CHAPTER 5

TRIBAL ELECTIONS

Most modern Indian nations utilize a republican form of government and engage in periodic elections to select governmental leaders, although there are numerous exceptions in the form of theocracies and other government structures. An enormous amount of litigation over the election of tribal officials arises in tribal courts, and even occasionally in federal courts, despite the fact that federal courts almost never have jurisdiction over those suits. A subset of these disputes are cases involving the removal of tribal officials from office via a public petition and referendum process.

In some unusual circumstances, tribal elections have generated incredibly difficult and heartbreaking intratribal conflicts. Tribal court judges have been asked to perform the difficult task of choosing between competing families, clans, and political factions — sometimes when an Indian community is on the verge of violence. The United States Supreme Court's hotly debated and controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000), is a frequent occurrence in tribal communities.

As with any federal or state election, judicial review of tribal elections poses very special problems. Tribal courts face intense scrutiny when issuing an order preventing an election from going forward, or when disqualifying political candidates. Questions of judicial independence and judicial authority arise out of these controversies. Moreover, some tribal judges are themselves elected officials.

A. JUDICIAL REVIEW OF TRIBAL ELECTIONS

1. STANDARDS OF REVIEW

DARDEN v. CHITIMACHA ELECTION BOARD

Chitimacha Tribal Court of Appeals, No. CV-00-0075, 2001.NACH.0000001
(February 2, 2001)

Before, DELAHOUSSAYE, Chief Judge, and BIENVENUE and LABORDE, Associate Judges

The opinion of the court was delivered by: LABORDE, Associate Judge

Decision

This case involves a dispute over a Tribal election that was held on July 8, 2000. The winning candidate, Toby Darden[,] has been certified and seated, and has been holding office and serving the Tribe as a member of the Tribal Council since August 3, 2000.

Under Chitimacha law, Tribal elections are administered by the Tribal Election Board. One of the candidates in the July 8 election, John Paul Darden (Appellant), sought to challenge the determination of the Election Board that two absentee ballots were spoiled. . . . In the end, after following the appropriate procedures under Tribal law, and providing John Paul Darden with a full and fair opportunity to be heard, the Election Board reaffirmed its holding that the two absentee ballots were spoiled. . . .

In short, both the Election Board and the Tribal Court properly rejected John Paul Darden's efforts to change the result of the July 8 election. The ruling of the Tribal Court is correct because Tribal law expressly provides that the decision of the Election Board is final.

Facts and Procedural Background

On July 8, 2000, the Chitimacha Tribe held a duly called runoff election for a Tribal Council seat between John Paul Darden and Toby C. Darden. Two hundred and Forty-five (245) votes were cast in the election, including forty-four (44) by absentee ballot. Also on July 8, 2000, the Chitimacha Election Board, in tallying the ballots, determined that two of the 44 absentee ballots were spoiled. Following the canvassing of the ballots, the Chitimacha Election Board declared Toby Darden the winner by a vote of 123 to 122 and certified this outcome to the Tribal Council. . . .

Application of Law

The Election Board is authorized under Chitimacha law to administer all aspects of the Tribe's elections.[1] This includes contests of elections—challenges to the results of an election that has already been held. Indeed, the Code specifically provides that the decision of the Election Board on a contest of election is "final." Code, Title X, section 519. That article specifically provides as follows:

> The election Board will hear the dispute and render a decision, and notify the Tribal Council. The Election Board is the final Decision on appeals.

Moreover, the Tribal Council specifically amended this provision in 1990—changing the provision from one which specifically provided for Tribal Court review of Election Board decisions, to the current provision which does

1. Title IV, Section 501 (a) of the Code, governs the conduct of Tribal elections. There is no federal law that preempts or conflicts with Tribal law in this regard. Thus, the Tribal Election Code, coupled with the construction of that Code provided through the custom and usage of the Tribal Election Board in administering that Code, is controlling.

not.[2] Both the language and history of the provision make it clear that Chitimacha law provides that the Election Board decision on a contest of election is not subject to review in the Tribal Court.

Relying on Section 519, the Tribal Court held that "the Court lacks jurisdiction to overturn the decision of the Election Board." . . . The Tribal Court subsequently reaffirmed this determination, citing section 519 in holding that with regard to "the rights of Mr. [John Paul] Darden as a candidate to contest the election . . . the decision of the board is the final decision on appeal, concerning the challenge of the candidate." . . . These rulings are clearly correct and are affirmed by this Court.

