IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

MUSCOGEE (CREEK) NATION NATIONAL COUNCIL, and ROBERT TREPP, an individual Muscogee (Creek) tribal citizen, and DOES 1-10, Inclusive, Petitioners, v. MUSCOGEE (CREEK) ELECTION BOARD, A.D. ELLIS, in his capacity as Principal Chief of the Muscogee (Creek) Nation, and MUSCOGEE (CREEK) CONSTITUTIONAL CONVENTION COMMISSION, Respondents.	SUPREME COURT FILED DEC 03 2010 ROSANNA L. FACTOR, COURT CLERK MUSCOGEE (CREEK) NATION **Supreme Court Case** **No. SC 09-10**

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV

CHIEF JUSTICE JONODEV CHAUDHURI, VICE-CHIEF JUSTICE HOUSTON SHIRLEY AND JUSTICE AMOS McNAC CONCURRING. JUSTICES LEAH HARJO-WARE AND DENETTE MOUSER DISSENTING, JUSTICE KATHLEEN SUPERNAW NOT PARTICIPATING.

OPINION AND ORDER

For the reasons discussed below, this Court vacates its December 21, 2009 Opinion in this matter, assumes original jurisdiction, and dismisses Petitioners' claims with prejudice.

I. SUMMARY

In a Special Election held on November 7, 2009 ("Special Election"), the electorate of the Muscogee (Creek) Nation ("Mvskoke" or "Nation") voted to approve eleven of twelve proposed amendments to the Mvskoke Constitution ("Constitution"). This event demonstrated the will of the Mvskoke people, through ballot vote, to substantially amend the Constitution.

In the wake of this election, Petitioners filed an action in this Court challenging the validity of the formulation and adoption of some of the amendments that were approved (the "Approved Amendments" or "Amendments"). In December of 2009, after briefing by all parties, this Court issued an Opinion declining to extend original jurisdiction in this matter and noting that the case should have first been filed in the Mvskoke District Court "where a Special Judge would be appointed to hear it."

In the eleven months since this Court issued that Opinion, however, and for a variety of reasons, no Special Judge has been appointed to hear the case. For this, and other reasons set forth below, we find that critical public policy considerations compel us to revisit the need for lower court review. In doing so, we discover that this case is readily resolved solely by reference to issues of law. As this Court rules upon all issues of law *de novo*, lower court review, while generally desirable, is in this unique case unnecessary and in fact unjustifiable. Upon review of the relevant issues of law, this Court finds that Petitioners' claims cannot be constitutionally supported and therefore must be dismissed.

Accordingly, this Court holds that: 1.) this Court exercises original jurisdiction in this case; 2.) Petitioners do not have standing; 3.) Petitioners' prayer for injunctive relief and an evidentiary hearing are denied; 4.) Petitioners' claims are dismissed with prejudice; 5.) the process by which all Amendments submitted to and voted upon by the Mvskoke people in the

Special Election as challenged by Petitioners is upheld; and 6.) the Approved Amendments are deemed duly-adopted amendments to this Nation's Constitution.

II. BACKGROUND

A. Procedural History

On November 13, 2009, Petitioners filed in this Court an "Ex Parte Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction and Expedited Discovery" ("Application"), along with a supporting memorandum and two declarations. Together, these filings alleged a number of errors regarding the Approved Amendments.[1] Petitioners' procedural arguments addressed the manner in which the Constitutional Convention Commission ("Commission") collected citizen input and drafted and presented proposed Amendments for ballot vote in conjunction with the Muscogee (Creek) Nation Election Board ("Election Board"). Petitioners sought to "preclud[e] the [Election] Board from certifying the results of the Special Election." *Petitioners' Ex Parte Application for Temporary Restraining Order.*

On November 18, 2009, this Court issued an *Ex Parte Restraining Order* enjoining the Election Board from certifying the Special Election results and ordered all parties to submit letter briefs by November 30, 2009 addressing this Court's jurisdiction, ripeness of the issues, standing, and any other threshold issues. Unbeknownst to this Court at the time, the Election Board certified the Special Election on November 17, 2009, one day prior to this Court issuing

[1] While not framed by Petitioners as such, these alleged errors involved two categories: 1.) procedural challenges, and 2.) substantive challenges claiming that certain proposed Amendments were contradictory to one another and other portions of the Nation's Constitution. The claims regarding alleged contradictions among the Amendments and their inconsistencies with other constitutional provisions are easily disposed of. Not only does the Court make every effort to refrain from issuing declaratory or advisory opinions, the proper synthesis of any provisions of the Constitution, whether newly adopted or long-standing, are to be addressed in the course of the application of such provisions. Therefore, Petitioners challenges to the substance of any proposed Amendments are clearly misplaced, cannot be resolved prospectively, and must be dismissed as patently unripe for review.

