Tribe (Feb. 15, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 241. I have not been able to locate the talk given to Knox.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*



oblige us to Look for new friends.”<sup>117</sup> Congress had a choice: stop white encroachment or the Nations would align with Spain.

After leaving the Chickasaw Nation, Tobocah, the Queen, Muckleshamingo, and Woods may have traveled to the Creek Nation.<sup>118</sup> But no deputy from the Creek Nation appears to have joined the group. Instead, information about the Creek Nation’s plan to move against Georgia traveled with the delegation. By early 1787, the deputation was staying with Governor Sevier at his home, Mount Pleasant (now in northeastern Tennessee).<sup>119</sup> They hoped to meet with James White, the new superintendent of the southern department.<sup>120</sup> But White seems not to have appeared; indeed, he likely had begun to privately encourage the Spanish minister Don Diego de Gardoqui to consider the possibility that the southern states might break from the United States over the loss of the Mississippi.<sup>121</sup> Sevier was quick to send on news of the visitors. To the Georgia governor, Sevier described the group as having “set out for Congress in Order to negociate national business.”<sup>122</sup> Likewise, Arthur Campbell wrote the Virginia governor that the group was “going to Congress to lay before them the true state of affairs of the Southern Indians.”<sup>123</sup> By late March, southern governors knew the deputation planned to negotiate with Congress on behalf of the “Southern Indians”—an apparently nearly united group, intriguingly parallel to the northern United Indian Nations.

### C. The Cherokee Nation

In early April when the deputation left for Philadelphia en route to New York, no Cherokee Nation representative accompanied them.<sup>124</sup> Woods had urged Old Tassel to join but he declined.<sup>125</sup> Old Tassel hoped to hear from Congress through official channels. In March, Martin had arrived at the Cherokee town of Chota and was told to write to the “Beloved men of

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117. *Id.* For a discussion on trade, see David A. Nichols, *The Enterprise of War: The Military Economy of the Chickasaw Indians, 1715–1815*, in *THE NATIVE SOUTH: NEW HISTORIES AND ENDURING LEGACIES* 33 (Tim Alan Garrison & Greg O’Brien eds., 2017).

118. See Letter from Arthur Campbell to Edmund Randolph, *supra* note 76, at 254 (referring to a group including “the Creeks, Choctaws, and Chickassas”); Letter from John Sevier to George Matthews (Mar. 3, 1787), in *THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY* 385 (J. G. M. Ramsey ed., Charleston, John Russell 1853) (describing Tobocah coming “by way of the Creek Nation”); Letter from John Woods to Georgia Governor (Mar. 3, 1787) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia) (describing a trip passing through Creek country).

119. See Letter from John Sevier to George Matthews, *supra* note 118.

120. See *id.*; see also Albert V. Goodpasture, *Dr. James White. Pioneer, Politician, Lawyer*, 1 *TENN. HIST. MAG.* 282, 284 (1915).

121. KEVIN T. BARKSDALE, *THE LOST STATE OF FRANKLIN: AMERICA’S FIRST SECESSION* 105 (2009); DUVAL, *supra* note 14, at 315–16.

122. Letter from John Sevier to George Matthews, *supra* note 118.

123. Letter from Arthur Campbell to Edmund Randolph, *supra* note 76, at 254.

124. Letter from John Sevier to Benjamin Franklin (Apr. 9, 1787), in *SAMUEL COLE WILLIAMS, HISTORY OF THE LOST STATE OF FRANKLIN* 165 (rev. ed. 1933).

125. A Talk Delivered Colo. Joseph Martin by the Old Corn Tassell (Mar. 25, 1787), in *22 THE STATE RECORDS OF NORTH CAROLINA*, *supra* note 62, at 493.

Congress.”<sup>126</sup> Similarly, Old Tassel had urged Hawkins to “do Something.”<sup>127</sup> Thus, Old Tassel decided to “sett still till I hear from Congress.”<sup>128</sup>

Nonetheless, in the meantime, the Cherokee Nation faced a crisis. Martin “[f]ound the Indians in Greater Confusion Than I Ever saw them.”<sup>129</sup> The “pretended State of Franklin” was holding an assembly and opening a land office to distribute Cherokee Nation land, including the “Beloved Town, Chota.”<sup>130</sup> Old Tassel’s talk confirmed the problem: the “Franklin people are Settling all our Lands.”<sup>131</sup> Martin concluded that the Franklinists were taking “every step that appears most productive to a war” and that “nothing will Remove” the white settlers “but an armed Force.”<sup>132</sup> He was not alone in worrying about an Indian war triggered by encroachment.<sup>133</sup> The French at Muscle Shoals spread rumors that the three European powers were joined against the Americans with the Creeks and “Northward Indians” to “strike this spring.”<sup>134</sup> Old Tassel similarly hinted at an impending military engagement with the Americans, on one side, and the Northward Indians, the Creek, the Spanish, and the French, on the other.<sup>135</sup>

In addition to the issue of Franklin, Kentucky colonel John Logan, the titular county sheriff, and a large militia group recently had killed at least seven Cherokee. Details gradually emerged from letters sent to the Virginia governor. The Kentucky people had killed some of the “friends” of “some of the Chickamogga people.”<sup>136</sup> In a letter filled with implicit scorn at the inability to distinguish among Indians, Martin recounted how Logan had set off against a “Crow Town” but “missing his way,” had killed seven hunters.<sup>137</sup> Another correspondent explained that Logan and around one hundred men had set out to “attack and destroy a Small Town of the Cherokees” whom they blamed for “depredations on the Kentucky-Path.”<sup>138</sup> The seven people killed included a chief from “the friendly Towns.”<sup>139</sup>

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126. *Id.*

127. *Id.*

128. *Id.* at 494.

129. Letter from Joseph Martin to Edmund Randolph (Mar. 25, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 261, 261.

130. Letter from Joseph Martin to Edmund Randolph (Mar. 16, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 256, 256.

131. A Talk Delivered Colo. Joseph Martin by the Old Corn Tassell, *supra* note 125, at 493–94.

132. Letter from Joseph Martin to Edmund Randolph, *supra* note 130, at 256; Letter from Joseph Martin to Edmund Randolph, *supra* note 129, at 261.

133. See Letter from Evan Shelby to William Russell (Apr. 27, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 274 (explaining the land office was taking “the Lands Reserved to the Indians” and might end up with “Intestine War”).

134. A Talk Delivered Colo. Joseph Martin by the Old Corn Tassell, *supra* note 125, at 493–94.

135. *Id.*

136. Letter from Joseph Martin to Edmund Randolph, *supra* note 130, at 256.

137. *Id.*

138. Letter from Arthur Campbell to Edmund Randolph, *supra* note 76, at 254.

139. *Id.*; Letter from Arthur Campbell to Edmund Randolph (Mar. 17, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 257, 257.

Martin was told by the Cherokee Nation that “if the White People” let them live in peace, “nothing will Induce them To Take up the Hatchett or Join the Spaniards.”<sup>140</sup> However, “if they are to be killed whenever they Go to Hunt, they must have Satisfaction.”<sup>141</sup>

There were two talks to Congress sent with Martin, both emphasizing the problem of white encroachment. The Cherokee Nation wanted Congress to have “their people moved off our Lands.”<sup>142</sup> Chief Hanging Maw explained, “[w]e have held several treaties with the Americans” in which “[b]ounds was always fixt and fair promises always made that the white people should not come over.”<sup>143</sup> In the past, he pointed out, “we always find that after a treaty they Settle much faster than before.”<sup>144</sup> But this time—at Hopewell—they had “treated with Congress.”<sup>145</sup> Congress was different from an individual state and Hanging Maw believed that “we made no doubt but we should have Justice.”<sup>146</sup> Yet, the Cherokee Nation was being told that the Americans meant to “deceive us” and they were beginning to “think it is true.”<sup>147</sup>

Although Martin left Chota to head in theory towards Congress, Old Tassel and Hanging Maw decided to send their own deputy by another route. They needed someone important enough to be treated as a representative, yet who would not undermine the official channel hopefully represented by Martin and Hawkins. They chose a young man, Sconetoyah, described by newspapers as the “brave young Warrior Sconetoyah, an Indian Chief of the Cherokee Nation.”<sup>148</sup> He was “a War Captain and son to one of the principal Chiefs of that nation.”<sup>149</sup> In fact, Sconetoyah was the son of Katteuha, the Beloved Woman of Chota, the most important female political leader, and he carried a talk to Congress from her.<sup>150</sup> Later that summer, Benjamin Franklin complimented Katteuha on “having so good a Son.”<sup>151</sup> Striking a personal tone, Franklin hoped that she would have the “Benefit of his Support when

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140. Letter from Joseph Martin to Edmund Randolph, *supra* note 129, at 261.

141. *Id.*

142. *Id.* at 262.

143. Talk Delivered by Hanging Maw to Joseph Martin (Mar. 24, 1787), in 22 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 62, at 492, 493.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Baltimore, June 12.*, MD. J. & BALT. ADVERTISER, June 12, 1787.

149. *Philadelphia, June 14.*, INDEP. GAZETTEER, June 14, 1787.

150. See HOIG, *supra* note 3, at 70 (brief mention); Letter from Benjamin Franklin to the Cherokee Indian Queen (June 30, 1787) (available at the Library of Congress) (“I have seen your Letter to the Congress.”).

151. Letter from Benjamin Franklin to the Cherokee Indian Queen, *supra* note 150.

you grow old.”<sup>152</sup> Accompanying Sconetoyah was Alexander Dromgoole, a trader-interpreter, possibly a relative of Old Tassel by marriage.<sup>153</sup>

In April, as the two groups moved toward Philadelphia, news of the impending Convention mingled with the volatile western situation. Governor Edmund Randolph worried that he had overstepped the Articles of Confederation by sending a talk to the Cherokee leaders.<sup>154</sup> He explained that the “Cherokees have begun to be troublesome in our country” so he had to “direct some soothing steps to be taken on the part of Virginia” by sending the talk.<sup>155</sup> Indeed, Randolph tried but failed to get state attorney general Harry Innes to prosecute Logan for the murders.<sup>156</sup>

In mid-April, Congress finally received the talks from Old Tassel and Hanging Maw that were sent in September 1786.<sup>157</sup> The committee on Indian affairs, headed by James Madison, took up the stated concerns but they seemed not to be a priority. In addition to preparing for the Convention, Madison spent the spring addressing British accusations of state violations of the Treaty of Peace and trying to prevent John Jay from relinquishing American navigation of the Mississippi in negotiations with the Spanish.<sup>158</sup> Madison probably left New York for Philadelphia before his committee gave a report on May 8 about the Cherokee Nation’s complaints (the report has never been located).<sup>159</sup> The next day, May 9, an ordinance for “the government of the Western Territory” was read for a second time, then postponed before its final reading on May 10.<sup>160</sup> As delegates left for Philadelphia, Congress lost its quorum on May 11 and was not expected to reconvene until after the Convention.<sup>161</sup>

Throughout May, deep concern about white encroachment continued to spread, joined by news of meetings—conventions—of Native Nations. The southern department superintendent, James White, warned Knox that increased encroachments would lead to violence. As he put it, “the white people on the frontier” were “continuing their encroachments” and extending

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152. *Id.*; see TRANSATLANTIC FEMINISMS IN THE AGE OF REVOLUTION 178–83 (Lisa L. Moore et al. eds., 2012); cf. M. Amanda Moulder, “By Women, You Were Brought Forth into This World”: Cherokee Women’s Oratorical Education in the Late Eighteenth Century, in RHETORIC, HISTORY, AND WOMEN’S ORATORICAL EDUCATION: AMERICAN WOMEN LEARN TO SPEAK 19 (David Gold & Catherine L. Hobbs eds., 2013).

153. HOIG, *supra* note 3, at 70 (stating Dromgoole may have “married a sister of Corn Tassel’s nephew, John Watts Kunoskekie”).

154. Letter from Edmund Randolph to Virginia Delegates (Apr. 4, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 10, at 366, 366.

155. *Id.*

156. *Id.*

157. *Id.* at 366 n.1.

158. See GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 159 (2010).

159. James Madison, Notes on Debates in Congress (Apr. 26, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 10, at 407, 407; Letter from Edmund Randolph to Virginia Delegates, *supra* note 154.

160. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 274–75, 283.

161. *Id.* at 292.

“their surveys into the Indian country.”<sup>162</sup> White noted “[t]he natural reluctance of the Indians to part with any of their lands; for, to use their expression, they look on their lands as their blood and their life, which they must fight for rather than part with.”<sup>163</sup> The Georgia governor was informed of a “Convention” of “Nations to the North and West.”<sup>164</sup> Unless white encroachment halted, war appeared inevitable and understandable.<sup>165</sup> Although Congress had created a regulatory division based on the Ohio River, there appears to have been movement toward a unified western response by Native Nations against white encroachment. The Chickasaw Nation gathered in a general meeting to discuss a convention of “all Nations.”<sup>166</sup> A continental confederation of Native Nations would be a formidable opposition to the tenuous confederation of states.