In short, the Tribe's law is clear. The decision of the Election Board is "final." The Tribal Court had no jurisdiction to review the action of the Election Board, and properly dismissed the case. This Court finds this issue dispositive and therefore declines to address the remaining issues herein.

For the reasons set forth above, the decision of the Tribal Court, dismissing this action, is AFFIRMED at Appellant's costs. . . .

NOTES

1. Many tribes choose to limit or even eliminate judicial review of administrative election disputes. The *Darden* Court held that it had no subject matter jurisdiction to review any election dispute. Other tribes place significant limits on judicial review by establishing a standard of review that grants enormous deference to the administrative entity, often an election board, or by adopting a rule that election results are presumed valid. For example, in *Hornbuckle v. Cherokee Board of Elections*, No. CV-07-6790B (Eastern Band of Cherokee Indians Supreme Court, Sept. 30, 2007), the Eastern Band of Cherokee Indians had adopted a statute providing that

> [a]ny person filing a protest for election irregularities under Section 161-16(c) above, must establish during a hearing in front of the Board of Elections that the alleged irregularities unfairly and improperly or illegally affected the actual outcome of the election or that but for the alleged irregularities, the outcome of the election would have been different.

Id. at ¶18 (quoting Cherokee Code §161-16(d)). As a practical matter, it is extremely difficult for a petitioner to demonstrate that election irregularities have affected the outcome of the election. In *Hornbuckle*, the court found the following:

> The Elections Board concedes that two (2) voters, Appellant Paul Hornbuckle and Kimmy Jackson were erroneously precluded from voting in Wolfetown. Assuming that these two voters would have voted for DeWayne "Tuff" Jackson, this would reduce the margin of victory to ten (10). . . .

2. On February 23, 1990, the Election Code was amended to provide that a decision of the Election Board "may be brought before the Chitimacha Tribal Court." On May 16, 1990, the Election Code was amended to alter this provision, specifically to provide that "the Election Board is the final decision on appeals."

> Appellant claims thirteen (13) registered voters were not allowed to vote. The record before the Court, and approved by counsel for all parties, discloses that five (5) were, in fact allowed to vote. One (1) attempted to register too late. If the remaining seven (7) are assumed *arguendo* to have voted for DeWayne "Tuff" Jackson the final margin of victory is three (3).
>
> Therefore, the Court is left with the inescapable conclusion that the Appellant has not shown that but for the irregularities, the actual outcome of the election has either been affected or that the outcome would have been different.

Id. at ¶¶25-28.

2. Other tribes have adopted an even stricter standard — that the election challengers bear the burden of establishing *beyond a reasonable doubt* that the alleged violations had a strong likelihood of affecting the outcome. *See Byrd v. Cherokee Nation Election Commission*, Nos. JAT-03-08 & JAT-03-09, 8 Okla. Tribal Court Rep. 172, 178 (Judicial Appeals Tribunal of the Cherokee Nation of Oklahoma 2003).
3. Often, the tribal court will apply a common law standard of review in which the court will not disturb findings of fact by the fact finder unless they are "clearly erroneous," but will review conclusions of law de novo. *E.g.*, *Yellow Bird v. Three Affiliated Tribes Tribal Election Board*, 29 Indian L. Rep. 6018, 6019 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct., Sept. 27, 2001). This standard effectively grants enormous deference to the fact-finding capacities of election boards.

2. DE NOVO REVIEW

Bailey v. Grand Traverse Band Election Board

Tribal Judiciary for the Grand Traverse Band of Ottawa and Chippewa Indians (en banc), No. 2008-1031-CV-CV, 2008 WL 6196206 (August 5, 2008)

Per Curiam

Findings of Fact

In this case, Plaintiff Derek Joseph Bailey (hereinafter "Bailey") filed a complaint against the Grand Traverse Band Election Board (hereinafter "Election Board"). . . .

Bailey was a candidate for the Tribal Council Chairman position, running against the incumbent Tribal Council Chairman Robert Kewaygoshkum. On May 16, 2008, five business days prior to the general election scheduled for May 21, 2008, the Election Board received a written complaint from tribal member and Tribal Councilor Sandra Witherspoon, as well as a complaint from tribal member Ruth Anderson, both regarding alleged violations of the 2008 Election Regulations by candidate Derek Bailey. . . .

The complaints alleged that Bailey violated the 2008 Election Regulations by accessing a campaign website concerning his candidacy for Tribal Chairman from a Grand Traverse Band workplace computer. Both complaints also implied that the Election Board failed to investigate the circumstances

surrounding Bailey's use of his computer when the issue of access to campaign websites was first brought to the Election Board's attention in March 2008, and that the Board should have addressed the issue at that point.