its *Ex Parte Restraining Order.*

On November 20, 2009, this Court issued an *Amended Order* rendering as moot portions of the November 18 Order and upholding the portions requiring all parties to submit letter briefs. Furthermore, the Court directed the parties to address in their letter briefs setting forth the impact of the Election Board's certification. Petitioners' subsequent letter brief provided responses to these issues and requested a preliminary injunction "halting the Constitutional Amendments from going into practical effect" pending a full evidentiary hearing.

On December 21, 2009, this Court issued an Opinion dismissing this case for ripeness and ruling that this Court would not exercise original jurisdiction.[2] This Court further ruled that the case should have been brought in the District Court for review by a Special Judge.[3]

As of the date of this Opinion and Order, no Special Judge has been appointed. In light of this and other considerations, this Court finds it necessary to revisit this case and issue this Opinion and Order.

B. Participation and Voting of Justices

It is noted that at the time of this Court's review of and substantive vote on the issues underlying this Opinion, there were only five Supreme Court Justices seated. Muscogee (Creek) Nation Code of Laws, Title 27, § 3-101 (codified from NCA 82-30) states that a "judgment or decision of the Supreme Court requires the approval of a minimum of four justices." In rendering this Opinion, this Court holds Title 27, § 3-101 (NCA 82-30) has no force or effect

[2] Because the case was dismissed contemplating lower court review, this dismissal was a dismissal without prejudice. By way of this Opinion, we now dismiss this case with prejudice.

[3] The current sitting District Court Judge Moore had been member of the Constitutional Convention Commission, thus a Special Judge would be required for lower court review.

when less than six Justices are seated.[4] As such, in this case, three Justices constitute a majority and this Opinion and Order is accordingly issued as the majority opinion of this Court.[5,6]

III. DISCUSSION

A. Resumption of Original Jurisdiction

While this Court previously declined to exercise original jurisdiction in this matter, such action does not remove the duty of this Court to inquire into its own jurisdiction[7] in light of compelling public policy considerations and the fact that no lower court action has yet occurred. For reasons discussed below, we reexamine our exercise of original jurisdiction in this case and determine that original jurisdiction is appropriate.

This Court's authority to determine whether original jurisdiction in this case is appropriate is inherent in its authority over judicial policy and operations. The ultimate source of this Court's jurisdiction is the Nation's Constitution which gives judicial powers to the Supreme

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[4] It has been a key principle throughout the history of our constitutional form of government, beginning in 1867, that judicial decisions are made by a majority vote. Nothing in our history supports that this Court's decision-making power should be based on a super-majority basis. This Court has always issued opinions based on a majority vote and our rules only require a majority of Justices voting. *See,* Supreme Court Rule 3-108.

NCA 82-30 did not contemplate only five Justices reviewing a case. No legislative history is found that would indicate the reason for establishing this provision. It is implausible to construe this law to mean that each case must be decided by four justices when less than six Justices are on the Court. If interpreted this way, this would require our Court to make decisions based on a super-majority. Such a legislative requirement would unduly interfere with this Court's internal decision- making process and would be unconstitutional. We have held in *Ellis v. Muscogee (Creek) National Council, (Ellis II), SC 06-07(Muscogee (Creek) 2007)* ___ Mvs.L.Rep. ___ that any attempt to control the Supreme Court under the guise of legislation will not be tolerated.

This Court has previously held that where NCA 82-30 required the Supreme Court to grant a jury trial when requested by a party, this law infringed upon the inherent powers of the Court to enforce its orders, and maintain orderly administration of justice, and was, therefore, unconstitutional. *Ellis v. Muscogee Creek Nation National Council* SC 06-07 (Muscogee (Creek) 2007). ___Mvs. L. Rep.___. This analysis applies directly to the provision of NCA 82-30 requiring a concurring vote of four justices when only five justices are seated. Such a requirement infringes on the Court's inherent powers granted by the Constitution and therefore such provision cannot stand.

[5] This does not mean, however, that in an instance when a plurality opinion is ever issued that this Court has not met its constitutional requirement of majority.

[6] At the time of the substantive vote of this Opinion, the dissenting Justices reserved the opportunity to provide dissenting opinions. Therefore, separate dissenting or concurring opinions by any voting Justice may be appended to this Opinion and Order.

