

TRIBAL CONSTITUTIONS

Most Indian nations had no written or formal constitution prior to the enactment of the Indian Reorganization Act in 1934, according to which Congress encouraged Indian nations to “reorganize” as constitutional democracies. 25 U.S.C. §476. As such, Indian nations have a relatively new tradition of constitutionalism, and some tribes — most notably the Navajo Nation — still have no written constitution. This chapter details the origins, the development, and the jurisprudence of tribal constitutions.

A. MODERN TRIBAL CONSTITUTIONS

1. A BRIEF HISTORY OF TRIBAL CONSTITUTIONS AFTER THE INDIAN REORGANIZATION ACT

The following excerpts focus on Felix S. Cohen, the leading figure in the development of tribal constitutions after the enactment of the Indian Reorganization Act in 1934. Cohen was the primary drafter of the bill that would become the Act, and a leading proponent of encouraging Indian tribes to adopt *tribally generated, indigenous* constitutions. *See generally* DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 103-17 (2007).

HOW LONG WILL INDIAN CONSTITUTIONS LAST?

Felix S. Cohen, Indians at Work (Dept. of Interior 1939), Reprinted in
The Legal Conscience 222, 222-28 (Lucy Kramer Cohen ed., 1960)

Between October 28, 1935, and January 15, 1939, ninety-seven Indian tribes framed constitutions for self-government, which were approved under the Act of June 18, 1934 [the Indian Reorganization Act].

How long are these Indian constitutions likely to last? . . .

[One] basic fact that stands out in a survey of the life span of Indian constitutions is that the Indians themselves cease to want a constitution when their constituted government no longer satisfies important wants. When this

happens, a tribal government, like any other government, either dissolves into chaos or yields place to some other governing agency that commands greater power or promises to satisfy in great measure the significant wants of the governed. . . .

I

The most fundamental of the goods which a tribe may bring to its members is economic security. Few things bind men so closely as a common interest in the means of their livelihood. No tribe will dissolve so long as there are lands or resources that belong to the tribe or economic enterprises in which all members of the tribe may participate. The young man who in the plastic years of adolescence goes to his tribal government to obtain employment in a tribal lumber mill, cooperative store, hotel, mine, farm, or factory, or who applies to a committee of his tribal council for a chance to build up his herds, or to build a home and garden upon tribal lands assigned to his occupancy, cannot ignore this tribal government.

Government is an affair of human loyalties. These loyalties Indian tribes cannot command if, in the important economic decisions of their lives, the members of the tribe must look elsewhere for opportunity and guidance. . . .

The roots of any tribal constitution are likely to be as deep as the tribe's actual control over economic resources.

II

Less tangible than the possession of common property, but perhaps equally important in the continuity of a social group, is the existence of common enjoyments. In community life, as in marriage, community of interest in the useful and enjoyable things of life makes for stability and loyalty. . . .

In this field, much will depend on the attitude of Indian Service officials, and particularly upon the attitude of teachers, social workers, and extension agents. It will be hard for them to surrender the large measure of control that they now exercise over the recreation and social life of the reservations, but unless they are willing to yield control in this field to the tribal government, that government may find itself barred from the hearts of its people.

III

Outside of Indian reservations, local government finds its chief justification in the performance of municipal services, and particularly the maintenance of law and order, the management of public education, the distribution of water, gas, and electricity, the maintenance of health and sanitation, the relief of the needy, and activities designed to afford citizens protection against fire and other natural calamities. On most Indian reservations all of these functions, if performed at all, are performed not by the tribal councils but by employees of the Indian Service. Thus the usual reason for maintenance of local government is lacking.

The cure for this situation is, obviously, the progressive transfer of municipal functions to the organized tribe. Already some progress has been made in this direction in the field of law and order. Codes of municipal ordinances have been adopted by several organized tribes; judges are removable, in

some cases, by the Indians to whom they are responsible; and the former absolute powers of the Superintendent in this field have been substantially abolished. . . .

. . . The shift of control from a Federal bureau to the local community is likely to come not through gifts of delegated authority from the Federal bureau, but rather as a result of insistent demands from the local community that it be entrusted with increasing control over its own municipal affairs.

IV

A fourth source of vitality in any tribal constitution is the community of consciousness which it reflects. Where many people think and feel as one, there is some ground to expect a stable political organization. Where, on the other hand, such unity is threatened either by factionalism within the tribe or by constant assimilation into a surrounding population, continuity of tribal organization cannot be expected.

This is a factor which shows every possible variation. At one extreme of social solidarity are those pueblos that voted unanimously to accept the Wheeler-Howard Act and for centuries have regularly cast unanimous votes for their officers. At the other extreme are those areas of the Northwest where today, as in the days before Columbus, every family is a faction and the "tribe" is only a statistical concept. . . .

V

A fifth source of potential strength for any tribal organization lies in the role which it may assume as protector of the rights of its members. . . .

In this field of activity, tribal governments can achieve significant results. A council, for instance, that employs an attorney to enjoin the enforcement of an unconstitutional statute depriving Indians of the right to vote is likely to secure a first lien on the respect of its constituency and materially increase the life expectancy of the tribal constitution. . . . A rubber stamp council that simply takes what the Indian Office gives it is not likely to establish permanent foundations for tribal autonomy. Rubber is a peculiarly perishable material, and it gives off a bad smell when it decays. . . .

COHEN ON TRIBAL CONSTITUTIONS

David E. Wilkins, *Introduction*, Felix S. Cohen, *On the Drafting of Tribal Constitutions* xxi, xxi-xxiii, xxviii (David E. Wilkins ed., 2006)

Cohen and his colleagues were convinced, especially at the beginning of the process, that tribal organization via written constitutions, charters, and bylaws was the most appropriate means for Native nations to protect and exercise their basic right of political and economic self-determination. . . .

Shortly before the IRA became law, but well before the major thrust of constitutional development had taken place, some sixty tribes had preexisting constitutions, or "documents in the nature of constitutions," that were already on file with the Department of Interior. It is not known precisely how many of these were early versions of IRA-type constitutions, but it seems fairly certain that at least forty of them well predate the New Deal period. . . .

... [A] close review of [Cohen's] archived papers reveals that in the early drafts of the IRA his understanding of, and vision for, tribal constitutional development was heavily influenced, not by preexisting or other indigenous forms of governance, but by the regulations of the municipal governments that dot the American landscape.

In Cohen's view, tribal constitutional governments "were to be like town governments, except that they would have federal protection and their special rights." ...

After the IRA was adopted in the summer of 1934, 181 tribes adopted the act, with some 77 choosing to reject it. Although tribes that voted to accept the measure were not required to adopt constitutions, many tribes expressed interest in doing so, and Cohen intensified his efforts to learn more about tribal governance, to dig deeper into the prior constitutional history of Indian nations.

The process of modern tribal constitutional development has long been fraught with uncertainty and ambiguity. Many commentators have maintained that Western-styled constitutions were forced on reluctant tribes, thereby eclipsing extant traditional systems that, they argue, had survived the previous century of coercive assimilation. These authors also typically assert that the BIA developed a "model" constitution that it sent out to newly organizing tribes to structure the style and content of their organic documents, forcing a constitutional uniformity that denies the diverse nature of tribal nations.

Contrarily, Elmer Rusco declared in his excellent 2000 study of the IRA, *A Fateful Time*, that the allegation that a coercive and uniform "model" tribal constitution had been sent out was in "error." While acknowledging that the idea had been "considered," Rusco says that this approach was ultimately rejected by the bureau. ...

My analysis of Cohen's relevant papers and a review of his "Basic Memorandum" on tribal constitutions generally supports Rusco's interpretation of events, although there is incontrovertible evidence that some tribes did, in fact, receive a copy of a "model" constitution ... or in some cases an "outline" of what a constitution should contain. ...

... Cohen ... traveled into Indian Country to listen to Indians and to learn more about how they might structure tribal organization. It was during this period of study that Cohen learned of the status and utility of preexisting Indian constitutions and of the residual traditional governing systems that were still active in many places. Nevertheless, we still see evidence of the inherent ideological and policy tension that Cohen and his colleagues faced as federal employees. On one hand, they wanted to facilitate and encourage a degree of Indian self-rule; on the other hand, they were operating under certain cultural and political presuppositions that elevated their own values and governing systems over those of indigenous nations. This produced a set of sometimes conflicting questions, policies, and views that led to contradictory constitutional results throughout Indian Country. ...

Finally, to add further ambiguity to the question of whether tribes were presented with "model" constitutions, we have a Cohen memo dated December 14, 1935, titled "Criticisms of Wisconsin Oneida Constitution." In the

opening paragraph he notes that “except for four short provisions . . . this constitution is identical with the ‘Short Form Model Constitution’ which *has been presented to and adopted by various other tribes*” [emphasis added]. In fact, it was apparent, said Cohen, that the Oneida had not given “any constructive thought on self-government in this constitution,” meaning that it had probably been offered to them and that they had not had an opportunity to express their own views on the document, much less have had a role in its development. . . .

NOTES

1. Frank Pommersheim’s important work on tribal law, *Braid of Feathers*, included a harsh assessment of many tribal constitutions adopted during the years following the enactment of the IRA:

These BIA constitutions did not provide for any separation of powers, and did not specifically create any court system. Most constitutions, rather facetiously, it seems, recognized a power in the tribal council—the elected legislative body—to “promulgate and enforce ordinances providing for the administration of justice by establishing a reservation court and defining its duties and powers.” Most tribal legislation also required the approval of the Bureau of Indian Affairs. In recent years a number of tribes have amended their constitutions to remove the Bureau of Indian Affairs approval power.

FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY LIFE* 65 (1995).

2. Despite Cohen’s intentions and efforts, many tribal constitutions adopted in the years following the passage of the IRA were barely organic documents of Indian origin. As an appellate judge, Professor Pommersheim participated in *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, 32 Indian L. Rep. 6047 (Saginaw Chippewa Indian Tribe Appellate Court, Jan. 7, 2005), a case involving the highly controversial efforts of the then-tribal council to disenroll deceased members of the tribe:

This case is not just about the meaning of the Saginaw Chippewa Tribal Constitution of 1986, but it is also a story about a People and a Tribe enmeshed in the coils of an unknowing and meddlesome Bureau of Indian Affairs and Federal Government. This destabilizing federal force is amply demonstrated in the history leading up to the adoption of the first Saginaw Chippewa Tribal Constitution in 1937. The Saginaw Chippewa Tribe of Michigan came into specific *legal* existence as a result of the Indian Reorganization Act (IRA) of 1934. . . .

Many local tribal leaders and people were interested in the possibilities offered by the IRA. In fact, even before the referendum on the IRA itself, a Business Committee headed by Elijah Elk was established to meet with various tribal communities and to begin drafting a tribal constitution. The work of this committee resulted in a (draft) constitution that was sent to Secretary of Interior Harold Ickes on Nov. 27, 1934 for his approval.

The draft constitution is noteworthy in several respects that are directly pertinent to this litigation. The proposed constitution’s preamble began, “We, the members of the Saginaw, Swan Creek, and Black River Bands of

Chippewa Indians. . . .” The proposed Tribal Council represented four districts—three of which were outside the boundaries of the Isabella Reservation—three representatives from Mt. Pleasant (i.e., Isabella Reservation), three from Bay City, one from Caro, and three from Hubbard Lake.

Action on this proposed Constitution was slowed as a result of BIA Commissioner John Collier’s direction to Elijah Elk that no action could be taken until the formal referendum to accept the IRA took place. As a result, energy shifted away from the draft constitution toward developing a list of eligible voters to vote in the IRA referendum. The list that was compiled by tribal individuals and BIA special agent George Blakeslee contained the names of many tribal people living outside the boundaries of the Isabella Reservation. The referendum was held on June 17, 1935 and included at least two off reservation voting places. The referendum passed.

With the successful referendum accomplished, attention returned to the Constitution itself. The Tribe’s desire to include all of its communities—even those communities outside the Isabella Reservation—met strong resistance from Assistant Commissioner of Indian Affairs, William Zimmerman. Commissioner Zimmerman took the position that a tribe could only organize under the IRA if it had a reservation and its only members could be tribal people residing on the reservation.

With this dubious interpretation at the forefront of his review of the proposed Constitution, he changed the preamble to read, “We, the Indians residing on the Isabella Reservation in the State of Michigan. . . .” In addition, he changed the proposed Tribal Council representation to require all council members be elected from within the Reservation, and required that all tribal members *reside* on the Reservation. Commissioner Zimmerman further advised the Tribe that subsequent to the referendum to accept the constitution the Tribe could “adopt” those individuals living off the reservation. In fact, this “adoption” language appears in Sec. 2 of Art. III—Membership of the 1937 Constitution.

All these “recommendations” were accepted by the Business Committee and incorporated into the proposed Tribal Constitution that was voted on and accepted by tribal members on March 27, 1937. Unfortunately, the 1937 Constitution—whatever its intent—sowed the seeds of membership confusion and discontent that yielded the bitter harvest at the core of this most challenging, even heart wrenching, litigation about the cultural and legal aspects of tribal belonging.

Id. at 6048-49.

3. Even decades later, the Bureau of Indian Affairs would interfere in the adoption of tribal constitutions for newly recognized tribes.* The Grand Traverse Band of Ottawa and Chippewa Indians, the first Indian tribe to be administratively recognized by the Branch of Acknowledgement and Research, was an early victim of notorious Department of Interior Secretary James Watt’s government-shrinking, anti-Indian policies. After recognition in 1980, the Bureau of Indian Affairs informed the Grand Traverse Band that it “[would] not be eligible to organize and adopt a constitution under the Indian Reorganization Act until a reservation ha[d] been set aside for it.” In a classic pincer maneuver that placed the Band’s feet to the fire, the Bureau

*Much of the material in this note appears in different form in Matthew L. M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL’Y 273, 279-83 (2005).

strongly implied that it would not declare the Grand Traverse Band a reservation until the Band agreed to amend its proposed constitution to exclude more than 80 percent of its proposed membership.

While we admit it is well established that Indian tribes have authority to determine their own members, there is an equally fundamental principle that membership in an Indian tribe is a bilateral, political relationship which derives its legal significance from, and is dependent upon, an interaction between the individual and the tribal community. The existence of such a relationship was one of the criteria considered in the acknowledgement process. During that process it was determined that the group of 297 individuals met this criterion and their acknowledgement as a tribe was based upon that determination.

Letter from Deputy Assistant Sec'y, Indian Affairs (Operations), to Joseph C. Raphael, Chairman Grand Traverse Band of Ottawa and Chippewa Indians (Nov. 4, 1983).

The Bureau told the Band that its federal acknowledgment depended completely on the Bureau's interpretation of the relationship between individual Michigan Ottawas and the Band. As the Band sought to expand its definition of membership, the Bureau responded with threats, saying that it would refuse to distribute Indian Claims Commission judgment funds; refuse to declare a reservation; cut off federal program funds; refuse to take additional land into trust; refuse to issue treaty fishing cards; and, most incredibly, reconsider federal recognition of the Band (which it had no authority whatsoever to do on its own).

Once the Bureau realized that it could extort the Grand Traverse Band in this manner, it extended its extortion to other newly recognized Indian tribes. The Bureau, in reviewing the Jamestown Klallam tribe's proposed constitution, "made some rather significant changes to the membership provisions." The Bureau based its apparent authority to impose these changes on the "precedent" it created by forcing the Grand Traverse Band to amend its membership criteria. The Bureau took the stance that the Jamestown Klallam's members must "have a 'significant community relationship' with the Jamestown Klallam Tribe." This "significant community relationship" requirement has no basis in statutory or case law.

2. SECRETARIAL APPROVAL OF DRAFT TRIBAL CONSTITUTIONS

COYOTE VALLEY BAND OF POMO INDIANS V. UNITED STATES

United States District Court for the Eastern District of California,
639 F. Supp. 165 (1986)

MILTON L. SCHWARTZ, District Judge. . . .

I. Background

Plaintiffs are an individual Native American, Wanda Carrillo, and three Native American tribes, Coyote Valley Band of Pomo Indians, Hopland Band of Pomo Indians, and Karuk Tribe of California. All three tribes are

federally recognized tribal entities which have a government-to-government relationship with the United States and are eligible for programs administered by the Bureau of Indian Affairs ("BIA"). . . .

[Plaintiffs alleged that the BIA acted illegally] by (1) unreasonably delaying the calling of secretarial elections on their draft constitutions under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §461 et seq.; (2) establishing an unwritten policy requiring BIA review and approval of IRA draft constitutions prior to authorizing elections; (3) failing to adopt uniform standards for reviewing and approving IRA constitutions; and (4) refusing to provide BIA benefits and services to plaintiffs until after the calling of IRA elections.

. . . At the heart of this controversy is the proper interpretation of 25 U.S.C. §476 which authorizes any recognized Indian tribe to organize for its common welfare and to adopt an appropriate constitution by a majority vote of the adult members of the tribe. Tribal ratification of a draft constitution in such a manner cannot be accomplished until the Secretary of the Interior authorizes a special election. Plaintiffs challenge the Secretary's practice of withholding authorization of special elections until after the completion of a lengthy process for the review and modification of proposed tribal constitutions by the BIA. They contend that the Secretary has delayed authorization of elections for several years from the time of the tribes' initial request for elections because the tribes did not willingly incorporate the BIA's suggested modifications into their draft constitutions.²

Plaintiffs maintain that, in order to be consistent with the statutory policy in favor of tribal self-government, section 476 of the IRA must be interpreted to impose upon the Secretary a mandatory, nondiscretionary duty to authorize elections within a reasonable time after a final request from an eligible tribe. It is their view that, while defendants may offer recommendations for the modification of draft constitutional provisions prior to elections, the Secretary has the discretion to approve or disapprove the constitution only *after* an election has been held and the constitution officially ratified by the majority vote of tribal members. Plaintiffs therefore assert that the Secretary's failure to call elections at this stage of the process violates defendants' trust responsibility to them. . . .

V. Secretary's Duty to Call Elections

The source of the Secretary's duty to call elections on IRA draft constitutions is 25 U.S.C. §476. It provides in relevant part:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by

2. The Coyote Valley Band of Pomo Indians submitted its draft IRA constitution to the BIA on February 22, 1980. . . . They transmitted their first request for a secretarial election to the Central California Agency of the BIA on October 31, 1980. . . . The Hopland Band of Pomo Indians initially requested approval of its proposed constitution on November 7, 1980. . . . The Karuk Tribe made its first request for a secretarial election on November 15, 1979. . . . It made a subsequent request on March 19, 1981 after modifying its draft constitution as recommended by the BIA. . . .

the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided.

Since the court is interpreting a statute in a case of first impression, it must look to the traditional signposts of statutory construction: first, the language of the statute itself; second, its legislative history; and third, the interpretation given to it by its administering agency. . . .

In light of the special trust relationship between the United States and Indian tribes, this court must also be mindful of well-established canons of statutory construction which have been developed to construe federal statutes affecting Indian affairs. *See generally* F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 220-28 (1982 ed.). . . .

A. Statutory Language

Defendants contend that there are three clauses in 25 U.S.C. §476 which suggest that the Secretary has broad discretion to approve a draft constitution before he calls elections. The court will examine each of these clauses in turn.

Clause (1): "Any Indian tribe . . . may adopt an appropriate constitution and bylaws which shall become effective when ratified. . . ."

"Appropriate" is the word in clause (1) focused upon by defendants. They claim that the Secretary must have discretion to determine what is "appropriate" because he cannot call a federal election on a document which "violates" federal law. Following this line of reasoning, defendants assert that a document which the Secretary deems violative of federal law is *a priori* "inappropriate."

The court is not persuaded that the word "appropriate" necessarily confers pre-election discretion upon the Secretary to approve draft constitutions. One of the primary objectives of the IRA was to "encourage Indians to revitalize their self-government" and to participate more directly in developing the laws which intimately affect their lives. . . . Keeping in mind the underlying purpose of the IRA, as well as canons of statutory construction favoring the Indians, an equally plausible interpretation would be that the constitution must be a document "appropriate" to the needs of the tribe as determined by the tribal members themselves. Nothing in the statute suggests that the Secretary must determine the appropriateness of the tribe's governing document before the tribal members themselves have had an opportunity to review and ratify it.

Clause (2): "[The constitution shall become effective when ratified] at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe."

[T]he court finds that clause (2) refers to the procedural steps which must be followed by defendants in calling and administering secretarial elections. *See* 25 C.F.R. §81 et seq. There are no rules and regulations, however, mandating pre-election secretarial approval of the substantive provisions of the tribes' governing documents. . . .

Clause (3): "Such Constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior. . . ."

Clause (3) is the only portion of the statute which makes any mention of secretarial approval. It is not entirely clear, however, that the clause requires secretarial approval of draft constitutions prior to authorization of elections.

. . . If Congress had intended that the Secretary should exercise his discretion to approve or disapprove draft constitutions prior to ratification, it could very easily have juxtaposed the order of the words to read “when approved by the Secretary of the Interior and ratified as aforesaid. . . .” Given the existing language of the statute, however, the court can only conclude that ratification procedures precede secretarial approval and that no element of secretarial discretion exists at the pre-election stage.

Finally, the court must take note of the rule of statutory construction which commands it to avoid construing statutes in a manner which would lead to unjust or absurd consequences. . . . Defendants are concerned that if the Secretary is not allowed to have discretionary authority over draft constitutions prior to the calling of elections, tribes organizing under the IRA will request elections on constitutions which contain objectionable provisions and which are certain to be disapproved by the Secretary after ratification. Defendants maintain that because of the costliness of elections, it makes more sense to conduct elections only on those constitutions which have received prior approval.

Defendants’ concerns are overstated. It is unlikely that a tribe would go to the trouble of requesting a secretarial election on a constitution which it knows is destined for disapproval—unless it firmly believes that the provisions found objectionable by the Secretary are valid and lawful. Perhaps a more constructive way for defendants to address any potential problems with hasty or impulsive election requests by tribal leaders would be to set up a more definitive timetable for the BIA’s review of draft constitutions. . . .

Under the current challenged procedure, defendants can delay the tribal reorganization process indefinitely simply by holding the draft constitution hostage and requiring modifications to be made prior to releasing it for elections. Such an approach may operate to stultify the initiative shown by tribal leaders in moving toward reorganization and to discourage all of those who have inevitably expended much time and effort in the preparation of the tribe’s governing document. It would be an understatement to say that defendants’ current procedure is antithetical both to the spirit of the IRA and to traditional notions of meaningful self-government. Thus, it is defendants’ interpretation of the statute which would lead to “unjust or absurd” consequences.

The court turns next to the legislative history of the IRA to determine whether it contradicts the court’s interpretation of the statute.

B. Legislative History

A careful review of the legislative history of the IRA indicates that the issue of whether the Secretary has a mandatory, as opposed to a discretionary, duty to call elections was never specifically addressed. Nevertheless, an examination of the legislative materials reveals nothing contrary to this court’s interpretation of the statute. . . .

The IRA reflects an ambivalent and sometimes precarious balance of federal guardianship principles with ideals of cultural, economic, and political

self-determination. While the IRA did not contemplate a complete cessation of secretarial supervision over various aspects of Indian life, one of the major objectives of the legislation was to curb administrative absolutism. . . . In a memorandum of explanation submitted to members of the Senate and House Committees on Indian Affairs, John Collier, former Commissioner of Indian Affairs, stated:

The first section of the bill states the fundamental purpose of the bill, *i.e.*, to promote Indian self-government, gradually to turn over to organized Indian communities the various functions and powers of supervision which the Interior Department now exercises, and to offer to Indians the opportunities of training and financial assistance which will be needed to carry out this program. It will be seen that the bill looks toward the elimination of the Office of Indian Affairs in its present capacity as a nonrepresentative governing authority over the lives and property of Indians. It contemplates that the Office of Indian Affairs will ultimately exist as a purely advisory and special service body, offering the same type of service to the Indians of the Nation that the Department of Agriculture offers to American farmers. . . .