The Election Board scheduled an emergency meeting for 6:45 a.m. on May 19, 2008 to consider the substance of the allegations. . . . No notice or opportunity to appear at the meeting was provided to the complaining parties, nor to Bailey who was the subject of the complaints. After the Board met to discuss the complaints, . . . [it] approved the written Election Dispute Determination at a later meeting in the early evening of May 19, 2008. On the morning of May 20, 2008, roughly 22-23 hours before the polls were to open for the May 21, 2008 general election, the Election Board Chairman Samuel Evans sent the Election Dispute Determination via global e-mail to all gaming and government employees of the Grand Traverse Band of Ottawa and Chippewa Indians, as has been the Election Board's past practice. Receipt of this global e-mail by Bailey on the day before the election was the first notice that Bailey received that indicated that the Election Board had not only received complaints against him, but also had acted on the complaints.

The general election was held on May 21, 2008. Bailey was defeated in the general election by Kewaygoshkum by a vote of 233 to 210 votes. Bailey timely filed his complaint against the Grand Traverse Band Election Board (hereinafter "Election Board") challenging the actions of the Election Board in the days just prior to the May 21, 2008 general election. Bailey has alleged improprieties by the Election Board both as to the procedure used by the Election Board, as well as statements made within the written Election Dispute Determination. . . .

From the outset, Bailey has admitted that he used his work computer to access his campaign website (www.votederekbailey.com), but disputes the characterizations of the frequency and dates of his use as stated in the Election Dispute Determination. The evidence showed that all of Bailey's access to the website occurred prior to his formal filing for candidacy (with the last access being February 27, 2008). Bailey testified that he filed the paperwork to formally declare his candidacy on March 3, 2008. There is no evidence to suggest that Bailey accessed the website in question after he had declared himself to be a candidate for the Tribal Council Chairman position.

Pursuant to Article VII, Section 5(e) of the Constitution above, the Election Board adopted regulations governing the conduct of the 2008 primary and general elections. The Election Board has admitted that it failed to follow the Election Regulations in issuing the Election Dispute Determination concerning Bailey on May 20, 2008, the day before the general election. The Election Board has attempted to justify its failure to follow its own regulations based upon concerns about "rampant rumors" that were circulating relating to the Election Board not taking action as to Bailey's use of his work computer and "covering up" his alleged violations of election regulations, the "new evidence" of the IT Department report received by the Board, and the lack of time to effectively deal with the situation. The Election Board has argued that it felt it had no alternative but to issue its determination without input from the complaining parties or the candidate Derek Bailey who was accused of wrongdoing for these reasons. . . .

GTB Election Law

This Court's authority in election cases is limited by the Grand Traverse Band of Ottawa and Chippewa Indians Constitution. Article VII, Section 5 states:

> Section 5. Election Board
>
> (a) The Tribal Council shall appoint an Election Board, composed of five (5) registered voters of the Grand Traverse Band, to hold elections, certify election results, and settle election disputes other than allegations of impropriety by the Election Board. The decisions of the Election Board shall be final and conclusive on the Grand Traverse Band. . . .
>
> (c) **Allegations of impropriety by the Election Board shall be settled by the Tribal Judiciary.** . . . (Emphasis added.)

Article VII, Section 5(a) of the Constitution gives sole authority to resolve "election disputes" to the Defendant Election Board, except for allegations of impropriety by the Election Board. The Tribal Judiciary only has jurisdiction to resolve allegations of impropriety by the Election Board under the provisions of Article VII, Section 5(c). The Constitution does not define "allegations of impropriety" as stated in Article VII, Section 5. However, in order for both Section 5(a) and 5(c) to make sense and be in harmony with each other, "allegations of impropriety" must mean more than just disagreement with a decision made by the Election Board. To find otherwise would make the last sentence of Section 5(a) meaningless. *TwoCrow v. GTB Election Bd.*, Case No. 2008-998-CV-CV, Order Concerning Jurisdiction and Dismissing Complaint (2008); *Yannett v. GTB Election Bd.*, Case No. 2008-1003-CV-CV, Order Concerning Jurisdiction and Dismissing Complaint, (2008). If the drafters of the Constitution had wanted the Tribal Court to hear all appeals from decisions of the Election Board, they could have easily drafted the Constitution to provide that remedy. *Id.* Instead, it is the opinion of this Court that the intent behind Section 5(a) was to make the Election Board the final arbiter of election disputes in most circumstances, not the Tribal Judiciary. *Id.* Further, it is the opinion of this Court that the intent of Section 5(c) was to give the Tribal Court jurisdiction to provide an avenue of redress *only* under limited circumstances where the Election Board itself acted improperly, such as where the Election Board acted in violation of the law or the Board's own election rules, regulations and procedures; or where the Election Board's conduct showed bias or prejudice such that its ability to render a fair decision was compromised or impaired; or where the Election Board failed to carry out its responsibilities with integrity, impartiality and competence. *Id.*