[7] *See Wilde v. Kelly*, 4 Mvs.L.Rep. 159, (Muscogee (Creek) 1996) (Supreme Court has a duty to inquire into its own jurisdiction).

Court and inferior courts. (See Muscogee (Creek) Nation Constitution, Article VII, Section 1). Article VII, § 1. Furthermore, this Court is the final arbiter of cases and controversies concerning constitutional provisions. *See, e.g., Courtwright v. July,* 4 Mvs.L.Rep. 105 (Muscogee (Creek) 1993); *Begley, supra.* The Supreme Court oversees the judiciary, a necessary and separate branch of the Nation, vested with judicial authority and power of the Creek Nation. *Done in Conference, October 31, 1986,* ___ Mvs.L.Rep. ___ (1986). Inferior courts may be established by, but not diminished by, the National Council, but this Court has supreme, inherent judicial authority over the inferior courts and this Court is the supreme judicial decision-maker. There is no higher authority in determining constitutional decisions regarding Muscogee (Creek) Nation law or the operations of this Court and duly established inferior courts.

The Constitution does not distinguish between original and appellate jurisdiction. As an expression of this Court's inherent authority, however, this Court has, at times, assumed original jurisdiction in various matters.[8] Unfortunately, the standards applied by this Court for when to exercise original jurisdiction have not always been clearly and uniformly applied in our opinions. Despite this lack of clarity, this Court's seemingly divergent approaches regarding original jurisdiction can be harmonized by viewing them as a whole. When doing so, a uniform standard emerges.

The decision of whether to accept original jurisdiction has always been made by this Court with an eye toward good public policy. This Court recognizes the benefit of lower court

[8] By way of comparison, the United States Supreme Court is limited in its exercise of original jurisdiction. *See, Constitution of the United State, Article III.* No such limitation on Supreme Court jurisdiction exists in this Nation's Constitution. As such, the appropriate exercise of original jurisdiction is a matter of prudent judicial policy within the Muscogee (Creek) Nation framework. This Nation's Constitution vests all judicial power within the Supreme Court and other inferior courts. As the Supreme Court is the ultimate authority within this Nation's judiciary, this Court must be the final arbiter of when the exercise of original jurisdiction is proper. Furthermore, as the Constitution places *all* jurisdiction within the judicial branch, questions regarding original jurisdiction are matters of judicial, not legislative, policy.

review in most cases.[9] The presumption, therefore, is that this Court should decline original jurisdiction unless important public policy considerations indicate that assumption of original jurisdiction would benefit the pursuit of justice. Even in such circumstances, these public policy considerations must be weighed against the benefits of lower court review.

The most common area in which this Court has exercised original jurisdiction is cases involving constitutional questions. *See, e.g., Begley vs. The Constitutional Commission*, ___ Mvs.L.Rep. ___ (S. Ct. 06-04, 2008); *Ellis* v. *Muscogee (Creek) National Council*, ___ Mvs.L.Rep. ___ (S. Ct. 06-07, 2007); *Oliver* v. *Muscogee (Creek) National Council*, ___ Mvs.L.Rep. ___ (S. Ct. 06-04 2006); *Alexander v. Gouge*, 4 Mvs.L.Rep. 226 (2003); and *Ellis* v. *Muscogee (Creek) National Council*, ___ Mvs.L.Rep. ___ (S. Ct. 05-03/05 2006). To characterize constitutional questions as automatically qualifying for original jurisdiction would be wrong, however. Instead, the *importance* of the constitutional questions in these cases were such that public policy required this Court to exert original jurisdiction. Such considerations outweighed any benefits of lower court review.[10] Therefore, in order to clarify our standards, we will apply a two-pronged test for when this Court shall exercise original jurisdiction.

From this point on, we will only accept original jurisdiction if: 1.) important public policy considerations indicate that assumption of original jurisdiction would benefit the pursuit of justice; and 2.) if these public policy considerations outweigh the benefits of lower court review. Both elements must be satisfied for this Court to appropriately exercise original jurisdiction.

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[9] In general, the District Court is better-suited to make findings of fact, as trial courts are usually in a better position to admit and review evidence and weigh the credibility of witnesses. Allowing the District Court discretion to make factual findings usually increases the judiciary's efficiency and allows the Supreme Court to focus primarily on issues of law, which we review *de novo*. When this Court exerts original jurisdiction over a case, the Supreme Court cannot benefit from the District Court's fact-finding function.