### III. PHILADELPHIA

Throughout May, newspapers reported the progress of the two deputations. By mid-May, Sconetoyah was in Winchester.<sup>167</sup> By the end of the month, the “Prince of the Cherokee Nation” passed through Fredericksburg<sup>168</sup> and Tobocah, the Queen, and Muckleshamingo passed through Charlottesville.<sup>169</sup> Word spread about their progress as they applied to Virginia and Maryland for funds to complete their journeys.<sup>170</sup> Only on June 12 did Sconetoyah reach Philadelphia, followed by the second deputation on June 18. Although intending to travel on to New York and to Congress, both groups turned back toward their homes after staying in Philadelphia for several weeks.

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162. Letter from James White to Henry Knox (May 24, 1787), in DOCUMENTS AND OTHER PAPERS RELATING TO THE BOUNDARY LINE BETWEEN THE STATES OF GEORGIA AND FLORIDA 16 (Washington, Beverley Tucker 1855). For more concerns on these hostilities, see Letter from Henry Knox to George Washington (July 6, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 123 (Dorothy Twohig ed., 1989).

163. Letter from James White to Henry Knox, *supra* note 162, at 18.

164. Letter from William Davenport to the Governor of Georgia (May 27, 1787) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

165. *Id.*

166. *Id.*

167. *Frederick-Town, May 30. Extract of a Letter from Winchester, May 26, 1787, supra* note 75.

168. *Frederick-Town, June 6, MD. CHRON. OR UNIVERSAL ADVERTISER, June 6, 1787* (noting a Cherokee prince passing through on “Wednesday last”).

169. *See Frederick-Town, May 30. Extract of a Letter from Winchester, May 26, 1787, supra* note 75.

170. In Annapolis, they stopped because they were “without money.” Woods applied for a supply “to pay for their Passages from Richmond to the Head of the Elk and to take them to as far as Philadelphia.” Letter from Thomas Harwood to Delegates in Congress (June 14, 1787) (available at the Maryland State Archives).

### A. Treaty Supremacy

When the Convention began in late May, Governor Randolph's opening speech promoted expansive national power over the states.<sup>171</sup> His earlier view that the general government had exclusive authority over relations with Native Nations seemingly was confirmed in the Virginia delegation's draft plan to give the national legislature authority well beyond that of the current Congress and to legislate wherever the states were "incompetent" or when national legislation was needed to ensure the "harmony of the United States."<sup>172</sup> The national legislature seemed ready to rebuff Georgia's repeated efforts to insist on its own authority over Native Nations. There was to be a national legislative negative, or veto, on all state laws "contravening in the opinion of the National Legislature the articles of Union."<sup>173</sup> Similarly, the states were "bound by oath to support the articles of Union."<sup>174</sup> The national legislature was also to be authorized "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."<sup>175</sup>

In justifying Virginia's plan, Randolph blamed the misguided optimism of the Articles, which resulted in the current instability. As he put it, at that earlier point, "treaties had not been violated."<sup>176</sup> Randolph's repeated concern about the western boundary seemed an overt reference to the recent Hopewell Treaties. These violations established that a different approach was required substantively and linguistically. Indeed, for some delegates, the plan was not sufficiently explicit about state exclusion from treaties. Almost immediately, Benjamin Franklin made sure that the national supremacy included treaties. He proposed that states were bound to support "any Treaties subsisting under the authority of the union."<sup>177</sup> Apparently there was unanimous approval.<sup>178</sup> National treaty supremacy was a foundational principle within the Convention's early consensus.

As the Convention delegates guaranteed national treaty supremacy, a widely reprinted newspaper account described the impending Native

171. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 58, 180–81 (2015) (discussing Randolph's speech notes transmitted to Madison in 1789).

172. 1 DHRC, *supra* note 15, at 244. I am not persuaded by a recent claim that the Virginia Plan was to have included an Indian affairs provision as sent to the Committee of Detail, nor that any such absence reflected the intentional omission of an enumerated power as opposed to the assumption of implied congressional power. See generally Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021).

173. 1 DHRC, *supra* note 15, at 244.

174. *Id.* at 245.

175. *Id.* at 244.

176. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 15 (May 29, 1787).

177. Convention Journal (May 31, 1787), reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]; see also McHenry's Notes (May 31, 1787), reprinted in 1 FARRAND'S RECORDS, *supra*, at 60.

178. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 33 (May 31, 1787) (reflecting a later addition by Madison based on the Convention Journal); see also *id.* at 56 (June 4, 1787) (recounting Franklin reminding delegates of western violence).

Nation's visits to be about compliance with the Hopewell Treaties and the prevention of white encroachment. This account began with the Cherokee Nation chief and ended with the Choctaw and Chickasaw Nations. The purpose was to discuss the Hopewell Treaties with Congress. In between, the account summarized various examples of disputes arising from white encroachment in the western territories. It is useful to reprint the article in full as it appeared in New York and Philadelphia newspapers:

Last evening arrived here, Mr. Alexander Dromgoole, on his way to Congress, with an Indian Chief, one of the Cherokee nation, who will remain in town a few days. We are told that this Chief's business is principally concerning a treaty held at Hopewell, on the Keowee, between the Commissioners of the united states of America, and the head men and warriors of the Cherokee Nation. By this gentleman we are informed, that the Creek nation are encouraged to war against the settlements of Georgia and Cumberland, and it is said that all their towns at this time, are supplied with large quantities of powder and lead, by the Spaniards, for that purpose. It is also said, that the northern Indians are all determined to take up the hatchet this summer, in retaliation for the depredations committed by the Kentucky people in burning their towns last fall. That there have been some French traders at the Muscle Shoals, on the Tennessee river, last winter trading from Detroit, who have been encouraging the Cherokees to go to war, but they pay little attention to their council.

By late accounts from Kentucky it appears, that five persons have lately been killed by the Indians on the north side, among whom were a son and overseer of Gen. Scott's, who were out on a fowling party. That three women were killed in a place called the Rich Valley, near the head of Holston, and many others killed on the waters of Clinch. Several of the Indians have been seen near the great road that leads from Holston to Winchester, which has alarmed the people very much.

By a gentleman from Charlottesville, we are told, that there is a Choctaw Chief, and a Chickesaw, on their way to Congress; they passed through that town about the 20th of May.<sup>179</sup>

Reading between the lines, the actions of settlers in Georgia, Cumberland, North Carolina, and Kentucky, Virginia, were bringing the United States to the brink of great violence. To uphold treaty relationships between the

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179. *Extract of a Letter from Baltimore, dated June 1.*, DAILY ADVERTISER (N.Y.), June 8, 1787; *Baltimore, May 29.*, INDEP. GAZETTEER OR CHRON. OF FREEDOM, June 8, 1787; *Extract of a Letter from a Gentleman in Norfolk, to His Friend in Petersburgh, N.Y.* PACKET, June 8, 1787; *Baltimore, May 29.*, PA. MERCURY & UNIVERSAL ADVERTISER, June 8, 1787; *Baltimore, June 1.*, PA. PACKET & DAILY ADVERTISER, June 8, 1787; *Extract of a Letter from Washington, County, Rhode-Island, Dated May 1787*, INDEP. J. OR GEN. ADVERTISER, June 9, 1787; *From the Baltimore Gazette, of June 4*, N.J.J. & POL. INTELLIGENCER, June 13, 1787. A shorter version appeared elsewhere. *See, e.g., New-York, State. New-York, June 9. Extract of a Letter from Baltimore, Dated June 1*, 2 N.H. SPY, 273, 275 (1787); *Summary of Late Intelligence*, MASS. SPY, June 21, 1787; *New-York, June 8*, U.S. CHRON., June 21, 1787; *Albany, June 14*, VT. GAZETTE, June 25, 1787; *June 8.*, CUMBERLAND GAZETTE, June 28, 1787; *Baltimore, June 1.*, COLUMBIAN HERALD, July 2, 1787. An earlier version appeared in *Frederick-Town, May 30. Extract of a Letter from Winchester, May 26, 1787*, *supra* note 75.

United States and the Native Nations might prevent a European-backed Indian war.

In contrast to this possible violent path was a path of political friendship between Native Nations and the United States. As Sconetoyah neared Philadelphia, another reprinted article cast him as the “Friend of the United States.”<sup>180</sup> In Baltimore, he had been welcomed and showed “an exquisite Sensibility of Mind”:

During his Stay in this Town, tho’ an untutored Son of Nature, he behaved with the Propriety of a civilized Citizen, and deservedly gained the Attention of many respectable Americans and Foreigners, who entertained him with the greatest Hospitality. His Gratitude was manifested, on these Occasions, in a Manner expressive of an exquisite Sensibility of Mind, and he appeared to obey the strong Impulse of lively Gratitude, at the Moment of his Departure, in requesting that “the hearty Thanks of SCONETOYAH, the Friend of the United States,” might be presented, thro’ the Channel of this Paper, “to the generous Inhabitants and great Warriors of Baltimore.”<sup>181</sup>

The newspaper account sought to reassure white readers that coexistence was possible. The Cherokee chief—romanticized as the “untutored Son of Nature”—had behaved “with the Propriety of a civilized Citizen.” The hospitality provided by “many respectable Americans,” as well as the “lively Gratitude” of Sconetoyah, presented an acceptable option for white Americans. The term “friend”—a word signaling both the chain of friendship of treaties and perhaps also alluding to the “firm league of friendship” of the states described in the Articles of Confederation—carried political symbolism.<sup>182</sup>

Inside the Philadelphia Convention, the delegates continued to meet as a Committee of the Whole House and to accept general government authority relating to treaties. In the discussion of the proposed legislative negative, state violations of treaties figured prominently.<sup>183</sup> Georgia’s practice of linguistic caviling under the Articles seemed to motivate further decisions. Its attempt to claim that Native Nations were members of the state of Georgia was blocked by a substituted rule of representation. That rule explicitly excluded “Indians not paying taxes.”<sup>184</sup> Membership in the state thus would be determined by volitional tax paying, not geographical location. Only if Indians chose to pay taxes could the state count them. In brief, the rule barred the states from unilaterally incorporating the members of Native Nations through state legislation. As the Convention approached the completion of

180. *Baltimore, June 12.*, MD. J. & BALT. ADVERTISER, June 12, 1787.

181. *Id.*; *Baltimore, (Maryland) June 12.*, 2 N.H. SPY, 281, 283 (1787); *America. Maryland.*, SALEM MERCURY, June 26, 1787; *New-York, June 18.*, AM. HERALD, July 2, 1787; *From the Maryland Journal, Printed by William Goddard*, VT. GAZETTE, July 2, 1787.

182. 1 DHRC, *supra* note 15, at, 86.

183. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 88 (June 8, 1787) (recounting Pinckney and Madison arguing for a universal negative by emphasizing states’ violation of treaties).

184. *Id.* at 107.



its committee draft, state authority to treat with Native Nations appeared decisively prohibited.

### B. Washington's Handshake

On Tuesday, June 12, Sconetoyah arrived at the Indian King Tavern in Philadelphia, where he and Dromgoole stayed until July 1.<sup>185</sup> The Philadelphia newspapers covered Sconetoyah's movements over the next several days, repeatedly emphasizing his goal to ensure observance of the Treaty against white encroachment.<sup>186</sup> As the *Independent Gazetteer* reported on June 14, Sconetoyah planned to present grievances to Congress and to demand observance of the Hopewell Treaty, "which they say has been violated and infringed by the lawless and unruly whites on the frontiers."<sup>187</sup> The same report added, "We are informed that a Choctaw King, and a Chickasaw Chief, are also on their way to New-York, to have a *Talk* with Congress, and to *brighten the chain* of friendship."<sup>188</sup> This account was reprinted far beyond Philadelphia throughout the month.<sup>189</sup>

The day after Sconetoyah arrived, the Convention heard the completed Report of the Committee of the Whole House.<sup>190</sup> This June 13 report established extensive national powers in Congress and included a negative over state laws that contravened, in Congress's opinion, "any treaties subsisting under the authority of the Union."<sup>191</sup> In addition, the states were barred from claiming Native Nations within their jurisdiction through the exclusion of "Indians not paying taxes in each State" from the ratio of representation.<sup>192</sup> The Convention immediately postponed discussion and adjourned.<sup>193</sup>

185. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 103, at 238 (paying Sidney Paul, proprietor of the Indian King Tavern); *Late 18th Century Philadelphia, Block by Block: Market (or High) Street*, EARLY PHILA., <http://www.philahistory.net/market.html> [https://perma.cc/KUK5-2VFE] (last visited Mar. 16, 2021).