Election results are "presumptively valid." *Barrientoz v. GTB Election Bd.*, Case No. 2006-316-CV-CV, Opinion and Order: Petitioner's Motion to Stay the GTB General Election, p. 4-5 (2006). This Court held in *Barrientoz* that: "Petitioners must demonstrate by clear and convincing evidence that: 1) the [Election] Board failed to comply with its own mandated policies and procedures in conducting and certifying the election; or 2) the Board followed its mandated policies and procedures, but that these policies and procedures are

unconstitutional; or 3) the [Election] Board certified the election despite improper, or fraudulent practices which it had a duty to monitor and prevent. . . . [The Petitioners] would be required to demonstrate by clear and convincing evidence that the [Election] Board impropriety affected the outcome of the election." *Id.*, p. 6. While the Election Board has in essence conceded that they did not follow the 2008 Election Regulations in issuing its Election Dispute Determination as to Plaintiff Bailey, it argues that Bailey has not proven by clear and convincing evidence that the Election Board's failure to follow the Election Regulations affected the outcome of the election.

In the instant case, we find that Plaintiff has established by clear and convincing evidence that the Election Board failed to comply with its own duly adopted 2008 Election Regulations in several respects when it met on May 19, 2008, and when it issued its Election Dispute Determination on May 20, 2008. The Election Board has admitted that it failed to follow the 2008 Election Regulations in issuing its determination against Derek Bailey. For reasons explained more fully below, the Court finds that the Board acted improperly such as would give this Court jurisdiction under Article VII, Section 5(c) of the Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians. . . .

Due Process

. . . The Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians (hereinafter "GTB Constitution") guarantees tribal members the right to due process, and is very similar to the Fifth Amendment of the United States Constitution. Article X, Section 1 of the GTB Constitution provides in pertinent part:

> The Grand Traverse Band in exercising the powers of self-government shall not: . . .
>
> (h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

This provision is essentially the same as the due process rights guaranteed to tribal members under the Indian Civil Rights Act of 1968, 25 U.S.C. §1302(8). . . .

Other tribal jurisdictions have held that the Indian Civil Rights Act of 1968 guarantees procedural due process in hearings before tribal administrative agencies. *Mustach v. Navajo Board of Election Supervisors*, 1987.NANN.0000016, ¶31, Jan. 22, 1987. Procedural due process, under the Indian Civil Rights Act, relates to the requisite characteristics of proceedings seeking to effect a deprivation of liberty or property. *Id.* In the *Mustach* case, the Supreme Court of the Navajo Nation considered a case similar to this one where the Navajo Board of Election Supervisors failed to follow election law and regulations concerning a grievance filed by a candidate, citing concerns of inadequate notice and lack of a meaningful opportunity to be heard. The Court held that the failure of the Board of Election Supervisors to follow the election law was highly prejudicial to the plaintiff Mustach, and that he was denied procedural due process.

Id., ¶32-33. As a result of these and other procedural errors, the Navajo Supreme Court ordered that a special election take place. *Id.*, ¶40. . . .

. . . Given the significant and material failure of the Election Board to follow its own adopted 2008 Election Regulations, and the denial of any opportunity to provide any meaningful response prior to the election, we conclude that Plaintiff Derek Bailey's constitutional right to due process was violated by the Election Board in this matter. The procedural deficiencies and the action taken by the Election Board immediately before the election to comment upon Plaintiff's use of his work computer as outlined above, without any opportunity for Bailey to respond or challenge the action of the Election Board prior to the election, amounted to a deprivation of Bailey's liberty and/or property interests. In this case, Bailey was denied notice of the nature of the proceedings, and was denied an opportunity to be heard in a meaningful time and manner. . . . In short, Bailey has established that there has been a "patent and fundamental unfairness" in the election process, and a "purposeful deprivation of clear rights." . . .