Id. at 22.

This court's interpretation of section 476 is consistent with the spirit of the IRA. The BIA may provide advice and guidance to aid a tribe in drafting its constitution, but the constitution is subject to secretarial approval only after the tribe has had an opportunity to ratify it. There is no direct evidence in the legislative history to indicate that Congress intended that the Secretary use elections as a *quid pro quo* for concessions on the substantive provisions of the tribe's governing document.

C. The Secretary's Administrative Regulations

The interpretation given a statute by the agency charged with its administration is entitled to great deference. . . . Furthermore, the agency's interpretation of an administrative regulation is controlling unless "plainly erroneous or inconsistent with the regulation." . . . Pursuant to the authority delegated to him by 25 U.S.C. §476, the Secretary has promulgated regulations prescribing the manner in which IRA elections will be called and conducted. *See* 25 C.F.R. §81.1 et seq. The court finds that defendants' argument regarding the existence of pre-election secretarial discretion is belied by the Secretary's own administrative regulations.

For example, 25 C.F.R. §81.4 provides that BIA officials "will cooperate with and offer advice and assistance (including the proposing of amendments), to any tribe in drafting a constitution." The BIA's ability to offer "advice" at the drafting stage does not translate into a power to withhold elections on the proposed constitution once a tribe has decided that it is not within its interest to adopt the BIA's suggested modifications.

The regulation governing requests to call elections is 25 C.F.R. §81.5(a), the meaning of which can hardly be disputed:

The Secretary *shall* authorize the calling of an election to adopt a constitution and bylaws or to revoke a constitution and bylaws, *upon a request from the tribal government.*

(Emphasis added.) Section 81.5(a)'s use of the word "shall" imposes a nondiscretionary duty on the Secretary to call elections and comports with this court's interpretation of the language in 25 U.S.C. §476. To further bolster plaintiffs' contention that ratification precedes the exercise of secretarial discretion, 25 C.F.R. §81.24(a) provides:

Action to approve or disapprove constitutional actions will be taken promptly by the authorizing officer *following receipt of the original text of the material voted upon* and the original of the Certificate of Results of Election from the officer in charge.

(Emphasis added.)

In addition, the court notes with interest that as early as 1947, in a pamphlet issued by the federal government, Theodore H. Haas, Chief Counsel for the United States Indian Service, provided a detailed description of the process by which a tribe could organize for self-government under the IRA:

When a tribe is ready to draft its constitution, a constitutional committee of representative tribal members is chosen. It is the duty of this committee to draw up a constitution which will fit the needs of the tribe. The Department offers its assistance in the preparation of such documents, but only to the extent that such assistance is required. Scrupulous care is exercised to see that the document as drafted represents the wishes of the Indians.

When the constitutional committee has completed its draft and is ready to present the constitution to the tribal members for a vote, an election is requested by the constitutional committee or by a petition signed by one-third of the adult members of the tribe. The calling of this election is mandatory upon the Secretary of the Interior when the request is made in the manner prescribed by law. Thus a tribe may vote repeatedly upon the question of adopting a constitution, in those cases where such elections have failed to carry. *It is not within the Secretary's discretion to determine whether or not the election shall be called.*

T. H. HAAS, UNITED STATES INDIAN SERVICE, TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A., p. 2 (1947) (emphasis added). Thus, just 13 years after the passage of the IRA, the agency charged with its administration made it clear that the Secretary's duty to call elections is a mandatory one.

VI. Conclusion

The court finds that defendants' failure to call elections within a reasonable time after plaintiffs' final requests for elections is unlawful under 5 U.S.C. §706(2)(A) of the APA. Defendants' conduct contravenes the procedures described in 25 U.S.C. §476 and the accompanying administrative regulation, 25 C.F.R. §81.5(a). The language of section 476, the policies underlying the statute, and defendants' own administrative regulations all support the conclusion that the Secretary has a mandatory duty to call elections upon a request from an eligible tribe.

Since the court has decided that defendants' current practice of requiring secretarial approval of draft constitutions prior to elections is contrary to law, it is not necessary to address plaintiffs' additional contention that defendants violated the APA by failing to publish that invalid procedure. . . .

NOTES

1. After *Coyote Valley*, Congress amended 25 U.S.C. §476, but some commentators noted that the Department of Interior succeeded in muting the change:

Procedurally, Congress adopted suggestions made by the *Coyote Valley* court that a timetable be established for the calling of a constitutional referendum and that the timetable include a process by which the BIA could “suggest possible modifications to objectionable constitutional provisions.” As to the substantive terms of the amendment, the new §476 provides that the Secretary “shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.”

Congress [defined] “applicable laws” [as such]:

“Applicable laws” means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts.

Thus, the 1988 amendments set a substantive standard which limits the Secretary’s discretion to disapprove constitutional amendments.

The 1988 amendments’ limitations on secretarial discretion represent a positive shift in the right direction despite the fact that secretarial authority to disapprove amendments is still an infringement on tribal self-determination. The Department of the Interior noted, however]:

Secretarial involvement in the calling of elections and approval of constitutions and bylaws, and amendments to them, is not consistent with the policy and goal of tribal self-determination. . . . Any challenges to tribal elections of tribal governing documents should be resolved through a tribal process in the tribal forums.

Ironically, after recommending that secretarial involvement be completely removed, the Secretary proceeded to ask Congress to expand the definition of “applicable laws” in order to give the Secretary more latitude to disapprove amendments.

Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZAGA L. REV. 81, 96-99 (1993-1994).

2. The Constitution and Bylaws of the Hannahville Indian Community contain, to this day, extensive Secretarial approval provisions, and even a detailed process for procuring Secretarial approval:

Article III—Membership

...

3. The members of this Community may by a majority vote adopt as a member of the Community any person of Indian blood related by marriage or descent to the members of the Community who will assist the Community, in the fulfillment of its purposes and also any other person whose adoption is approved by the Secretary of the Interior. . . .

Article V — Powers of the Council

...
 SEC. 5. Manner of Review. — Any action of the Council which by the terms of this Constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the jurisdiction, who shall within ten (10) days thereafter, approve or disapprove the same. If the Superintendent shall approve such action, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date the Council decided action, disapprove such action, for any cause, by notifying the Council of such decision. If the Superintendent shall refuse to approve any action submitted to him, within ten (10) days after the Council made its decision, he shall advise the Council of his reasons therefor. If these reasons appear to the Council insufficient, it may, by a majority vote, refer the action to the Secretary of the Interior, who may, within ninety (90) days from the date the Council made its decision, approve the same in writing, whereupon the action of the Council shall become effective. . . .

Article VI — Assignments of Land

...
 SEC. 5. The Council shall make all further necessary rules governing assignments, which shall be subject to review by the Secretary of the Interior.

Article VII — Amendments

This Constitution and bylaws may be amended or revoked by a majority vote of the qualified voters of the Hannahville Indian Community voting in an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote, shall vote in such election but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment at the request of the Council.

CONST. AND BYLAWS OF THE HANNAHVILLE INDIAN COMMUNITY, MICHIGAN (July 23, 1936).

3. While it has been rare in recent decades for the Secretary to question tribal ordinances in which the tribal constitution requires secretarial approval, some tribal ordinances face scrutiny and possible disapproval from the Secretary. Consider the Moapa Band of Paiute Indians' ordinance permitting houses of prostitution on their reservation. *See Moapa Band of Paiute Indians v. United States Dept. of Interior*, 747 F.2d 563, 564 (9th Cir. 1984). The Ninth Circuit affirmed the Secretary's decision to disapprove the ordinance:

Under powers granted to it by the tribal constitution and bylaws, the Moapa Business Council enacted an ordinance permitting the licensing and operation of houses of prostitution on the Reservation. The tribal constitution requires the Business Council to submit licensing ordinances to the Department of the Interior for approval, which the Department can deny for "any cause." MOAPA CONSTITUTION, art. V, §4. . . .

The Area Director offered two reasons for rescinding the ordinance: (1) non-Indian patrons would be subject to arrest under Nevada laws relating to prostitution despite the Band's licensing ordinance, and (2) Indians and non-

Indians both would be subject to arrest under the Assimilative Crimes Act, 18 U.S.C. §13 (1976), which makes punishable as a federal crime any act committed on federal land which would be a state crime if committed in the state surrounding that land. The Director also observed that although the federal government encourages the economic development of Indian reservations, the commerce generated by prostitution was “not the kind of economic development envisioned by federal policy” and the likelihood of substantial revenues was slim.

On appeal, the Assistant Secretary for Indian Affairs, acting for the Secretary of the Interior, agreed with the Area Director’s reasons, and added his concern that brothels would actually retard the Band’s overall economic development. Furthermore, he articulated two additional public policy reasons for rescinding the ordinance: (1) licensing and operation of brothels on the Moapa Reservation would bring about a political reaction adverse to Moapa and other Indian tribes, and (2) prostitution is an activity frowned upon by federal policy. . . .

[W]e interpret the tribal constitution to require the Secretary to approve tribal ordinances unless he finds “cause” to rescind them. Under this interpretation, we review the Secretary’s public policy findings of “cause” under the same “arbitrary and capricious” standard that applies to the Secretary’s other actions. *See* 5 U.S.C. §706(2)(a) (1976). . . .

While attitudes towards prostitution may have changed somewhat since 1912, there is no indication that Congress has altered its position so as to condone the operation of bordellos. Moapa argues, however, that there is a conflicting federal policy favoring Indian self-determination. . . . Moapa contends that even if federal policy disfavors prostitution, the activity is legal in Nevada and apparently is a profitable economic enterprise for non-Indians. The Secretary’s decision denies Moapa an economic opportunity which the Moapa Business Council has determined will benefit the tribe, and which is available to non-Indians nearby albeit not in Clark County.

Our standard of review is determinative of this issue. We cannot say that the Secretary’s decision, after weighing the competing federal policies, is arbitrary or capricious. We therefore must affirm the rescission on the ground that the operation of houses of prostitution is contrary to federal public policy.

Id. at 565-68.

4. Overhauling tribal constitutions requires the federal government to step back from its traditional and historical role as paternalistic partner of Indian nations, as Eric Lemont writes:

In many ways, the IRA helped revitalize and provide formal federal recognition to tribal governments at a time of their great fragility. But for the many tribes with histories and cultures of decentralized, consensus-oriented, and deliberative methods of decision making, IRA constitutions’ centralization of power in small tribal councils acting by divisive majority votes with few checks or balances has been a difficult transition. In addition to their substantive drawbacks, IRA constitutions have been criticized for the way in which they were imposed “top-down” upon tribal memberships that did not fully understand their contents and purposes. . . .

Significantly, the United States Government’s impact on the organization of tribal government extends beyond the sheer numbers of IRA governments. Over the course of the last century, numerous non-IRA tribes have adopted

provisions from IRA constitutions, including the requirement that the U.S. Government approve constitutional amendments. Others, such as the Navajo Nation, have governed through tribal councils that also were originally created by officials from the Department of the Interior and that share characteristics, such as centralized and unitary government, mirroring those of IRA governments. . . .

American Indian leaders' efforts to revise or replace IRA constitutions have been reinforced and accelerated by the commencement of the U.S. Government's self-determination policy in the 1970s.

On a practical level, the increased governmental responsibilities assumed by tribal governments over the past twenty-five years require stronger and more responsive government institutions. By contracting and compacting with federal agencies of the U.S. Government, numerous American Indian nations have taken over responsibility for managing and delivering a wide range of government programs and services in areas as diverse as health, education, gaming, economic development, housing, and the environment.

Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform*, 26 AM. INDIAN L. REV. 147, 153-56 (2001-2002).

4. CHEROKEE NATION OF OKLAHOMA—A CASE STUDY

OVERCOMING THE POLITICS OF REFORM: THE STORY OF THE CHEROKEE NATION OF OKLAHOMA CONSTITUTIONAL CONVENTION

Eric Lemont, 28 Am. Indian L. Rev. 1, 19-32 (2003-2004)

. . .

III. Major Areas of Reform Debated at Constitution Convention

Topics dominating discussion . . . fell into two broad categories. The first set consisted of concrete proposals for strengthening the accountability and effectiveness of the Nation's government. . . . During the Commission's public hearings, citizens called for procedures allowing for the recall of elected officials, the holding of mandatory community meetings by Council members in their respective districts, open financial records of the Nation's government, publication of the Nation's laws, the creation of an independent election commission, and better publicized notices of open Council meetings.

A number of these concerns subsequently were addressed at the Convention, with delegates voting to create a permanent record of the Nation's laws, remove language requiring their approval by the Bureau of Indian Affairs, stagger terms and implement term limits for Council members, create an independent election commission, and remove the Deputy Principal Chief from service as President of the Council.

A second set of reform proposals stemmed from the growing disconnect between the constitution's corporate model of government and the Nation's phenomenal growth in population, diversity and assumption of governmental responsibilities over the past three decades. Between 1970 and 1999, the Nation's population had grown from 40,000 to over 200,000. The government had contracted or compacted with the U.S. Government in a host of different

areas, including housing, health, economic development, elderly programs, education, and environmental management. As a result, the Nation's budget had ballooned from \$10,000 to \$192 million. This change in the size of the Nation's government matched an equally dramatic change in the Nation's demographics. The absence of a blood quantum requirement in the constitution and the passing of a generation had combined to lower the average blood quantum of the Nation's citizenry by the time of the Convention. And the Nation's citizens, once concentrated in Oklahoma, were increasingly living in places as far-flung as Texas and California. . . .

A. Bicameralism

One of the first major convention debates involved whether the Nation should return to the bicameral form of government of the Nation's 1827 and 1839 constitutions. Across Indian Country, the overwhelming majority of tribal governments concentrate legislative power in unicameral tribal councils. During the nineteenth century, the U.S. Government—frustrated at tribes' slow, consensus-oriented method of political decision making—began pressuring tribes to form small tribal bodies capable of quickly approving treaties and agreements. . . .

[T]he motivation for unicameral councils was to facilitate the receipt and disbursement of federal funds through a corporate structure. . . . Relative to other branches of government, most tribal councils have vast and relatively unchecked powers. . . .

On the second day of the convention, John Keen introduced a motion for the Convention to consider a return to bicameralism. Keen argued that the Nation's current unicameral form of government had allowed nine persons—the Principal Chief and eight Council members—to control the Nation's entire government and only six boycotting Councilors to bring the Nation's government to a halt. Keen's motion called for a lower house (tribal council) apportioned by district population and an upper house (senate) apportioned by one delegate per district. The move to two houses of government would increase the total number of legislators from fifteen to thirty-three and reduce the ratio of legislators to citizens from 1:12,000 to 1:5,500.

Quoting James Madison's Federalist No. 51, Keen argued that a bicameral legislature's dual legislative track structure and form of election as well as its increased size would prevent a small bloc of united Council members from controlling the levers of the Nation's government. A supporter of the motion said the lower house could address local concerns while the upper house would provide "balance" and "stability" by ensuring that the legislature did not get bogged down in debates over local issues. Another argument raised in favor of Keen's bicameral proposal was its consistency with the Nation's bicameral system of government in the 1827 and 1839 constitutions.

In response, several delegates proffered a series of counterarguments against the adoption of a bicameral legislature. Some feared that two houses of government would double the potential for stonewalling and make it more difficult for the Nation to reach consensus. Another delegate argued that, unlike the Founding Fathers of the U.S. Government, who wanted to develop a mechanism for distributing power among states of unequal population, the

Nation did not have a problem with regard to unequal power among its districts. Several members of the Convention Commission reported that bicameralism had been raised during public hearings but felt that such a change would present too many practical difficulties. Commission members said they were “stymied” in their attempt to figure out a way to implement a bicameral legislature without affecting other constitutional provisions. The Nation’s Chief Justice quickly and forcefully denounced the Commission’s concerns, describing it as “mindboggling” that the leaders at the Convention couldn’t figure out how to form a bicameral legislature.

Surprisingly, the argument that appeared to seal victory for opponents of a bicameral legislature was the simple one of cost. Numerous delegates felt that the Nation’s annual budget should be spent on delivering services to Cherokee citizens rather than creating a bigger government. Although several delegates said the issue was important enough to justify a fuller examination of structure, powers, and cost, the delegation ultimately voted down the proposal.

B. Judiciary

Much focus at the Convention was spent on restructuring the Nation’s judiciary. . . . The [1976] constitution vested the Nation’s three-member Judicial Appeal Tribunal with powers only “to hear and resolve any disagreements arising under any provisions of this Constitution or any enactment of the Council.” In addition to strengthening the judiciary’s powers, the delegates were concerned about its political independence. Great concern was placed on preventing a reoccurrence of the impeachments, standoffs, lockouts, dual court systems and other problems between the judiciary and the other two branches. . . .

To strengthen the powers of the judiciary, the delegates agreed to a two-tiered court system consisting of a Supreme Court (formerly the Judicial Appeals Tribunal) and lower district courts. The proposed constitution vests the Nation’s district courts with original jurisdiction to hear and resolve disputes arising under the laws or constitution of the Nation, whether criminal or civil in nature. It vests the Supreme Court with powers of original jurisdiction over all cases involving the Nation or its officials named as a defendant and with exclusive appellate jurisdiction over all district court cases. To improve the scope and depth of decision making of the Supreme Court, the proposed constitution raises the number of justices from three to five.

The delegates also took a series of steps to strengthen the judiciary’s independence while providing checks on the exercise of its powers. To protect the Judiciary’s independence from various interest groups, delegates voted to have judges and justices appointed by the Principal Chief rather than elected. Under the proposed constitution, judges and justices also serve longer terms (ten years for Supreme Court justices) and cannot have their salaries diminished during their terms. To prevent court-stacking, the proposed constitution staggers the terms of the judges and justices so they do not overlap with the terms of the Principal Chief more than twice in any five year period.

At the same time, the proposed constitution contains several checks. First, it keeps judges and justices subject to removal by the Council for specified causes. The most innovative check, however, is the proposed constitution’s

Court on the Judiciary. After suffering through the recent impeachment of the entire judiciary by the Principal Chief and Council, the delegates wanted to preserve the judiciary's integrity without allowing it to police itself entirely. [T]he Court on the Judiciary is a seven-member panel vested with powers of suspension, sanction, discipline and recommendation of removal of judges and justices. Borrowed from a similar body in the Oklahoma Constitution, the Court is composed of two appointees from each of the Nation's three branches of government, who collectively appoint a seventh. . . .

C. Representation on Tribal Council for Off-Reservation Residents

Mandatory federal relocation programs, forced removals, a lack of well-paying jobs on many reservation lands, and routine migration has left many American Indian nations with high numbers of off-reservation citizens. The situation is especially pronounced for American Indian nations lacking a sufficient number of well-paying reservation-based jobs. With approximately forty percent of its 200,000 citizens living off-reservation, the Cherokee Nation is at the forefront of this trend of dispersed Indian citizenry.

The . . . 1976 Constitution does not provide for specific representation on the Tribal Council for off-reservation residents. Instead, off-reservation residents select a district or precinct within the Nation's historical boundaries for purposes of registration and voting. Off-reservation residents claim this has led many candidates to solicit their votes before elections and ignore them afterwards.

Gaining representation on the Council proved to be the foremost priority of the fourteen Convention delegates residing off-reservation. Julia Coates Foster, a Cherokee citizen living in New Mexico, organized a meeting of all fourteen off-reservation delegates on the night before the Convention's first day to develop a strategy for gaining representation. . . .

On the Convention's second day, Foster introduced a motion requesting representation for off-reservation residents. Foster's motion called for twenty percent of Council seats to be reserved for representation of the Nation's off-reservation residents. If off-reservation Cherokees were included as delegates to the Convention, she asked, why shouldn't they have a seat at the legislative table? Foster argued that representation would provide off-reservation residents with the information necessary to advocate for Cherokee issues against outside public and private interests. She also pointed to the need for stronger bonds among Cherokee's diverse citizenry. "Our land base is minimal . . . but in some sense our Nation exists from coast to coast and border to border because our Nation exists in our people, our citizens and our citizens are everywhere."

Opposition by delegates residing within the reservation's boundaries was swift. Delegate David Cornsilk reminded delegates that off-reservation citizens were adequately represented in the Nation. Contrasting Foster's view of the Nation being made up of its citizens, wherever they were, Cornsilk countered that the "Cherokee Nation is a real place, that it is here. That it is within the exterior boundaries of the Cherokee Nation as described in our treaties, and that the focus of the people who live outside the Cherokee Nation should be to strengthen the Nation, the place here." Other delegates argued that the Nation's current system of having off-reservation residents choose a district

within which to register and vote was sufficient. Couldn't a group of off-reservation residents simply form an organization and agree to register in the same district as a bloc?

The tide turned when a well-respected current Council member, Barbara Starr-Scott, unexpectedly stood up in support of off-reservation representation with the simple declaration that "[w]hen everybody represents you, nobody represents you." The motion then became renamed the Starr-Scott proposal. Eventually, the two sides reached a compromise calling for the Council to be expanded from fifteen to seventeen members, with the additional two at-large seats reserved specifically for representation of off-reservation residents.

D. Blood Quantum Requirements for Candidates for Principal Chief

... At the time of the Convention, approximately ninety percent of the Nation was one-quarter Indian blood or less, with the most common degree of blood quantum being one-sixteenth or one-thirty-second.

The tension between full-blooded and lower-blooded Cherokees manifested itself on the Convention's fifth and sixth day, when delegates introduced motions to establish a minimum blood quantum requirement for candidates for Principal Chief. The first motion was for candidates to be citizens by one-sixteenth of greater blood quantum and be bilingual in Cherokee and English. The motion was immediately and strongly opposed by several delegates. One, referring to the low blood quanta of the Nation's citizenry argued:

If we put this kind of limitation on ourselves, we are simply saying that we don't trust ourselves to lead our own Nation. We're trying to say that the people, our own children, our own grandchildren, at some point are not capable of leading this Nation, simply because they have some federally imposed degree of Indian blood.

A second delegate opposed the motion with a warning for the future:

We're saying that we are going to put a time and date on the existence of the Cherokee Nation. If we put a grade of Indian blood on it . . . we're saying that in a hundred years or two hundred years, that we will cease to exist as a people, at least with a leader.

The motion was quickly voted down. The next day, however, the issue was raised again, this time through a motion presented on behalf of a bloc of nondelegates calling for a one-quarter blood quantum for candidates for Principal Chief. The sponsor based the motion on the "pride of not one day seeing a blond-haired, blue-eyed Chief representing me." Supporters of the motion associated low blood quantum Cherokees with dominating the Convention by talking in fast "legalese" that they couldn't understand. One grounded his desire for a blood quantum requirement as a way to maintain the "integrity of the Cherokee Nation." Another felt that a blood quantum requirement for Chief would serve as an important symbol for Cherokee children: "... I would like for our Cherokee children, our dark-skinned Cherokee children to be able to look at their Chief and see someone like them. I think that's essential for their self-esteem."

In opposition, delegates argued along several lines: the blood quantum requirement could not stand up against the test of time and the Nation's

ever decreasing native bloodlines; citizens' opportunities to run for office should not be limited by their blood; those favoring higher blood quantum could express their desire for such a candidate at the ballot box; blood quantum is a nontraditional value introduced by the federal government and not an appropriate criterion for determining the Nation's Chief; the Dawes Commission made mistakes in its original blood quantum determinations, therefore making it inherently inaccurate; and blood quantum is not a perfect match for "Indianness." A final argument was that such a change would never be approved by Cherokee voters at a referendum.

In the end, the delegates voted to reject a minimum blood quantum requirement for candidates for Principal Chief.