[10] For example, in *Begley*, as here, the case could be resolved solely based on a review of dispositive issues of law, thus negating the need for the judiciary to perform any significant fact-finding function. *Supra*.

Whereas, upon our initial review of this case, we determined that insufficient reasons existed for this Court to assume original jurisdiction, present circumstances mandate – based on the standards articulated above – that we resume original jurisdiction over this case.[11]

1. General Public Policy Dictates Reexamination.

In addition to comprising part of the standard, as set forth above, for when we may exert original jurisdiction, public policy considerations, in this unique and limited circumstance, demand that we reexamine our previous decision to decline original jurisdiction.[12]

This case involves important questions regarding the validity of the Approved Amendments. So long as these questions remain unresolved, the day-to-day functions of this Nation's government are compromised. Government officers and employees need to know the language of the Constitution under which they operate. More importantly, the citizens of this Nation have a right to know what their Constitution says.[13]

While this Court originally assumed that a ruling on Petitioners' claims could be quickly made in a lower court, and that this Court would then be able to review the relevant Constitutional issues in short order, this course has proved difficult. This Court initially selected

[11] We note that Justice Harjo-Ware, in her dissent to our December 21, 2009 opinion, argued that original jurisdiction should have been exercised with respect to Petitioner Trepp. Justice Harjo-Ware stated: "In my opinion, given the peculiar circumstances of this case, this Court should have exercised original jurisdiction over the individual citizen's contest . . . ." *December 21, 2009 Opinion* at 4. Due to such "peculiar circumstances," we agree that original jurisdiction should be exercised over Trepp, but further hold that such jurisdiction applies to all Petitioners in this case. As discussed in footnote 19, we do not agree that the dissent's analysis regarding Approved Amendment A114's applicability to this matter, especially as a basis for declining original jurisdiction with respect to the National Council. We do note, however, that Petitioners' challenges involved the process by which all Approved Amendments were submitted to the voters, so to give effect to A114 necessarily implies the validity of all of the Approved Amendments.

[12] In no way, however, should this reexamination ever be construed to contradict the doctrine of *stare decisis*. This case involves extraordinarily unique public policy considerations as discussed herein. Among the most important considerations is the fact that no substantive District Court action has occurred since our original decline of jurisdiction and the relevant Constitutional questions first raised by this action have yet to be resolved to this day. This is in stark contrast to cases in which this Court has already ruled on important constitutional questions.

[13] As stated in footnote 1, we refrain from declaratory judgments regarding constitutional and statutory interpretation. Nonetheless, citizens have the right to know, at the very least, what textual constitutional provisions are in force and effect. While now is not the time to harmonize any purported inconsistencies or contradictions among any of the Approved Amendments, we have a duty to clarify whether the Approved Amendments have been duly enacted. Interpretation is not appropriate at this time.

an appropriate candidate to act as Special Judge, however that candidate was unavailable to serve. Furthermore, this Court has yet to reach consensus as to another appropriate Special Judge. Accordingly, no hearing or any other action involving the merits of this case has occurred in the lower court.[14] As a result, a cloud has remained over the validity of the Approved Amendments, hampering government functions and denying citizens the right to know what their Constitution says.

Lower court review of this matter will necessarily result in additional time and expense before this Court inevitably reviews the Constitutional issues at hand. While allowing these costs may have been justified at the time of our initial opinion, the question arises whether they are appropriate in the present circumstances.

Given the critical need for clarity regarding the approval of the Amendments, the practical difficulties hereto faced in appointing a Special Judge, and the question whether the costs associated with lower court review are presently justified, compelling public policy considerations mandate that we revisit whether the exercise of original jurisdiction over this case is warranted.[15] For the following reasons, this Court determines that it is.

2. Acceptance of Original Jurisdiction.

As stated above, this Court will exercise original jurisdiction only where two elements are met: 1.) important public policy considerations must indicate that assumption of original jurisdiction would benefit the pursuit of justice; and 2.) these public policy considerations must

[14] The only lower court action in this matter is that the District Court Judge, Honorable Patrick Moore, has recused himself in the matter.

[15] As noted above, the relevant substantive points of this Opinion (re-visitation of original jurisdiction, dismissal due to lack of standing, etc.) was voted upon by the Court several months ago and prior to a sixth Justice joining the Court. Since that vote, this Court has exercised significant care in the formulation and structuring of the written form of this Opinion. During this drafting period, internal conflicts within our Nation's government have increased tremendously. Most of these conflicts involve inter-branch disputes involving the National Council. These public matters, appropriate for judicial notice, further illustrate the need to speedily clarify the validity of the Approved Amendments and the changes to the structure of our Nation's government they entail.

outweigh the benefits of lower court review.

a. Prong I – Public Policy.