The Election Board has argued that it took action essentially on an *ex parte* basis because there was not enough time to address the issues in the complaints. While the time frames would have undoubtedly been short, we specifically reject the notion put forth by the Election Board that it has the inherent authority to make election determinations on an *ex parte* basis. *Ex parte* is a Latin legal term meaning "from (by or for) one party." Typically, courts only grant *ex parte* relief under exigent circumstances or on an emergency basis, or where notice to the opposing party may precipitate adverse action, such as in a child custody or personal protection matter. A court order issued on the basis of an *ex parte* proceeding, therefore, will typically be temporary and interim in nature, and the person(s) affected by the order must be given an opportunity to contest the appropriateness of the order before it can be made permanent. There is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued. . . . However, in the instant case, there was no meaningful opportunity for Bailey to be heard prior to the election, as the Election Dispute Determination was circulated to the public via the global e-mail less than 24 hours before the polls opened. There is no provision in the 2008 Election Regulations authorizing the Election Board to make election determinations on an "ex parte" basis, nor was such relief sought by the complainant.

As stated above, the testimony and affidavits presented at the trial indicated that the Election Board acted without following its own regulations because it sought to "clear the air" and address the rumors and innuendo that were circulating throughout the community as to what Mr. Bailey had done (as well as that the Election Board had not done anything about it), and because the Election Board felt there was not enough time to deal with the complaints fully without delaying the election. We perceive that the Election Board found itself in what it thought was an untenable situation. Namely, the Election Board could not act until there was a complaint before it, but Election

Board members were aware of community rumors of their prior inaction and possible bias. Then the Election Board was presented with a last-minute complaint regarding the substance of the rumors circulating in the community. While we certainly have the benefit of hindsight, we find that the circumstances did not justify the Election Board's failure to follow the duly adopted regulations which were sufficient to address the complaints. To make a determination under these circumstances without affording the interested parties notice or an opportunity to be heard, and issue that determination less than 24 hours before the start of the election violated Bailey's fundamental right to due process.

Conclusion

In conclusion, we hold that the actions of the Election Board in failing to follow the provisions of the 2008 Election Regulations as outlined above, coupled with the time frame in which such action was taken that provided Bailey with no meaningful opportunity to respond or challenge the Election Board's actions, were so egregious that it resulted in a violation of Derek Bailey's right to due process. The only remedy which we find would adequately redress the Plaintiff in this situation is to order that a special election be held for the Tribal Council Chairman position. The Court does not make this decision lightly. We are very cautious about overturning a validly held election. The standards for overturning an election are strict, as they should be in the absence of a clear showing of unfairness. *Johnson v. June*, No. A-CV-31-82, 4 Nav. R. 79, 1983.NANN.0000050, ¶30, September 30, 1983. As stated by the Fort Peck Court of Appeals, Assiniboine and Sioux Tribes in *Reddoor v. Wetsit*, Appeal No. 95, 1990.NAFP.0000009, ¶130, January 18, 1990:

> As a general rule, a court of equity will not enjoin the canvass of votes or declaration of the result of an election, although there is considerable conflict in the decisions as to the underlying theory in support of denying injunctive relief in such a case. Some courts refuse the injunction on the theory that a court of equity either has no jurisdiction over questions purely political in character or that it will not interfere in political matters or protect purely political rights. Others have predicated their decision on the theory that the courts will not prevent the performance of a legal duty, and since the statute imposes on designated officers the duty to canvass the votes and declare the result, their acts in so doing are not subject to judicial control and supervision. The existence of an exclusive statutory remedy or the existence of an otherwise adequate remedy at law has also been held to preclude injunctive relief. Failure to show irreparable injury will also preclude enjoining the canvass of votes and the declaration of the result of an election, the theory generally being that until enforcement of the result of an election, as distinguished from its declaration, is attempted or threatened, there is no invasion of the complainant's personal or property rights. However, equity will act to enjoin the canvass of votes and the declaration of the result of an election where the existence of particular factors justifies or calls for equitable intervention to protect personal or property rights. 26 AM. JUR. 2d Elections Section 308 (1966).

In the final analysis, we must consider whether the election was honestly and fairly conducted. Slight irregularities are more than apt to creep into the

procedure. To hold that slight irregularities, for which the voters were not to blame, should invalidate the election, is contrary to public policy. . . . If there has been an opportunity to correct irregularities in the election process prior to the election, the challenger should not, in the absence of fraud, irregularity or misconduct that affects or impeaches the election process or results, be heard to complain of them afterward. *Jones v. Election Board of the Fort McDowell Yavapi Nation*, Case No. CV-2000-005, 2000.NAFM.0000001, ¶46, February 1, 2000. In this case, the irregularities involved were far more than slight, Bailey had no opportunity to correct or even address them, and under these unique circumstances they in fact rose to the level of depriving Bailey of his constitutional rights.