IV. Ratification

Notwithstanding the scope of the Convention's work, there was no guarantee that the Cherokee people would vote to ratify the proposed new constitution. Indeed, the sweeping nature of the changes in the proposed constitution posed a significant obstacle to ratification. . . .

. . . David Mullon, former general counsel for the Nation, worried that the Commission's introduction of a replacement constitution would present a "big target" for opposition, where individual opposition to a single proposed provision might lead to a vote against the constitution as a whole. . . .

Notwithstanding these points of disagreement, reform leaders on both sides of the aisle affirmed the legitimacy of the Nation's constitutional revision process and the substance of the proposed constitution. Even [Ross] Swimmer, the primary author of the current constitution, agreed at the time that "the constitution convention and the product they developed seems to be pretty well accepted by most people."

In fact, the most significant obstacle to ratification did not result from internal debates within the Nation. Rather, a referendum vote to approve the Convention's proposed constitution was delayed for over four years because of the Nation's interactions with the Bureau of Indian Affairs. The delay stemmed from Article XV, Section 10 of the 1976 Constitution, which included language requiring that any amendment or new constitution be approved by the "President of the United States or his authorized representative." Because the Cherokee Nation did not organize its government pursuant to the Indian Reorganization Act, it was not required by U.S. law to obtain federal approval for new and amended constitutions. Swimmer said he included the language as a defensive measure to ensure the recognition of the Nation's 1976 constitution by the U.S. Government.

Following the constitution's self-imposed requirement, the Commission sought BIA approval of the proposed constitution adopted by delegates to the Convention. After not hearing from the Bureau for several months, the Commission began to lobby the Bureau with calls and letters from September through December 1999. After nine months of review by two separate field offices, the Solicitor's office, and several internal levels in the Bureau's Washington central office, the Bureau finally decided on December 14, 1999, not to approve the Convention's proposed constitution. In a lengthy disapproval letter to the Nation, the Bureau delivered a series of mandated and recommended changes to specific articles of the proposed constitution. . . .

Finally, in April 2002, after a change in administration at the Bureau and much behind-the-scenes discussions, the Department of Interior approved the Council's proposed amendment removing the need for approval of constitutional amendments by the U.S. Government. With the legal path clear, Cherokee citizens voted on May 24, 2003, to strike the 1976 Constitution's requirement of U.S. Governmental approval of all constitutional amendments. A final referendum on the constitution adopted by Convention delegates in 1999 was scheduled for July 26, 2003.

In preparation for the final vote, the Commission conducted a public education initiative unprecedented in Indian Country. The Commission inserted 100,000 copies of a fourteen page Constitution Education Tabloid into the tribal newspaper and mailed an additional 26,000 copies to all Cherokee registered voters. The Commission also conducted forty-one Constitution Education forums throughout the Nation and the United States, including Texas, California and Kansas, where there were high concentrations of Cherokee citizens. The schedule for the education forums were advertised by 500 posters printed and posted throughout the Cherokee Nation, direct mailings of 26,000 oversized "post cards" to registered voters, and press releases to over forty newspapers. The Commission also made ample use of the Nation's website to disseminate critical information regarding the referendum.

Finally, on July 26, 2003, more than four years after the conclusion of the Convention, the Cherokee citizens voted to approve a new constitution replacing the Nation's current 1976 constitution. . . .

NOTES

1. Several other Indian nations have embarked on a full-fledged tribal constitutional convention, with notable successes and with heartrending failures. *E.g.*, CROW TRIBAL CONSTITUTION (new constitution ratified and adopted in 2001-2002), available at http://www.tribalresourcecenter.org/ccfolder/crow_const.htm; TURTLE MOUNTAIN BAND OF CHIPPEWA CONSTITUTION CONVENTION AND REVISION PROCESS 2001-2002 (Jerilyn DeCoteau ed., 2003) (history of the failed Turtle Mountain Band constitutional convention). The Blackfeet Tribe has been engaged in a constitutional reform discussion for some time. *See* Blackfeet Constitutional Reform website, available at <http://www.blackfeetvoice.org>. For more discussion on tribal constitutional reform, see AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS (Eric D. Lemont ed., 2006).
2. The White Mountain Band of Chippewa Indians currently is engaged in a process of reviewing a new constitution drafted in part by Gerald Vizenor, a tribal member who is an esteemed novelist and indigenous literary critic. Chapter 2, Article 4 of the draft constitution reads:

No person or government has the privilege or power to diminish the sovereignty of the White Earth Nation.

What are the possible reasons for including this provision? What tribal government actions might be affected by such a provision?

B. TRIBAL CONSTITUTIONAL STRUCTURE

Tribal constitutions often borrow heavily from the United States Constitution — for example, some form of separation of powers. Many tribal constitutions, however, tend to read more like a municipal charter than a constitution, a likely result of the original constitution-drafting process initiated by the Bureau of Indian Affairs in the 1930s. This section will deal with some key features of many tribal constitutions, and with how the tribal courts have interpreted those features.

1. JUDICIAL REVIEW

DOMENCICH V. ONEIDA TRIBAL ENROLLMENT & TRUST DEPARTMENT

Oneida Appeals Commission, No. 95-CVL-0005 (November 30, 1995),
1995.NAOW.0000029

This case has come before the Oneida Appeals Commission. Commissioners Carole Liggins, Kirby Metoxen, Dorothy Skenandore, Mark N. Powless, and Wanda Webster, presiding.

The appellant in this case, Mr. Lee F. Domencich, has had disenrollment proceedings initiated against him by the Oneida Tribal Enrollment and Trust Department (Enrollment Dept.). [T]he appellant is seeking a declaratory ruling as to the appellate jurisdiction over enrollment matters in the Tribe. . . .

Appellate Jurisdiction

This membership matter calls for an interpretation of the Oneida Tribe's membership ordinance which is codified in Resolution 6-2-84-A. Article V Section C of this ordinance sets forth the procedures to be followed when a person is denied enrollment. Implicitly, such procedures should be followed when a person is disenrolled. This ordinance empowers the Enrollment Dept. to hold hearings on membership matters. V.C.2.g. states that a final appeal can be made to the Oneida Business Committee. The appellant seeks a declaratory judgment from this Commission as to the validity of this part of the membership ordinance.

The Oneida Appeals Commission was created pursuant to Resolution 8-19-91-A of the General Tribal Council. It was granted appellate jurisdiction over contested cases that arose within the tribe. The Appeals Commission has appellate review powers over lower hearings held by agencies of the Tribe.

At the time of the Membership Ordinance's passage, the Oneida Appeals Commission did not exist. Nor did the Oneida Administrative Procedures Act which sets forth general procedures for contested cases and their appellate review. Currently, with the passage of the OAPA, there exists a separation of powers within the Oneida Tribe. The role of the Appeals Commission is that of judicial review. The role of the Business Committee is that of a legislative body. It is no longer appropriate for the Business Committee to function as an appellate body in membership matters. This is now the role that the Appeals Commission is empowered to play. It is therefore held by this Commission

that Article V Section C 2 (g) of the Oneida Membership Ordinance which states, “(f)inal appeals may be made to the Oneida Business Committee only after they have been processed by the Oneida Trust Committee with a recommendation,” shall no longer be valid. The Oneida Appeals Commission shall have final appellate review over the membership determinations of the Oneida Tribal Enrollment and Trust Department. All other sections of the membership ordinance shall remain in effect.

Therefore, the Enrollment Dept. is hereby ordered to stay its proceedings on the disenrollment of Lee F. Domencich until such time as his search for his biological parents is complete. . . . In addition the Enrollment Dept. is put on notice that appellate jurisdiction over the hearings it conducts now resides with the Appeals Commission.

NOTES

1. Like the United States Constitution, many tribal constitutions do not include a specific provision authorizing the tribal judiciary to engage in judicial review of tribal legislative or executive branch acts. Most tribal courts not expressly authorized to engage in judicial review, like the United States Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803), simply assume the authority.
2. Other tribal courts, notably the Navajo Nation Supreme Court, asserted the right of judicial review deriving not from the tribe’s constitution — as there is none — but from Navajo common law and the Indian Civil Rights Act:

There is no question in our minds about the existence of such authority. When the Navajo Tribal Council adopted Title 7, Section 133 of the Tribal Code, it did not exclude review of Council actions from its broad grant of power to the courts.

Indeed, in our opinion, Title 25, Section 1302 of the United States Code precludes such an exclusion of judicial review of legislative actions because that law is a mandate for Indian governments which necessarily assumes and requires judicial review of any allegedly illegal action by a tribal government.

In particular, 25 U.S.C. 1302 (8) prohibits the denial of equal protection of the laws and deprivation of liberty or property without due process of law. We cannot imagine how any legislative body accused of violating these primary rights could be the judge of its own actions and at the same time comply with the federal law. Of course, this is not possible.

Judicial review must, therefore, necessarily follow. If the courts established by Indian tribes cannot exercise this power, then the only alternative is review in every case by federal courts.

It is inconceivable to us that the Navajo Tribal Council would prefer review of its actions by far-away federal courts unfamiliar with Navajo customs and laws to review by Navajo courts. We know that this is not the case because the Council has not limited the power of Navajo courts in this respect and has never indicated a willingness to do so.

The courts of the Navajo Nation, including this Court, have frequently reviewed and interpreted legislation passed by the Council and executive actions of the Chairman of the Council. See *Dennison v. Tucson Gas and Electric* (Navajo Court of Appeals, December 23, 1974).

Our right to pass upon the legality or meaning of these actions has been questioned in certain places but never by the Council or its Chairman. That is because they have a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it with them through history.

The style and the form of problem-solving and dispensing justice has changed over the years but not the principle. Those appointed by the People to resolve their disputes were and are unquestioned in their power to do so. Whereas once the clan was the primary forum (and still is a powerful and respected instrument of justice), now the People through their Council have delegated the ultimate responsibility for this to their courts. That is why 7 N.T.C. 133 is so broadly written.

In any case, judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act, 25 U.S.C. 1302.

Halona v. McDonald, 1 Navajo Rep. 189, 203-06 (Navajo Nation Court of Appeals 1978). See also Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1118 (2005).

3. Some tribal councils restrict judicial review in certain circumstances. Consider this statute from the Mashantucket Pequot Nation:

If the Mashantucket Pequot Tribal Council resolves that a matter is private, the courts of the Mashantucket Pequot Tribe must recognize the matter as privileged. Communications made during an announced executive session of the Mashantucket Pequot Tribal Council are privileged.

MASHANTUCKET PEQUOT RULES OF EVIDENCE §508(a).

2. SEPARATION OF POWERS

WILSON V. BUSINESS COMMITTEE

Cheyenne-Arapaho Tribes Supreme Court, No. CAN-SC-02-02, 8 Oklahoma Tribal Court Rep. 109, 2003 WL 24313610, March 18, 2003, reh'g denied, May 7, 2003

Justice ARROW delivered the Opinion and Order of the Court, in which Chief Justice RIVAS and Justice BLACK join.

I.

Prior to January 8, 2002, Appellant Wilson was the validly-elected representative of Cheyenne District 3 to the Business Committee of the Cheyenne-Arapaho Tribes. On that date, he was provided notice that a recall petition alleging misconduct had been filed against him, and that a removal hearing was scheduled for January 23, 2002, at 11:00 a.m.

On January 14, 2002, then-Business Committee Chairman James Pedro attempted to rescind the notice letter of January 8. On January 17, an emergency hearing was held before the District Court of the Cheyenne-Arapaho Tribes in *Business Committee v. Pedro*, No. CNA-CIV-02-08, 7 Okla. Trib. 391[, 2002 WL 32099760] (Chey.-Arap. D. Ct. 2002), in which the Court ordered then-Chairman Pedro to proceed with the scheduled January 23 meeting. On

January 23, at 9:00 a.m., then-Chairman Pedro submitted a letter of resignation as Chairman to himself, despite Article VIII, Section 3 of the Cheyenne-Arapaho Constitution, which provides that “[t]he term of office for each committeeman elected after the first election shall be for a period of four (4) years, or until his successor is duly elected and installed in office.” *Id.* (emphasis added). Six members of the Business Committee did, however, meet at 11:00 a.m. on January 23, 2002 (including Appellant), but no meeting was convened. Later on the afternoon of the 23rd, the District Court sua sponte ordered the convening a meeting [sic] of the Business Committee at 3:00 p.m. on January 25. *See Pedro*, 7 Okla. Trib. at 394.

At the appointed time on January 25, a quorum was assembled and a Business Committee meeting was convened, with Vice-Chairman Bill Blind (according to one rendition) apparently refusing to formally chair the meeting even though then-Chairman Pedro had again ignored the District Court’s Order by failing to appear. Appellant did not attend, though he had notice of the meeting. The petition to remove Appellant from his Business Committee position was discussed, and a removal motion was adopted by a vote of five to one. Appellant was thereupon removed from his C-3 Business Committee seat. . . .

II.

The Cheyenne-Arapaho Constitution establishes two procedures for removal of members of the tribal Business Committee. First, any member of the Business Committee may charge another member, in writing, with misconduct or neglect of duty. The constitutional provision applicable in such an eventuality provides, in whole, as follows:

Any member of the business committee charged, in writing, with misconduct or neglect of duty by a fellow committeeman may be removed from the business committee or from an office of the business committee, provided at least five (5) of the members vote in favor of removal. A special meeting of the committee shall be called to consider any removal action; and the accused shall be provided with a minimum of fifteen (15) days notice of said hearing and be provided the opportunity to attend and testify in his own behalf. The decision of the committee shall be final.

CHEY.-ARAP. CONST. art. IX, §1 (emphasis added). . . .

IV.

A.

. . . Appellant first argues that the District Court lacked power to have ordered the Chairman to call, convene, attend, and preside over the January 23 Business Committee meeting, and to have ordered the attendance at that meeting of the other Business Committee members. Appellant also challenges the District Court’s power to have ordered the convening of the meeting of January 25, and/or the District Court’s decision to actually preside at that meeting (if that is in fact the proper characterization of the January 25 events).

Business Committee members are paid in large measure for attending Business Committee meetings and conducting important tribal business therein.

See generally CHEY.-ARAP. CONST. art. IV, §5 (tying compensation of Business Committee members in substantial measure to meeting attendance). Tribal welfare as a general matter, the best interests of individual tribal members, and tribal constitutional law all demand that Business Committee meetings be held regularly, *see, e.g.*, CHEY.-ARAP. CONST. art. XVI, §1 (“Regular monthly meetings of the business committee shall be held on the first Saturday of each month at the tribal headquarters. . . .”), and that tribal business be transacted professionally and efficaciously at such meetings, *see, e.g., id.* art. IV, §4 (“All action taken by the . . . business committee shall be pursuant to duly adopted ordinances or resolutions, and shall be certified by the presiding officer.”). Nevertheless, this Court takes judicial notice of the fact that more than one Chairman has refused to convene regular (or otherwise-constitutionally-required) Business Committee meetings over the years, apparently on the assumption that the Chairman has the power to prevent the Business Committee from meeting—apparently forever (or at least until the Chairman’s term expires)—by simply refusing to call, convene, attend, or preside over such meetings. That assumption is false.

. . . Article XIV, Section 1 assigns the following five functions (*i.e.*, non-discretionary duties or discretionary powers) to the Chairman of the Cheyenne-Arapaho Tribes:

1. “[P]resid[ing] over all meetings of the [Business C]ommittee”;
2. “[P]erform[ing] all the duties of a chairman”;
3. “[E]xercis[ing] any authority delegated to him by the [Business C]ommittee”;
4. “[V]oting in case of a tie [Business Committee vote]”; and
5. “[P]residing at all meetings of the tribal council, unless a different presiding officer is selected by the tribal council. . . .”

CHEY.-ARAP. CONST. art XIV, §1. In addition, Article XVI, Section 2 assigns the Chairman a sixth function (in this instance, a power): it authorizes the Chairman to call special Business Committee meetings within his own discretion. A seventh function (in this instance, a non-discretionary duty) is established by Article XVI, Section 2 and Article IX, Section 1, which require the Chairman to convene special Business Committee meetings under the circumstances described in those provisions. And Article IV, Section 4 establishes an eighth function (a contingent duty), by requiring the “presiding officer” of the Business Committee or Tribal Council (who will often but not necessarily be the Chairman) to certify duly-adopted ordinances or resolutions. No other functions are assigned to the Chairman of the Cheyenne-Arapaho Tribes by the Cheyenne-Arapaho Constitution, and as noted above, not all of the eight above-described functions are discretionary powers. For ease of identification, the functions described above will be referred to as the Chairman’s “eight functions.”

It is obvious to this Court (and Appellant’s briefs do not dispute) that were the Chairman of the Cheyenne-Arapaho Tribes to enjoy the power to prevent the Cheyenne-Arapaho Business Committee from meeting indefinitely, that power could only be derived from the first of the eight functions described above. [T]he power of a Chairman to prevent the Business Committee from

meeting stems either from the “first function” or it does not exist at all. As we shall see, it does not exist at all.

As defined by Article XIV, Section 1 of the Cheyenne-Arapaho Constitution, the Chairman’s “first function”—presiding over Business Committee meetings—is a nondiscretionary *duty*, not a discretionary power. Article XIV, Section 1 states that “[t]he chairman of the business committee *shall* preside over all meetings of the committee,” *id.* (emphasis added), and the Constitution elsewhere provides:

As used in this constitution and by-laws, the word *shall* is deemed to mean *imperative or mandatory and to exclude the exercise of discretion*. The word may is deemed to mean permission or liberty and to include the exercise of discretion.

CHEY.-ARAP. CONST. art. I, §9 (second emphasis added). . . . Cheyenne-Arapaho constitutional law leaves the Chairman with no discretion whatsoever to refuse to call, convene, attend, and preside over regular monthly meetings, and such special meetings as are required by Articles IX and XVI of the Cheyenne-Arapaho Constitution.

The residual question then becomes simply a question of judicial remedy for situations in which the Chairman has breached his or her nondiscretionary duty. Unlike the Constitution of the United States of America, the separation-of-powers structure of the Cheyenne-Arapaho Constitution establishes a “legislative-executive branch”—the Business Committee—that both exercises legislative power and (through, among other things, the selection of the Business Manager) indirectly supervises the executive operations of the Tribes. The Business Committee—composed of only eight members, CHEY.-ARAP. CONST. art. I, §3—is an enormously powerful branch of the Cheyenne-Arapaho government. The judicial branch, which is constitutionally necessary to insure the enforcement of tribal members’ rights, *see, e.g.,* CHEY.-ARAP. CONST. art. III, enforce tribal law generally, and adjudicate disputes (such as the present one) that arise under the tribal Constitution, is by comparison relatively weak. The judicial branch enjoys no power to run the Cheyenne-Arapaho government even if it wanted to—which it does not. That is the province of the Cheyenne-Arapaho Business Committee. . . .

On the basis of the premise that the Cheyenne-Arapaho Business Committee must run the Cheyenne-Arapaho Tribes (because no other institution can do so), and the inextricably intertwined premise that to run the Cheyenne-Arapaho government, the Business Committee must meet, there can be no conclusions other than the ones we announce today. For purposes of resolving the Business-Committee-meeting issue, we hold:

1. That each member of the Cheyenne-Arapaho Business Committee has the NON-DISCRETIONARY DUTY to assemble “on the first Saturday of each month at the tribal headquarters, unless it falls on a legal holiday; and in such event, [the meeting] will be held on the following Saturday.” CHEY.-ARAP. CONST. art. XVI, §1;

2. That the Chairman of the Cheyenne-Arapaho Tribes has the NON-DISCRETIONARY DUTY to call, convene, attend, and preside over regular monthly meetings of the Business Committee, and such special meetings as

are required by Article IX, Section 1, and Article XVI, Section 2 of the Cheyenne-Arapaho Constitution;

3. That if the Chairman of the Cheyenne-Arapaho Tribes fails to perform the NON-DISCRETIONARY DUTY described in the preceding numbered item, the other members of the Cheyenne-Arapaho Business Committee shall have the NON-DISCRETIONARY DUTY to convene the constitutionally-required meeting themselves. In such an event, the meeting shall be chaired by the highest-ranking officer present, in the following order: Vice-Chairman, Secretary, Treasurer; and

4. That because every member of the Cheyenne-Arapaho Tribes is injured by the failure of the tribal Business Committee to meet regularly as required by the tribal Constitution, in the event that the Chairman of the Cheyenne-Arapaho Tribes fails to perform the NON-DISCRETIONARY DUTY described above, or in the event that a quorum cannot be mustered for a regular or constitutionally-required special meeting of the Business Committee for any other reason, any Cheyenne-Arapaho citizen (including but not limited to any Business Committee member) shall have standing to bring an action before the District Court of the Cheyenne-Arapaho Tribes to enforce the provisions of the Cheyenne-Arapaho Constitution and this Order. In securing the attendance of Business Committee members at regular and constitutionally-required special meetings of the Business Committee, the District Court shall enjoy the normal, broad, inherent remedial power of courts of equity in enforcing the above-discussed provisions of the Cheyenne-Arapaho Constitution and this Order. This power shall include but not be limited to the power to actually convene a Business Committee meeting—with attendance compelled by the Court's contempt power—where other remedial options reasonably available to it have proved to be unavailing.

Pursuant to the above reasoning and constitutional authority, it follows that the District Court had the power to: (1) order the Chairman of the Cheyenne-Arapaho Tribes to call, convene, attend, and preside over the January 23rd meeting, which was required by Article IX, Section 1 of the Cheyenne-Arapaho Constitution; (2) order the other members of the Cheyenne-Arapaho Business Committee to present themselves at the January 23 meeting; (3) do the same with respect to the January 25 meeting when the January 23 meeting failed to materialize; and (4) actually convene and preside over the January 25 meeting (if he in fact did so) to secure the transaction of constitutionally-required tribal business at that meeting. . . .

D.

Fourth, Appellant relies on Article XIV, Section 1 of the tribal Constitution, which provides in relevant part that “[t]he chairman of the business committee shall . . . have the privilege of voting in case of a tie.” Reasoning (in this respect, correctly) that under the well-known maxim *inclusio unius est exclusio alterius* [“the inclusion of one thing is the exclusion of others”], and on the basis of tribal constitutional structure, the Chairman of the Business Committee may vote in Business Committee meetings only “in case of a tie,” Appellant contends that Vice-Chairman Blind (who on his theory—at least for purposes

of this argument—was the “acting chairman” of the January 25 meeting) should not have been allowed to vote at the meeting. Without Vice-Chairman Blind’s vote to remove him from office, Appellant (again, correctly) points out that there would have been only four votes to remove—less than the five required for his removal by Article IX, Section 1. Appellant’s argument, however, fails for either of two individually-dispositive reasons.

First, the Chairman’s inability to vote in Business Committee meetings (except “in case of a tie”) is a *personal* disability that follows the *incumbent of the Chairman’s office* whether or not he or she is present at a particular meeting. See CHEY.-ARAP. CONST. art. XIV, §1 (“The *chairman of the business committee* shall . . . have the privilege of voting in case of a tie.” (emphasis added)). Thus, Vice-Chairman Blind (or for that matter, any other Business Committee member who finds himself or herself presiding over a Business Committee meeting for whatever reason) is unencumbered by the voting restrictions imposed on the Chairman by Article XIV, Section 1.

Second, while Article XIV, Section 1 establishes as a general matter that the Chairman of the Business Committee may not vote in Business Committee meetings unless there would otherwise be a tie, Article IX, Section 1—which applies *only to proceedings to remove a Business Committee member*—appears to create an exception to the general rule, stating that under the circumstances described earlier in that provision, “a fellow committeeman may be removed . . . provided at least five . . . *of the members* vote in favor of removal.” CHEY.-ARAP. CONST. art. IX, §1 (emphasis added). Nothing about Chairman-disqualification from voting is provided by Article IX, Section 1, and its text would appear to authorize any member of the Business Committee—the Chairman included—to cast a vote on the ouster of a fellow Business Committee member.