As a practical matter, as long as this case remains unresolved, a perceived cloud over the Approved Amendments remains.[16] This situation is imminently unfair to the people of the Nation who collectively voiced their will in the Special Election and have a right to know whether their vote mattered. Additionally, as stated above, the day-to-day operations of the government requires certainty as to the specific language of the Constitution under which it operates. For these reasons, the pursuit of justice is served by resolving the underlying constitutional issues in this case as quickly as possible.

Moreover, one of the Petitioners, the National Council, is the legislative branch of this Nation's government.[17] As such, the question of the National Council's standing in this matter, as well as the constitutional issues raised by Petitioners, are constitutional questions of the utmost importance that this Court, and only this Court, shall ultimately determine.

Finally, public policy dictates that we not waste judicial resources, or permit parties to waste one another's resources. This Nation's priority should be to serve its people, and the limited resources for such service should be conserved whenever possible. Further proceedings in this case, when this case may be resolved solely by reference to issues of law, as discussed below, would be an unjustifiable waste of limited Mvskoke resources as well as those of the

[16] The effect of this uncertainty has, to some degree, served Petitioners' stated goal of forestalling implementation of the approved amendments. *See , Pet. Letter Brief, November 30, 2009 at 1* (requesting preliminary injunction to "halt the Constitutional Amendments from going into practical effect").

[17] As has been the unfortunate history of this Nation, several lawsuits have been filed between tribal officers or bodies (*In re District Judge,* 2 Okla. Trib. 54 (Muscogee (Creek) 1990) ___Mvs. L. Rep.;___ *National Council v. Cox,* 5 Okla. Trib. 513 (Muscogee (Creek) 1990) ___Mvs. L. Rep.;___ *Larry L. Oliver vs. Muscogee (Creek) National Council* (SC 06-04) ___Mvs. L. Rep.___; *A.D. Ellis, In his Official Capacity as Principal Chief of the Muscogee (Creek) Nation vs. Muscogee (Creek) Nation National Council* (SC 05-03/05) ___Mvs L. Rep.___; *A.D. Ellis, In his Official Capacity as Principal Chief of the Muscogee (Creek) Nation vs. Muscogee (Creek) Nation National Council* (SC 06-07), (Muscogee (Creek) 2007) ___Mvs. L Rep.___; *A.D. Ellis, In his Official Capacity as Principal Chief of the Muscogee (Creek) Nation vs. Muscogee (Creek) Nation National Council* (SC 09-06) (Muscogee (Creek) 2009). ___Mvs. L. Rep.___.

litigants.

The preceding concerns establish sufficient important public policy considerations to merit weighing original jurisdiction with the benefits of lower court review.

b. Prong II – Public Policy Outweighs Benefits of Lower Court Review.

As discussed *supra*, the entire judicial system typically benefits from lower court review, especially when crucial issues of fact are present in a case. This is because trial courts are generally better-suited than appellate courts to conduct factual reviews. In cases involving dispositive issues of law, however, the benefit of lower court review is minimal.[18] As this Court reviews all lower court rulings on issues of law *de novo*, all dispositive constitutional law issues are ultimately decided by this Court.[19] Upon review, dispositive issues of law are manifest in this case.[20] Therefore, there is almost no benefit to lower court review in the present matter, and, weighted against the compelling public policy issues discussed above, lower court review is unnecessary.

Having determined that extremely important public policy considerations merit original jurisdiction, even when weighed against the benefits of lower court review, this Court hereby exercises original jurisdiction over this case. Next, the Court must review the justiciability of

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[18] This is evident when considering appropriate standards of review used in our appellate jurisdiction. This Court reviews issues of law on appeal *de novo*, and gives no deference to the trial court's legal determinations. The same is true for mixed questions of law and fact that are primarily legal questions. Regardless of whether appellate or original jurisdiction is exercised, this Court has the duty and Constitutional authority to be the final interpreter of this Nation's Constitution. *See, e.g., Ellis v. Muscogee (Creek) Nation National Council*, SC 05-03/05 Muscogee (Creek) 2006) ___ Mvs.L.Rep. ___ ("the Court is also mindful of our role as arbitrator of disputes and there are times that additional clarification to the Constitution[al] meaning is needed").