We are also mindful that this decision will affect not only the Plaintiff Derek Bailey, but his campaign opponent, Robert Kewaygoshkum, who has not been a party to these proceedings. We would note that **absolutely no evidence** has been presented to indicate that the Election Board, nor any of its members individually, were influenced by or acted at the behest of Mr. Kewaygoshkum (or any other members of the Tribal Council or Tribal Administration). The evidence presented leads us to the conclusion that the Election Board acted out of concern for how the Board was being perceived in the community for its failure [to] deal with the rumors of Derek Bailey's computer use. As stated above, we do not find this to be an emergency or exigent circumstance to justify the failure to provide a candidate with his or her due process rights.

We are also mindful of the potential for "opening of the floodgates" to future election cases with arguments being made of additional Constitutional rights violations. However, we would point out that the circumstances of this case are unique. If the election disputes had been filed in early March, rather than just days before the election, chances are the Election Board would have followed the procedure set forth in the 2008 Election Regulations and would have given Mr. Bailey an opportunity to be heard. It is the failure to follow those Election Regulations which resulted in no meaningful opportunity for Bailey to be heard which cause us to conclude that Bailey's due process rights were violated and that a special election should result.

NOTES

1. The Grand Traverse Band Tribal Court had previously held in *Barrientoz v. GTB Election Board*, No. 2006-316-CV-CV (May 12, 2006), that the tribal court had jurisdiction to review "improprieties" in the actions of the election board:

> The Judiciary has ruled that the Petitioners must demonstrate by clear and convincing evidence that: 1) the Board failed to comply with its own mandated policies and procedures in conducting and certifying the election; or 2) the Board followed its mandated policies and procedures but these policies and procedures are unconstitutional; or 3) the Board certified the election despite improper, or fraudulent practices which it had a duty to monitor and prevent. Further, if the court finds that the election was invalid due to fraud or impropriety that the Board had a duty to monitor and prevent, the election

> certification would be deemed invalid per se. If the court finds the Petitioners have met the burden of tier one or two of the standard of proof, they would be required to demonstrate by clear and convincing evidence that the Board impropriety affected the outcome of the election.

Id. at 6.

The *Bailey* Court relied upon this standard to assert judicial review over the 2008 election. Note one provision of the Grand Traverse Band Constitution quoted above: "The decisions of the Election Board shall be final and conclusive on the Grand Traverse Band." Article V, Section 5(a). How is the *Barrientoz* standard consistent with this provision, which seems to provide for the finality of Election Board decisions? Why would a tribe choose to create an election board, and then grant it significant power to resolve election disputes without court review, as in the *Darden* case above? Does "impropriety" include any allegation of a violation of due process, according to the *Bailey* Court? Could the court's decision be read to include virtually all election challenges, or is there a firm limitation on the tribal court's jurisdiction?

2. What remedies are available to an election challenger? The *Bailey* Court threw out the results of the first election and ordered a new election. The *Barrientoz* Court ordered a stay of a general tribal council election of 45 days to allow the challenges to the primary tribal council election to be adjudicated. *See Barrientoz*, *supra*, at 9. These court orders are incredibly disruptive, creating the possibility that elected officials remain in office beyond the end of their term, or creating vacancies in the elected leadership of a tribe. Would it be more disruptive if a tribal court or election board order allowed a newly elected candidate to assume the duties of office while preserving the possibility that the adjudicating body might later determine that the election was invalid, forcing the recently installed official out of office?

Bailey was victorious over the incumbent chairman in the repeat election. *See Kewaygoshkum v. Grand Traverse Band Election Board*, 2008 WL 6196207 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary 2008) (en banc).

3. The Cheyenne River Sioux Tribal Court of Appeals dealt with the disruptive character of potential remedies in an election challenge in which the petitioner moved the trial court to enjoin the swearing in of the purported election winner in *Ducheneaux v. Cheyenne River Sioux Tribe Election Board*, 26 Indian L. Rep. 6155 (Cheyenne River Sioux Tribal Court of Appeals, June 2, 1999).