186. See *Philadelphia, June 14.*, *supra* note 149; *Philadelphia, June 15.*, *supra* note 1; *Philadelphia, June 18.*, INDEP. GAZETTEER OR CHRON. OF FREEDOM, June 18, 1787; *Philadelphia, June 20.*, FREEMAN'S J. OR N. AM. INTELLIGENCER, June 20, 1787; *Extract of a Letter from a Gentleman in Rhode-Island, to His Friend in This City, Dated June 7.*, PA. GAZETTE, June 20, 1787.

187. *Philadelphia, June 15.*, *supra* note 1. The New York newspapers followed suit. See *New-York, June 18.*, DAILY ADVERTISER (N.Y.), June 18, 1787; *Philadelphia, June 16.*, INDEP. J. OR GEN. ADVERTISER, June 20, 1787; *Philadelphia, June 14.*, N.Y.J & WEEKLY REG., June 21, 1787.

188. *Philadelphia, June 15.*, *supra* note 1.

189. See, e.g., *New-York, June 19.*, N.Y. PACKET, June 19, 1787; *Philadelphia, June 16.*, *supra* note 187; *Intelligence by Last Mails: Philadelphia, June 15.*, 7 MASS. CENTINEL, 109, 110 (1787); *Philadelphia, June 16.*, AM. HERALD, June 25, 1787; *Philadelphia, June 15.*, AM. MERCURY (Hartford), June 25, 1787; *Philadelphia, June 13.*, WEEKLY MONITOR (Litchfield), June 25, 1787; *Savanna, May 10.*, ESSEX J. & N.H. PACKET, June 27, 1787; *Pennsylvania: Philadelphia, June 15.*, N.H. MERCURY & GEN. ADVERTISER, June 28, 1787.

190. See Convention Journal (June 13, 1787), in 1 FARRAND'S RECORDS, *supra* note 177, at 223, 232–33.

191. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 121.

192. *Id.*

193. See Convention Journal (June 13, 1787), *supra* note 190, at 223.

Following adjournment, the delegates met publicly with Sconetoyah. As the newspaper recounted: “Sconetoyah, a warrior of the Cherokee nation, sent with a letter to Congress by the king of that nation, conducted by Mr. Dromgoole, was introduced to his Excel. Alex. Martin, late Governor of North-Carolina, and a number of the gentlemen members of the Convention.”<sup>194</sup> This emphasis was intended to send a message. The representative of the king of the Cherokee Nation, Sconetoyah, met the former governor of the state that refused to recognize the Cherokee boundaries. In addition to this public meeting with Martin, Sconetoyah met a “number of the gentlemen Members of the Convention.”<sup>195</sup> Here again, the Cherokee Nation’s treaty concerns intertwined with the Convention’s work on a new constitution.

Of even greater significance, Sconetoyah met George Washington at the Pennsylvania State House. Always referred to as “the General,” Washington signified the United States and the Convention of which he was president. The location of the meeting at the State House suggested an official diplomatic event. The discussion took place within the norms of diplomatic courtesy. Thus, Washington expressed concern regarding the health of “the King and all his people.”<sup>196</sup> The newspapers described the meeting in detail and emphasized the handshake between Washington and Sconetoyah:

[He] was from thence conducted to the State-House, where he had the honor of taking his Excellency General Washington by the hand. The General said he was glad to see him, and hoped he left the King and all his people well when he came from home, which he answered and said he did. He also asked him his business to Congress, which he told the General, it was chiefly respecting the white people incroaching on their lands. The general took him by the hand, and bid him farewell; wished him great success in his business, and a safe return to the nation, that he might find all his people well when he returned.<sup>197</sup>

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194. *Philadelphia, June 16.*, PA. PACKET & DAILY ADVERTISER, June 16, 1787 [hereinafter *Packet: Philadelphia, June 16.*]; *Philadelphia, June 18.*, supra note 186; *Extract of a Letter from a Gentleman in Rhode-Island, to His Friend in This City, Dated June 7.*, supra note 186; *Philadelphia, June 14.*, N.Y.J. & PATRIOTIC REG., June 21, 1787; *Philadelphia, June 18.*, DAILY ADVERTISER (N.Y.), June 22, 1787; *Philadelphia, June 18.*, CONN. J., June 27, 1787 [hereinafter *Journal: Philadelphia, June 18.*]; *Philadelphia, June 18.*, 7 MASS. CENTINEL, 113, 114 (1787) [hereinafter *Centinel: Philadelphia June 18.*]; *Philadelphia, June 20.*, POUGHKEEPSIE J., June 27, 1787; *Philadelphia, June 20.*, N.J.J. & POL. INTELLIGENCER, June 27, 1787 [hereinafter *Journal: Philadelphia, June 20.*]; *Philadelphia, (Pennsylvania) June 14.*, 2 N.H. SPY, 285, 286 (1787); *Philadelphia, June 16.*, PROVIDENCE GAZETTE & COUNTRY J., June 30, 1787 [hereinafter *Gazette: Philadelphia, June 16.*]; *From the Maryland Journal, Printed by William Goddard*, supra note 181; *Philadelphia, June 20.*, MASS. GAZETTE, July 3, 1787; *Pennsylvania.*, SALEM MERCURY, July 3, 1787; *Philadelphia, June 20.*, MD. CHRON. OR UNIVERSAL ADVERTISER, July 4, 1787 [hereinafter *Chronicle: Philadelphia, June 20.*]; *Philadelphia, June 20.*, NEWPORT HERALD, July 5, 1787 [hereinafter *Herald: Philadelphia, June 20.*]; *Summary of Late Intelligence*, MASS. SPY, July 5, 1787; *Philadelphia, July 11.*, COLUMBIAN HERALD, July 23, 1787.

195. See *Philadelphia, June 18.*, supra note 186.

196. *Id.*; *Packet: Philadelphia, June 16.*, supra note 194.

197. *Packet: Philadelphia, June 16.*, supra note 194.

Washington shook hands—a pledge of faith—once in greeting and once in parting. The newspaper described Sconetoyah instigating the first handshake and Washington instigating the second. The meeting thus appeared to be the diplomatic meeting of representatives of two sovereign nations.<sup>198</sup>

The two men carried on a public conversation about the fundamental problem of white encroachment. As the newspapers described, the primary business concerned “white people incroaching on their lands.”<sup>199</sup> Indeed, in asking that Sconetoyah state his “business to Congress,” Washington provided an opportunity for a public presentation. Sconetoyah’s response emphasized the Cherokee Nation’s insistence on retaining “their land.”<sup>200</sup> The problem was therefore simple: “white people incroaching.”<sup>201</sup> In response, not only did Washington shake Sconetoyah’s hand, but he “wished him great success in his business”—suggesting approval of his mission.<sup>202</sup> Indeed, Washington’s wishes for a “safe return” and to “find all his people well” may have been gesturing at the white racial violence against the Cherokee that spring.<sup>203</sup> The performance of the handshake between Sconetoyah and Washington appeared to be a confirmation of the Hopewell Treaty’s promises to respect Native Nation land.

This dramatic public meeting constituted only the most public of the meetings between Sconetoyah and Convention members and congressional delegates. The newspaper noted, “Since he arrived in this city, there has been every mark of friendship shewn to him, and he has frequently had the honor to dine with several of the Members of Congress and Convention.”<sup>204</sup> Another key meeting occurred between Sconetoyah and Virginia governor Edmund Randolph. According to Randolph, the “Cherokee chief” came with an interpreter to meet him.<sup>205</sup> Either the chief or the interpreter “urged” Randolph to “send a talk and a present.”<sup>206</sup> With his usual fretfulness over the boundaries of his authority, Randolph explained that he “could not refuse.”<sup>207</sup> He sent a silver pipe “with some symbols of Virginia and Cherokee friendship.”<sup>208</sup> Patronizingly, Randolph described the pipe as “an ornament to the townhouse of the Indians” and a medal to “conciliate the chief.”<sup>209</sup> In addition, Randolph apparently sent back talks.<sup>210</sup> Presumably,

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198. See sources cited *supra* note 196; see also John Ray, *George Washington’s Pre-presidential Statesmanship, 1783–1789*, 27 *PRESIDENTIAL STUD. Q.* 207, 207–18 (1997).

199. See sources cited *supra* note 196.

200. See sources cited *supra* note 196.

201. See sources cited *supra* note 196.

202. See sources cited *supra* note 196.

203. See sources cited *supra* note 196.

204. See sources cited *supra* note 196.

205. Letter from Edmund Randolph to Beverly Randolph (July 12, 1787), reprinted in *A SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 165 (James H. Hutson, ed. 1987).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. See *id.*

Randolph sought to reassure the Cherokee Nation that his state would respect the Hopewell Treaty.

In some newspaper accounts of Washington's handshake and the conversation, the report appeared in sections discussing the Convention.<sup>211</sup> Considerable reprinting occurred over the summer.<sup>212</sup> On September 8, 1787, even the *Georgia Gazette* published the handshake account underneath a notice that the Convention was nearing completion of its work.<sup>213</sup> Although Sconetoyah never set foot inside the Convention, his visit was interwoven with the work of the Convention.

### C. Compelling Observance of Treaties

In the immediate wake of the handshake, the New Jersey delegates drafted an alternative plan to the Committee Report.<sup>214</sup> The New Jersey Plan proposed a model more closely aligned with specific problems arising under the Articles. Yet as with the Virginia Plan, the New Jersey Plan guaranteed the general government's authority with respect to Native Nations. Acts of the United States in Congress made in the past (under the Articles) and future were "supreme law of the respective States."<sup>215</sup> The New Jersey Plan incorporated the concern that treaty authority be affirmed and made explicit: "all Treaties made & ratified under the authority" of the United States were supreme law.<sup>216</sup> Congress was given broad power to "pass Acts for the regulation of trade & commerce as well with foreign nations as with each other."<sup>217</sup> And importantly, the federal judiciary was given jurisdiction in cases "in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade."<sup>218</sup> This approach shifted disputes over treaties and trade to the federal judiciary. By specifying a federal judicial arbiter, the New Jersey Plan sought to bar North Carolina and Georgia from judging their own authority.

Strikingly, the New Jersey Plan authorized national enforcement to stop white encroachment. Article 6 addressed situations where a state "or any body of men in any State" opposed or prevented "carrying into execution" acts or treaties.<sup>219</sup> In such a situation, the "federal Executive" was authorized to "call forth the power of the Confederated States."<sup>220</sup> The aim was to "enforce and compel an obedience to such Acts, or an Observance of such

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211. See, e.g., *Summary of Late Intelligence*, *supra* note 194; *Centinel: Philadelphia, June 18.*, *supra* note 194; *Herald: Philadelphia, June 20.*, *supra* note 194; *Gazette: Philadelphia, June 16.*, *supra* note 194.

212. See *supra* note 196.

213. *Philadelphia, July 28.*, GA. ST. GAZETTE OR INDEP. REG., Sept. 8, 1787.

214. The New Jersey Amendments to the Articles of Confederation (June 15, 1787), in 1 DHRC, *supra* note 15, at 250.

215. *Id.* at 252–53 (article 6).

216. *Id.* (article 6).

217. *Id.* at 251 (article 2).

218. *Id.* at 252 (article 5).

219. *Id.* (article 6).

220. *Id.* at 253 (article 6).

Treaties.”<sup>221</sup> Observance of treaties was to be compelled through a new enforcement mechanism.<sup>222</sup>

The delegates instantly grasped this difference regarding enforcement between the two plans. As New York delegate Robert Yates noted, the New Jersey Plan gave “power to the executive to compel obedience by force,” as opposed to merely negating a state law.<sup>223</sup> Massachusetts delegate Rufus King’s summary made the use of force almost a duty when faced with treaty opposition, stating, “The Acts Treaties &c &c to be paramount to State Laws and when any State or body of men opposed Treaties or general Laws, the Executive to call forth the force of the Union to enforce the Treaty or Law.”<sup>224</sup> James Wilson described the provision as “[t]he Right to call out the force of the Union.”<sup>225</sup> As Rufus King’s summary underscored, compelled observance extended to any “body of men”—a phrase that likely brought to mind settlements such as the State of Franklin.<sup>226</sup> Moreover, the New Jersey Plan removed the decision about the use of compelled force from Congress. The executive became the decision maker over treaty enforcement. In the context of the demands of the Native Nations that the Hopewell Treaties be honored and white encroachment ended, the New Jersey Plan suggested willingness to use the general government’s military power on the side of Native Nations and against white settlers if necessary. As North Carolina governor Alexander Martin had recognized earlier that spring with respect to the Franklin settlers, “nothing will Remove them but an armed Force.”<sup>227</sup>

Alexander Hamilton’s lengthy speech on Monday, June 18 echoed the robust treaty-focused stance of the New Jersey Plan. The executive and the Senate would have the “power of making all treaties,” Hamilton declared, and they would control the departments on war and foreign affairs, as well as nominate ambassadors to foreign nations.<sup>228</sup> Contrary state laws were to be “utterly void” and state governors would be appointed by the “general Government.”<sup>229</sup> Similarly, state militias were to be controlled by the general government, with their officers also appointed by the general government.<sup>230</sup> In short, Hamilton recommended an approach similar to that of the British government.