[19] Amendment A114 as placed on the ballot stated: "Shall language be added to the Constitution to read as follows: All litigation between tribal officers shall originate in the District Court of the Muscogee (Creek) Nation, with the right of appeal to the Supreme Court. All questions of fact shall be determined by a jury." This amendment was approved. This Court does not address the interpretation of this amendment or whether the National Council is a "tribal officer" but notes that this case was filed in this Court requesting reversal of the certification of the amendments voted upon on constitutional grounds. For the reasons stated herein, this Court assumes jurisdiction as is its constitutional right and obligation.

[20] As dispositive issues of law are manifest, an evidentiary hearing is patently unnecessary to resolve this case, and therefore Petitioner's prayer for such a hearing must be dismissed.

Petitioners' claims.

B. Petitioners Lack Standing

This Court will not hear a case unless a petitioner has standing. A petitioner has standing only if he or she can demonstrate a concrete stake in the outcome of the controversy. *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (as cited and adopted in relevant part by *In Re Constitutionality of NC 98-02*, 4 Mvs.L.Rep 175, 181 (Muscogee (Creek) 1999)). A petitioner must have suffered an injury in fact to show a sufficient stake in the controversy. *In Re Constitutionality of NC 98-02*, at 181. An abstract injury is not enough. *Id.* There must be "sustained or immediate danger of some direct injury." *Id.* In addition to having suffered a direct injury in fact, there must also be a causal connection between the injury and the challenged conduct to establish standing. The petitioner bears the burden of establishing standing. *Lujan* at 583.

1. National Council Does Not Have Standing.

a. No Injury In Fact or Casual Connection.

Petitioner National Council has failed to establish standing. There is nothing in the National Council's filings that demonstrates that Petitioners have suffered any cognizable actual or imminent injury. This is so even when the National Council's allegations are viewed in the light most favorable to the Petitioners and assuming all of Petitioner National Council's facts to be true.

As discussed with regard to Petitioner Trepp below, the National Council is incorrect in its allegation that the Constitutional Convention Commission, in conjunction with the Election Board, somehow erred by submitting amendments for general ballot vote that did not have the

exact wording as those voted upon during the Convention. This is not a factual question, but a dispositive issue of law concerning the bounds of the Commission's and Board's Constitutional authority as provided in the 2006 Constitutional amendment creating the Constitutional Convention process.[21] Neither the Commission nor the Board were under any duty to submit the exact language of amendments voted upon at the Convention to the general citizenry for general ballot vote.

Regardless of the incorrect characterization of the alleged injuries sustained by the National Council, any injuries sustained by the National Council in this case are "institutional" injuries suffered by all members of the Council equally. Such injuries are not sufficient to provide standing to the legislative body as a whole.[22] However, no injury to the National Council as a whole is even alleged to have occurred. While the National Council may be "impacted" by the Approved Amendments, National Council fails to suggest how duly enacted Constitutional amendments can be deemed invalid just because the Council is "impacted".[23] The people of this Nation have the right to amend their delegations of authority to the various branches through an amendment process. The fact that they did so on November 7, 2009 does not constitute a cognizable injury to the Council.

Likewise, no sustained or imminent danger of direct, personal injury to any specific member of the National Council is alleged in the present case.[24] Additionally, neither the

[21] Adopted in 2006, amendment A105 repealed the old Article IX, § 2 of the Constitution and created the Constitutional Convention process. This amendment was in turn repealed in the Special Election.
[22] *See, Raines v. Byrd*, 521 U.S. 811 (1997). In that analogous case from the United States federal system, members of Congress had no standing to challenge Line Item Veto Act authorizing the President to cancel (veto) certain spending and tax law measures that are part of a bill the President signs into law. Rather than causing a "personal" or "concrete" injury, the challenged statute caused only a type of "institutional" injury to all members of Congress equally. *Raines* was also cited by this Court in *In Re Constitutionality of NC 98-02*.
[23] *See, Pet. Letter Brief, November 30, 2009, at 4.*
[24] Petitioner National Council specifically cites Amendment A67 as one of the amendments "impacting" the makeup of the Council. However, this impact is prospective and does not affect any legislator's existing term. Clearly, no person has the right to an office that he/she has yet to be elected in to.

Petitioners' Ex Parte Application nor their Response to Motion to Dismiss filed with this Court on December 9, 2009 show any causal connection between the Special Election and any harm to the Council or any individuals on the Council. As such, Petitioner National Council has failed to establish standing.

b. National Council's Ability to Bring Suit is Extremely Limited.