4. Election challenges, however, may be barred by the doctrine of laches, as the court in *Kewaygoshkum v. Grand Traverse Band Election Board*, 2008 WL 6196207 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary 2008) (en banc), noted:

> There is a strong public interest in having election matters filed quickly because of potential prejudice and damage to the election process. . . . For these reasons, several courts, including this Court, have applied the doctrine of laches to late filed claims. *See Russell v. Grand Traverse Band of Ottawa and Chippewa Indians Election Board*, Case No. 00-03-108, (May 8, 2000). The

doctrine of laches refers to circumstances where there is an unreasonable delay or negligence in pursuing a right or claim in a way that prejudices the party against whom relief is sought. . . .

Kewaygoshkum, 2008 WL 6196207 at *7.

B. QUALIFICATIONS OF TRIBAL GOVERNMENT ELECTORAL CANDIDATES

Begay v. Navajo Nation Election Administration

Navajo Nation Supreme Court, No. SC-CV-27-02 (July 31, 2002), 8 Navajo Rep. 241; 30 Indian L. Rep. 6035

The opinion of the court was delivered by: Chief Justice Robert Yazzie.

I. Procedural History

On May 3, 2002, the Appellant filed with the Navajo Nation Election Administration ("NNEA") an application for candidacy for the position of President of the Navajo Nation. On June 3, 2002, the NNEA informed the Appellant that he did not meet the residency requirements and was therefore disqualified as a candidate for President. . . .

The sole question here is whether the Appellant was disqualified as a candidate for the office of Navajo Nation President as a result of the unequal application of the requirements of permanent residency and continual presence. More broadly understood, the basic issue is one of fairness. Did the NNEA and the OHA [Office of Hearings & Appeals] apply the Navajo Election Code to Edward T. Begay as a presidential candidate in a fair way? The Navajo Nation Bill of Rights recognizes liberty as a fundamental right. (1 N.N.C. §3 (1995).) Liberty cannot be taken away unless it is done using a fair process ("due process") and the law must be evenly applied ("equal protection of the law"). *Id.* For purposes of due process of law under Navajo common law, the right to participate in the political process is considered a protected liberty right.[2] We announce the rule adopted in other jurisdictions that if any ambiguities exist in an election statute, the presumption lies in favor of the candidate. *See, e.g., Arnold v. Hughes*, 621 So.2d 1139, 1140 (La. 1993), *Romero v. Sandoval*, 685 P.2d 772, 775 (Co. 1984). Although we have never explicitly adopted this rule, it is clearly consistent with the approach taken in our past election decisions. . . .

2. We indicated in *Bennett v. Navajo Board of Election Supervisors*, 6 Navajo. R. 319, 325 (1990), that "the right or privilege of placing one's name in nomination for public elective office is a part of political liberty. . . ." We recognize that this use of the term "liberty" may seem odd to those not trained in the legal tradition. The common understanding of liberty is that it means freedom from restraint. However, the legal definition of "liberty" includes rights that are considered to be fundamental, such as the right to participate in the political process. This use of the word may be more clearly understood if one considers what is meant when we claim that this is a "free country." One of the main meanings of that phrase is that we are a democracy and that our rights to participate in the political process may not be unnecessarily infringed.

III. Standard of Review

Before we address the substantive issues of this case, we must determine what standard of review is appropriate to apply to a decision of the OHA. Where there are allegations of violations of due process, this Court "is not limited by . . . the scope of review set forth in Section [341]" of the Navajo Election Code. *Morris v. Navajo Board of Election Supervisors*, Nav. R. 75, 78 (1993). Rather, where we are addressing the legal interpretations of lower courts and administrative bodies, we apply a de novo standard of review.

IV. Analysis of the Statute

The Navajo Election Code lists the qualifications for candidacy for President. 11 N.N.C. §8(A). Among those qualifications are that the candidate:

> Must have permanent residence and have been continually physically present within the Navajo Nation as defined in 7 N.N.C. §254 for at least three (3) years prior to the time of elections.

11 N.N.C. §8(A)(1).

. . .

"Permanent Residence" is defined as:

> The place where a person physically lives with the intent to remain for an indefinite period of time. The permanent residence is a person's fixed and permanent home. Permanent means lasting, fixed, stable and not temporary, part-time, or transient. A person cannot have more than one permanent residence at the same time.

11 N.N.C. §2(Z).

Continually present is defined as:

> Being actually physically present within the Navajo Nation or living on Navajo Country in a fixed and permanent home without any significant interruption. An extended absence from Navajo Country in the course of employment or pursuit of a trade or business or for purposes as attending school and serving in the military service, is not significant interruption.