It is likely that even as Hamilton gave his speech, Tobocah, the Queen, and Muckleshamingo arrived in Philadelphia. Along with Dromgoole, they

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221. *Id.* (article 6).

222. *Id.* at 252–53 (article 6).

223. Yates Notes (June 16, 1787), *reprinted in* 1 FARRAND’S RECORDS, *supra* note 177, at 257, 260.

224. Yates Notes (June 15, 1787), *reprinted in* 1 FARRAND’S RECORDS, *supra* note 177, at 246, 247.

225. Yates Notes (June 16, 1787), *supra* note 223, at 265.

226. *See* Yates Notes (June 15, 1787), *supra* note 224, at 247.

227. Letter from Joseph Martin to Edmund Randolph, *supra* note 129, at 261.

228. Madison Notes (June 18, 1787), *reprinted in* 1 FARRAND’S RECORDS, *supra* note 177, at 282, 292 (recounting Hamilton’s speech).

229. *Id.* at 293.

230. *Id.*

stayed at the Cross Keys Inn until July 5.<sup>231</sup> They too intended to ensure an end to white encroachment. As the newspapers noted, they had been “appointed to see the articles of the treaty made at Hopewell Seneca, in the state of South Carolina, by the representatives of their nations and the commissioners of the United States, ratified and made good.”<sup>232</sup> Immediately upon their arrival, they wrote Benjamin Franklin requesting his assistance and “Directions to proceed to their Business.”<sup>233</sup>

Inside the Convention, James Madison seemed to reference the presence of four members of Native Nations the very next day. On June 19, Madison gave the only speech that scholars identify as explicitly referring to the “Indians,” in the course of his argument seeking approval of the Committee’s Report.<sup>234</sup> Worried perhaps that the New Jersey and Hamilton plans might create the impression that the Committee Report was sympathetic to white encroachment, Madison firmly condemned “encroachments on the federal authority.”<sup>235</sup> His use of the word “encroachments” cleverly connoted jurisdictional violations of the general government’s authority in any number of cases, while also hinting at the specific instance of physical encroachments of Native Nation territory protected under the general government’s treaty authority. Madison more explicitly referenced exclusive congressional authority over matters relating to Native Nations. He stated, “By the federal articles, transactions with the Indians appertain to Congs.”<sup>236</sup> Even without expansion of congressional jurisdiction, Madison insisted that Congress controlled under the existing Articles.<sup>237</sup> In brief, Congress had full and complete authority in relations with Native Nations.

Madison condemned state violations of treaties and singled out Georgia. As he explained, “Yet in several instances, the States have entered into treaties & wars with them.”<sup>238</sup> Robert Yates recalled Madison’s statement of the problem more dramatically. He said that the “confederated states” had

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231. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 102, at 240 (paying Israel Israel, proprietor of the Cross Keys Inn); see also Robert Earle Graham, *The Taverns of Colonial Philadelphia*, 43 TRANSACTIONS AM. PHIL. SOC’Y 318, 324 (1953).

232. *Philadelphia, June 19.*, *supra* note 98; *American Intelligence: Philadelphia, June 20.*, INDEP. GAZETTEER OR CHRON. OF FREEDOM, June 20, 1787; *American Intelligence: Philadelphia, June 20.*, PA. HERALD & GEN. ADVERTISER, June 20, 1787; *Philadelphia, June 20.*, *supra* note 186; *Philadelphia, June 22.*, PA. MERCURY & UNIVERSAL ADVERTISER, June 22, 1787; *Philadelphia, June 20.*, INDEP. J. OR GEN. ADVERTISER, June 23, 1787; *Philadelphia, June 23.*, CARLISLE GAZETTE & W. REPOSITORY OF KNOWLEDGE, June 27, 1787; *Journal: Philadelphia, June 18.*, *supra* note 194; *Philadelphia, June 20.*, MASS. GAZETTE, June 29, 1787; *Gazette: Philadelphia, June 16.*, *supra* note 194; *Journal: Philadelphia, June 20.*, *supra* note 194; *Chronicle: Philadelphia, June 20.*, *supra* note 194 (with Sconetoyah paragraph); *Philadelphia, July 11.*, *supra* note 194 (with Sconetoyah paragraph).

233. Letter from Tobocah, Choctaw Chief & a Chickasaw Captain to Benjamin Franklin, *supra* note 110.

234. Madison Notes (June 19, 1787), *reprinted in* 1 FARRAND’S RECORDS, *supra* note 177, at 312, 316 (Madison’s speech).

235. *Id.*

236. *Id.*

237. *Id.* at 314–15.

238. *Id.* at 316 & n.7 (noting that “in question Georgia” was crossed out).

“power” (meaning capacity) “to violate treaties.”<sup>239</sup> Yates recollected, “Has not Georgia, in direct violation of the confederation made war with the Indians, and concluded treaties?”<sup>240</sup> According to King, Madison had forcefully denounced Georgia’s illegitimate interpretation that “Georgia has declared & prosecuted a war agt. the Indians—they have treated with them.”<sup>241</sup> The word “treated” was the verb to form a treaty—and Madison left no doubt that Georgia’s actions in treating and declaring war were illegitimate under the Articles. The Committee Report only reinforced that exclusion.

Cleverly, Madison then played on fears that white settlers’ encroachment would lead to an Indian war. He warned about a future in which the Franklin or Kentucky settlers achieved statehood. If the New Jersey Plan were adopted, the “prospect of many new States to the Westward”—each with an equal vote—would create “a more objectionable minority than ever might give law to the whole.”<sup>242</sup> Allowed to create a state “minority” voting bloc, white settlers in western territories would bring the nation to the brink of war with Native Nations.<sup>243</sup>

Beyond establishing that every plan affirmed exclusive general government treaty authority, the visits by the Native Nations deputies apparently focused Madison’s thinking about the United States as a confederation. They suggested that if the United States breached the Hopewell Treaties and failed to repair the relationship, then Native Nations would turn to Spain. Madison’s June 19 speech noted that, according to the “Expositors of the law of Nations,” a breach of any one article by a part leaves people to consider it “dissolved”—that is, “unless they choose rather to compel the delinquent party to repair the breach.”<sup>244</sup> From this principle, Madison drew the further conclusion that the United States should not be analogized to a confederation.<sup>245</sup> If the states imagined themselves as sovereign, then they too could threaten to align with Spain. (One wonders if Madison had heard rumors to that effect.) With the conclusion of Madison’s speech, the delegates voted on the Committee Report. Although New Jersey, Delaware, and New York dissented, the other delegations voted in favor.<sup>246</sup>

#### *D. The Friendship and Justice of the United States*

While the Convention completed these deliberations, three significant political figures in Indian affairs left New York for Philadelphia. Secretary

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239. *Id.* at 326 (recounting Yates’s speech).

240. *Id.*

241. *Id.* at 330 (recounting King’s speech).

242. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 162 (June 19, 1787).

243. *See id.* As the delegates went on to consider the first resolution, King declared that the states were not sovereigns and could not make treaties. *See id.* at 163.

244. *Id.* at 153 (continuing to discuss treaties).

245. *See id.*

246. Madison Notes (June 19, 1787), *supra* note 234, at 322 (noting that Maryland was divided).

at War Henry Knox arrived around June 14 or 15 and left around June 30.<sup>247</sup> North Carolina representative William Blount took his seat at the Convention on June 20.<sup>248</sup> And, accompanying Blount was his fellow North Carolina congressional delegate and Hopewell Treaties commissioner Benjamin Hawkins.<sup>249</sup> Although Hawkins initially intended to continue south after reaching Philadelphia, by early July, he and Blount returned to New York to give Congress an unanticipated quorum. The Native Nations' presence in Philadelphia raised concerns with the Spanish envoy, Diego de Gardoqui. By June 22, he was relaying this information to relevant Spanish officials in Louisiana and, before the Convention adjourned, he would himself journey to Philadelphia.<sup>250</sup>

For the two North Carolina representatives, the deputies' visits confirmed the problem of treaty infractions by whites. According to Blount, the Cherokee Nation deputy "complained loudly against the infractions of the Treaty at Hopewell in as much as that the whites had settled with in a few miles of their towns and within that part assigned them by the State of N.Ca."<sup>251</sup> Blount added, "I could wish the whites had for born their settlements on that part."<sup>252</sup> For Hawkins, the white encroachments betrayed the Hopewell Treaty. Hawkins explained to Jefferson that the Treaties showed "how attentive I have been to the rights of these people" and that there was "nothing I have more at heart than the preservation of them."<sup>253</sup>

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247. See Letter from William Knox to Henry Knox (June 14, 1787) (available at the Gilder Lehrman Institute of American History); Letter from William Knox to Henry Knox (June 28, 1787) (available at the Gilder Lehrman Institute of American History) (discussing Henry Knox's travel plans to and from New York).

248. See 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 166 (June 20, 1787).

249. Letter from William Blount to Richard Caswell (July 19, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 362 (Paul H. Smith ed., 1996).

250. See ALCÉE FORTIER, 2 THE SPANISH DOMINATION AND THE CESSION TO THE UNITED STATES 126–27 (1904); Letter from Esteban Miró to José Manuel de Ezpeleta (Apr. 1, 1788) (available at the Mississippi Department of Archives & History) (enclosing Letter from Henry Knox, to Chamby, *supra* note 109)); Letter from Henry Knox to James White (June 28, 1787), as translated in Letter from Esteban Miró to José Manuel de Ezpeleta, *supra*; Benjamin Franklin, Talk to the Old Chief (June 30, 1787) (available at the Library of Congress), as translated in Letter from Esteban Miró to José Manuel de Ezpeleta, *supra*; see also Letter from Diego de Gardoqui to Esteban Miró (June 22, 1787) (available at the Archivo General de Indias); Letter from Diego de Gardoqui to Arturo O'Neill (June 22, 1787) (available at the Archivo General de Indias). Miró states that Chamby and "Payé Mingo" said "the warriors who had met the Americans had done it of their own accord, and they had not been authorized by the nation," that Franchimastabé also upbraided the two, and that they were all willing to "pledge their allegiance to Spain" but that nevertheless "from my knowledge of the Indians, I fear they will do as these have done, for there is no obedience or subordination to be had among them." Letter from Esteban Miró to José Manuel de Ezpeleta, *supra*.

251. Letter from William Blount to Richard Caswell, *supra* note 249 (describing visits).

252. *Id.*

253. Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 640, 641. Deeply interested in Indian languages, Hawkins had been able to communicate in the Cherokee and Choctaw languages and he noted that the Chickasaw language was "radically the same." *Id.* at 640. In Philadelphia, he may have spoken with the visitors. See Letter from Benjamin Hawkins to Thomas Jefferson (June 9, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 413.



Once in Philadelphia, Henry Knox, representing Congress as the secretary at war, met with the Native Nations deputies. The nature and timing of his meetings are not known. In their wake, however, Knox composed formal letters to the kings of the Chickasaw and Choctaw Nations on Wednesday, June 27.<sup>254</sup> Each letter began acknowledging receipt of the talk sent to Congress and apologized that the “great Council of the United States” was not then assembled.<sup>255</sup> Knox promised, however, once they did assemble, he would submit the talks and obtain an answer.<sup>256</sup>

In his official capacity, Knox pledged the United States to the Treaty relationships. He formally sent “A Message from the Secretary at War of the United States . . . in answer to his Message to Congress.”<sup>257</sup> And he carefully constructed the letters to demonstrate the equality between the United States and the Nations; he repeatedly used the words “brother” and “Nation.”<sup>258</sup> To the Chickasaw Nation, Knox wrote, “Let your Nation keep the Chain of friendship fast with the right hand.”<sup>259</sup> They could “depend” that John White as superintendent would “hold fast” the other end “on the part of the United States.”<sup>260</sup> Knox promised that White would “take care that all the Boundaries are preserved agreeably to the Treaties.”<sup>261</sup> Indeed, Congress will “embrace every occasion to convince you how sincerely disposed they are to preserve all treaties that have or shall be made with you.”<sup>262</sup> To the Choctaw Nation, Knox noted that they could “depend on the friendship of the United States.”<sup>263</sup> The pledges were official commitments.<sup>264</sup>

Knox promised U.S. medals and gifts as evidence. Medals had become a visible pledge of allegiance, so much so that the Spanish governor in New Orleans had threatened to stop trade unless the Native Nations that “wear British medals” exchanged them for Spanish medals.<sup>265</sup> Knox planned to send “great & small Medals” for their “great Warriors” and “great men of your Nation” and also “Colour”—flags—for the towns.<sup>266</sup> The gifts were “evidence of the friendship of the United States” and the nation’s “good disposition.”<sup>267</sup>

A similar message was conveyed by Benjamin Franklin, the most important American in Philadelphia other than Washington, when Franklin

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254. Letter from Henry Knox to Chamby, *supra* note 109; Letter from Henry Knox to Frenchmastubié, *supra* note 81.