For either of the above-described reasons, Appellant’s fourth theory also fails. . . .

V.

For the reasons described above, the decision of the District Court of the Cheyenne-Arapaho Tribes in Case No. CNA-CIV-02-20 is **AFFIRMED**. Kent Stonecalf, who prevailed in the special election to replace Appellant as Cheyenne District 3 representative to the Business Committee, is declared to be the rightful occupant of that position.

NOTES

1. Tribal election disputes provide some of the most difficult areas for tribal courts to adjudicate. They are wrought with political questions and implied limitations on judicial authority. Tribal judges deciding these cases face the wrath of the losers and their close supporters, some of whom will invariably be elected to power at a later date, ostensibly with the power to reappoint the judges who once adjudicated their rights.
2. Robert McCarthy described the separation-of-powers conundrum as follows:

[P]ublished cases would seem to indicate that tribal courts generally prevail in clashes with tribal councils over interpretation and enforcement of the

ICRA and tribal law. For example, the Duck Valley Tribal Court reinstated a chief judge, holding that the Tribal Council may remove a judge only after the Council conducts a hearing complying with tribal law and due process under the ICRA. [*McKinney v. Business Council*, 20 Indian L. Rep. 6020, 6020 (Duck Valley Tr. Ct. 1993).] . . .

[T]he Ute Tribal Court ruled that the Tribal Business Committee lacked authority to withdraw jurisdiction from the court and vest jurisdiction in the Business Committee itself where the Business Committee was a party to the litigation. [*Chapoose v. Ute Indian Tribe*, 13 Indian L. Rep. 6023, 6023 (Ute Tr. Ct. 1986).] . . .

The Southern Ute Tribal Court ruled that it had jurisdiction to hear a claim that the tribal election board violated the ICRA and tribal law although the tribal constitution, without any reference to the tribal court, made the election board the final authority on election disputes. [*Committee for Better Tribal Gov't v. Southern Ute Election Bd.*, 17 Indian L. Rep. 6095, 6095-96 (S. Ute Tr. Ct. 1990).] The court held that, although courts have no inherent authority to hear election disputes, tribal courts are the proper forum to present ICRA claims. The ICRA's guaranty of equal protection makes it impermissible for tribes to intentionally interfere with a member's right to vote as granted by the tribe. Judicial review of actions by tribal agencies and boards is necessary to provide a remedy for an injured party. . . .

Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 492-94 (1998).

3. In *Little River Band of Ottawa Indians Tribal Council v. Little River Bands of Ottawa Indians Tribal Ogema*, 8 Am. Tribal Law 287 (Little River Band of Ottawa Indians Tribal Court 2009), the court held that the tribal executive branch leader (the tribal *ogema*) had authority to terminate the employment contract of the legislative branch attorney over the objections of the tribal legislature:

This matter involves the attorney contract of Joseph Martin, Chief Legislative Counsel; specifically, does the Ogema have the authority to terminate the contract. The contract was signed on September 10, 2007, by Joseph Martin, and Ogema Romanelli, and was ratified by the Council. . . .

The Ogema, issued a Notice of Termination of the contract to Mr. Martin for the reasons that upon information and belief, Mr. Martin's license to practice law in the State of Illinois lapsed and that Mr. Martin had not obtained his license to practice law in the State of Michigan within the time frame as provided in the contract, six months, which is a breach of the contract. Council has admitted that the license in Illinois did lapse, but was corrected, and the Mr. Martin does not have a license to practice law in the State of Michigan. . . .

Council argues that they are the intended beneficiary of the contract, and that because the contract states that Mr. Martin would be under the control and supervision of the Council, it is the only one who can terminate the contract.

The Constitution states at Article IV, Section 7(e) as follows:

Powers of the Tribal Council. The legislative powers of the Little River Band of Ottawa Indians shall be vested in the Tribal Council, subject to any express limitations contained in this Constitution.

The Tribal Council shall have the power, including by way of illustration, but not be limitation:

...

(e) To employ legal counsel, subject to the approval of the secretary of the Interior so long as such approval is required by federal law.

Council argues that the above-cited provision vests Council with the sole and exclusive authority to hire legal counsel, and that the fact that the Ogema signed this contract was an anomaly. . . . In fact, the language simply reflects the fact that at one time, all attorney contracts entered into by Indian Tribes were required to be submitted to the Secretary of Interior pursuant to 25 U.S.C. 81 and the Secretary of Interior always required those submissions to be supported by resolutions from the applicable Tribe's Council. This section, which was no doubt adapted from "boilerplate" language found in many Tribes' Constitutions, simply reflects this prior requirement under federal law. The Court does not believe that contracts with legal counsel should be treated any differently from any other contract the Tribe may enter into. The Constitution vests the Ogema with the authority to execute contracts on behalf of the Tribe subject to ratification by the Council.

. . . [T]he Council (or Mr. Martin, who is after all, an attorney), could have requested that the form of the contract with Mr. Martin be counter-signed by the Council Speaker and could have included terms that gave the Council the sole authority to terminate that contract. . . .

Little River Band Tribal Council, 8 Am. Tribal Law at 287-89.

3. CONSTITUTIONAL AMENDMENT PROCEDURES

MASHANTUCKET PEQUOT TRIBAL NATION V. McKEON

Mashantucket Pequot Tribal Court, No. MPTC-CV-GC-2008-127, 5 Mash. Rep. 94, 2008 WL 2746707, 2008.NAMP.0000015 (July 9, 2008)

The opinion of the court was delivered by: THOMAS J. LONDREGAN, Judge.

I. Facts and Procedural History

This is a declaratory judgment action brought by the Mashantucket Pequot Tribal Nation ("MPTN" or "Tribe") . . . , to determine the validity of a referendum petition ("Petition") presented by a group of un-sponsored Mashantucket Pequot tribal members ("Petitioners"), under Article VIII, §1 of the Mashantucket (Western) Pequot Constitution.

This Court has authority to determine the validity of the Petition by an express grant of jurisdiction from the Mashantucket Pequot Tribal Council ("Tribal Council" or "Council"):

The Tribal Court shall have jurisdiction to hear and decide, through a declaratory judgment action, matters pertaining to the legal sufficiency or validity of a petition presented pursuant to Article VIII Section 1 of the Mashantucket (Western) Pequot Constitution, and sovereign immunity of the Tribe is hereby waived for the limited purposed of such a declaratory judgment action in Tribal court provided such action is commenced within 20 days from the time the Tribal Council does not accept the validity or sufficiency of the petition.

12 M.P.T.L. ch. 1 §1(b).

Jurisdiction to hear declaratory judgment actions to determine the validity of a petition presented pursuant to Article VIII Section 1 of the Constitution was granted in 2002 by the Mashantucket Pequot Tribal Council via Resolution TCR122602-01. . . .

On or about February 7, 2008, a group of Mashantucket Pequot tribal members began circulating a petition in response to rumors that Tribal Council was planning to eliminate 40 million dollars from the Mashantucket Pequot governmental operating budget. Between February 7, 2008 and March 11, 2008, these petitioners collected signatures, and submitted the Petition to the Tribal Clerk's Office on March 11, 2008. Upon receiving the Petition, the Tribal Clerk counted the signatures, and verified that a sufficient number of signatures had been obtained to meet the 1/3 requirement of Article VIII, §1 of the Constitution. The Tribal Clerk then forwarded the Petition on to the Mashantucket Pequot Office of Legal Counsel ("OLC"), for a determination of the legal validity of the Petition. On March 24, 2008 the OLC submitted a memorandum to Tribal Council recommending that Council declare the Petition invalid on procedural and substantive grounds. On May 1, 2008, . . . Tribal Council determined that the Petition had a sufficient degree of irregularities to forward the matter to Tribal Court for a determination of the Petition's legal status. On May 2, 2008, MPTN initiated a declaratory judgment action in Tribal Court. . . .

The Petition is entitled, "Petition for special meeting of membership regarding government reductions," and its text states in entirety:

The members of the Mashantucket Pequot Tribal Nation petition to mandate our Tribal council to report any and all information related, directly or indirectly, to the current consideration of tribal government reductions, to the entire Mashantucket Pequot Tribal Membership in a mandatory Special Meeting of the membership under Article VIII of the Constitution. The Mashantucket Pequot Tribal Council shall not make a decision as to how the government budget will [be] reduced by the forty million dollars (\$40,000,000) until membership has developed a process to determine what programs and services are necessary to remain and still meet the said reduction target. The members of the Mashantucket Pequot Tribal Nation mandate the Mandatory Special Meeting of the Membership shall be held within fourteen (14) days from the submission of this petition. During the above-mentioned, mandatory special meeting, the membership, by way of vote of general membership, shall then decide the process for membership involvement and time-frame for the implementation of the process.

. . . On the substantive question, the Court must determine if the Petition—as actually drafted by the Petitioners—can constitute a proper subject for referendum under Article VIII, and whether the Court has authority to grant the relief requested by the Petitioners. . . .

III. Discussion

. . .

B. The Powers Present in the Mashantucket (Western) Pequot Constitution

Before beginning its analysis of the Petition's alleged procedural or substantive defects, the Court finds it helpful to first review the text of the

Constitution to determine which powers have and have not been preserved for exercise by the tribal membership.

Traditionally, state and municipal governments have recognized five different kinds of political powers by which an electorate interacts with its representative officials: (1) Initiative; (2) Referendum; (3) Referral; (4) Recall; and (5) Amendment. . . . Initiative generally refers to the power of the people to propose bills and laws, and to enact or reject them at the polls, independent of legislative assembly. . . . Referendum, on the other hand, is a right constitutionally reserved to the people of a state, or local subdivision thereof, to have submitted for their approval or rejection, under prescribed conditions, any law [or] part of law passed by a lawmaking body. . . . Referral is the ability of a governmental legislative body to seek approval from the people before adopting a particular piece of legislation. . . . Recall is a right or procedure by which a public official may be removed from office before the end of his or her term by a vote of the people to be taken on the filing of a petition signed by a required number of qualified voters. . . . Most jurisdictions also provide the people with the power of changing the governing principles for that jurisdiction—most frequently framed in the form of an amendment to the Constitution. . . .

The Mashantucket (Western) Pequot Constitution reserves to the tribal membership only the powers of referendum, recall, and amendment. It does not, however, provide the people with the power of initiative. It does provide Tribal Council—but not the membership—with the prerogative of Referral.

Article VIII of the Mashantucket (Western) Pequot Constitution (“Constitution”), is entitled “Referendum,” and comprises two sections. Section 1 is entitled “Petition” and states in its entirety:

Upon a petition of at least one-third (1/3) of the eligible voters of the Mashantucket (Western) Pequot Tribe, any enacted or proposed law, resolution or other regulative act of the Tribal Council shall be submitted to a referendum of the qualified voters of the Mashantucket (Western) Pequot Tribe.

Article VIII, §1 of the Mashantucket (Western) Pequot Constitution.

Section 2 is entitled “Resolution” and comprises seven sections which together describe how a valid referendum petition would be presented to the tribal membership.

A fair reading of the Petition leads the Court to conclude that Petitioners are seeking neither a recall nor an amendment to the Constitution in this action. Additionally, the Constitution does not provide tribal membership with the initiative power, and the referral power may be exercised only by Tribal Council. Therefore, the Court need not evaluate the Petition under the principles governing initiative, referral, recall, or amendment mechanisms, and need only address whether the Petition suffices as a proper subject for a referendum.

C. Referendum Power

...

C2. Substantive Defects

The Tribe next argues that the Petition is insufficient and invalid because it does not form a proper subject matter for a referendum. Specifically, the

Petition does not reference “any enacted or proposed law, resolution or other regulative act of the Tribal Council,” as required by Article VIII, §1 of the Constitution. The Tribe maintains that at the time the Petition was circulated and presented to Tribal council, there were no specific proposals or resolutions pending and that Council was simply engaged in policy discussions about the need for budget reductions.

Furthermore, the Tribe argues that a referendum petition must “be in a form which can be reasonably capable of being understood and placed on [a] ballot,” and suggests that because the Petition combines two or more thoughts or forms of relief, it is incapable of being presented in a question calling for a single “yes or no” answer on a ballot, and is therefore legally insufficient on a substantive basis.

At oral argument on the Petition, Petitioners summarized the substance of the relief requested in the Petition [as] follows:

1. That the Tribal Council report any and all information related to the current consideration of tribal government reductions;
2. That Tribal membership get access to all financials, including the fiscal 2008 government and departmental budgets;
3. That the requested information be reported to the Mashantucket Pequot membership in a special meeting to be called by Tribal Council to give the membership this information;
4. That the Tribal Council be enjoined from making a decision as to how the governmental budget would be reduced until the membership had an opportunity to participate in the decision-making process;
5. That the membership be included in the decision-making process;
6. That a special meeting of membership be held to determine how membership can work with Council to create a process that can be followed to ensure a fair and equitable process, and timeframe for implementing any cuts to the municipal budget.

A “referendum” is typically the power of the people to accept or reject at the poll any legislation that has been adopted. . . . In Mashantucket, the Constitution has expanded the target of referendum power to include “any enacted or *proposed* law, resolution or other regulative act of the Tribal Council.” Article VIII, §1 of Constitution (emphasis added). The right of referendum therefore is not limited just to legislation that has already been adopted. Rather, proposed legislation, resolutions, or any regulative act may also be petitioned to referendum in the Mashantucket system.

The Petition does not request the repeal of any specifically enacted or proposed statute, law, or regulative act of the Council. When the petition was being circulated and filed, Council had not yet even begun to take specific action; on the contrary, Council was still considering what—if any—specific action to take. Apparently, a goal of 40 million dollars was discussed as a budget reduction target, but no discrete proposal had yet been made to identify specific programs or services that would be cut. The Court must therefore decide whether Petitioners’ requests for relief can be properly categorized as “proposed legislation, resolutions, or any regulative act” under Article VIII, §1.

Additionally, the Court must be concerned about judicial intrusion into the political process. . . . The Petitioners are asking for reports, for access to financial information, and for a chance to participate in the decision-making process. Petitioners also seek to enjoin Tribal Council from making decisions. This case demonstrates the strained relationship that develops between the power of the people to legislate directly through the process of referendum and the mandate requiring elected officials to discharge their duties in accordance with law. Petitioners seek to advise the Council and to participate in the decision-making process; at the same time, Tribal Council, elected by the voters of the Tribe, seeks to perform its duties which include the adoption or modification of a governmental budget. A referendum question, by definition, must state the specific subject of the proposed action and ask the voters to be “for the statute, regulation or regulative act” or “against the statute, regulation or regulative act.” Since, at the time the Petition was circulated, Council had not yet enacted a specific proposal, the Court cannot fashion the required form of referendum question from the relief Petitioners request.⁴

Even if Council had promulgated a discrete proposal or resolution, preparing a budget for a government directly implicates the primary function and authority of a legislative body, such as the Tribal Council. The formulation of the budgetary process is best left to Tribal Council. It is not the province of this court to determine what information, reports, or participation, if any, the Petitioners should have in the formulation of a budget. The electorate’s satisfaction with the Tribal Council in matters such as disclosure of reports and information and listening to the Tribal voters is best left to the ballot box and not the courtroom. *See for example, Citizens for a Responsible Government v. Easton*, 04-CBR-0126 (March 24, 2004), where plaintiff Citizens’ request for an injunction to stop the construction of an elementary school because the information and financial data provided by the town was incomplete, not accurate, and failed to provide the citizens with sufficient information, was denied because there was no case law that required a certain degree of information to be provided to the voters. The Court can find no authority to place on a ballot the request made by the Petitioners in the Petition which is before this Court.

Once the Council identifies proposed cuts in the budget and a petition is drafted that clearly states what specific services are to be eliminated, then a question, such as, “Shall the [proposed] decision of the Council to eliminate

4. Furthermore, even if Council had implemented a particular proposal or resolution that had been discretely identified by the Petition, the Court might still have to address the question of whether the proposal or resolution would be categorized as a legislative, executive, or administrative action. Generally, the power of referendum does not extend to acts that are purely administrative in nature, and some jurisdictions specifically do not permit the power of referendum to be exercised in response to appropriation decisions made by the executive branch of government or one of its administrative agencies. 42 Am. Jur. 2d Initiative and Referendum §6-§14 *et seq.* Since the Court here has decided that the form of the Petition did not precisely address a particular proposal or resolution and that, in fact, no discrete proposal or resolution had been promulgated when the Petition was being created, the Court does not need to reach the classification question here, and saves this analysis for another day.

XYZ services from the government's budget be rescinded [or repealed]," can be submitted to referendum before the voting membership of the Tribe. . . .

Therefore, the Court finds that Tribal Council need not submit this Petition to a referendum of the qualified voters of the Mashantucket (Western) Pequot Tribe.

NOTES

1. In *In re: Status and Implementation of the 1999 Constitution of the Cherokee Nation*, 9 Okla. Trib. 394, 6 Am. Tribal Law 63 (Cherokee 2006), a split Cherokee Nation Judicial Appeals Tribunal held that the proposed constitutional amendments to the 1975 Cherokee Constitution, which had passed by the electorate in 2003, were effective after that election, despite the failure of the Secretary of Interior to ratify the election (then-assistant secretary Neal McCaleb had refused to act on the new constitution due to ongoing litigation involving the Cherokee Freedmen). The majority disregarded Article XV, Section 10 of the 1975 Cherokee Constitution, which provided:

[N]o amendment or new constitution shall become effective without the approval of the President of the United States or his authorized representative.

Justice Dowty wrote in a special concurrence that the three-year period between the election and the Secretary's inaction was especially disturbing:

I agree that the requirement of federal approval was self-imposed and that the same provision can be, and was, effectively removed from the 1975 Constitution by the vote of the Citizens on May 24, 2003. The actions of Mr. McCaleb by letter in his official capacity as representative of the federal government, and by his subsequent affidavit coupled with the federal inaction and non-appearance in this litigation is sufficient for this writer to find that the 1999 Constitution has been in effect from and since its approval by the voters on July 26, 2003.

6 Am. Tribal Law at 67.

Justice Leeds dissented, noting that "the Cherokee people made it clear that the 1975 Constitution could *never* be amended or superseded by a new constitution without the approval of the federal government. There are no exceptions." 6 Am. Tribal Law at 67 (emphasis in original). Justice Leeds quoted from an earlier opinion of the court rejecting the application of a different constitutional amendment. There, the Court wrote:

The Cherokee Constitution is the organic document of the Cherokee government. It must not be trifled with. Any and all amendments to the Cherokee Constitution must be made following the strict, long-established procedure.

McLain v. Cherokee Nation Election Commission, 6 Okla. Trib. 582, 588 (Cherokee 1998).

C. CONSTITUTIONAL LAW AND TRIBAL GOVERNMENT

1. SOURCES OF TRIBAL GOVERNMENTAL AUTHORITY

IN THE MATTER OF VILLAGE AUTHORITY TO REMOVE TRIBAL COUNCIL REPRESENTATIVES (BACAVI CERTIFIED QUESTION)

Hopi Appellate Court, No. 2008-AP-0001 (February 11, 2010)

Before Chief Justice ANNA M. ATENCIO and Associate Justices PAUL S. BERMAN and ROBERT N. CLINTON. . . .

Certified Question of Law

[3] Do Villages, regardless of their form of government, have the authority to remove or decertify their duly-certified Tribal Council Representatives?

Answer

. . .

[5] This Court unanimously finds that, under both the Constitution and Hopi custom and tradition, the Hopi and Tewa Villages, regardless of their form of government, have authority to remove, recall or decertify their duly certified Tribal Council Representatives during their term of office by whatever process the Village selects and that Article IV, section 4 of the Constitution governs both selection and removal, recall, or decertification of Tribal Council Representatives.

Discussion

. . .

Village Authority to Remove or Decertify Tribal Council Representatives

A. Constitutional Background

[8] Prior to the initial drafting and adoption of the Hopi Constitution in 1936 there was no central Hopi government. Rather, the people comprising the Hopi Tribe lived in 12 self-governing Villages, each of which retained its own aboriginal sovereignty. Each was an autonomous, sovereign city-state. The historical letters and records filed with this Court as part of the record in this case demonstrate that the creation of a central Hopi government and the drafting of the Constitution, significantly promoted by the federal government through Oliver La Farge, was highly controversial, a fact well understood by Mr. La Farge. Accordingly, unlike many of the tribal constitutions drafted pursuant to section 16 of the Indian Reorganization Act of 1934 (IRA), codified as amended at 25 U.S.C. §476, the Hopi Constitution avoided boilerplate legal clauses and was carefully drafted to preserve the Hopi way of life. In particular, the Hopi Constitution advances a very different theory of the source of power of the Hopi Tribe than most of the tribal constitutions drafted during this period. While most of the tribal constitutions drafted at the same time suggest the source of power of the central tribal government rests with delegation from

the people of the affected tribe, the Hopi Constitution expressly rejects that approach. Instead, the Preamble to the Hopi Constitution states:

This Constitution, to be known as the Constitution and By-Laws of the Hopi Tribe, *is adopted by the self-governing Hopi and Tewa Villages of Arizona* to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States Government and with the outside world generally.

(Emphasis supplied.)

[9] Furthermore, the entire structure of the Hopi Constitution indicates that the authority of the central government of the Hopi Tribe rests on the bedrock of the aboriginal sovereignty of the Hopi and Tewa Villages. The Villages delegated limited powers to the central Hopi government. Under Article II, section 4 of the Constitution the Villages determine Village membership. As already noted, the Constitution expressly reserves certain powers of dispute resolution to the Villages in Article III, section 2. The only officials in the current government of the Hopi Tribe selected by all members of the Hopi Tribe are the Chairman and Vice Chairman, who, pursuant to Article IV, section 7 of the Constitution are elected in at-large elections. All members of the Tribal Council Representatives, according to the express language of the Constitution, constitute “representatives from the various villages.” Const. Art. IV, sec. 1. The Tribal Council Representatives are apportioned among the Villages, not the population generally, under a formula set forth in Article IV, section 1 of the Constitution. Under Article IV, section 3, each Tribal Council representative “must be a member of the Village he represents.” And, of course, Article IV, section 4, the most critical provision for purposes of resolving this certified question of law, provides:

Each village shall decide for itself how it chooses its representatives, subject to the provisions of SECTION 5. Representatives shall be recognized by the Tribal Council only if they are certified by the Kikmongwi of their respective villages, Certifications may be in writing or in person.

[10] Thus, unlike most tribal governments adopted under section 16 of the Indian Reorganization Act of 1934, which, according to the express language of their constitutions, owe their authority to powers delegated by their people, the authority of the central government of the Hopi Tribe, according the express provisions in the Preamble of the Constitution, derives exclusively from power delegated to it by the Hopi and Tewa Villages. In this respect, as early noted by Oliver La Farge, the legal theory of the Hopi Constitution is far closer to the Articles of Confederation employed by the federal government from 1781 until 1789 than the current legal theory of the United States Constitution. The bedrock constitutional authority upon which the tribal sovereignty of the Hopi Tribe therefore rests is the inherent aboriginal sovereignty of the Hopi and Tewa Villages that comprise the Hopi Tribe. As in the Articles of Confederation, the Hopi Villages retain all aspects of their inherent aboriginal sovereignty not exclusively delegated by the Constitution to the central government of the Hopi Tribe.

[11] The basic structure of the Hopi government reflects this relatively unique tribal constitutional theory and structure. As already noted, under the express terms of the Constitution, Tribal Council Representatives are selected by and represent the Villages from which they came and they must be members of their respective Villages. Certification of their selection occurs through the Kikmongwi of their Village. Article III, Section 4 authorizes Villages that lack a traditional Hopi form of governance or which seek to make a change or add to it to adopt a written Constitution and By-Laws. In so doing any Village "shall clearly say how the Council representatives and other village officials are chosen. . . ." Thus, the Hopi Constitution, therefore leaves both the selection and the manner of selection of the Tribal Council Representatives entirely to the unfettered discretion of the Hopi and Tewa Villages. Unlike virtually all other tribal constitutions adopted under the Indian Reorganization Act of 1934, the Hopi Constitution does not expressly provide the mechanism for selection of Tribal Council Representatives, leaving both the selection and the manner of selection, instead, to processes determined separately and entirely by each Village. . . .