Regardless of the Petitioner National Council's lack of standing due to the absence of cognizable injury and failure to cite any personalized injury, Petitioner National Council also lacks standing based on this Court's precedent. It is imperative that this Court re-establish and clarify the limitations on the National Council's ability to bring suit.

This Court has previously found that only in rare cases will actions by the National Council be entertained.[25] *See, Preferred Mgmt Corp. v National Council*, 4 Mvs.L.Rep. 44, 50 (Muscogee (Creek) 1990). In *Preferred Mgmt Corp. v. National Council,* not only did the majority opinion recognize the disadvantages involved in allowing the National Council to bring a legal action, but an insightful dissenting opinion predicted the situation in which the Nation now finds itself.

Justice Howe, in his dissent in *Preferred Mgmt*, warned the Court of the error of allowing the National Council to bring suit in any circumstance. To allow National Council standing "invites chaos in tribal government" by providing the opportunity for the National Council to hire independent counsel to bring lawsuits against members of its executive branch of government. As Justice Howe stated, "mistakes have a prolific way of breeding more damaging mistakes."

Since the *Preferred Mgmt* decision in 1990, this Court has seen a never-ending parade of

[25] The Court recognized the three separate branches of government as distinct legal entities and the right of each to have separate legal representation and to have the control of expenditure of funds for purposes centered within that branch.

litigation between the legislative and executive branches. It is essential, in the interest of adhering to the Nation's Constitution and in the best interest of the Mvskoke citizens, that this Court limit the standing of the National Council to the rare situations previously contemplated by this Court – mainly to control the expenditure of its dedicated funds.

The National Council is the legislative branch of the Mvskoke government, not the government *in toto*. The ultimate source of authority in Mvskoke government is the people. The Constitution represents a delegation of the people's authority to the government's three branches, and no branch may act beyond the scope of such delegation. Article VI of our Nation's Constitution sets forth the National Council's authority. Section 2 of that Article vests the Council only with legislative power. Section 7 enumerates the types of "matters" over which the Council may legislate.

A common misreading of Article VI, § 7 is that the Council may exercise independent authority over the subject matter set forth in subsection 7(a) through (j). This reading of Article VI, § 7 is fundamentally flawed. A careful reading of the first sentence of section 7 clearly shows that 7(a) through (j) are simply a list of appropriate subjects of legislation. Additionally, subsection 7 clearly states that the Council's legislation, even within the enumerated areas, is subject to Constitutional limitations. This Constitutional delineation of the Council's legislative authority is consistent with commonly-held concepts of a legislature's powers as understood almost universally among tri-partite governments. Accordingly, subsection 7(j), merely provides that the Council may, within Constitutional limitations, legislate on matters involving the exercise of power not otherwise referenced. Thus, the exercise of the Council's authority must necessarily be limited to those powers necessary to effectively legislate.

The power to bring suit on behalf of the Nation is generally not a power necessary to

legislate. Instead, it is inherently an executive function. A legislative body acts by passing laws, not by enforcing them, and certainly not by bringing suit.[26] To allow otherwise, outside of the very narrow parameters allowed in *Preferred Mgmt*, will foster abuse of the Nation's court system and ultimately its citizens. As such, the case at hand is not one in which the National Council would have standing, even with the establishment of an injury and causal connection.

2. Trepp and Does 1-10 Lack Standing.

Petitioner Trepp and Does 1-10, much like the National Council, have failed to establish a specific injury causally connected to the conduct. Unlike the National Council, Petitioner Trepp and Does 1-10 are citizens of the Nation and allege injuries to his citizenship. However, people have no standing merely "as citizens" where they otherwise have no direct, personal claim. *Lujan*, 504 U.S. 555.

Petitioners' pleadings do not cite specific injuries to the unnamed Does 1-10. Instead, the alleged injuries to Does 1-10 arise out of the same types of alleged injuries suffered by Petitioner Trepp – namely alleged injuries caused by the manner in which the Commission and Board handled their input and submitted language for the Special Election ballot. Because the alleged basis for Trepp's standing encompasses the basis for the Doe's standing, the following examination of Trepp's standing applies to the Does as well.