255. See sources cited *supra* note 254.

256. See sources cited *supra* note 254.

257. See sources cited *supra* note 254.

258. See sources cited *supra* note 254.

259. See sources cited *supra* note 254.

260. See sources cited *supra* note 254.

261. See sources cited *supra* note 254.

262. See sources cited *supra* note 254.

263. Letter from Henry Knox to Frenchmastubié, *supra* note 81.

264. *Id.* Knox wrote to White apparently emphasizing the need to respond to complaints about trade. See Letter from Henry Knox to James White, *supra* note 250.

265. Letter from W. Davenport to John Sevier (July 28, 1786) (available at the Hargrett Rare Book and Manuscript Library, University of Georgia).

266. See sources cited *supra* note 254.

267. See sources cited *supra* note 254.

met with the deputies. As the Choctaw Nation resided “far asunder,” Franklin said, he had never had “the Pleasure before to see a Man of your Nation.”<sup>268</sup> Confirming Knox’s message that Congress was not meeting, Franklin promised that as Tobocah had not been able to do his “Business there,” Congress in the future would take “your Nation into Consideration” and give “Satisfaction[,] Brother”<sup>269</sup> He gave Tobocah a personal letter with a pledge of protection because “Mr. Woods and the Indians under his Care” had come “from far distant and friendly Nations on public Business.”<sup>270</sup> And he ordered gifts from Pennsylvania, including a gorget with the Pennsylvania arms and calico for the Queen.<sup>271</sup> His repetition of “Nations” and “Brother” underscored Native Nation sovereignty.

With these assurances, Knox and Franklin induced Tobocah and Muckleshamingo to return home. The pledges of the Treaty relationship were intended to persuade the deputies to bypass New York. To this end, Knox agreed to have the United States cover the expenses of the return journey.<sup>272</sup> And Knox attempted to prevent future unexpected visits by encouraging them to deal with the superintendent, thereby avoiding “the trouble of sending any of your own people to so great a Distance.”<sup>273</sup>

Sconetoyah, however, remained unhappy. Franklin sought to reassure him that justice would be done. As Franklin noted, however, Sconetoyah was “going back, apparently dissatisfied, that our General Government is not just now in a Situation to render them Justice.”<sup>274</sup> Franklin added that the discontent would “tend to increase Ill Humor in that Nation.”<sup>275</sup> Sconetoyah also may have met with Knox because Knox requested the purchase of a horse for “the Cherokee Chief.”<sup>276</sup> In addition to or in lieu of such a meeting, Franklin met Sconetoyah and drafted letters hastening to reassure that “Justice will be done to your Nation.”<sup>277</sup> Franklin grasped that the fundamental issue was that “the white People encroach on your Lands, contrary to Treaty.”<sup>278</sup> Franklin “assured” Old Tassel that, when Congress convened in a few months, the Native Nations’ complaints would be addressed. As a token of his pledge, Franklin sent a silver medal.<sup>279</sup>

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268. Franklin, *supra* note 250.

269. *Id.*

270. *Id.*

271. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 103, at 229.

272. See Report of the Board of Treasury (July 18, 1787), reprinted in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 353, 353–54.

273. Letter from Henry Knox to Chamby, *supra* note 109.

274. Letter from Benjamin Franklin to John Sevier (June 30, 1787) (available at the Library of Congress).

275. *Id.*

276. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 103, at 232. Knox referenced the 1787 visits in 1789, but he did not do the same for the Cherokee. Letter from Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 143.

277. Letter from Benjamin Franklin to The Cornstalk, Cherokee Indian Chief (June 30, 1787) (available at the Library of Congress).

278. *Id.*

279. *Id.*

Separately, Franklin wrote to “the Cherokee Indian Queen.” Referring to Katteuha as “Sister,” he praised her letter to Congress as evidence of her “Prudence and Wisdom, and your Love of Peace.”<sup>280</sup> Franklin promised that once Congress met, “Justice will be done.”<sup>281</sup> Signing himself “Your loving Brother,” Franklin gave Sconetoyah a medal and sent a picture of himself in silver for Katteuha.<sup>282</sup>

Although unauthorized white encroachment threatened an Indian war and Congress was obliged and committed to uphold the Treaty relationship, Franklin thought there was a path forward for future white settlement. He immediately wrote to John Sevier suggesting that he avoid “an Indian War by preventing encroachments on their Lands.”<sup>283</sup> Instead, Franklin recommended purchasing land as “these People” usually gave “very good Bargains.”<sup>284</sup> A war would result in larger losses than if white settlers were to fairly buy lands that the Cherokee could “spare.”<sup>285</sup> Franklin warned Sevier: “It may be well however to acquaint those Encroachers that the Congress will not justifie them in the Breach of a solemn Treaty.”<sup>286</sup> Indeed, the general government would not support the settlers if they brought a war “upon themselves.”<sup>287</sup> Congress would uphold the Treaties.

Reassured by Knox and Franklin that Congress would do justice and would uphold the Treaty relationship, as well as stop white encroachment, the four deputies left Philadelphia: Sconetonayah on July 1 or 2 and the others around July 5.<sup>288</sup> The United States covered the cost of transportation to Fort Pitt for Tobocah, the Queen, and Muckleshamingo.<sup>289</sup> From Fort Pitt, possibly by flatboat, the delegation turned toward home. Sconetoyah returned to Chota in early September.<sup>290</sup> Old Tassel and Hanging Maw received the medals and silver gorgets; Katteuha, the Beloved Woman, received Franklin’s picture in silver, a silver hairplate and ear bobs.<sup>291</sup> Randolph’s silver pipe was smoked—and apparently enjoyed most of all.<sup>292</sup> The U.S.

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280. Letter from Benjamin Franklin to the Cherokee Indian Queen, *supra* note 150.

281. *Id.*

282. *Id.*

283. Letter from Benjamin Franklin to John Sevier, *supra* note 274.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. See 15 COLONIAL RECORDS OF PENNSYLVANIA, *supra* note 103, at 238 (reporting an order “drawn in favor of Sidney Paul”).

289. *Id.* at 277 (listing 114 pounds, seven shillings, and nine pence); Letter from Richard Butler to Henry Knox (Aug. 26, 1787) (available at the National Archives); Letter from Carlos de Grand-Pré to Esteban Miró, *supra* note 102.

290. Letter from Cherokee Indian Women to Benjamin Franklin (Sept. 7, 1787), in 11 PENNSYLVANIA ARCHIVES 181 (Samuel Hazard et al. eds., Phila., Joseph Severns & Co. 1855).

291. *Id.*

292. Abraham of Chilhawa and Allekieskee, Chief of the Chickamauga, sent talks to Randolph, noting that they had smoked the pipe. See Letter from Abraham of Chilhawah to Edmund Randolph (Sept. 15, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 342.

flag now flew in the Cherokee Nation.<sup>293</sup> Kattuha sent back to Franklin a talk and tobacco, hoping that “you & your Beloved men will smoke it in Friendship.”<sup>294</sup> She asked that her talk be placed on the “white stool in Congress” and that a “beloved woman amongst you . . . will help to put her Children Right if they do wrong.”<sup>295</sup> She hoped that messengers “shall go & come in safety Between us.”<sup>296</sup>

#### IV. THE CHAIN OF FRIENDSHIP

The departure of the deputies created a space in which three striking developments occurred. First, Congress met and passed the Northwest Ordinance. Second, Secretary at War Henry Knox prepared a report on the Native Nations establishing the beginning of the Indian affairs policy that characterized the Washington administration. Third, the Convention passed the Supremacy Clause, thereby avoiding a debate over control by a negative or military force. Only in the final weeks did concerns about possible linguistic caviling result in the additional inclusion of the so-called Indian Commerce Clause. I sketch here how each of these developments resulted from the visits.

##### A. Congress

Although Knox and Franklin informed the Native Nations deputies that Congress was not meeting, shortly thereafter, Congress reconvened. Its main piece of business was the passage of the Northwest Ordinance.<sup>297</sup> Was it coincidence that Congress—hitherto assumed to have adjourned until after the Convention—hurried back in session? Despite what Knox told the Native Nations deputies, he was an investor in the Ohio Company and may have been an instigator of the new quorum. Was the quorum driven by southern representatives like Blount, who had investment interests in plans for white settled southern territories? In any event, key Convention delegates raced to New York. Georgia and North Carolina delegates Blount, William Few, and William Pierce also traveled back after July 2.<sup>298</sup> Hawkins similarly turned around, abandoning his plans to return to North Carolina.<sup>299</sup> And Knox also returned to New York.<sup>300</sup> On July 9, Congress achieved a

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293. Letter from Alexander Dromgoole to Edmund Randolph (Sept. 15, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS, *supra* note 76, at 341.

294. Letter from Cherokee Indian Woman to Benjamin Franklin, *supra* note 290.

295. *Id.*

296. *Id.*

297. See Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225, 245–46 (1966) (arguing for a causal relationship between the three-fifths compromise and the ordinance); see also VAN CLEVE, *supra* note 158, at 154–58 (arguing for a causal relationship between the Spanish treaty negotiations and the ordinance).

298. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 303 (reflecting that Few and Hawkins arrived and including Pierce’s committee reports); *id.* at 310 (Congress assembled); Lynd, *supra* note 297, at 227, 233, 245.

299. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 303.

300. See Letter from William Knox to Henry Knox, *supra* note 247.

quorum when Richard Henry Lee of Virginia presented his credentials after having spent approximately a week in Philadelphia.<sup>301</sup>

Reconsidering the Northwest Ordinance's passage in light of the visit of the four deputies and the desire of Knox and others to stop them from reaching Congress, the passage may now be seen in a far more troubling light. Had the southern Native Nations arrived in New York in early July, the ordinance would have been entangled in explicit claims of the Treaties' violations and white encroachment. The idea of creating a blueprint for temporary government of the western territories would have been in obvious conflict with the underlying and inevitable expropriation of land. Moreover, warriors from the Oneida Nation were already in New York; indeed, Knox had been paying for their lodging and board.<sup>302</sup> They complained about the disorganization of the "indian department" and expressed their disagreement over personnel.<sup>303</sup> The southern deputies would have overlapped with the Oneida warriors. New York then probably would have become a meeting place for furthering a Native Nation Confederation, encompassing northern and southern Nations. For Knox, concerned personally with the Ohio Company and professionally with avoiding an Indian war, preventing such a meeting may have seemed of critical importance.

In early July, the proposed western ordinance offered a blueprint for occupation of territories.<sup>304</sup> In it there were two references to Native Nations. The first explicitly mentioned the extinguishment of Indian title. The territorial governor was given authority to "make proper division . . . [and] lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships."<sup>305</sup> The second longer section embraced the treaty relationship, insisting on good faith and friendship toward Native Nations.<sup>306</sup> It recognized "their lands and property" and required "their consent" for land and property transfers:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>307</sup>

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301. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 310.

302. Report of the Secretary at War (July 16, 1787), 32 JOURNALS OF THE CONTINENTAL CONGRESS, at 347, 348; see David J. Lehman, *The End of the Iroquois Mystique: The Oneida Land Cession Treaties of the 1780s*, 47 WM. & MARY Q. 523, 523 (1990).

303. Report of the Secretary at War, *supra* note 302, at 348.

304. An Ordinance for the Government of the Territory of the United States North West of the River Ohio (July 13, 1787), *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 334.

305. *Id.* at 337.

306. *Id.* at 340–41.

307. *Id.*

Yet, nowhere in this document was there incorporation of the explicit boundaries of Native Nations, as agreed to under treaties. That is, the Indians' *land* was something seemingly ephemeral and contingent; indeed, in place of guaranteeing established boundaries, the ordinance delineated legal modes of dispossession. Conversely, the ordinance explicitly provided a path for white settlement. With 5000 "free male inhabitants," a territory acquired a legislature.<sup>308</sup> Property ownership and a short two-year residency afforded voting rights.<sup>309</sup> The legislature was authorized to send a "[d]elegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary Government."<sup>310</sup> On reaching 60,000 free inhabitants, the temporary government became a state admitted on "equal footing with the original States."<sup>311</sup> Significantly, the ordinance explicitly drew the boundaries of the states—noting that they were unalterable once Virginia completed its cession of territory.<sup>312</sup> Despite recognizing Indian title and lands, the ordinance predicted the rise of future states and rendered invisible Native Nations.<sup>313</sup>

The speed with which the ordinance passed, and the addition of the antislavery clause, with southerners suddenly "favorably disposed," has long intrigued historians.<sup>314</sup> On July 9, the report on the ordinance—postponed since May 10—moved forward.<sup>315</sup> A revision limited the application of the ordinance to the *northwest* section of the territory above the Ohio River.<sup>316</sup> With the change, the ordinance suddenly only addressed the northern section, divided in the same manner as the recent superintendency of Indian affairs. The third reading occurred on July 12, and the next day, Congress approved what became known as the Northwest Ordinance.<sup>317</sup> In the final version on July 13, the ordinance included a new article barring slavery, yet nonetheless requiring the return of enslaved fugitives.<sup>318</sup> New Yorker Abraham Yates was the sole dissenting vote.<sup>319</sup> As prior historians have suggested, Yates

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308. *Id.* at 337.