D. Village Powers to Remove, Recall or Decertify Tribal Council Representatives

[14] Prior to adoption of the Hopi Constitution there was no central Hopi government and therefore each of the Hopi and Tewa Villages unquestionably possessed inherent aboriginal powers of self-government. *In re Komaquaptewa*, No. 01-AP-00013 (Hopi Ct. App. 8/16/2002); see also Frank Waters, *The Book of the Hopi* 316 (1977); Ragsdale, *The Institutions, Laws and Values of the Hopi Indians: A Stable State Society*, 55 U.M.K.C. L. Rev. 335, 376 (1987); L. Thompson and A. Joseph, *The Hopi Way of Law* 48 (1944). Those inherent aboriginal powers logically must have included the power to select, remove, recall or decertify spokespersons to negotiate or otherwise deal with other Villages and the outside world because without such powers the Villages would have lacked the authority to create the Hopi Constitution and By-Laws. Thus, selection, removal, recall or decertification of political spokespersons constitutes part of the inherent aboriginal sovereignty of each of the Hopi and Tewa Village.

[15] The problem posed by the certified question of law in this matter involves the question of whether the adoption of the Hopi Constitution operated to deprive the Hopi and Tewa Villages of their pre-existing sovereign right to select, remove, recall or decertify political representatives. The Hopi Tribal Council objects to this formulation of the issue, which was supported by most of the Villages, including the Village of Bacavi, noting that "because prior to 1936, the Hopi Villages had not established a central tribal government and the Villages existed as "autonomous city-states," "the removal of Tribal Council Representatives was not an inherent power of the Villages prior to the adoption of the Hopi Constitution in 1936. . . ." [sic] . . . Nevertheless, the Villages did have pre-existing sovereign authority to select, remove, recall or decertify political spokespersons generally, including the spokespersons who dealt with Oliver La Farge in the drafting of the Hopi Constitution. Clearly, the manner of selection of Tribal Council Representatives set forth in Article IV, section 4 of the Constitution expressly reaffirms the pre-existing

sovereign right of the Hopi and Tewa Villages to select their Tribal Council Representatives in whatever manner they choose. It constitutes a reaffirmation of preexisting sovereign power, not a delegation of new authority to the Villages. Thus, this Court rejects the excessively narrow formulation of the pre-existing aboriginal sovereign rights of the Hopi and Tewa Villages advanced by the Tribal Council in its Brief and finds that the Villages did have pre-existing inherent aboriginal sovereign rights to select, remove, recall, or decertify their political spokespersons and representatives.

[16] Clearly, no express provision of the Constitution purports to remove the powers of removal, recall or decertification of political representatives from the Hopi and Tewa Villages. Thus, if any limitation on this pre-existing sovereign power of the Hopi and Tewa Villages is to be found in the Constitution, the argument must derive from implied constitutional limitations on Village authority derived from the structure or clauses in the Constitution. The only obvious source for such an implied limitation on Village authority would be found in the combined effect of the two year term for Tribal Council Representatives set forth in Article IV, section 2 of the Constitution and the grant of a removal for cause authority to the Tribal Council in Article V, section 2. In its postargument submission the Tribal Council took the position that the delegated removal power for officers and representatives set forth in Article V, section 2 vested the exclusive authority over removal of representatives in the Tribal Council. Neither expressly purport to limit pre-existing Village authority and there are good reasons to believe that the granting of removal authority to the Tribal Council was not meant to preclude retention of removal, recall and decertification authority in the Hopi and Tewa Villages. The Constitution established a new central government for the Hopi Tribe and its powers needed to be and were expressly delegated by the Hopi and Tewa Villages in the Constitution. Thus, if the Tribal Council was to exercise any authority to remove officials and Village representatives for cause, such powers needed to be expressly delegated in the Constitution and they were in Article V, section 2. By contrast, the Villages possessed pre-existing aboriginal sovereignty over the selection, removal, recall and decertification of political spokespersons. No express delegation was required to reaffirm that sovereignty since they already possessed it. Article IV, section 2 simply reaffirms that view for purposes of the selection of the Tribal Council Representatives but is otherwise silent on the question of removal, recall, and decertification. The existence of the automatic removal provisions for conviction of described offenses set forth in Article V, section 1 of the Constitution further suggests that the powers of the Tribal Council over removals for cause are not exclusive. Since nothing in the Constitution suggests that the pre-existing sovereign power of the Hopi and Tewa Villages to remove, recall, or decertify their representatives was removed from them or exclusively delegated to the Tribal Council by Article V, section 2 of the Constitution, this Court finds that the Villages continue to retain that authority under the Hopi Constitution.

[17] Numerous other considerations further support this conclusion. First, as many of the Villages reminded this Court, this question needs to be resolved consistently with Hopi custom and tradition. The Preamble to the Constitution itself indicates that one of its main purposes is “preserving the good things

of Hopi life.” The history surrounding the drafting and adoption of the Constitution suggests that the Hopi drafters and Oliver La Farge sought to model the Hopi Constitution in accordance with the way Hopi was actually governed, albeit, adding in the process a new central governing authority that Hopi previously lacked. *Roads in the Sky: The Hopi Indians in a Century of Change* 151-52; Robert A. Hecht, *Oliver La Farge and the American Indian: A Biography* 102 (1991). According to his own words, La Farge sought to have the Hopi government “listen to the true voice of each village,” which he conceived as being part of the Hopi way of doing things. In a letter dated March 7, 1940, just four years after he assisted the Hopi in drafting the original Hopi Constitution, Oliver La Farge wrote, “the villages keep a whole way of running things, which they have inherited and which they know works.” He notes that “[t]he Hopi way is to deal with local problems by villages” and indicates that this bedrock principle “must be remembered in studying any part of the Constitution.” . . . In addition, this Court is charged by Hopi Resolution H-12-76 with taking account of Hopi customs and traditions in its decision making. *Hopi Indian Credit Association v. Thomas*, No. 98AC000005 (Hopi Ct. App. 11/13/1998). This focus on leaving all local matters primarily to Village decisions, presumably including the selection, removal, recall, or decertification of Village spokespersons including Tribal Council Representatives, constitutes a central part of the Hopi way that the Hopi and Oliver La Farge sought to preserve in the Hopi Constitution.

[18] At oral argument, this Court was repeatedly reminded that an essential part of the Hopi way is the right to decline to participate, i.e. to abstain, in decisions or actions with which one disagrees. As this Court understands the matter, the right of abstention constitutes an important political part of Hopi customs and traditions. It permits Hopi, whether individual Hopi members or whole Villages, to preserve harmony and consensus by not outright disruptively casting dissenting votes, while still politely manifesting their disagreement by declining to participate. It provides a way of preserving political civility while providing an outlet for political dissent—a tradition and custom from which the United States government could learn much. While this Court need not, and on the record before us cannot, trace the cultural origins of the right of abstention, it is sufficient to say that it clearly constitutes an essential part of the Hopi Way that is far older than the Constitution itself. Indeed, a considerable part of the early controversy over the legitimacy of the adoption of the Hopi Constitution turned on how few of the eligible Hopi members voted in the Indian Reorganization Act election that approved the Constitution and the refusal of the Department of the Interior to recognize the abstentions as effective negative votes on the adoption of the document. Peter Whitely, *Bacavi Journey to Reed Springs* 124 (1988); Frank Waters, *The Book of the Hopi* 316 (1963). While this Court has no authority to and cannot revisit that debate, it also has no wish to repeat the same mistake again. It recognizes that the right of abstention constitutes an essential part of Hopi custom and tradition. Not only did the Hopi seek to exercise it in the original adoption of the Constitution, but it has consistently been exercised since the adoption of that document. After the Hopi Constitution was adopted and the Tribal Council began to function, three Second Mesa villages withdrew their

representatives in 1937, objecting, among other things, to the boilerplate Law and Order Code the Secretary of the Interior was promoting for the Tribe, which they believed violated both traditional and constitutional rights. The combination of Village abstention and the refusal of the Tribal Council to enforce livestock reduction measures sought by the Secretary of the Interior led to the suspension of the Tribal Council functioning between 1943 and 1955 (with just a brief session in 1951 to submit claims under the Indian Claims Commission Act). Some villages have always refused to send representatives to the Tribal Council. This Court is informed that currently Old Oraibi, Lower Meoncopi and Shongopavi continue to exercise their right of abstention by declining to participate in the central Hopi government. Whatever else this history suggests, it plainly demonstrates that the right of political abstention constitutes a pre-existing and enduring part of the Hopi Way. Accepting the view that the removal for cause power established by Article V, section 2 constitutes the exclusive manner in which Tribal Council representatives can be removed or recalled during their term of office, would deny the Hopi and Tewa Villages and each member of those villages their longstanding right of abstention and force them to participate in the central Hopi government after they had concluded either that their Tribal Council Representatives no longer were serving their interests or positions or that they no longer wished to participate in the central government. Since this Court is charged both by the Preamble to the Constitution and by Hopi law with preserving Hopi customs and traditions, it therefore cannot agree with the Tribal Council and find that Article V, section 2 constitutes the exclusive means by which Tribal Council Representatives can be removed, recalled or decertified during their term of office. To do so would violate both the purposes for which the Constitution was established and Hopi customs and traditions. It would, in short, deny the Hopi and Tewa Villages their inherent aboriginal right of abstention. Since nothing in the Constitution indicates that the Villages gave up or were denied their sovereign right of abstention by that document and since the Hopi custom and tradition both before and since the adoption of the Constitution suggests the right of abstention persists, this Court must find, consistent with the Hopi Way, that the Villages retain their sovereign aboriginal right to select, remove, recall, or decertify their political spokespersons, including their Tribal Council Representatives, by whatever means they select. *Compare, In re Komaquaptewa*, No. -1- AP-00013 (Hopi Ct. App. 8/16/2002) ("Such a result seems at odds with the Constitution that sees the Hopi Tribe as composed of a group of self-governing villages".).

[19] The Tribal Council primarily argues that recognizing a Village power of removal, recall, or decertification of Tribal Council Representatives would imperil the functioning and stability of the Hopi Tribal Council and therefore the functioning [of] the Hopi central government. . . . In making their argument, the Tribe draws close analogies to the United States Constitution. This Court cannot accept either the analogy nor the Tribal Council's argument. As already noted, the form of government adopted by the Hopi Constitution is, in the views of Oliver La Farge, one of its principal drafters, far closer to the Article of Confederation than the United States Constitution. Thus, the analogy offered by the Tribe appears to miss the mark. More importantly, while this

Court recognizes that the extensive exercise of this right may rarely threaten the efficiency and the stability of the Hopi central government, as indeed it apparently did between 1943 and 1955, this result nevertheless appears to be the result compelled by the Hopi Constitution and the Hopi Way which, by its Preamble, the Constitution was meant to preserve. The Court first notes that the Tribe's stability concerns, as voiced in its Brief, appear at odds with and, as argued by the Tribal Council, denies the Hopi right of political abstention discussed above. The fact that Village exercise of this power of removal, recall, or decertification has not threatened the stability of the Hopi Tribal Council since 1955 indicates that the Villages have used this power responsibly and with restraint. It also suggests that the stability concerns strongly voiced by the Tribe may prove to be over-stated. Like many matters involving predictions of the future, however, only time and experience can resolve that question.

[20] The conclusion that the Hopi and Tewa Villages, regardless of their form of government, retain the aboriginal sovereign power to remove, recall, or decertify their Tribal Council Representatives during their constitutional term of office is also bolstered by the prior precedents both of this Court and of the actions of the Villages themselves. This Court has been advised in both written and oral submissions, without contradiction, that the power of removal, recall or decertification of Tribal Council Representatives during their term of office has been consistently, albeit infrequently, exercised by the Villages and until the past few years had always been recognized and honored by the Tribal Council. At least one precedent from this Court appears to confirm that history. In *Youvella v. Dallas*, No. 99-AP-000008 (Hopi Ct. App. 11/06/2000), two Tribal Council Representatives from [First] Mesa Consolidated Villages had been decertified by the Kikmongwi. Based on the facts, the Tribal Council clearly recognized the decertification since the Tribal Treasurer ceased to pay them. The two had petitioned the Tribal Council for reinstatement after they were decertified and, at least in that instance, the Tribal Council recognized the power of the Villages to decertify Tribal Council Representatives during their term of office and informed the two former Tribal Council Representatives that the matter was a local one they must take up with their Villages. They sued, claiming that the Treasurer was acting *ultra vires* (beyond his power) in declining to pay them. Neither the deposed Tribal Council Representatives nor the Tribal government contested the power of the Villages, through the Kikmongwi, to decertify these Tribal Council Representatives during their term of office. The *Youvella* case therefore confirms the historical claims of the Villages that they have long exercised the power of removal, recall, or decertification of their Tribal Council Representatives and have done so, until recently, without contest or objection from the Tribal Council. This case also suggests that until recently, the Tribal Council has long recognized the constitutional conclusion that once removed, recalled, or decertified by a Village a Tribal Council Representative can only be reinstated by the Village, not the Tribal Council. In short, it is a local Village political decision. The Tribal Council therefore lacks authority to reseat or recognize a Tribal Council Representative removed, recalled or decertified by a Village unless and until the Village itself informs the Tribal Council, through its Kikmongwi

or otherwise, that it has under its own processes reselected the previously removed Tribal Council Representative. . . .

[22] In some cases, the Villages will be in a superior position to the Tribal Council in knowing whether any particular Tribal Council Representative is fully performing his or her job. As noted above, the role of the Tribal Council Representative involves bilateral communication—representing the Village interests to the Tribal Council and informing and explaining to the Village the issues before and actions of the Tribal Council. Certainly, the Tribal Council will be fully aware of any failure of a Tribal Council Representative to perform the first duty and, as Article V, section 2, recognizes will be authorized to remove any Representative for “serious neglect of duty.” By contrast, the Villages, not the Tribal Council, will be aware of failures by any Tribal Council Representative to inform and explain to the Village the issues before and actions taken by the Tribal Council. Failure to do so may never come to the attention of the full Tribal Council. Thus, the Villages need the continuing ability to remove, recall or decertify Tribal Council Representatives who fail to perform this role or who fail in their actions and votes on the Tribal Council to fully and fairly represent the views and interests of their Village.

[23] For all of these reasons, this Court unanimously concludes that the removal power of the Tribal Council contained in Article V, section 2 is not exclusive and that the Hopi and Tewa Villages, regardless of their form of government, have authority to remove, recall, or decertify their duly certified Tribal Council Representatives during their term of office by whatever process the Village selects. . . .

NOTE

In 2010, the Navajo Supreme Court decided several cases relating to the governing authority of the Nation. *E.g.*, *Nelson v. Initiative Committee to Reduce Navajo Nation Council*, 8 Am. Tribal Law 407 (Navajo Nation Supreme Court 2010); *Todacheenie v. Shirley*, 2010 WL 2834401 (Navajo Nation Supreme Court, July 9, 2010). In *Office of Navajo Nation President and Vice-President v. Navajo Nation Council*, 2010 WL 2834409 (Navajo Nation Supreme Court, July 16 2010), the court enjoined an effort by the tribal legislature to place the Navajo chief executive on “administrative leave.” The court rejected the claim of the legislature that all tribal authority derived from the tribal council:

Passage of CJA-08-10 by the Council [purporting the place the President on leave] underscored Appellants’ . . . position that separation of powers does not exist on the Navajo Nation by purporting to restrict the type of law the courts may use to Council-enacted statutes. By stating that “Navajo common law cannot supply a rule of decision about how to allocate lawmaking power between the Council and the courts,” Appellants emphasized the competing views of the government on the use of Fundamental Law in judicial decision-making. . . . By asserting that “the Council is the absolute source of governance for the Navajo People,” Appellants necessarily involved the Court in sorting out the source of Navajo Nation governmental responsibility and power.

Id., 2010 WL 2834409, at *2. Instead, the court held that the source of governmental authority was the people of the Navajo Nation:

We have affirmed the power of the people to choose their government by singling out egalitarianism as the fundamental principle of Navajo participatory democracy and explaining its meaning as the ability of the People as a whole to determine the laws by which they will be governed. . . . Most importantly, we have held that “the power over the structure of the Navajo government ‘is ultimately in the hands of the People and [the Council] will look to the People to guide it.’” *In re Two Initiative Petitions Filed by President Joe Shirley, Jr.*, No. SC-CV-41-08, slip op. at 9 (Nav. Sup. Ct. July 18, 2008). We have elaborated that the power of the people to participate in their democracy and determine their form of government is a reserved, inherent and fundamental right expressed in Title 1 of our Dine Fundamental Law and the Navajo Bill of Rights. *In re Navajo Nation Election Administration’s Determination of Insufficiency Regarding Two Initiative Petitions Filed by Shirley*, SC-CV-24-09, slip op. at 6, fn 2 (Nav. Sup. Ct. June 22, 2009). This “reserved” right cannot be denied or disparaged except by a vote of the People. *Id.* Additionally, CD-68-89 provided the statutory foundation for principles of checks and balances, separation of powers, accountability to the People, acknowledgement of the People as the source of Navajo Nation governmental authority, and service of the anti-corruption principle. The Council may not amend any portion of the Navajo Nation Code in a manner that disturbs and undermines the above stated principles. The Council may not change, modify, override or amend provisions in which the People have expressed a decision through vote or other trustworthy and publicly accepted mechanism, such as Chapter resolutions, recorded and written comments provided to the Government Reform Project, and signed petitions. In other words, once the people have spoken, their proposition becomes law unless the people have acquiesced otherwise with full information and understanding.

Id. at *4.

2. TRIBAL CONSTITUTIONAL CRISES

HOLDER V. BYRD

Cherokee Nation Judicial Appeals Tribunal, No. JAT-97-14, 6 Oklahoma Tribal Court Rep. 349, 1997 WL 33477675 (April 24, 1997)

Justice BIRDWELL delivered the Opinion of the Court, in which Chief Justice KEEN and Justice VILES join.

I. Facts

On April 15, 1997, approximately 40 individual Cherokee citizens and Council members [“Plaintiffs”] filed a document styled “Complaint and Application for Emergency Temporary Restraining Order” [“Complaint”].

In that Complaint, the Plaintiffs alleged that the Defendants, Joe Byrd, Principal Chief; James “Garland” Eagle, Deputy Chief; and [several] Council members [“Defendants”], participated in an illegally constituted session of the Tribal Council on April 15, 1997. In the meeting, the Defendants voted, among other things, to request the Bureau of Indian Affairs to assume law

enforcement duties within the Cherokee Nation. At its conclusion, a recess was voted upon and approved, with the meeting to reconvene on April 28, 1997. James Fields, Area Director of the Bureau of Indian Affairs, was [also] named as a Defendant.

The Plaintiffs assert that the meeting of April 15, 1997, was illegal because it violated the Cherokee Constitution. The bases for the argument that the meeting was illegal were that because only nine members of the 15-member Council were present for the session, a quorum was not present, and that a 10-day notice was not given calling the session. At the hearing on April 21, 1997, the Court was informed that the absent Council members received no notice whatsoever of the April 15, 1997 meeting.

The Plaintiffs . . . ask this Court for a declaratory judgment finding that the session was an illegal meeting, void and without legal effect, and that any matters flowing out of the meeting are of no effect. . . .

On April 21, 1997, the Judicial Appeals Tribunal conducted a hearing on this matter. . . .

Neither the Defendants nor their counsel appeared at the hearing. They instead filed two substantially identical documents styled "Special Appearance Contesting Jurisdiction of the Court." . . .

II. Discussion

A. Jurisdiction

This Court is dismayed with the Defendants' argument that the Judicial Appeals Tribunal does not have jurisdiction over them in their official capacities or duties. We are more than dismayed with their legal counsel, who failed to provide the Court with any authority whatsoever in support of the position taken by their clients in the special appearances. This may be an admission that no such legal or equitable authority exists which would support the arguments of the Defendants. Regardless, this Court has no choice but to disregard these unusual pleadings. In the future, lawyers filing motions or other pleadings with this Court that contain unique arguments are urged to file briefs and provide references to legal authorities that support their positions. Under the Federal Rules of Civil Procedure [FRCP] adopted by this Court, there is no such pleading as a special appearance.

The Cherokee Nation Constitution is the highest legal authority within the Cherokee Nation. Article VII of the Constitution provides for the Judicial Appeals Tribunal. It states in part:

The purpose of this Tribunal shall be to hear and *resolve any disagreements* arising under any provisions of this Constitution or any enactment of the Council.

CHEROKEE CONST. art. VII (emphasis added).

Clearly, pursuant to the Cherokee Nation Constitution, this Court has the jurisdiction to determine this controversy, and also has jurisdiction over the Principal Chief, Deputy Chief, and Council members in order to bring about a resolution of such dispute.

THEREFORE, THIS COURT FINDS that it has jurisdiction in this matter and jurisdiction over the Principal Chief, Deputy Chief and the Council members

pursuant to the Cherokee Constitution, especially when the subject of the matters includes resolving “any disagreements under the Constitution” or “any enactment of the Council.”

It would defy all logic, common sense and reality to argue that the framers of the Constitution, and the Cherokee citizens who approved it, would have intended the highest Court in the Cherokee Nation to not have jurisdiction over controversies arising out of the conduct of the Principal Chief, Deputy Chief, and Council members while acting in their official capacities. . . .

B. Preliminary Injunction

The Plaintiffs have requested a preliminary injunction enjoining the Defendants from taking any action as a result of the purported Council meeting of April 15, 1997. Before the request for a preliminary injunction is considered, the relevant provisions of the Cherokee Constitution relating to regular, special, and extraordinary Council meetings must be analyzed.

As to regular Council meetings, Article V, Section 4 provides in part:

No business shall be conducted by the Council unless at least two-thirds (2/3) of the members thereof regularly elected and qualified shall be in attendance, *which number shall constitute a quorum.*

CHEROKEE CONST. art. V, §4 (emphasis added). This provision is clear and unambiguous. It means exactly what it says: no business can be conducted by the Council unless two-thirds, or 10 members are present of the total 15-member Council. In essence, a quorum is defined as the presence of at least 10 Council members.

Special Council meetings are authorized by Article V, Section 5, as follows:

Special meetings of the Council may be called: (A) by the Principal Chief, (B) by the Deputy Principal Chief when he has the full powers of the Principal Chief as elsewhere defined, (C) upon written request of fifty-one percent (51%) of the members of the Council, or (D) upon the written request of ten percent (10%) of the registered voters of the Cherokee Nation. *The purpose of said meeting shall be stated in a notice published not less than ten (10) days prior to the meeting and the Council may not consider any other subject not within such purposes. No special meetings may convene until thirty (30) days have elapsed after the adjournment of a prior session or meeting unless called pursuant to (A) and (B) above.*

CHEROKEE CONST. art. V, §5 (emphasis added).