In Petitioner Trepp's Declaration filed with this Court on November 13, 2009, he states that he participated in the 2008 Constitutional Convention held on November 7-8, 2008 (at Para. 5), that he voted on various amendments, including A67, A78, and Amendment A99, and that he had personal knowledge of the language that was approved at the Convention to be submitted to

[26] At times, the National Council may perform Constitutionally authorized non-legislative functions, such as certain "advice and consent" and confirmation duties, however, as such functions are not legislative, the Council's authority to perform them are not inherent in Art. VI, § 7's, and therefore must be authorized by a specific Constitutional provision. In other words, unless another Constitutional provision provides otherwise, the National Council's authority is limited to its legislative role, i.e., passing laws.

the tribal voters. He further states that he had knowledge that the language that was approved at the Convention was different than what was placed on the ballot. (at Para.6-7). Petitioner Trepp however states no injury occurred; only that the language submitted to voters was different than what he voted on in the November 7-8, 2008 Convention, which he admits he participated in. There is no harm alleged in Petitioner Trepp's Declaration that would give this Court reason to conclude an personal injury occurred or might occur.

Even assuming that the language of the ballot submitted to the people was different than that which the Commission brought before the people at the November 7-8 Constitutional Convention, the Commission had the authority and discretion to change the wording. (*See, Begley, infra,* at *4).*[27] This Court has already addressed similar issues regarding language and wording of amendments of the Constitutional Convention Commission in *Begley v. The Constitutional Commission* SC 06-06 (Muscogee (Creek) 2006). We first stated that the Commission is a civil office. *Begley at* 3. As part of the Commission's responsibility we observed that the "Constitutional Commission shall organize and promulgate rules and regulations . . . that will ensure citizen input and participation . . . conduct public hearings . . . to accept citizens' views on constitutional amendments, revisions, alterations or additions . . ." *Id.* at 3-4. The language of Article IX, Section 2 (d) is clear that the Constitutional Convention Commission shall then "work with the Election Board to prepare wording for separate ballots for

[27] This Court takes Judicial Notice of a Memorandum Opinion by the Muscogee (Creek) Nation Attorney General on December 15, 2008, addressed to the Constitutional Commission in regards to questions presented by the Commission about language proposed in Amendment A67 ("A67"). *See, Cox v. Kamp,* 2 Okla.Trib. 303 (Muscogee (Creek) 1991) (Muscogee (Creek) Nation's Supreme Court may take judicial notice of laws and official records of the Nation). The Nation's Attorney General was asked for his Opinion by the Constitutional Commission for clarity and guidance and to make sure any proffered amendment would in fact be constitutional. The Attorney General stated in his Memorandum that as proposed, A67 would not be constitutional. *Memorandum of Attorney General Roger Wiley,* December, 15, 2008. The Attorney General then rewrote the Constitutional Amendment A67 so that it would, in his opinion, pass both United States Constitutional muster and, more importantly, Muscogee (Creek) Nation Constitutional parameters. The Commission adopted this rewritten A67 amendment which was subsequently put on the ballot. Petitioners' arguments are flawed on their face as part of the Commission's responsibilities and duties were to make sure that amendments that were presented to the people in fact met constitutional standards. The Commission's authority would certainly include seeking guidance from the Attorney General.

each amendment, revision, alterations or addition to be submitted to the citizens." *Muscogee (Creek) Nation Constitution.*

Petitioners Trepp and Does 1-10 cannot be said to be personally injured by the actions of the Commission when the language is clear on its face that the Commission has the power to "prepare wording." The Constitutional Convention Commission sought the advice of the Nation's Attorney General to help ensure constitutionally sound language. As our precedent establishes:

> When a governmental entity is responsible for initiating, editing, processing, changing and reviewing a process assigned to it under the Constitution, it is the Court's opinion this entity is the ultimate authority for the process.

Ellis vs. Muscogee (Creek) Nation National Council, "Ellis II", SC 06-07 (Muscogee (Creek) 2007) ____ Mvs.L.Rep. _____. The duty of this Court, we have said, is to not merely give definition to words within the law but to determine the intent and scope behind the words and where the plain language is clear, we must not place a different meaning on the words. *See, Oliver v. Muscogee (Creek) National Council*, SC 06-04 (Muscogee (Creek) 2006) ____ Mvs.L.Rep. ____; *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991) ____ Mvs.L.Rep. _____.

There are no allegations set forth to show how Trepp or Does 1-10 were personally injured, or could be personally injured, by the Constitutional Convention Commission that was empowered by Creek Nation law to develop these amendments which were subsequently put to a vote of the people. Petitioners' claimed injuries, if they are in fact "injuries", are no more injurious to Trepp or Does 1-10 than any other citizen of this Nation. As stated, Petitioners Trepp and Does 1-10 have no standing merely as citizens. Petitioners Trepp and Does 1-10 have failed to show a personal injury with a casual connection to the actions of the Constitutional