309. *Id.* at 337–38.

310. *Id.* at 339.

311. *Id.*

312. *Id.* at 342.

313. *Id.* at 334–43.

314. Lynd, *supra* note 297, at 246 n.78 (quoting Letter from Nathan Dane to Rufus King (July 16, 1787), reprinted in 24 LETTERS OF DELEGATES TO CONGRESS, *supra* note 249, at 357, 358).

315. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 310 n.3.

316. *Id.* at 313; see ROBERT ALEXANDER, THE NORTHWEST ORDINANCE: CONSTITUTIONAL POLITICS AND THE THEFT OF NATIVE LAND 88–89 (2017); Staughton Lynd, *Foreword to THE NORTHWEST ORDINANCE: CONSTITUTIONAL POLITICS AND THE THEFT OF NATIVE LAND*, *supra*, at 1. See generally Jack N. Rakove, *Ambiguous Achievement: The Northwest Ordinance*, in THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY, *supra* note 66, at 1.

317. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 334.

318. *Id.* at 343 (article 6 of the ordinance).

319. *Id.* (showing Yates calling for the yeas and nays).

may have written anonymous articles “opposing the expropriation of Indian land” and his dissent could have arisen from this concern.<sup>320</sup>

It was largely white territorial expropriation that motivated the Northwest Ordinance. That an antislavery provision emerged may have been something of an ironic fortuity or a silent bargain to temper the concerns of any antislavery advocates also worried about Native Nation expropriation. For northerners with investments in the Ohio Company, the Northwest Ordinance suggested that Congress would not oppose white settlement and would ignore requests by northern Native Nations to halt surveys. For southerners hoping to invest in or to occupy the western claims of Virginia, North Carolina, and Georgia, the Northwest Ordinance seemed to offer a guarantee that, if the states completed cession of the territories, white settlement could continue.

At the end of the month, Edward Carrington, a Virginia congressional delegate, linked the new northwestern territorial plan to the apparent growing Indian Confederacy, as part of a policy of treaties in the face of possible war. After describing the new scheme for the western territory, Carrington explained that “Indian affairs wear an hostile aspect” and warned that a “general confederacy” was being formed.<sup>321</sup> As a lot of money would be required for a war, Carrington argued, it would be “better to spend a little money in Treating.”<sup>322</sup> Turning to hostilities in Kentucky, Carrington again suggested proceeding by treaty.<sup>323</sup> As he noted, “[t]he state of the general confederacy requires some care in the direction of this business.”<sup>324</sup> The rise of a united Indian Confederacy forced on the United States a choice: treaties under which white settlement would be based on purchase or an Indian war.<sup>325</sup>

### B. Secretary at War Report

With the ordinance’s passage achieved, Knox contemplated the repercussions of the Native Nations visits. The expenses of the visits, and more broadly the power that the deputies had wielded by appearing in person, focused his concerns. In addition, Knox worried about the continued effort by Georgia and North Carolina to claim authority over Native Nations and to encourage white settlement in lands protected by the Hopewell Treaties. First Knox sought the departure of the Oneida warriors; as he put it in his report, “it is the wisest mode to dismiss these people in a civil manner as soon

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320. ALEXANDER, *supra* note 316, at 128, 138–47 (arguing that Yates was *Cato*, the New York essayist who, in late 1786, argued that the ordinance was not legal because of Native Nation possessions).

321. Letter from Edward Carrington to James Madison (July 25, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 10, at 113.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

as possible.”<sup>326</sup> Agreeing to send powder, lead, and paper, Knox planned to “return them immediately to their own country.”<sup>327</sup>

With respect to the Philadelphia visits, Knox worked quickly to achieve approval of expenses, operating as if the “Indian chiefs” had reached Congress.<sup>328</sup> Nonetheless, the Board of Treasury warned against future expenses, as monies from general requisitions “scarcely support the expences of the Civil Government.”<sup>329</sup> The board worried that visits “by Indians of different Tribes to the Seat of Congress” were accompanied by “very considerable and unnecessary expense” and might increase.<sup>330</sup> The board and Congress agreed that “all communications to the United States in Congress” occur “through” the superintendents of Indian affairs.<sup>331</sup> And the resolutions penalized any person serving as a conductor without permission by making such a person responsible for expenses and permanently forfeiting his license to trade.<sup>332</sup>

That same day, July 18, Congress read the secretary at war’s report relating to the southern Indians.<sup>333</sup> As a congressional appointee, Knox treated his meetings with the Native Nations deputies as if they had met with Congress. Congress had “received strong complaints from the said Indians” and “requests for redress.”<sup>334</sup> The visits had clarified Knox’s thinking. His report emphasized the fundamental concerns: first, “certain encroachments on the lands claimed by said Indians,” and second, the likelihood of war arising from Georgia’s dispute with the Creek Nation.<sup>335</sup> The difficulty for Congress arose from “state constructions” of the powers “regulating the trade and managing all affairs” in the Articles.<sup>336</sup> The state’s interpretation of the carveout made any “interference of the United States” difficult.<sup>337</sup> For Knox, the problem arose from Georgia’s interpretation of the Articles’ phrase. Moreover, Knox foresaw the rise of a general confederacy of Indians to the south parallel to the general confederacy already existing of “nearly all the indians” north of the Ohio.<sup>338</sup> Knox warned against underestimating Joseph

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326. Report of the Secretary at War, *supra* note 302, at 348.

327. *Id.*

328. Report of the Board of Treasury, *supra* note 272, at 353–55; *New-York, July 25., DAILY ADVERTISER* (N.Y.), July 25, 1787.

329. Report of the Board of Treasury, *supra* note 272, at 354.

330. *Id.*

331. *Id.* at 355.

332. See *The United-States in Congress Assembled, New-York, July 18, 1787.*, MD. CHRON. OR UNIVERSAL ADVERTISER, Aug. 15, 1787. In early 1787, a congressional committee, including Madison and Hawkins, rewrote the instructions for the superintendents but a passage on visits was deleted. Report of the Committee on Indian Affairs (Feb. 20, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 66, 68.

333. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 353; Report of the Secretary at War, *supra* note 302, at 365; see also HORSMAN, *supra* note 25, at 36–39; JONES, *supra* note 15, at 157–68.

334. Report of the Secretary at War (July 18, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 367.

335. *Id.* at 365–66.

336. *Id.* at 366.

337. *Id.*

338. *Id.* at 368.



Brandt, the head of the northern Confederacy, because he was a “man of great influence and reputed abilities.”<sup>339</sup>

Ever the pragmatist, Knox saw only one solution to which the southern states would “be acceded to” regarding territorial disputes between the independent tribes and the western settlers of North Carolina and Georgia.<sup>340</sup> If North Carolina and Georgia ceded the lands involved, the United States could then “be powerfully enabled to restrain the indians within due bounds.”<sup>341</sup> Although Knox implied acceptance by the general government of white settlement in the western territory, he explicitly condemned the North Carolina encroachments. The North Carolina legislature should be “forcibly” informed that their repeal of the prior 1784 cession “involved the United States as a Sovereign nation in the deepest disgrace and humiliation.”<sup>342</sup> The Hopewell Treaty had been “flagrantly violated by the usurpation of the lands assigned by the said treaty as the hunting grounds of the Cherokees.”<sup>343</sup> Likewise, with respect to the Chickasaw and Choctaw Nations’ concerns, the “treaty and the expectations” of being “supplied with goods” should be “fully complied with.”<sup>344</sup> Finally, to attach the “minds and affections” of the “Southern and Northern tribes of indians,” Knox recommended sending medals, gorgets, and wristbands and armbands engraved with the arms of the United States.<sup>345</sup> The plan would subvert Spanish efforts to exchange British medals for their own and would represent allegiance to the United States.<sup>346</sup>

Implicitly addressing the Convention, Knox warned of an inevitable Indian war unless the United States “in reality possess the power.”<sup>347</sup> The power to which Knox referred was, as he put it, “to manage all affairs with the independent tribes of indians’ to observe and enforce all treaties made by the authority of the union.”<sup>348</sup> The words that Knox placed in quotations interestingly were not the literal words of the Articles. Knox’s version acknowledging “independent tribes”—rather than the Articles’ “Indians”—suggested the modern “Native Nations.” Moreover, Knox’s description of the power omitted the carveout and substituted instead the relationship embodied by and through an expansive embrace of treaties: managing affairs *with* the independent tribes *to observe and enforce* all treaties. Knox’s message to the Convention was clear: reconfirm the general government’s treaty authority and omit the convoluted carveout; indeed, ensure that the

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339. *Id.*

340. *Id.* at 367.

341. *Id.* at 366.

342. *Id.* at 367.

343. *Id.*

344. *Id.* at 368.

345. *Id.* at 368–69.

346. *Id.* at 369.

347. *Id.* at 368.

348. *Id.* *But see* ARTICLES OF CONFEDERATION of 1781, art. VI (“The united states in congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states . . .”).

language barring the states was impossible to parse semantically.<sup>349</sup> Indeed, several weeks later at the Philadelphia Convention, James Madison tried to address Knox's concern.<sup>350</sup>

In Congress, Knox's report was not immediately adopted but pressure on Congress continued. Indeed, one day later, William Blount wrote to the North Carolina governor that Congress had received a letter "in the Indian Language" from Joseph Brandt "informing that all the Nations of Indians" northwest of the Ohio had "formed a Confederacy offensive & Defensive."<sup>351</sup> The Confederacy demanded that the United States stop surveying. Furthermore, reports from Kentucky stated that "the Indians are hostile on that quarter" and that the Creek would soon start "hostilities" with "the Citizens of Georgia."<sup>352</sup> On July 21, Yates demanded a voice count of individual members as Congress continued consideration of Knox's report.<sup>353</sup> Finally, on July 23, Hawkins secured approval for at least medals and gorgets.<sup>354</sup>

Within Congress, some delegates favored Native Nations and promoted the general government's exclusive treaty authority. In late July, Georgia's congressional delegates were rebuffed in their effort to have Congress aid the state against the Creek Nation.<sup>355</sup> This committee report blamed encroachment—"[a]n avaricious disposition in some of our people to acquire large tracts of land and often by unfair means"—as the "principal source of difficulties with the Indians."<sup>356</sup> The Indians had "just claims to all lands occupied by and not fairly purchased from them."<sup>357</sup> Rejecting the "construction" of the carveout, the committee report declared it "by no means the true one."<sup>358</sup> The general government's power of "forming treaties or managing Affairs with the Indians" had long been accepted.<sup>359</sup> As the tribes were "common friends or enemies" of the entire United States, "no particular state" could have the "exclusive interest" in managing Indian affairs.<sup>360</sup> Powers in "managing affairs with them" were "indivisible," given entirely to the Union or to the states.<sup>361</sup> This dramatic language, however, never made it beyond the committee. As Gregory Ablavsky points out, Georgia was able to defeat a supermajority in support of the report.<sup>362</sup>

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349. *Id.*

350. *See infra* Part IV.C.

351. Letter from William Blount to Richard Caswell, *supra* note 249.

352. *Id.*

353. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 387.

354. *Id.* at 388.

355. *Id.* at 407–08; *see also* Preso, *supra* note 4, at 451.

356. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 455, 457.

357. *Id.* at 458.

358. *Id.* at 457–59.

359. *Id.* at 458.

360. *Id.* at 459.

361. *Id.* at 458; *see also* Clinton, *supra* note 4, at 1131.

362. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 463; Ablavsky, *The Savage Constitution*, *supra* note 4, at 1032.

Later that summer, yet another committee recommended that U.S. policy regarding Native Nations move toward greater equality and thus aspire to a general treaty.<sup>363</sup> The idea of a general treaty seemed to respond to the earlier advocacy of the northern Native Nations and also represented an elaboration of the similarities of the three Hopewell Treaties. In a wide-ranging report, the committee of Indian affairs declared, “Instead of a language of superiority and command; may it not be politic and Just to treat with the Indians more on a footing of equality . . . ?”<sup>364</sup> And it favored purchase: “the principle of fairly purchasing of them and taking the usual deeds.”<sup>365</sup> Congress acted on the report in October.<sup>366</sup>

The following May 1788, Knox wrote one more report, building on the principles articulated since the visits of the deputies. Emphasizing the northern Confederation’s opposition to white settlement, he pointed out that they “have expressed the highest disgust, at the principle of conquest.”<sup>367</sup> Instead of conquest, Knox proclaimed that the United States should adopt the policy of purchase.<sup>368</sup> As Robert Clinton writes, “[t]his recommendation by Knox later became the cornerstone of federal Indian policy.”<sup>369</sup> The visits had altered U.S. policy at the outset of the government under the new Constitution.