This section is also unambiguous. It prohibits any special Council meeting unless notice and an agenda are published at least 10 days prior to the special meeting. It is important to note that in Article V, Section 5, the Council may only convene a special meeting when 30 days have elapsed after the adjournment of a prior session or meeting. However, the same restriction does not apply to the Principal Chief or Deputy Chief, when acting as Principal Chief. A special meeting may be called by those officers when only 10 days have elapsed after the adjournment of the last meeting. The 10 day requirement is due to the constitutional mandate of publishing notice of the meeting, and the purposes (agenda) therefor. Naturally, without an agenda, no meeting of the Council or any committee thereof may occur. Moreover, only matters on

the agenda can be considered, unless new or additional items brought before such Council or committee meeting are insignificant and have no substantial impact on the business of the Cherokee Nation. Article VI, Section 8, states:

The Principal Chief may on extraordinary occasions convene the Council at the seat of government pursuant to Article V, Section 5, and such notice and other laws as may be prescribed by the Council. The purpose of said meetings must be stated and the Council may consider only such matters as are specified in the call of the extraordinary meetings. *Before the extraordinary meetings may be legally sufficient to conduct business, a quorum of the Council must be present.*

CHEROKEE CONST. art. VI, §8 (emphasis added).

Obviously, this section is a further definition of the circumstances under which the Principal Chief or Deputy Chief may call meetings as provided for in Article V, Section 5. It can only be read and applied as an *extension* of Article V, Section 5, and cannot be interpreted as a separate grant of power or as a broader grant of power than already provided. In other words, the Principal Chief or Deputy Chief may call meetings under special or extraordinary circumstances, but the requirements of Article V, Section 5 must be satisfied, and a quorum of the Council must be present before any business can be conducted. Article VI, Section 8 cannot, under any circumstances, be construed as standing alone so as to permit a special or extraordinary meeting until at least 10 days have passed since the adjournment of the last meeting. Moreover, notice of the meeting and the purposes (agenda) must be published at least 10 days prior thereto, and a quorum must be present to address the business at hand.

At this point, the question must be answered as to what constitutes a quorum for special or extraordinary meetings. Article V, Section 4, of the Cherokee Constitution defines a quorum as the presence of at least two-thirds (10) members of the 15-member Council. While this constitutional Article and Section deals with regular meetings, it is obvious, for definition purposes, that the Cherokees who drafted and ratified the Constitution intended for the word "quorum" to mean, for all purposes, the presence of at least 10 Council members. Therefore, no Council meeting, whether regular, special or extraordinary, may take votes unless 10 of the 15 Council members are present.

It has been suggested that inasmuch as 19 C.N.C.A. §35 permits the use of *Robert's Rules of Order*, then it is not required that 10 members of the Council be present at special or extraordinary meetings. Under certain limited, specified circumstances, *Robert's Rules of Order* provide that a simple majority of those present may act. It is important to note that 19 C.N.C.A. §35 further provides that the use of *Robert's Rules of Order* is prohibited when such use would violate or conflict with the Cherokee Constitution. Here, the conflict is obvious, because the Constitution requires the presence of 10 members, rather than a simple majority, to constitute a quorum. Therefore, the use of *Robert's Rules of Order* is inapplicable in this or in any other situation where such use would violate the Cherokee Constitution. *See Cornsilk v. Cherokee Nation Tribal Council*, Case No. JAT-96-15[, 5 Okla. Trib. 185, 190-91 (Cherokee 1996)].

Inasmuch as the required 10 day notice was not published for the Council meeting of April 15, 1997, and having further determined that a quorum was not present, THIS COURT HAS, AT THIS TIME, NO CHOICE BUT TO FIND

THAT ALL DECISIONS RENDERED AT SUCH MEETING ARE VOID AND ILLEGAL, INCLUDING THE CALL FOR A MEETING ON APRIL 28, 1997. Moreover, since the meeting of April 15, 1997 was recessed and not adjourned, THIS COURT FURTHER FINDS THAT NO OTHER SPECIAL OR EXTRAORDINARY COUNCIL MEETING CAN BE CONVENED FOR A PERIOD OF AT LEAST 10 DAYS FROM AND AFTER April 28, 1997. This is the earliest date the illegal meeting of April 15, 1997, would have been officially adjourned had the meeting of April 28, 1997, occurred. Consequently, the earliest date any future special or extraordinary meetings can legally occur is May 8, 1997.

The requirements for the issuance of a preliminary injunction include the following:

1. likelihood of prevailing on the merits;
2. immediate harm;
3. no adequate remedy at law;
4. irreparable harm; and
5. balancing of interests, including that of the public.

...

A threshold question in issuing a preliminary injunction includes: Is there a likelihood that the claimant will prevail on the merits? All that is required is a showing of a reasonable chance of success on the merits.

The Plaintiffs, in presenting their arguments pursuant to the Cherokee Nation Constitution and Cherokee Nation and United States Supreme Court case law, have shown this Court that they have an almost assured likelihood of prevailing on the merits. Therefore, the first requirement is satisfied.

The next requirement is whether there [is] an immediate threat of injury or harm. Have the Plaintiffs shown some evidence that a right is about to be violated? An injunction is never granted based upon mere apprehension of injury, nor where the injury is nominal or speculative. Immediate is the operative word.

The Plaintiffs as Cherokee citizens (and some of whom are Council members) do have a serious threat of injury. The meeting of April 15, 1997 was in fact illegal, and the business conducted at that meeting is void. Any person acting upon the business of that meeting could damage the individual members of the Cherokee Nation, as well as the Nation as a whole. The Defendants, acting pursuant to the business conducted in that meeting, would bring immediate harm.

The requirements that the Plaintiffs make a showing of no adequate remedy at law and show irreparable harm will be discussed together. These requirements are generally proved by a showing that an injury or right violated is of such a nature that it cannot be adequately compensated by damages. Furthermore, if the injury is such that it is continuing or permanent, and cannot be remedied any other way, it is ripe for injunction.

The circumstances of the instant case most definitely warrant injunctive relief. The issue is not money, but whether elected officials who, by oath, have sworn to uphold the Constitution and laws of the Cherokee Nation, can conduct business without the required notice and the constitutionally-mandated quorum. If the purported meeting was illegal, then anyone acting upon the

business conducted at such meeting would injure the tribal members of the Cherokee Nation in a way that money damages would not remedy.

THEREFORE, THIS COURT DETERMINES that there is no adequate remedy at law, and that irreparable harm will occur to the Plaintiffs if injunctive relief is not granted.

The last requirement is to balance the interests of the parties along with a recognition of possible harm, if any, to the public's interest.

The hardships in this matter clearly favor the Plaintiffs. These Defendants, elected officials, have violated the Constitution by meeting and conducting business illegally, and the tribal members individually stand to lose. Moreover, the public interest of the Cherokee Nation is paramount to any other. Indeed, since the Council has met illegally, the public interest of the Cherokee Nation has and will suffer greatly.

Therefore, all requisites of issuing a preliminary injunction being met, and the Defendants having due and proper notice of this proceeding, THIS COURT HEREBY FINDS the situation being grave to the citizens of the Cherokee Nation, and ISSUES A PRELIMINARY INJUNCTION.

The Defendants in this action . . . ; ARE HEREBY ENJOINED FROM ACTING UPON ANY AND ALL BUSINESS THAT WAS VOTED ON, DISCUSSED OR OTHERWISE BEFORE THE COUNCIL AT THE APRIL 15, 1997, COUNCIL MEETING. DEFENDANTS ARE FURTHER ENJOINED FROM CONDUCTING ANY SPECIAL OR EXTRAORDINARY MEETINGS PRIOR TO MAY 8, 1997, FOR THE REASONS SET FORTH ABOVE. . . .

NOTES

1. *Holder v. Byrd* was the first in a series of cases arising out of the Cherokee Nation's constitutional crisis of the late 1990s. See generally Denette A. Mouser, *A Nation in Crisis: The Government of the Cherokee Nation Struggles to Survive*, 23 AM. INDIAN L. REV. 359, 359-66 (1998-1999). Later tribal court cases included the efforts of a Cherokee District Court judge to set up a "rogue 'tribal court'" in support of Cherokee Principal Chief Joe Byrd. *In re Removal and Suspension of Jordan*, 6 Okla. Trib. 366 (Cherokee 1997). Principal Chief Byrd also authorized "security forces" to seize the Cherokee Nation's Courthouse, the building where the Cherokee Nation's Judicial Appeals Tribunal conducted business. *In the Matter of Access to the Cherokee Nation Courthouse*, 6 Okla. Trib. 375 (Cherokee 1997). In 1997, the Cherokee Nation commissioned a report of independent experts to analyze the Nation's constitutional law — the "Massad Commission." Anthony M. Massad, Robert A. Layden & Daniel G. Gibbons, *The Massad Commission Report to the Tribal Council of the Cherokee Nation*, 23 AM. INDIAN L. REV. 375 (1998-1999).

Mouser summarized the extraordinary events of the Cherokee constitutional crisis:

Indications of an impending crisis began as early as the summer of 1996. Director of the Cherokee Nation Marshal Service, Pat Ragsdale, pursued several apparently unrelated investigations. These investigations, primarily

criminal in nature, included . . . complaints lodged against Joel Thompson, Director of the Cherokee Nation Housing Authority and close associate of Principal Chief Joe Byrd. Byrd pressured Ragsdale to squelch his investigation of Thompson, and Ragsdale complied until he received evidence which strongly implicated Thompson in wrongdoing.

The allegations against Thompson ranged from criminal libel to misappropriation of funds. One allegation centered on a supposed "hidden bank account" that financed Byrd's summit at a local State Park lodge, paid \$5000 for a car rental, and the use of Housing Authority money to prepare and mail Byrd's campaign materials. Byrd, in an apparent violation of tribal law, then ordered Ragsdale to cease his investigation of Thompson. . . .

At that same time, council members of the Cherokee Nation Tribal Council made repeated requests to Byrd for documents related to financial records of tribal business. Among the documents requested were those showing payments to a Tulsa law firm in which Byrd's brother-in-law was a partner, and records related to a manufacturing deal in India. . . . Byrd refused to force compliance with the requests, and Council members petitioned the Cherokee Nation Judicial Appeals Tribunal (the Tribunal) for a ruling on the disclosure of the contracts. In August of that same year, the Tribunal ruled that the documents were indeed a matter of public record and should be provided to the Council. Byrd and his administrators continued their refusal to provide the documents. . . .

Months passed with tension between Byrd and other tribal officials escalating. Then, in late February 1997, Tribal Prosecutor A. Diane Blalock alleged that Byrd had misused tribal funds and requested that Chief Justice Ralph Keen issue a search warrant of Byrd's office based upon Ragsdale's sworn affidavit. The Tribunal issued the warrant, which was served by tribal marshals on February 25, 1997.

Cherokee marshals made copies of the subject financial records constituting five boxes of documents, but left the originals with Byrd. Outraged at the search of his office, Byrd fired Ragsdale and Lt. Sherry Wright, who were immediately reinstated by Justice Dwight Birdwell. Birdwell also warned that anyone who interfered with the Tribunal's orders or the investigations conducted by the Marshal Service would face charges of contempt.

. . . In response, the FBI instituted its own investigation into tribal activities which may have violated United States federal laws, including illegal wiretaps of some tribal officials. Byrd, refusing to recognize the "reinstated" Ragsdale and fourteen other tribal marshals, hired his own armed security force. . . .

Just four days later, on April 15, 1997, Byrd conducted a Council meeting attended by only eight of the fifteen Council members, and a vote to begin impeachment of the entire Judicial Appeals Tribunal was passed. . . .

By April 24, the Tribunal had ruled that the April 15 Council meeting was illegal due to lack of a quorum, and a contempt citation was issued against Byrd. . . .

Relentless in their determination to gain control of tribal business and tribal government, the eight Byrd-loyalist Council members announced a plan to amend the Cherokee Constitution so that a simple majority of Council members would be all that was required to legally conduct business. More disturbingly, the eight member Council conducted a "court of removal" and carried through with their vote to impeach the entire Tribunal. Byrd's administration confidently announced that he would not recognize

the actions of the impeached court, and he remained free from the warrant issued for his arrest. In response to their "illegal" impeachment, and operating despite a lack of funds, members of the Tribunal continued to carry out their functions in the Cherokee Courthouse. . . .

Then, on June 20, 1997, Byrd ordered his security force to conduct an armed takeover of the Courthouse. The takeover, conducted in a pre-dawn raid, left vacant the 1880s-era building which housed not only the Cherokee Nation's judicial branch of government but also the Cherokee Marshal Service. . . . Angry tribe members attempted to storm the building later that morning but were turned back by Byrd's armed security force.

The impeached justices and fired marshals were literally locked out of their offices. . . .

With no Tribunal and a locked Courthouse, the citizens of the Cherokee Nation had no access to an independent judiciary, and no method for handling child custody and other disputes. One Council member called for an end to "this long, long national nightmare" and others expressed a desire for orderliness and restoration of the Tribunal. On August 10, 1997, the "impeached" Tribunal ordered Ragsdale and the "fired" marshals to take back the Cherokee Courthouse on August 13 at noon.

On August 12, 1997, the full membership of the Cherokee Nation Council met to decide whether to reinstate the impeached tribunal. Just after midnight on the 13th, Deputy Chief Garland Eagle broke a 7-7 deadlock in a decision which upheld the impeachment of the tribe's highest court. . . .

Later that day, an unarmed Ragsdale served the Tribunal's eviction notice, requiring Byrd's security forces to vacate the Courthouse. Byrd's forces refused to step aside, and a melee resulted in which non-Indian police forces from five Oklahoma counties, officers from the Oklahoma Highway Patrol, and the Bureau of Indian Affairs police removed impassioned citizens and Ragsdale's team. Hundreds of Marshal Service supporters participated in the fracas, and six people suffered injuries. Among those injured was noted Cherokee artist Lisa Tiger, who alleged she was grabbed by the hair and thrown to the concrete steps of the Courthouse. . . .

The Cherokee Nation's internal turmoil and external physical conflicts captured the attention of U.S. Interior Secretary Bruce Babbitt who, along with U.S. Attorney General Janet Reno, called leaders of the tribe to Washington, D.C. The unprecedented intervention of the United States government occurred against a backdrop of possible federal remedies including: (1) President Clinton's authority to remove Byrd from office; (2) Congressional action to cease federal funding for the tribe; (3) removal of various federal programs; and (4) reinstatement of the BIA as trustee for the tribe, ending Cherokee Nation self-government.

On August 22, 1997, . . . Babbitt proposed a temporary moratorium on all legal action, the reopening of the tribal courthouse, and an outside review of whether the Judicial Appeals Tribunal should be recognized.

. . . Byrd balked at the provision which would have provided for the recognition of the ousted Judicial Appeals Tribunal, and returned to Tahlequah. Claiming fatigue as his reason for leaving the marathon session on Friday, Byrd stated, "I think everything I did was according to the constitution." . . . Upon Byrd's departure, Babbitt warned that Congress may intervene in the crisis if the disputes were not resolved. With the summit apparently ended, Babbitt left the nation's capitol and went on vacation. . . .

Following a weekend of uncertainty and apprehension, reports broke that Byrd had returned to Washington, D.C. on Monday, August 25. . . . Later that day, word came that an accord had been reached and that Byrd had signed an agreement he termed a “peace settlement.” The agreement . . . required Byrd to accept the opinion of an independent commission’s investigation into the constitutionality of the impeachment of the Judicial Appeals Tribunal, the reopening the Cherokee courthouse, and a moratorium on any legal action related to the dispute. . . .

Mouser, *supra*, at 359-66.

The constitutional crisis precipitated the Cherokee constitutional convention of 1999, discussed *supra*. See generally D. Jay Hannah, *The 1999 Constitutional Convention of the Cherokee Nation*, 35 ARIZ. ST. L.J. 1 (2003).

3. LEGISLATIVE PROCEDURES

HALL V. TRIBAL BUSINESS COUNCIL

Three Affiliated Tribes of the Fort Berthold Reservation Tribal District Court,
No. 95C000069, 23 Indian Law Rep. 6039 (January 5, 1996)

Before POMMERSHEIM, Special Judge . . .

I. Introduction

The plaintiffs in this action filed a complaint against the defendants on June 6, 1995. The gravamen of their complaint focused on the actions and procedures employed by the tribal business council in awarding unit grazing leases in early 1995 for the five year period to run from 1995-2000. . . .

C. Due Process

Analysis of the issue of due process proves a more complicated undertaking. The task of parsing this question raises a series of intricate sub-issues and parts. These include:

. . .

2. Whether any procedural due process is, in fact, due under these circumstances and if so,

A) Whether it has been provided, and

B) Whether if it was provided, was it adequate. . . .

2. Procedural Due Process

[T]here remains the issue of whether plaintiffs are entitled to any procedural due process and if so, whether it was afforded to them. Due process in its procedural context—whether under the fifth or fourteenth amendments to the U.S. Constitution or the Indian Civil Rights Act at 25 U.S.C. §1302(8)—generally guarantees that an individual shall be accorded a certain “process” if they are deprived of life, liberty, or property. When the power of government—including tribal government—is used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action.”

The threshold question here is whether plaintiffs have been deprived of “life, liberty or property.” The focus is whether plaintiffs have any property right—cognizable under the Indian Civil Rights Act of 1968—relative to the tribal review and award (in conjunction with the Bureau of Indian Affairs) of tribal grazing unit leases. There is no doubt that the award of a unit grazing lease constitutes “property” for purposes of the due process guarantee as set out in the Indian Civil Rights Act of 1968. A leasehold interest is clearly a property right under any definition of the term. Admittedly, that is not quite the case we have here. Plaintiffs claim a property interest, not based on the actual award (and subsequent impairment) of unit grazing leases, but on the failure to provide due process for those applicants who were not awarded unit grazing leases in the first instance.

In this regard, most courts have focused on the notion of “entitlement.” That is, are plaintiffs “entitled” to the government benefits—as defined by local law—as long as they comply with the appropriate requirements? Again, this is an easy question when the “entitlement” has been awarded (not the case here), but more difficult when the plaintiff is simply an applicant for, rather than a recipient of, the government entitlement. Such interests are sometimes referred to as mere “expectancies” without the necessary “present enjoyment.”

In the context of Indian land—specifically the tribal and individual trust land that make up range units—such land is clearly a critical tribal resource. As such, tribal member applicants for grazing units leases have more than a mere “expectancy” in potential awards. They do not, obviously, have an ultimate “entitlement” to a unit lease, but they do have the right, *vis-à-vis* the precious tribal resource, to be treated culturally and legally with dignity and appropriate fairness. Plaintiffs, as tribal members, are entitled to due process. Such a view comports not only with the lineaments of due process under the Indian Civil Rights Act of 1968, but also the traditions of dignity and fairness that are central to the history of the Three Affiliated Tribes.

Having decided that due process applies to the procedure utilized in the allocation of grazing unit leases, the question becomes what due process, if any, was provided and lastly, if any was provided, is it sufficient as a matter of law? Plaintiffs claim none was provided despite the specific promises and representations of the defendants to the contrary, while defendants claim that nothing was specifically promised in this situation, but that a “traditional” (tribal) form of due process was available and plaintiffs simply never availed themselves of the procedure to freely place themselves on the agenda for any tribal council meeting to make their concerns known. The parties agree and the relevant testimony supports a conclusion that the tribal business council did not provide any kind of a *special* meeting to hear concerns of plaintiffs or others who were denied range units.¹⁶ Regardless of the promise of any *individual* defendant or tribal business council representative relevant to

16. See, e.g., the minutes of the Regular Tribal Business Council Meeting of February 9, 1995 . . . in which Mr. [Austin] Gillette refers to a “memo which he sent out from the Natural Resources Committee, wherein he states that a Special Council Meeting will be held specifically to address the grazing issue in regards to all the discrepancies that the Fort Berthold Livestock Association is concerned with.” However, the minutes do not indicate that any proposal for a

a special meeting, such a promise or representation without more has no status as the law or policy of The Three Affiliated Tribes.¹⁷ There is no evidence in the record (at least at this point) that demonstrates that the tribal council ever considered such action, much less authorized it.

Due process, particularly in the civil (as opposed to the criminal) context, contains two broad constitutive elements: notice and the opportunity to be heard. It is also significant to note in this regard that the courts have generally held that due process (and equal protection) clauses of the Indian Civil Rights Act of 1968 need not mirror the exact same substantive content of these clauses under the fifth and fourteenth amendments to the U.S. Constitution. Nevertheless, it is generally required that (procedural) due process be grounded in some *factual* dispute. This requirement is clearly met in the case at bar. For example plaintiffs allege that some defendants did *not* meet the requirements relative to permissive debt loads and/or processing sufficient numbers of cattle called for by the tribal grazing resolution.²⁰

The guarantee of due process, while recognizing different situations may call for different procedures, has consistently required fair and impartial means. One element of fairness and impartiality has been the standard that decision makers have no pecuniary interest or otherwise be competitors of the aggrieved party. The potential problem here is therefore apparent. May the tribal council in its capacity as the actual decision makers in hearing claims of a denial of due process fairly discharge its responsibility when some of its members *may* have a direct pecuniary or competitive interest vis-à-vis an individual (aggrieved) claimant for the very same lease unit awarded to a member of the council? Of course, it is well to note that tribal approaches to this problem face significant technical and fiscal constraints not otherwise apparent in the federal context and there are, likely, other ways of avoiding the potential problem. Although this issue is not directly raised in the motion to dismiss, it nevertheless is one that is likely to be confronted in any future proceeding.

The element of notice that inheres in the concept and guarantee of due process is not subject to precise definition. Rather it varies with circumstance. As noted by the Supreme Court, "An elementary and fundamental requirement of due process in a proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Relevant here, of course, is likely to be the level of general and actual awareness of the alleged tribally sanctioned "traditional"

special meeting was actually voted on. *See also* the minutes of Regular Tribal Business Council Meeting of March 9, 1995 . . . at which some aggrieved applicants . . . were heard. Needless to say, the picture that emerges is less than pristine in its clarity.

17. *See, e.g.*, art. III, §2 of the Three Affiliated Tribe's Constitution and Bylaws which states: "Special meetings may be called by the Chairman or by any three Councilmen who shall notify all members of the council at least twenty-four (24) hours before the time of convening such meeting unless a majority of the Council approves a shorter call in an emergency."

20. *See* Resolution 94-40-DSB which states, for example, in relevant part, that "Qualified applicants can secure an allocation of grazing privileges; provided the application owns 40% of the livestock to be grazed on the unit with an approved plan to reach 80% ownership of carrying capacity within three (3) years."

due process that is not (apparently) envisioned to require the tribal government to provide anyone with specific, individual notice.

In the area of deprivation of governmental benefits, the Supreme Court has most often used a balancing test to determine whether the individual interest merits a specific procedure in view of its cost to the government and society in general. This balancing test is particularly appropriate in the tribal context which, as noted above, is subject to unique constraints of fiscal resources and institutional development. In addition, it is important to insure that the tribal sovereign has the opportunity to *fully* articulate why the process (if any) that it provides comports favorably with the kind of balancing test suggested here. That is, a kind of balancing subtle to nuance and local adaptation and not the broad replicative strokes of federal standards. Also, a balancing that recognizes that the process due to an aggrieved *applicant* as compared to an aggrieved range unit *permittee* or *lease holder* may well be different.

By way of summary, tribal applicants for range unit leases are entitled to due process under the Indian Civil Rights Act of 1968. The lineaments of such due process include the basic elements of fairness, notice, and an appropriate balancing of individual and (tribal) government interests to determine the adequacy of the procedure provided. The facts pertinent to these elements are barely discernible at this stage of the litigation and shall be appropriately developed at a trial on the merits.

Two other matters bear mention at this time. This action is not (and the parties have not argued to the contrary) barred by the doctrine of sovereign immunity. The Three Affiliated Tribal Constitution contains an express—albeit limited—waiver of sovereign immunity. At art. VI §3(b), the constitution states:

The people of the Three Affiliated Tribes, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Business Council, hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. §1301, et seq., including the award of injunctive relief only against the Tribal Business Council if it is determined through a adjudication that the Tribal Business Council has in a specific instance violated that Act.

Note, however, that this waiver also explicitly limits potential remedies to *injunctive* relief only. Therefore the plaintiffs, if they prevail on the merits, will be entitled only to said relief and the court will be so limited in this regard.