### C. Convention

Even as Knox finished drafting his initial report, the Convention ensured that the general government’s power regarding Native Nations was exclusive and, concomitantly, that state power was explicitly prohibited.<sup>370</sup> On July 17, the Convention approved broad congressional power and explicitly declared treaties to be supreme law.<sup>371</sup> Notably, Georgia’s delegation opposed the explicit expansion of power for the “general interests of the Union, and also in those to which the States are separately incompetent.”<sup>372</sup> The delegates then replaced the negative on state law with the Supremacy Clause. The clause came from the New Jersey Plan, where it had been paired with U.S. enforcement. The pertinent language was: “[A]ll Treaties . . . under the authority of the United States shall be the supreme law of the respective States as far as those . . . Treaties shall relate to the said States, or

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363. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 388.

364. *Id.* at 477, 479.

365. *Id.* at 480.

366. *Id.* at 477 n.1, 611–12; *see also* Horsman, *supra* note 25, at 41–42.

367. Report of the Secretary at War on Indian Affairs (Oct. 27, 1787), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 124.

368. *Id.* at 125.

369. Clinton, *supra* note 4, at 1135.

370. *See* PRUCHA, *supra* note 4, at 68–70.

371. *See* Convention Journal (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 21, 24 (showing a 6 to 4 vote in favor, with Connecticut, Georgia, South Carolina, and Virginia voting against).

372. *See id.* at 21, 24; *see also* 1 DHRC, *supra* note 15, at 257 (showing the effect of the amended language).

their Citizens and Inhabitants . . . .”<sup>373</sup> The benefit of treaty supremacy was to extend not only to citizens but to a broader category of “Inhabitants.”<sup>374</sup> And the wording—explicitly linking treaties to states—prevented possible caviling about the application of the Hopewell Treaties.

The draft by the Committee of Detail bolstered exclusive general government treaty power. The legislature was given the power to “call forth the aid of the militia” to execute laws and “enforce treaties.”<sup>375</sup> Immediately thereafter, the Supremacy Clause appeared as a stand-alone article.<sup>376</sup> And a new article listed prohibitions on the states, including explicitly entering “into any treaty, alliance, or confederation.”<sup>377</sup> This draft adopted the presumption within both the Virginia and New Jersey Plans that the United States government had authority with respect to Native Nations. The contested language from the Articles of Confederation was omitted.<sup>378</sup> The deputies’ presence in Philadelphia underscores that the absence of an enumerated power was neither inadvertent nor a deliberate omission.<sup>379</sup> The general government had the power to form treaties and manage affairs with Native Nations.

In Congress, however, Georgia and North Carolina continued to insist on state power to deal with Native Nations. Over the course of the summer, Georgia had moved close to war with the Creek Nation. On August 3, William Few of Georgia and William Blount (both also Convention delegates) introduced a congressional motion that Georgia and North Carolina, along with the superintendent of Indian affairs, deal with the Creek Nation.<sup>380</sup> Later that fall, a Georgia legislative committee placed the blame for the state’s war with the Creek Nation on the “too sudden interferences” of the United States with state treaties that had suggested to the Indians that “another disposition” might be made of the territory than becoming part of the state.<sup>381</sup> Georgia went to war against the Creek Nation in the fall.<sup>382</sup>

At the Convention, as a recent member of the Indian affairs congressional committee, Madison was familiar with the semantic parsing of the Articles by the two states and the two states’ recent avowal. On August 18, when the delegates reviewed the proposed congressional powers, Madison suggested additional language plausibly designed to bar the two states’ disputed

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373. Convention Journal (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 22.

374. *Id.*

375. 1 DHRC, *supra* note 15, at 264 (showing the August 6 draft of article VII of the Constitution); *cf. id.* at 256–60 (July 24 resolutions).

376. *Id.* at 265 (August 6 draft of article VIII).

377. *Id.* at 268 (August 6 draft of article XII).

378. See Clinton, *supra* note 4, at 1152–53.

379. For articles interpreting the Convention as failing to include authority relating to Native Nations, see Natelson, *supra* note 15; Prakash, *supra* note 15; Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 72–78 (1991); Toler, *supra* note 172, at 4–5, 34–35 (alleging omission based on a scrivener’s error).

380. 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 454; Clinton, *supra* note 4, at 1132–33; Downes, *supra* note 59, at 164–67.

381. Downes, *supra* note 59, at 164 (quoting committee language).

382. *Id.* at 162 (discussing Governor George Matthews’s description of “war” to Pierce).

claims.<sup>383</sup> Read in context, Madison's proposal focused on the contested western territories, as of then not yet ceded by the southern states. These territories were, of course, the lands of Native Nations, most recently confirmed under the Hopewell Treaties. In proposing new enumerated powers beyond the implied powers of the general government, Madison's first three examples dealt with western areas:

1. to dispose of the unappropriated lands of the U.S.
2. To institute temporary Governments for new States arising thereon.
3. to regulate affairs with the Indians as well within as without the limits of the U. States.<sup>384</sup>

Madison's proposal seemed driven by the location of Indians—the odd phrase, “as well within as without the limits” of the United States. What specifically the phrase referred to is uncertain. Later that week, Madison expressed concern about possible wording that could be “liable to cavil.”<sup>385</sup> He was particularly worried about situations in which a future interpreter might narrow congressional authority because the draft language did not use explicit words of inclusion.<sup>386</sup> Most delegates did not share Madison's anxiety. Nonetheless, Madison's fretting over a hypothetical situation may have been the motivation for his idea of an additional enumerated power: it would cover the lands expected to be ceded—but where cessions remained incomplete. In short, “without the limits” could include the controversial territories technically still claimed by the southern states. The continued congressional effort by Few and Blount may have led Madison to worry that the draft either needed to bar states explicitly from exercising authority even over land they claimed or that the United States needed to have its authority explicitly confirmed. The purpose was to prevent a new semantic argument launched by Georgia and North Carolina. This suggestion, along with several others, was referred back to the Committee of Detail.<sup>387</sup>

When the committee returned a brief report, the report tried a similar but slightly different approach to address the concern that the two southern states would continue to insist on their own authority. With the draft already explicitly prohibiting state treaty power, the committee turned to language relating to commerce. They recommended adding to the general government's existing power of commerce words that explained that Congress's power extended to Indians, including where Native Nation land lay inside state claims. The proposed language stated, “and with Indians,

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383. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 554 (Aug. 18, 1787).

384. *Id.*; see Ablavsky, *The Savage Constitution*, *supra* note 4, at 1039–40.

385. 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 568 (Aug. 20, 1787); see BILDER, *supra* note 171, at 135 (stating that Madison similarly worried with respect to “all laws” not including “offices” and that the treason definition was “too narrow”).

386. BILDER, *supra* note 171, at 134–35.

387. See Convention Journal (Aug. 18, 1787), in 2 FARRAND'S RECORDS, *supra* note 177, at 321.

within the Limits of any State, not subject to the laws thereof.”<sup>388</sup> The wording again attempted to ensure that Georgia and North Carolina would be barred explicitly from claiming authority over commerce with the Indian tribes within either state’s claimed boundaries.<sup>389</sup> The phrase resurrected the long-contested issue of the carveout; as with other controversial matters, it was referred to the Committee of Postponed Parts.<sup>390</sup>

In September, perhaps to sidestep the controversy entirely, the committee crossed out the phrase “Limits of any State”<sup>391</sup> and suggested the addition of the remaining words, “and with the Indian tribes.”<sup>392</sup> Congressional power respecting commerce with the Indian tribes, broadly construed, extended without regard to geographic or jurisdictional boundaries. The change clarified that power as to the Indian tribes lay with Congress regardless of state boundaries and unceded claimed lands.

The final draft was striking in its absolute rejection of the position of Georgia and North Carolina under the Articles. The treaty power lay in the general government—states were barred explicitly from making treaties. The Supremacy Clause applied to all treaties; indeed, the draft made clear that it applied retroactively to preexisting treaties, thereby encompassing the Hopewell Treaties.<sup>393</sup> The militia could be called out to enforce treaties within states.<sup>394</sup> And Congress had power to manage commerce with the Indian tribes within a state.

One final, little-noticed change underscored the general government’s exclusive authority to deal with Native Nations. On Wednesday, September 12, the treaty prohibition lay buried in the list of exclusions in the draft of the Committee of Style and Arrangement.<sup>395</sup> Article 1, section 10 excluded the states from a list of functions, beginning with coining money and ending with entering into any treaty or granting titles of nobility.<sup>396</sup> On Friday, the

388. *Id.* at 367 (Aug. 22, 1787) (showing an addition to the end of second clause of the second section of article VII).

389. Clinton, *supra* note 4, at 1121.

390. See Convention Journal (Aug. 31, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 473.

391. Convention Journal (Aug. 22, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 367.

392. Convention Journal (Sept. 4, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 493; see also Ablavsky, *The Savage Constitution*, *supra* note 4, at 1041 (offering an alternative broad interpretation of the shift from “Indian affairs” to “Commerce”).

393. Convention Journal (Aug. 25, 1787), in 2 FARRAND’S RECORDS, *supra* note 177, at 409 (showing the August 25 addition of “or which shall be made”); see also 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 619. Madison claimed in the post-1789 section of the notes to have made the motion along with Morris. *Id.*

394. The discussion on treaties of peace (September 8) later troubled Madison, and that folio of the notes was replaced. BILDER, *supra* note 171, at 218–19, 247. The folio includes one sentence by Hugh Williamson related to the issue of war for the “Western Territory.” 3 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 10, at 704. I am not comfortable citing it for evidence as to the summer of 1787. *But see* Ablavsky, *The Savage Constitution*, *supra* note 4, at 1041–42.

395. Report of Committee of Style (Sept. 12, 1787), reprinted in 2 FARRAND’S RECORDS, *supra* note 177, at 590, 597.

396. *Id.*

delegates reordered the section's arrangement.<sup>397</sup> The first words of section 10 became, "No state shall enter into any treaty, alliance, or confederation."<sup>398</sup> When the Convention adjourned the following Monday, the instrument appeared to have put an end to claims that the states had authority over Native Nations. In theory, nothing stood in the way of Congress honoring the Treaties.

Tobocah had begun his journey to Congress less than a year earlier in the belief that the Hopewell Treaties confirmed a constitutional relationship between the Native Nations and the United States. He insisted that the United States uphold the Treaties and the larger relationship established at Hopewell. Washington, Franklin, Knox, and others in Philadelphia shook the deputies' hands and pledged to uphold the Treaties and to prevent encroachments. Behind the scenes, some of them also made sure that the visits did not disrupt white expansion overseen by Congress, which included an enterprise in which some of them had personal investments. But the visits influenced the written instrument, securing exclusive U.S. treaty authority and recognizing the capacity of Native Nations and Congress to honor and fulfill those treaty relationships—as the Native Nations had insisted.

#### V. BACK OF THE STATE HOUSE

The influence of the visits lasted long after that summer of 1787. The Northwest Ordinance opened a vast expanse for white settlement and furthered the removal of Native Nations. In the southwest, as Knox predicted, states gradually ceded land to the United States. South Carolina ceded the strip it claimed in August 1787, North Carolina in 1790, and the remainder after 1796.<sup>399</sup> And long before any territories covered by the Northwest Ordinance became states, the areas contested in the summer of 1787 did. Kentucky became a state in 1792 and Tennessee in 1796, quickly followed by Ohio in 1803. To the south, Spanish interest in supporting the Native Nations east of the Mississippi, which had been waning since 1795, slowly came to an end.<sup>400</sup>

Despite the efforts to channel their visits through the superintendents, Native Nations visitors continued to arrive. They dined with Washington, smoked the calumet pipe of peace, and offered speeches. In 1789, a Cherokee agent went to New York.<sup>401</sup> In 1792, approximately fifty Iroquois chiefs and warriors visited the capitol in Philadelphia, including Red Jacket

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397. *See id.* at 610 n.2 (Sept. 14, 1787).

398. *Id.*

399. PAUL W. GATES, U.S. PUB. LAND L. REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 57 (1968).

400. *See* JONES, *supra* note 15, at 169–70; WEEKS, *supra* note 57, at 5–8.

401. CALLOWAY, *supra* note 3, at 338; Letter from George Washington to the U.S. Senate (Aug. 11, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 237.

and Peter Otsiquette.<sup>402</sup> Joseph Brant also visited in 1792.<sup>403</sup> In 1793, Washington, Jefferson, Randolph, and Knox dined with six men and two women who represented the Kaskaskia, Peoria, Piankashaw, Potawatomi, and Mascouten Nations.<sup>404</sup> A week later, Washington dined with chiefs from the Six Nations.<sup>405</sup> In 1794, Washington met thirteen Cherokee chiefs.<sup>406</sup> And a month after that, he met another delegation from the Chickasaw Nation.<sup>407</sup> In 1795, again in July, five Choctaw chiefs and three Chickasaw chiefs, along with an interpreter, visited Philadelphia.<sup>408</sup> As had become customary, they met with Washington.<sup>409</sup>

For Henry Knox, the visits still loomed large two years later. In 1789, Knox recalled the visits in his key advisory memo for Washington.<sup>410</sup> In reporting on the Chickasaw Nation, Knox noted:

In the year 1787 they sent one of the Warriors of their nation to Congress to represent the distressed situation of the Cherokees, and that unless the encroachments of the Whites were restrained they should be obliged to join the Cherokees; and also to enforce the establishment of trade agreeably to the Treaty.<sup>411</sup>

He similarly described the Choctaw Nation: “[i]n the year 1787 they sent Tobocah, one of their great medal Chiefs to Congress, principally in order to solicit the establishment of trade” because distance had prevented “those encroachments which have been complained of by the Cherokees.”<sup>412</sup> That memo, built on the foundation of the 1787 reports, went on to establish the boundaries of the Washington administration’s Indian policy. As federal Indian law scholars note, the government embraced a “full international self-determination model” after 1789.<sup>413</sup> Knox explained to Washington that the “independent nations and tribes ought to be considered as foreign nations, not a subject of a particular state.”<sup>414</sup>

402. NICHOLS, *supra* note 27, at 141–42.

403. Letter from George Washington to Gouverneur Morris (June 21, 1792), in 10 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 489.

404. See CALLOWAY, *supra* note 3, at 414–15.

405. Colin G. Calloway, *George Washington Lived in an Indian World, but His Biographies Have Erased Native People*, LONGREADS, <https://longreads.com/2018/11/07/george-washington-lived-in-an-indian-world-but-his-biographies-have-erased-native-people> [<https://perma.cc/EJW9-C2UY>] (last visited Mar. 16, 2021).

406. *Id.*

407. *Id.*

408. *Id.*

409. Letter from Timothy Pickering to George Washington (July 7, 1795), in 18 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 295; see also Calloway, *supra* note 405. See generally COLIN CALLOWAY, THE CHIEFS NOW IN THIS CITY: INDIANS AND THE URBAN FRONTIER IN EARLY AMERICA (forthcoming May 2021).

410. Letter from Henry Knox to George Washington, *supra* note 276; see also Letter from Henry Knox to George Washington (June 15, 1789), in 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 488 (including enclosures).

411. Letter from Henry Knox to George Washington, *supra* note 276, at 144.

412. *Id.* at 145.

413. AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 17 (Carole E. Goldberg et al. eds., 7th ed. 2015); see Horsman, *supra* note 17, at 40–41.

414. Letter from Henry Knox to George Washington, *supra* note 410.



In the immediate aftermath, the two men who had served as conductors for the Native Nations deputies struggled financially. After the visits, John Woods continued efforts to recover his expenses. In December 1787, Congress paid “for his services and expences attending sundry Chiefs of the Choctaw Nation on a visit to Congress.”<sup>415</sup> After further disputes with the Board of Treasury, Knox intervened in June 1788 and Congress authorized sufficient funds for Woods to “Journey homewards.”<sup>416</sup> Alexander Dromgoole, the Cherokee Nation, and Sevier recommended him for the position of superintendent of Indian affairs, but Martin was appointed instead.<sup>417</sup> In 1789, Dromgoole continued to carry talks between state officials and the Cherokee Nation, as well as the Creek and Chickamauga Nations.<sup>418</sup> Thirty years later, Dromgoole curiously petitioned Congress in 1823 for compensation related to “services rendered in the intercourse between the United States and the Cherokee Indians, in 1787.”<sup>419</sup> What led to this belated effort is not apparent.

In west Yazoo, Tobocah kept the gifts—the armbands, gorgets, sword, sash and, apparently, even spectacles—as evidence of his connections.<sup>420</sup> When Spanish official Stephen Minor visited in 1792, Tobocah showed him a small box containing portraits of George Washington and others.<sup>421</sup> And he told the Natchez governor, Manuel Gayoso de Lemos, that General Washington “treated him with great intimacy, having his house open at any hour and even recommending to him that he should frequent it often” in New

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415. Joseph Nourse, Enclosure: Statements of September 24, 1789 No. II: Indian Affairs, in 5 THE PAPERS OF ALEXANDER HAMILTON 400, 405 (Harold C. Syrett ed., 2011) (reporting a payment made to John Woods on December 31, 1787).

416. Report of Committee on Memorial of J. Woods (June 19, 1788), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 240; Report of Board of Treasury on Memorial of J. Woods (Feb. 28, 1788), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 74 (showing a treasury report reflecting that money paid was full compensation); Report of Secretary of Congress on Sundry Memorials and Letters (May 14, 1788), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 152, 153–54 (referring to a memorial of and payment for John Woods); 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 192 (June 2, 1788) (reporting transmission of a petition for pecuniary assistance of May 30, 1788); Report of Board of Treasury on Memorial of J. Woods (June 4, 1788), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 200 (describing his “pertinacious adherence, in prosecuting unwarrantable and extravagant Claims”); Report of Board of Treasury on Memorial of J. Woods (June 12, 1788), in 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 42, at 230.

417. Talk of Headmen & Warriors of the Cherokee Nation Indians to President of Congress (Sept. 8, 1787) (available at the National Archives); Letter from Bennet Ballew to George Washington (Aug. 22, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 516.

418. Letter from Alexander Dromgoole to Samuel Johnston (Feb. 20, 1789), in 21 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 62, at 529.

419. H.R. JOURNAL, 18th Cong., 1st Sess. 43 (1823).

420. See Letter from Alexander Fraser to Esteban Miró (Apr. 15, 1788), translated in *Papers from the Spanish Archives Relating to Tennessee*, 14 E. TENN. HIST. SOC’Y PUBL’NS, 86, 99–100 (D. C. Corbitt & Roberta Corbitt ed. & trans. 1942).

421. WEEKS, *supra* note 57, at 74.

York.<sup>422</sup> Tobocah may have even been among a group of Choctaw chiefs who visited Philadelphia in 1795.<sup>423</sup>

As for Sconetoyah, I have found little. Perhaps he led a long life, but he may have been murdered by a white militia member in 1788. The claimed justification for the murder was retaliation for the murder of members of the Kirk family by Slim John, a Cherokee.<sup>424</sup> The surviving member of the Kirk family, John Kirk, set off to retaliate, along with John Sevier and 150 Franklin militia members.<sup>425</sup> Despite a lack of evidence of more extensive Cherokee involvement, Sevier and his militia burned Cherokee towns and murdered inhabitants.<sup>426</sup>

Reaching the Cherokee town of Chilhowee, Sevier's forces surrounded the town where Old Tassel and Old Abraham were meeting in council.<sup>427</sup> They were allegedly flying a flag—a U.S. flag given to them at Hopewell.<sup>428</sup> The chiefs were told Sevier was on his way to meet with them and that the Franklin militia carried a white flag of truce.<sup>429</sup> But it was all a lie. With the chiefs inside the cabin, Kirk was permitted to enter and by tomahawk kill each man.<sup>430</sup> In addition to the three chiefs—Old Tassel, Fool Warrior, and Old Abraham—Kirk murdered several other male relatives of the chiefs. One included a man sometimes described as Old Tassel's son.<sup>431</sup> That man might have been Sconetoyah. In the aftermath, Sevier claimed to be a quarter mile away during the massacre.<sup>432</sup> He then refused to prosecute Kirk. Congress offered resolutions condemning the act.<sup>433</sup> Sevier was eventually prosecuted but found not guilty.<sup>434</sup> War broke out and Martin ended up leading the forces against some of the Cherokee.<sup>435</sup>

In the summer of 1794, Muckleshamingo returned to Philadelphia along with Piomingo to meet George Washington and Henry Knox. Washington told them to “consider yourselves at home and take comfort accordingly,” and he promised that if they wanted to “go further and see the City of New York,” the secretary at war would make arrangements.<sup>436</sup> In addition,

422. *Id.* at 75 (quoting Letter from Manuel Gayoso de Lemos to Baron de Carondelet (Apr. 14, 1792)).

423. O'BRIEN, *supra* note 3, at 64–66; WEEKS, *supra* note 57, at 75–76; Letter from Timothy Pickering to George Washington, *supra* note 409, at 295.

424. BARKSDALE, *supra* note 121, at 114.

425. *Id.*

426. *Id.* 114–15.

427. *Id.* at 115.

428. WILLIAM R. REYNOLDS JR., THE CHEROKEE STRUGGLE TO MAINTAIN IDENTITY IN THE 17TH AND 18TH CENTURIES 258 (2015).

429. *Id.*

430. *Id.*

431. *Id.* (including “Tassel's son”). *But see* BARKSDALE, *supra* note 121, at 115. (suggesting Old Abraham's son and Old Tassel's brother).

432. REYNOLDS, *supra* note 428, at 258.

433. *Id.*

434. *Id.*

435. *See* BARKSDALE, *supra* note 121, at 116–17; REYNOLDS, *supra* note 428, at 264–66.

436. Enclosure: To the Chiefs & Warriors of the Chickasaw Nation (July 11, 1794), in 16 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 162, at 332; *see*

Washington was authorized to “employ such a number of Indians” to serve “against the hostile tribes northwest of the Ohio.”<sup>437</sup> Washington appointed Muckleshamingo to the rank and pay of “Captain of the Militia.”<sup>438</sup> The signed commission noted “having full confidence in the well tried friendship of Muckleshamingo a chief of the Chickasaw Nation.”<sup>439</sup> Future president John Quincy Adams attended the reception.<sup>440</sup>

Shortly thereafter, in 1800, William Birch published an engraving entitled, *Back of the State House*. In the print, a group of men—members of Native Nations—walk across Independence Square in Philadelphia. Talking in an animated fashion, they attract little attention from the white Philadelphia inhabitants strolling the grounds. The perspective is from the front of Congress Hall—and the group seemingly is headed in that direction. The print seemed to commemorate the long history of such visits. Did the title *Back of the State House* suggest that Native Nations had been removed from the regular channels of governmental power or did it demonstrate the ubiquitous presence of Native Nations in U.S. governance? Either way, the deputation occupied the center.

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Letter from Pitchlynn to Delavillebeuvre (July 16, 1794), in *PROBLEMS OF FRONTIER DEFENSE, 1792–1794*, pt. 3, at 319, 319 (Lawrence Kinnard ed., 1946).

437. HORATIO BARDWELL CUSHMAN, *HISTORY OF THE CHOCTAW, CHICKASAW AND NATCHEZ INDIANS* 483 (Greenville, Headlight Printing House 1899).

438. Commission to Muckleshamingo, a Chief of the Choctaw Nation (July 20, 1794) (available at the Oklahoma Historical Society). For background information on the commission, see R. S. COTTERILL, *SOUTHERN INDIANS: THE STORY OF THE CIVILIZED TRIBES BEFORE REMOVAL* 111 n.31 (1954).

439. Commission to Muckleshamingo, *supra* note 438.

440. 1 *MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 34 (Charles Francis Adams ed., Phila. J. B. Lippincott & Co. 1874).

Figure 3. Back of the State House (*close up*)<sup>441</sup>



#### CONCLUSION

Congress's relationship with Native Nations is older than the Constitution of 1787. The Constitution further pledged to uphold that relationship. Restoring the deputies to Philadelphia makes it clear that their visits proved to be a catalyst that influenced the Convention and the general government. The visits by the deputies of the Native Nations highlight understandings between Congress and Native Nations that centered on treaties absorbed into, confirmed, and clarified by the written Constitution. In 1787, the United States promised the deputies that it would uphold treaties, ensure justice, and preserve peace and friendship. These 1787 visits marked the beginning of the Washington administration's policy that presumed Native Nation sovereignty, pledged protection against white encroachment, and sought expansion through purchase as opposed to claimed conquest. Yet the same visits also threatened to destabilize Congress's effort to seize control of white encroachment and to convert it into a federally controlled process of establishing white inhabited states. The visits thus also marked the beginning of efforts to discourage Native Nations from sending deputies to Congress. Although Native Nation leaders continued to appear to press claims, the failure to remember the 1787 visits created a space for Justice William Johnson's effort in 1831 to deny that the Hopewell Treaties contained a right

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441. Russell Birch, *supra* note 2.

to a deputy in Congress. Recovering the visits of the deputies to Philadelphia in 1787 and the promises they received, including Washington's handshake, suggests that the United States today should reaffirm the right and the importance of Native Nations sending deputies to Congress.