In addition, it is noted that Bureau of Indian Affairs is not a named party in this lawsuit and whatever relief, if any, administrative or otherwise, that might be available, here (or elsewhere) against it is not currently before this court and the Bureau of Indian Affairs is not—at least at this point in the litigation—considered an indispensable party. . . .

[T]he court specifically orders the implementation of the following to comply with the . . . opinion and order.

1. That the Tribal Business Council of the Three Affiliated Tribes will meet in a special session to consider the appeals, written or otherwise, of each

plaintiff, in regard to each range unit for which any plaintiff submitted a written application to the tribal business council

... and which was not allocated as an entire unit to an individual plaintiff. . . .

2. That the plaintiffs through their counsel will be provided at least ten (10) days written notice of the special meeting.

3. That any council member who has applied for any range unit for which one or more of the plaintiffs applied, or who has an "immediate family member" who applied for any range unit in which one or more of the plaintiffs applied, will not participate in any way concerning the decision of the tribal business council on the appeal of that plaintiff or plaintiffs. . . . The phrase "immediate family member" includes mother, father, son, daughter, brother and in-laws of the same degree; and

4. That the tribal business council will use the following procedure when conducting the appeal for each contested range unit:

(a) Each plaintiff will be allowed sufficient time to present relevant information, in the form of written documents and/or oral testimony, with or without an attorney, about their application and the reasons why his or her application should be reconsidered as improperly denied.

(b) Regarding each appeal, the tribal business council will consider only such information that was available at the time of the initial consideration of the range unit applications.

(c) The tribal business council may, either during or after the presentation . . . , request from, or consider relevant information presented to it by the individual or individuals to whom the range unit was initially allocated. Such information shall be limited in scope as specified in subparagraph (b), above.

NOTE

In *In re Certified Question from U.S. District Court for the District of Arizona*, 3 Am. Tribal Law 497, 8 Navajo Rep. 132 (Navajo Nation Supreme Court 2001), acting Chief Justice Raymond Austin held that a tribal council resolution ordering Navajo agencies to take certain action was not legislation and could not be retroactive:

Our concern is that under 2 N.N.C. §164(D)(1) (April 22, 1997), the authorities who are required to review proposed resolutions, and most particularly the Attorney General and the Legislative Counsel, must "Determine whether each proposed resolution is legally sufficient." The precise question posed to us by the United States District Court for the District of Arizona is whether or not the Council's resolution retroactively applies to Jolene Nez and her cause of action. We hold that it does not, because there would have been significant issues implicating her rights under the Navajo Nation Bill of Rights which would have to have been considered to make such a resolution "legally sufficient." . . .

While the Navajo Nation Council "recognizes" existing state and Navajo Nation statutory law as the exclusive remedy for worker injuries, Resolution

No. CJA-18-00, Resolved Cl. No. 2, there is no reference to any title in the Navajo Nation Code or any provision of the Navajo Nation Workers' Compensation Act, and the language is not underscored, indicating "new language" for a "new law." 2 N.N.C. §165. The word "recognize" is precatory ("should") policy language, while the word "declare" would have been the kind of language we would expect to find in a statute.

Finally, the Navajo Nation President has the power to "[v]eto legislation passed by the Navajo Nation Council" and no evidence was presented to this Court that the president reviewed Resolution No. CJA-18-00 pursuant to 2 N.N.C. §1005(C)(10) (1995 ed.) (this section gives the president veto power). That also tells us that this resolution is not legislation, so it does not have the weight of statutory law.

8 Navajo Rep. at 140.

4. REMOVAL OF TRIBAL JUDGES

TURTLE MOUNTAIN JUDICIAL BOARD V. TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

Turtle Mountain Band of Chippewa Indians Court of Appeals,
No. 04-007 (June 15, 2005)

Before: Justices JERILYN DECOTEAU, MATTHEW L. M. FLETCHER* and MONIQUE VONDALL.

By Justice FLETCHER for a unanimous Court.

I. Facts and Procedural History

On May 13, 2004, the Duly Elected and Certified Judicial Board of the Turtle Mountain Band of Chippewa Indians (hereinafter "Judicial Board") "immediately suspend[ed] Tribal Court Administrator/Special Tribal Judge Shirley Cain with pay during the impeachment investigation and impeachment proceedings beginning on May 17, 2004." Duly Elected and Certified Judicial Board of the Turtle Mountain Band of Chippewa Indians Resolution #04-05-101-JB at 1 (May 14, 2004) (hereinafter "Judicial Board Resolution"). The Judicial Board Resolution provided that Judge Cain would be provided with a "Summons and Complaint as her written notice." *Id.* This "Complaint" would "enumerate the impeachment charges against . . . Judge . . . Cain. . . ." *Id.* The Judicial Board Resolution noted that Judge Cain "shall have twenty (20) days to provide the Judicial Board with her Answer." *Id.* In the record, there is no copy of a "Complaint" as contemplated by the Judicial Board Resolution and it appears likely that no such "Complaint" ever existed.

Instead of a "Complaint," the Judicial Board served the Judicial Board Resolution onto Judge Cain on May 17, 2004 at 4:31 p.m. . . . The Judicial Board Resolution itself, however, states that Judge Cain "is hereby notified that she is to cease and desist from attending work and the Turtle Mountain Tribal Court

* *Disclosure:* The author of this book participated in the case as a sitting appellate judge, and wrote the opinion.

in any capacity.” . . . The Judicial Board Resolution further noted that the Judicial Board would hold Judge Cain in contempt if she “failed to obey.” . . .

It appears that the Judicial Board anticipated that the twenty days allowed for Judge Cain to file her “Answer” would begin to run on May 17, 2004. Before the expiration of those twenty days, however, the Turtle Mountain Band of Chippewa Indians (hereinafter “Band”) initiated this proceeding in Tribal Court on June 4, 2004.

The Band in its Complaint for Injunctive Relief . . . sought an injunction that would prohibit the Board from “the suspension of Tribal Court judges in violation of Judicial Board rules” and vacate the Judicial Board Resolution. . . .

After a June 23, 2004 hearing, Associate Special Judge El Marie Conklin issued a Memorandum Decision and Order on June 29, 2004 . . . substantially granting the relief requested by the Band. . . .

On or about July 1, 2004, the Judicial Board filed a request to appeal with this Court, along with a request for a stay of execution, and a brief in support. . . .

. . . The Judicial Board had represented to this Court that Mr. Eugene L. DeLorme was a primary drafter of Article XIV and much of the tribal code. The Judicial Board also represented to this Court that it would ask Mr. DeLorme to file an Amicus Brief in this matter on the intent of the drafters of Article XIV. On or about May 10, 2005, the Judicial Board filed its Brief on Appeal and Mr. DeLorme filed an Amicus Brief. . . .

III. The Validity of the Judicial Board’s Actions

A. Standard of Reviewing the Issuance of Injunctive Relief

This Court must first determine the appropriate standard of review in this matter. Since the Band sought and received an injunction from the tribal court, we must review whether the tribal court’s issuance of injunctive relief was appropriate. The issuance of injunctive relief is a question of law. *Cf. Youvella v. Dallas*, No. 99AP000008, 2000.NAHT.0000004, at ¶20 (Hopi Ct. App., Nov. 6, 2000) (holding that the issuance of a writ of mandamus is a question of law). Tribal appellate courts generally review a tribal court’s conclusions of law under a *de novo* standard. *See LaFontaine-Gladue v. Ojibwe Indian School*, No. 94-003, at 3 (Turtle Mountain Band Ct. App., Aug. 1996) (“This Court reviews the grant of summary judgment *de novo*. . . .”); *Rose v. Adams*, No. CIV-APP 95-27, 2000.NACT.0000005, at ¶14 (Crow Ct. App., Jan. 11, 2000). The *Rose* Court conducts an “independent review” of questions of law. *Id.* We concur with these conclusions. As such, this Court holds that it will conduct an independent review of the tribal court’s issuance of injunctive relief under a *de novo* standard, granting no special deference to the tribal court’s conclusions of law.

B. The Judicial Board’s Actions Are Unconstitutional

We hold today that the Judicial Board’s actions in attempting to summarily suspend Judge Cain are not on sound constitutional footing. We therefore affirm the ruling of the tribal court that the Judicial Board could not suspend Judge Cain without first providing her adequate notice and a meaningful opportunity to be heard.

1. Due Process Rights of Sitting Tribal Court Judges

The purpose of the enactment of Article XIV by the People of the Turtle Mountain Band community was “[t]o provide for a separate branch of government free from political interference and conflicts of interest for the development and enhancement of the fair administration of justice.” *TURTLE MOUNTAIN BAND CONST.* art. XIV, §1. The Judicial Branch of the Turtle Mountain Band government consists of “the Turtle Mountain Appellate Court, the Tribal Court, the Judicial Board and the elected officials, appointees and employees of said courts.” *TURTLE MOUNTAIN BAND CONST.* art. XIV, §2. Given that the Turtle Mountain Band Constitution did not contain an enumerated listing of individual rights, it appears that one of the purposes of amending the Constitution to include Article XIV was to expressly incorporate notions of due process, equal protection, and other individual rights exemplified by the Indian Civil Rights Act (25 U.S.C. §1302). *See TURTLE MOUNTAIN BAND CONST.* art. XIV, §3(a) (“The Judicial Branch of government . . . shall have jurisdiction . . . to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Act of 1968. . . .”); *see also* [Letter from Gene DeLorme to Paul W. Picotte, BIA, at 2 (May 17, 1995)]⁷ (hereinafter “DeLorme Letter”)] at 2 (noting that the intent of Article XIV was to incorporate the individual rights protections of the Indian Civil Rights Act into the Constitution).

Given this Court’s mandate under Article XIV, we have repeatedly held inviolate the notion that individuals are entitled to due process prior to the taking of their liberty or property by the Turtle Mountain Band government. *E.g., Monette v. Schlenvogt*, No. TMAC 04-2021, at 3-4 (Turtle Mountain Band Ct. App., March 31, 2005) (holding that an individual is entitled to notice of court proceedings prior to being evicted from her home); *St. Germain v. PKG Contracting, Inc.*, No. TMAC 03-005, at 3 (Turtle Mountain Band Ct. App., [2003]) (holding that a notice of appeal must be dismissed for violation of procedural due process if the notice is not served on the opposing party); *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 10-12 (Turtle Mountain Band Ct. App., Feb. 1, 2005) (holding that the tribal court is obligated to provide “notice and an opportunity to be heard” before issuing a judgment against a party); *Lenoir v. Monette*, No. CIV-02-0039, at 9-10 (Turtle Mountain Band Ct. App., July 2, 2002) (holding that elected officials of the Turtle Mountain Band are entitled to due process prior to being removed for cause); *Monette v. Lenoir*, No. [TMAC docket no. not available], at 4 (Turtle Mountain Band Ct. App., May 22, 2002) (same); *Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025, at 4 (Turtle Mountain Band Ct. App., Oct. 1996) (holding that the Judicial Board may not suspend a tribal judge without providing due process).

7. We are mindful of the interpretation of the “actual cases and controversies” language given by Eugene L. DeLorme, our Amicus Curiae, on Amendment XI to the Turtle Mountain Band Constitution, approved on November 3, 1992 and codified as Article XIV in the mid-1990s. *See DeCOTEAU, supra*, at 116 (reprinting the amendment). Mr. DeLorme wrote this letter after the amendment had already been approved and, as such, we do not and cannot consider his interpretation to be the definitive legislative history of Article XIV, but this Court gives his opinion some deference as persuasive authority.

Following this line of authority, this Court has already made a clear statement that the Judicial Board must provide due process to sitting tribal court judges before taking action to suspend those judges. *See Parisien, supra*, at 4. This Court has held, “[T]he Judicial Board has the constitutional authority to suspend tribal judges *provided due process of law is provided*.” *Id.* (emphasis added). Other tribal courts faced with the question of whether tribal judges should be afforded due process prior to being suspended agree. *E.g., In re Matter of CLB 0201*, No. 02-01, 2002.NACT.0000004, at ¶¶67-68 (Crow Ct. App., March 5, 2002).

We hold that the process due a tribal court judge facing suspension or any other disciplinary action, including impeachment, must be extensive and comprehensive and must be strictly complied with by the prosecuting authority. As one other tribal court noted, “It is axiomatic that as the consequences of harm increase, the burden of *strict compliance* with procedural and substantive form likewise increases.” *Chitimacha Housing Authority v. Martin*, No. CV-93-0006, 1994.NACH.0000002, at ¶18 (Chitimacha Ct. App., Sept. 1, 1994) (emphasis added). The protection of the Turtle Mountain Band’s Judicial Branch from the political machinations of the tribal government, be it Tribal Chairman, Tribal Council, Judicial Board, or whatever, is paramount. As Article XIV expressly states, the primary purpose of Article XIV is “[t]o provide for a separate branch of government *free from political interference*. . . .” *TURTLE MOUNTAIN BAND CONST.* art. XIV, §1 (emphasis added). *Cf. DeLorme Letter, supra*, at 2 (discussing Article XIV, §3(b), which authorizes the Judicial Branch to develop an independent operating budget, and opining that “[t]he purpose of this section and the associated intent was to truly establish a [sic] independent tribal court. This section was adamantly added by the tribal council in that they recognized that if they controlled the purse strings, you would never have a *truly independent judicial branch of government*.”) (emphasis added). And, although we recognize that the Judicial Board—and only the Judicial Board—is empowered by the Turtle Mountain Band Constitution to oversee the tribal and appellate courts, we must also acknowledge that the Judicial Board is an elected, political body. *See TURTLE MOUNTAIN BAND CONST.* art. XIV, §6(c). In order to give meaning to both Section 1, which demands that the Judicial Branch remain free from political interference, and to Section 6, which authorizes an elected body to oversee the tribal and appellate courts, we will therefore require that the Judicial Board strictly comply with its own procedures *and* with the Constitution’s procedural due process requirements. . . .

3. The Process Provided to Judge Cain upon Her Suspension Was Insufficient to Meet Constitutional Requirements

The Judicial Board Resolution purporting to suspend Judge Cain failed to meet the due process required under the Turtle Mountain Band Constitution and must be declared invalid insofar as it purports to operate as a summary suspension of Judge Cain. As this Court has continuously reaffirmed, “The basic tenants of due process of law are notice and an opportunity to be heard.” *Mathiason, supra*, at 10 (citing *Smith v. Belcourt School District #7*, No. 02-10155, at 2 (Turtle Mountain Band Ct. App., Nov. 30, 2004)). We have held that the notice must be “adequate or reasonable,” sufficient “to

apprise interested parties of the pendency of the action. . . .” *Monette v. Schlenvogt*, *supra*, at 3 (citation and quotation marks omitted); see *Chitimacha Housing Authority*, *supra*, at ¶¶99-105. Moreover, “[r]easonable notice must be given at each new step in the proceedings.” *Monette v. Schlenvogt*, *supra*, at 3 (citation omitted). The Judicial Board Rules on notice, contained in Rule 5(b) (notice of preliminary investigation); Rule 7 (notice of institution of formal proceedings); and Rule 9 (notice of setting of time and place for hearing), meet these constitutional requirements on their face. For example, Rule 5(a) requires the Judicial Board to provide notice to the judge “of the investigation, the nature of the charge, and the name of the [accuser]”; and Rule 7 requires the Judicial Board to provide a notice “specify[ing] in ordinary and concise language the charges against the judge . . . and the alleged facts upon which those charges are based. . . .” If the Judicial Board complies with these Rules, then the judge likely will be given adequate due process.

In this matter, however, we hold that the Judicial Board did not comply with these constitutional requirements. Initially, we hold that the Judicial Board’s Resolution suspending Judge Cain does not meet the constitutional requirements for reasonable notice articulated in our *Monette v. Schlenvogt* opinion. The Judicial Board Resolution merely states that Judge Cain is “immediately suspend[ed]” and offers nothing to show why. . . . Moreover, the resolution promises that a “Summons and Complaint” that “will enumerate the impeachment charges” would follow. See *id.* No such “Summons and Complaint” is to be found in the record. As such, the Judicial Board did not provide adequate or reasonable notice to Judge Cain of the charges against her.

Moreover, the Judicial Board did not follow its own Rules, further supporting our finding that the Judicial Board violated Judge Cain’s due process rights. An agency’s violation of its own procedural rules is presumptive evidence that the agency has violated the due process rights of an accused. See *Chitimacha Housing Authority*, *supra*, at ¶94 (“At a minimum, due process . . . requires the [tribal agency] to follow its own rules and regulations.”). Judicial Board Rule 5(a) requires the Judicial Board to provide notice to the judge “of the investigation, the nature of the charge, and the name of the [accuser].” None of this information is present in the Judicial Board Resolution or any other document served on Judge Cain. As such, we find that the Judicial Board’s actions violated Judge Cain’s right to due process.

4. Judicial Board Rule 22 Is Unconstitutional

We reach one other question that neither party has explicitly addressed — whether the Judicial Board acted in compliance with Judicial Board Rule 22 and, if so, whether Rule 22 is constitutionally sound. We grant the benefit of the doubt to the Judicial Board where it apparently assumed that it had authority to suspend Judge Cain “immediately.” . . . Judicial Board Rule 22 appears to operate as an attempt by the Judicial Board to exert the authority to suspend a judge “while an investigation and/or disciplinary action is pending” if the Judicial Board “deems there is probable cause to believe that it is in the best interests of the Tribe. . . .”

We hold that Judicial Board Rule 22 is facially invalid under the Turtle Mountain Band’s constitutional law. This Court has already ruled in *Parisien*

that, *prior* to suspending a tribal court judge, the Judicial Board must provide due process of law. After proper notice is given, we have made clear in this context that, at a bare minimum, a judge should be provided with “ample opportunity to call witnesses and cross-examine the Board’s witnesses. . . .” *Parisien*, *supra*, at 4; *see also Hoopa Valley Indian Housing Authority v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Ct. App., Sept. 27, 1992) (holding that a meaningful opportunity to be heard includes four minimum rights: “(1) adequate notice; (2) a hearing decision by [an] independent arbiter; (3) an initial burden of proof imposed on the [accuser]; and (4) the right to confront and cross-examine those witnesses used against the [accused]”). Even assuming the Judicial Board complied with the terms of Judicial Board Rule 22, which is doubtful given that no valid investigation had begun in accordance with Judicial Band Rule 5 when the Judicial Board suspended Judge Cain, we find that Rule 22 does not provide “ample” opportunity to call witnesses and cross-examine the Judicial Board’s witnesses. In fact, it provides no opportunity to respond at all prior to being suspended.

Moreover, we find that the Judicial Board has no constitutional authority to summarily suspend tribal court judges. We have previously so held in *Parisien*, *supra*, at 4, but we reiterate our holding to emphasize certain constitutional limitations on the Judicial Board. We note first that there is nothing in Article XIV that grants the Judicial Board the authority to suspend sitting judges.⁹ As such, the authority that the Judicial Board exerts in this area is authority that is implied from the Constitution. *See Parisien*, *supra*, at 4 (finding that the authority of the Judicial Board to “implement” the Judicial Board Rules is sufficient to authorize the Judicial Board to suspend tribal judges) (citing *TURTLE MOUNTAIN BAND CONST.* art. XIV, §6(b)). We note further that the Judicial Board is not authorized to “regulate the day-to-day activities of the court . . . or to interfere with the administration of justice.” *TURTLE MOUNTAIN BAND CONST.* art. XIV, §6(b). And, because we must interpret the Constitution in light of the express purpose of Article XIV—to protect the judicial branch from “political interference”—we hold that Judicial Board Rule 22 is an unconstitutional exercise of authority by the Judicial Board. The Constitution does not empower the Judicial Board to summarily suspend tribal court judges. . . .

9. In fact, our Amicus expressly repudiated in very strong language the notion that the Judicial Board would have the authority to suspend judges under Article XIV, §6:

[T]here was also no intended grant of authority by this constitutional amendment to grant the judicial board the ability to suspend judges. *The power to suspend interferes with the day to day operation of the tribal court and creates the opportunity to have judges rendered ineffective for political purposes.* This constitutional amendment was intended to grant the judges tremendous authority and autonomy. At the same time, this amendment provided a safety valve in the people by allowing impeachment. *Impeachment, however, was the only intended vehicle for the removal of judges. Again, I must point out that the intent of Article 14 was to remove political influence from the judicial system.* In order to accomplish this, the judges were intended to be granted independence. The impeachment process was intended to be difficult by requiring a formal hearing process with an enhanced burden of proof.

DeLorme Letter, *supra*, at 4 (emphasis added).

This Court strongly suspects that the actual intent of the Turtle Mountain Band community was to deny the Judicial Board the power to suspend tribal judges for the reasons our Amicus suggests, but no party has asked us to revisit our holding in *Parisien*, where we upheld the authority of the Judicial Board to suspend judges upon due process. As such, we make no ruling on that question at this time.

V. Conclusion

We note that this is a matter of fundamental constitutional importance to the Turtle Mountain Band, as the parties and our Amicus have thoroughly demonstrated. We urge the parties, as other tribal courts have done in such critical matters, to “place themselves in the heart of Native American jurisprudence by ‘healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again.’” *Snowden, supra*, at 12-13 (quoting *Chamberlain v. Peters*, 27 Indian L. Rptr. 6085, 6097 (Saginaw Chippewa Indian Tribe Ct. App., Jan. 5, 2000)). It appears that this dispute is a symptom of a basic lack of communication and understanding between the parties that could easily have been resolved before reaching this forum. We sincerely hope in the future that the parties attempt to resolve their disputes in a non-adversarial forum and manner.

NOTES

1. The Turtle Mountain Band had established a form of judicial independence from the politics of the legislative and executive branches of the tribal government by creating a Judicial Board with significant authority to oversee the tribal courts.
2. Prior to the *Turtle Mountain Band Judicial Board* decision, the Turtle Mountain Band established a formal constitutional convention on July 20, 2001. See JERILYN DECOTEAU, *TURTLE MOUNTAIN BAND OF CHIPPEWA CONSTITUTION CONVENTION AND REVISION PROCESS, 2001-2002*, at 24 (Turtle Mountain Community College Project Peacemaker (2005)). The convention proposed two amended constitutions, both of which were voted down by the tribal electorate. See *id.* at v.

5. REMOVAL OF TRIBAL LEGISLATIVE OR EXECUTIVE OFFICIALS

IN RE MCSAUBY

Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary,
No. 97-02-001-CV-JR, 1997 WL 34691849 (July 29, 1997)

MICHAEL PETOSKEY, Chief Judge.

This matter comes before the Tribal Judiciary, sitting en banc, to consider two (2) issues. The first is whether Tribal Councilor, John McSauby, is entitled to court-appointed counsel and, if so, who should pay for the representation. The second issue is whether Tribal Councilor, John McSauby should be removed from office for misconduct. The Judiciary addresses these two (2) issues in that order and enters unanimous decisions on both issues.

I. Court-Appointed Counsel and Attorney Fees:

Preliminary Trial Court Determinations:

The trial court made a preliminary determination that Councilor McSauby should be represented by legal counsel for the following reasons:

- (1) Councilor McSauby was confused about how to defend against this removal action because there is another civil proceeding pending against him to rescind the land sale that is at the heart of the current controversy. For one untrained in the law and its processes, it is difficult to separate the two. There is a commonality of facts because the two legal actions arise from the same incident. However, the legal issues are different because the nature of the two actions are completely different. It was clear that Mr. McSauby's lack of understanding and familiarity with the law and judicial process would result with an inability to focus cleanly on the issues as the Court would need to deal with them. The result would have been that the Court itself would have been forced by necessity to be pro-actively involved with guiding the case through the judicial process and, undoubtedly, guiding the defense if unrepresented to ensure fairness, due process, and to just get the appropriate legal arguments before the Court. Surely, that would have appeared to some as the Court being biased. More importantly, the Court itself was uneasy about the prospect of guiding, as its role of being decision-maker requires impartiality. Thus, without the appointment of counsel, the necessity of clearly focused proceedings would have resulted in the decision-maker's role being compromised and the helping hand to move the proceedings being viewed by some as biased. In a case of this importance to the tribal community neither of those consequences are acceptable.
- (2) This is a matter of utmost importance to the Tribe. This is the first removal action. How the Tribal Judiciary handles this matter will be legal precedence for future removal actions. Thus, fundamental fairness is viewed not only important to the instant matter but for future matters as well. That being the case, fully-developed facts and legal arguments are important to the Court.

It is clear for the above-mentioned reasons Councilor McSauby would not be able to present either to the Court. This entire matter is an unfortunate happening. The last thing the tribal community needs is for bad law to develop on top of it. Good law results from the parties presenting their cases and arguments well. Otherwise, courts are basing decisions on partial facts and incomplete arguments.

Arguments Against Appointment:

Legal counsel for the Tribal Council presents the Judiciary with the following arguments why Mr. McSauby should not be appointed counsel paid by the Tribe:

- (1) Indigent status is a prerequisite for court-appointed counsel;
- (2) Tribal court should adopt the so-called "American rule";
- (3) There is no constitutional or legislative authorization to pay court-appointed counsel;
- (4) It results in adding insult to injury; and
- (5) There is no budget authorization to pay court-appointed counsel.

En Banc Determinations Regarding Appointment:

The Tribal Judiciary expressly adopts the reasons cited by the trial court for appointing counsel to represent Mr. McSauby. In addition, there are at least

two (2) more reasons for ensuring that Mr. McSauby is represented by legal counsel:

- (1) This is an important matter to tribal voters. Councilor McSauby was elected to office. To deprive them of their elected voice is a very serious undertaking. Those who elected him to office are entitled to have their chosen representative be represented by legal counsel.
- (2) Tribal Councilors with minority opinions should have protections in a system of checks and balances from a tyranny by Council majority. Checks and balances in government serve to ensure good government. One of checks and balances for Councilor removal is the referral to the Tribal Judiciary, but the check and balance would be incomplete without legal representation because the deck is stacked in favor of the majority. It will be represented by the tribal attorney staff. Tribal attorneys work for the Tribal Council using tribal resources, so tribal resources should also be used to “balance” the “check” against majority reprisals against minority office holders.

The Tribal Judiciary by reasoning as above rejects all five (5) arguments made by counsel for the Tribal Council. All five (5) rejections are based on the reasoning above and respectively follow:

- (1) Given that this matter is of the utmost importance to the tribal community as a whole for the reasons cited above, indigent status is not required. If Mr. McSauby has unduly profited, there are other remedies available for tribal redress.
- (2) The “American rule” adopted by state and federal courts is rejected in its application to this case. If we are to be just like them, with wholesale adoption of their rules and laws, why do we continue to argue that Indian people have very different perspectives than those of the society that surround us and thus, exercise self-government to incorporate our own values? The Tribal Judiciary’s sense of what is fair and why can be different than those of other courts and is, as expressed above, in this case.
- (3) The Tribal Court is a court of general jurisdiction. *See* TRIBAL CONSTITUTION, Article V, Sec. 1. As such, it has the inherent power to do whatever is reasonably necessary to fairly resolve any matter that is appropriately before it. This is a constitutional power. Thus, the Tribal Constitution gives the Court the power to do what is reasonably necessary. The Tribal Council’s authorization is not necessary.
- (4) There was no way of knowing whether insult would be added to injury prior to these matters being heard by the Judiciary. Even at the point of releasing this Opinion, much fact-finding must occur to fairly resolve the civil suit between the Tribe and Mr. McSauby. To this point, the stipulated facts and offers of proof presented to the Judiciary are only the tip of the iceberg.
- (5) That there is no budget authorization is a woefully inadequate reason to deny representation by counsel in a matter of this importance to the Band. It seems that the Tribal Council can find resources to do many other things that are not expressly included in prior appropriations.

In this time of relative resource-rich ability to do many things for the community benefit and in light of the reasoning expressed above clearly pointing out the numerous benefits to the community as a whole, the Tribal Council must pay Defendant McSauby's attorney fees and court costs.

FOR ALL OF THE FOREGOING REASONS, reasonable attorney fees and costs are awarded to Councilor McSauby's attorney. A detailed invoice must be submitted to the Tribal Court for its review and approval prior to submission to the Tribal Council for payment.

II. Referral for Removal

The referral to the Tribal Judiciary of the removal from office of Tribal Councilor John McSauby was premised on the suspicion that he might have engaged in misconduct. The En Banc Hearing before the Tribal Judiciary on June 18, 1997 only involved the suspicion of misconduct that implicates violations of the Tribal Constitution and tribal law.

It is both unfortunate and surprising that the conflict-of-interest aspects of this matter went unnoticed by those involved until tribal members brought them to the attention of the Tribal Council. "Red flags" should have been jumping up all over and flapping like crazy. It is also clear that this matter would not have gotten this far if Tribal Council would have: (1) worked more closely with legal staff in order to ensure that Council has the legal guidance it needs; and (2) refrained from using polling forms to conduct business and posted the proposed action for public notice. Legal counsel for the Tribal Council acknowledged that mistakes were made but argued that such should not excuse Councilor McSauby. We agree.

Constitutional Interpretation

The pertinent language upon which the decision of the Tribal Judiciary rests in deciding this matter is: "In carrying out the duties of tribal office, no tribal official . . . shall make **or** participate in making decisions . . ." GTB TRIBAL CONSTITUTION, Article XII, Sec. 1 (bold added for emphasis). The question that must be answered is whether Councilor McSauby either made or participated in making the decision to purchase the land from himself.

The Judiciary expressly gives its definitive interpretation of that language as follows:

- (1) "... make ..." means affirmatively voting on the issue; and
- (2) "... participate in making ..." means engaging in any activity directed toward any decision-maker to influence, directly or indirectly, a decision which involves a personal financial interest.

The Tribal Judiciary rejects the prevailing interpretation of the conflict-of-interest provision that was argued by both counsel during oral argument at the Hearing on June 18, 1997. The pertinent portion involved in that dominant interpretation is "... which require balancing a personal financial interest, other than interests held in common by all tribal members, against the best interests of the Band." GTB TRIBAL CONSTITUTION, Article XII, Section 1. The

arguments centered upon whether the personal interest of Councilor McSauby was outweighed by the benefit to the Band. This interpretation is fostered by the word “balancing” which leads some to think that a balancing test is required to ascertain whether there is in fact a conflict-of-interest. We think not. The mere fact a personal financial interest is involved is sufficient to create a conflict-of-interest. The benefit to the Band is irrelevant. The word “balancing” simply means that the benefit to the individual must be weighed against the benefit to the Band. The outcome of the balancing is not determinative of a conflict-of-interest. The conflict-of-interest arises because a balancing of Councilor McSauby’s personal financial interest against the interest of the Band must occur. Who does the balancing or at what juncture is irrelevant. The promoter of a personal financial interest would not push for action or decision if he/she had not balanced the interests in his/her mind in order to develop the justification to sell the promotion to others. That kind of balancing is inherent in promotion of any personal interest.

Offers of Proof Applied to Constitutional Interpretation:

The Stipulation of Facts and Offers of Proof do not implicate Councilor McSauby in actually casting a vote for the land purchase. However, there is much to show that he actively engaged in promotion of the land purchase to the other members of the Tribal Council, that he pushed the process to make the ultimate decision, and that he influenced the decision. Councilor McSauby’s offer of proof is very telling. He offers to prove that he:

- (1) discussed the project with individual Tribal Councils [sic] members, the Tribal Chairman and aggregates of Tribal Council members;
- (2) subsequently met Tribal Council members to present proposed plans, an itemization of costs and benefits, the engineering site plans, marketing analysis, and discussed the status of the project through several conversation [sic];
- (3) took a proposed polling voting form that he prepared to the Tribal Chairman’s office;
- (4) presented the polling form to a Tribal Council member at a subsequent Gaming Commission Meeting for that Council member’s vote;
- (5) met with another Council member, who was about to leave town, in order to get her vote;
- (6) asked a third Council member to vote;
- (7) personally submitted the polling form to the Gaming Commission Accounting Department for the preparation of a check request;
- (8) on a later date, December 4, 1996, personally took the signed check request form to the Tribal Chairman’s office for his signature, at the request of the Gaming Commission Accounting Department;
- (9) returned the signed check request form to the Gaming Commission Accounting Department;
- (10) signed the check issued by the Gaming Commission Accounting Department to Leelanau Title Company to purchase the land; and
- (11) delivered the signed check to the Leelanau Title Company closing officer.

All of the above are conflict-of-interest activities. (1) through (6) are misconduct in violation of the constitutional prohibition of participating in the making of a decision. (7) through (10) are activities that demonstrate Councilor McSauby's personal financial interest in seeing the deal through. Normally, the (7) through (10) activities are ones which would be handled administratively which points out that this entire matter was handled outside of procedural norms. Councilor McSauby's land sale to the Band was not placed on any Tribal Council agenda for presentation, discussion, consideration, public input, or Tribal Council decision. Those who serve the Tribe can be reasonably expected by its membership to operate within commonly accepted government and administrative procedures. The Judiciary understands that the Tribal Council has taken steps to ensure procedural safeguards for the future by the adoption of the "Tribal Council Meetings Ordinance". It is a good step in the right direction. The Tribal Constitution is clear about open meetings, public notice of meetings, a reasonable opportunity to be heard, and that the Tribal Council shall act only by ordinance, resolution, or motion.

The tribal community has every right to expect that tribal officials and employees will avoid conflicts-of-interest. Tribal members have a right to loyal service and fulfillment of confidence placed in officials and employees. Tribal officials have a fiduciary responsibility to tribal membership. Good government will require that even the appearance of a conflict-of-interest be avoided. In that regard, the Tribal Council is urged to seriously consider the adoption of a code of ethics for tribal official and employee conduct to provide additional guidance beyond that offered in this Opinion.

Removal Authority

Councilor McSauby was referred to the Tribal Judiciary for removal because it was suspected that he might have engaged in misconduct. Having found that there was indeed misconduct, the Tribal Judiciary finds grounds for removal. Having found that grounds for removal exist, the Judiciary must remove Councilor McSauby from office. The removal is mandated under Article VIII, Sec. 2(f) of the Tribal Constitution.

FOR ALL OF THE FOREGOING REASONS, IT IS THE FURTHER ORDER OF THE TRIBAL JUDICIARY that Councilor John McSauby be removed from office. . . .

NOTES

1. In *Coalition for Fair Government II v. Lowe*, 1 Am. Tribal Law 145 (Ho-Chunk Nation Tribal Court 1997), the court enjoined a special election called to replace removed tribal council members on grounds that the entity serving notices of removal of council members had no such authority:

First and foremost, the Notices were deficient because they were prepared and served by people without any authority to prepare and serve such notices. The General Council has never given the authority to issue charges of malfeasance to the GCPC. . . . The Notices were apparently prepared by the General Council Planning Committee [GCPC], on April 23, 1996 although

the conscious absence of the GCPC makes it impossible to determine this with certainty.

The GCPC is a committee of Tribal members who serve in a capacity to assist the operation of the General Council by among other things, securing the site, arranging for meals, ceremonial openings and payments of costs associated with holding the General Council and setting a proposed agenda. The GCPC exists through a delegation of authority from the HCN Legislature and has no independent authority that has not been delegated to it from either the Legislature or a General Council itself. . . . No minutes or official actions of any General Council were ever produced showing a delegation of authority to the GCPC or to the server of the Notices, Sanford Decorah, despite the self serving announcement of that fact by the drafters of the Notice itself.

Id. at 163.

2. In *Youvella v. Dallas*, 2 Am. Tribal Law 369 (Hopi Appellate Court 2000), the court held that a suit brought by removed tribal council members against the tribal treasurer seeking payment due the council members was not barred by sovereign immunity:

Respondents would have us believe that a voice vote on a motion whose meaning, on its face, is ambiguous, could be converted into "direction" to the Secretary and Treasurer to stop payment to Appellants. . . .

Official action of such magnitude often has serious consequences for all parties involved and, therefore, ought to be accompanied by a greater degree of procedural formality than the voice vote to ensure the parties understand precisely what action has been taken. In this case, the Council could easily have formalized their decision about Appellants' status, but failed to do so. Subsequent actions of the Council, while indicative that Council no longer considered Appellants to be members of the Council, do little to cure the lack of formality with which they made their initial decision. We are not prepared to instruct the Council as to the exact standard, but we find that on these facts that Council's actions were insufficiently formal and insufficiently clear to constitute direction to the Secretary and Treasurer to stop payments to Appellants.

Id. at 372-73.

D. TRIBAL SOVEREIGN IMMUNITY

DECKROW V. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Little Traverse Bay Bands of Odawa Indians, No. C-006-0398, 1999 WL 35000425
(September 30, 1999)

MICHAEL PETOSKEY, Chief Judge. . . .

Defendants raise several affirmative defenses in their Answer to Plaintiff's Complaint[, which seeks to disallow results of tribal election]. Those defenses are that: . . .

- (2) the claims are barred by the sovereign immunity of the Defendant; . . .

The Court will address these defenses one-by-one: . . .

(2) The claims are barred by sovereign immunity—Defendant argues that it is immune from suit because it is a federally-recognized Indian tribe. Indian tribes enjoy sovereign immunity under federal law unless the immunity has been expressly waived by the U.S. Congress or by the tribe itself. The issue that must be addressed by courts is whether there has been an express waiver either by Congress or the Tribe.

Sovereign immunity is an English-law doctrine that “the king can do no wrong.” One cannot sue the king. This ancient doctrine came to this country with the adoption of English law as the legal foundation for the development of law in the new United States. A new country was superimposed over numerous indigenous Native communities. Each with their own political structure and tribal law. Since that earlier time, many non-Native governments have waived their immunity in various areas to provide redress for government negligence and wrongdoing. Reasons for the various waivers might be generalized to say that the people of a representative democracy realize that “the king” can do wrong and does make mistakes. After all, government is a human institution and the maxim “to err is human” is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely in everyone’s book. However on the other hand, governmental immunity ensures that no one can “break the bank” by a bank-breaking award of tribal assets. No one wants to see the government bankrupted. It seems reasonable to expect the Tribal Council to look at these various considerations and develop well-reasoned positions on immunity as it relates to this tribal community. After all, this is not England. We do give a lot of lip service to the fact that Indian communities are different [than] those of dominant society. We point out that our judicial and legal systems need not be mirror-images of those of dominant society. If that is truly the case, why should tribal government adopt the Anglo-American concept of sovereign immunity?

Rather, why shouldn’t tribal sovereign immunity mirror tribal culture? It is difficult to imagine that an outdated ancient English doctrine fits this tribe’s needs. Importantly, the Court recognizes that these policy questions are political questions that can only be addressed by the Tribe’s political body. Thus, the Court respectfully suggests that Tribal Council duly deliberate on these issues, rather than relying on the Tribal Court to simply dismiss everything based upon arguments of sovereign immunity.

ARTICLE VIII of the Tribe’s Interim Constitution entitled “Bill of Rights” expressly provides that members have “. . . the right to petition for action or the redress of grievances. . . .” This is the supreme law of Tribe because the Tribal Constitution is the supreme law. It is the peoples’ expression of its delegation of power to the government. The right to petition for action or redress would be rendered meaningless if sovereign immunity is deemed to be a bar. If the provision is meaningless, why the expression of a right? Why bother? The expression must have a purpose, otherwise the language would not be included. Thus, the Court construes the cited constitutional provision to be an express waiver of sovereign immunity by the Tribe. Whether the “Bill of Rights” provision of the Interim Tribal Constitution is construed a reservation of the power in the people

or a waiver of immunity by those who drafted its provisions is not significant for the purposes of deciding the instant matter. It is still an express waiver. For all of the foregoing, sovereign immunity is not a bar to this action. . . .

FOR ALL OF THE FOREGOING, this Honorable Court rejects all of the Defendant's arguments and denies the Defendant's Motion to Dismiss. This Court will schedule this matter for a hearing on the merits.

NOTES*

1. In an earlier opinion in the same case, Judge Petoskey pondered the dilemma posed to tribal courts about sovereign immunity under Tribal law and suggested that the Tribal government must deliberate carefully on its application. *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. C-006-0398, slip op. at 4-5 (Little Traverse Bay Bands Tribal Ct., Feb. 22, 1999).

The *Deckrow* decisions came down under an "Interim" tribal constitution that the Little Traverse community replaced in 2002 with a permanent constitution. Article XVIII of that document governs the sovereign immunity of tribe:

A. Tribal Immunity from Suit

The Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, and officials and employees of the Tribe acting within the scope of their duties or authority shall be immune from suit.

B. Suit against Officials and Employees

Officials and employees of the Little Traverse Bay Bands of Odawa Indians who act beyond the scope of their duties and authority shall be subject to suit in Tribal Court for purposes of enforcing rights and duties established by this Constitution or other applicable laws.

CONSTITUTION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS art. XVIII (2002).

2. As a matter of both tribal and federal law, Indian Tribes possess sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *E.g.*, *Martin v. Hopi Tribe*, 25 Indian L. Rep. 6185, 6187 (Hopi Tribe Ct. App. 1996); *McCormick v. Election Committee of the Sac & Fox Tribe*, 1980 WL 128844 (Court of Indian Offenses for Sac & Fox Tribe 1980). "When a tribe or its agencies are sued in tribal court, the scope, protection, and meaning of tribal sovereign immunity are governed primarily by tribal, rather than federal or state, law, although other bodies of doctrine may be looked to for guidance by analogy." *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian L. Rep. 6045, 6046 (Cheyenne River Sioux Ct. App. 1996).

Sovereign immunity is an important element to the efficient development of Tribal government and is "necessary to promote 'tribal self-determination,

* Author's Note: Some of the material in the notes appears in Matthew L. M. Fletcher, *Tribal Court Conundrum*, 38 U. MICH. J. L. REFORM 273 (2005).

economic development, and cultural autonomy.'" *Martin v. Hopi Tribe*, 25 Indian L. Rptr. 6185, 6187 (Hopi Tribe Ct. App. Mar. 29, 1996). As one Tribal Court wrote, "[S]overeign immunity [is] an essential attribute of Indian tribes and [is] to be highly supported unless clearly waived. It serves to avoid interruption of tribal government and agents in improper law suits and to protect public funds from improper distribution under the Tribal Constitution." *DeVerney v. Grand Traverse Band of Ottawa & Chippewa Indians*, 2000 WL 35749822, at *2 (Grand Traverse Band Court of Appeals 2000). See also *Sturgeon Electric Co. v. AHA MACA Power Service*, 26 Indian L. Rptr. 6026, 6027-28 (Fort Mojave Indian Reservation Court of Appeals 1998) ("Immunity is a fundamental aspect of sovereignty which protects a government from suit to avoid undue intrusion on governmental functions or depletion of the government's assets without the government's consent."). Sovereign immunity prevents depletion of valuable common resources and protects against litigation interfering with the operation of the Tribe. See *Guardipee v. Confederated Tribes of Grand Ronde Cmty. of Or.*, 19 Indian L. Rptr. 6111 (Confederated Tribes of Grand Ronde Cmty. of Or. Tribal Court 1992) ("Moreover, it has been held that tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources.") The influential Navajo Nation Supreme Court agreed:

The Navajo people are entitled to a representative and accountable Navajo tribal government. For this reason, important decisions having direct consequences on the Navajo tribal treasury should be made by the elected representatives of the Navajo people. If we hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo courts, we will be sanctioning an attack on the tribal treasury. Such decisions are best made by elected Navajo representatives after consultation with their constituents.

In addition, the funds of the Navajo Nation are not unlimited. Each year the funds maintained by the Navajo Nation for the operation of the Navajo tribal government are exceeded by the people's demand for more governmental services. ICRA suits which result in money damages against the Navajo Nation will only divert funds allocated for essential governmental services.

Johnson v. Navajo Nation, 14 Indian L. Rptr. 6037 (Navajo Nation Supreme Court 1987). See also *Gonzales v. Allen*, 17 Indian L. Rptr. 6121, 6122 (Shoshone-Bannock Tribal Court 1990) ("The legislative and executive branches of government have the responsibility for determining the purposes and the extent to which government funds will be utilized. Absent explicit waiver of such authority the courts do not usually have the authority to spend such funds. Nor do the courts have authority to waive sovereign immunity on behalf of the government.").

Tribal courts generally hold that the concept of sovereign immunity "does not defy Native American traditions. . . ." *Novak Construction Co. v. Grand Traverse Band of Ottawa & Chippewa Indians*, 2001 WL 36194389, at *2 (Grand Traverse Band Court of Appeals 2001). See also *Sulcer v. Barrett*, 17 Indian L. Rptr. 6138, 6139-40 (Citizen Band Potawatomi Indians of Okla. Supreme Court 1990) (Rice, J., concurring) ("While the doctrine of

sovereign immunity is admittedly of European origin, it is entirely consistent with the tribal constitution and common law. . . .”).

Some tribal courts have explicitly rejected tribal sovereign immunity. *E.g.*, *O'Brien v. Fort Mojave Tribal Ct.*, 11 Indian L. Rptr. 6001, 6002 (Fort Mojave Tribal Ct. Dec. 8, 1983).

3. One prominent Indian law practitioner and commentator argued that some aspects of tribal immunity can hurt Indian communities:

Tribal sovereignty can be exercised affirmatively or defensively. Affirmative sovereignty is the positive assertion of tribal authority, including the enactment of tribal law, to govern matters within the jurisdiction of a given tribe. Defensive tribal sovereignty involves the use of sovereign immunity to shield tribes, tribal enterprises, and tribal officials from lawsuits or the invocation of legal doctrines to shield tribes, their reservation affairs, and their reservation enterprises from the imposition of state or federal authority. Defensive tribal sovereignty draws, by far, the most media attention, and when tribes, tribal enterprises, or tribal officials appear to avoid liability or accountability, that attention is often negative.

The exercise of affirmative tribal sovereignty can offset the negative perception of defensive tribal sovereignty. Consider, for example, an Indian tribe with a tribal law providing employees with enforceable tribal court remedies for workplace sexual harassment. Such an “affirmative tribe” will be far less vulnerable to media attack when it, or one of its enterprises, prevails in dismissing a federal court action by an employee under Title VII of the Civil Rights Act; for it can point to fair and enforceable tribal law protections for the employee. Similarly, the EEOC or the Department of Labor will be less inclined to push for the imposition of federal employment remedies upon tribes and their enterprises if employees can pursue remedies in tribal court, under tribal law, that are on a par with federal law remedies.

Thus, it can be argued that to stave off negative perceptions of defensive tribal sovereignty, tribes should enact laws, consistent with the values of the tribal community, that protect the health, safety, and welfare of Indians and non-Indians within their jurisdiction; and to do so as well as any state or federal authority would do it if the latter had jurisdiction. . . .

Affirmative sovereignty may also mean taking a long range view of whether to litigate a defensive tribal sovereignty position in the federal courts. Again, considering the adage that bad facts make bad law, this could mean careful consideration of the risks of creating bad precedent for the field of federal Indian law, not just the consequences for the particular case. Is there any “ethical” obligation for a tribal attorney to take into account how a particular case for a particular tribal client might affect federal court precedent in the field of federal Indian law? Surely there is no equivalent obligation in most other fields of law. But federal Indian law is unique. . . .

Kaighn Smith, Jr., *Ethical “Obligations” and Affirmative Tribal Sovereignty: Some Considerations for Tribal Attorneys* at 532, 533-35, in 31ST ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE—ACTIVE SOVEREIGNTY IN THE 21ST CENTURY: COURSE MATERIALS (April 6-7, 2006).