11 N.N.C. §2(G).

At first glance the statute seems clear. However, a close reading of the statute shows that its proper interpretation is difficult to ascertain. There are several difficulties with the statutory language that we could not conclusively resolve. Do the definitions of permanent residency and continual presence mirror the legal definitions of domicile and residency, respectively? The definition of the continual presence requirement in particular is difficult to interpret. That definition provides that a candidate must be "actually physically present within the Navajo Nation or living on Navajo Country in *a fixed and permanent home*." 11 N.N.C. §2(G) (1995) (emphasis added). Does this mean that a candidate must have "a fixed and permanent home" in the Navajo Nation, or does it mean that a candidate may be physically present in another way while not having a permanent home in the Navajo Nation? Do the exceptions apply to both prongs of the test or only to the continual presence requirement? Does the continual presence requirement merely add a durational

requirement to the permanent residency requirement? Although Justice King-Ben's concurring opinion provides one possible interpretation, the Court, as a whole, could not agree on the proper answer to these questions.

These questions leave room for an unequal application of the general rule. Unequal application of a general rule can deny a liberty interest. *See Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 325 (1990). "This court has repeatedly dealt with situations where loose interpretations or applications of election laws create a potential for abuse or selective enforcement." *See Howard v. Navajo Board of Election Supervisors*, 6 Nav. R. 380, 382 (1991) (citations omitted).

V. Application of the Statute

The statute as written is confusing. However, if a confusing statute is applied in a fair and consistent manner, it may not deny liberty interests. Therefore, we must determine whether the statute was applied fairly and evenly.

The Appellant initially listed his Gallup, New Mexico home as his address. He received a letter on May 28, 2002, requesting that he clarify his residence. He explained, in a written response to the NNEA's letter, that he had a traditional or customary residence in the Churchrock Chapter. Ms. Antoinette Yellowhorse, another candidate for President, also received a letter requesting that she clarify her residence. The content of these letters was not the same. In the letter mailed to Ms. Yellowhorse, the explanation of the residency requirement indicated that there were some exceptions to the residency requirement. The Appellant's letter contained no such language. After a conversation with Ms. Yellowhorse, the director of the NNEA determined that, "she fell within the exception if you're going to school then you can be allowed to live off the reservation." . . .

The application for candidacy for President of Mr. Larry Curley was handled by Mr. Robert Black of the Tuba City office. Despite the fact that Mr. Curley listed an Albuquerque, New Mexico address, he was never sent a letter requesting clarification. . . . Rather, because he stated in his voter registration verification form that he worked in Albuquerque but owned some land 4 miles east of Birdsprings Chapter, he was certified as eligible under the "work" exception to the requirements.

There were also questions raised about the residence of Dahaani Baadaani. His application stated a Durango, Colorado address. Mr. Baadaani had submitted his application for candidacy on April 4, 2002, well in advance of the May 3 deadline. The NNEA was forced to qualify him because they neglected to examine his application until after the 30 day deadline had passed. . . .

Because OHA did not examine the Appellant's application in light of the continual presence requirement, OHA denied the Appellant the opportunity to demonstrate that he, too, qualified for the exceptions to that requirement. Indeed, they did not even inform him of the possibility that he might be covered by an exception. Edward T. Begay could have stated that he was absent from Navajo Country due to employment, trade, business, education, or military service. He initially moved to Gallup due to his wife's employment and children's education. The statute does not explicitly limit the employment

or the education exceptions to the candidate himself. He purchased a house for investment and tax purposes. This seems to be a business purpose. Finally, his residence in Gallup is closer to his work in Window Rock than is his traditional home in Churchrock. He might therefore qualify for the employment exception.

Navajo common law strongly supports the role of families in meeting the needs of family members. This is very relevant. Navajo common law highly values respect. NNEA showed respect for one presidential applicant's desire for an education in Gallup and another's professional career in Albuquerque. It appears that the third was approved because of NNEA's own neglect. What about the Appellant? Did he have a right arising from Navajo practice of respect for his family's needs?

We do not know whether such arguments would have succeeded before NNEA or OHA. The point is that the failure to determine whether Appellant satisfied the "continually present" requirement denied him the opportunity to make these arguments or any others. The other applicants, in contrast, were allowed this opportunity.

The policy for examining candidate qualifications was applied unevenly. . . .

Vagueness of the election law and its loose and unequal application led to a denial of the Appellant's right to participate. In *Howard v. Navajo Nation Board of Election Supervisors*, 6 Nav. R. 380 (1991), the Court remedied a similar loose application of an Election Code provision. Chief Justice Tso and Associate Justice Bluehouse, in their majority opinion, decided not to strike down the statute as void on its face. Rather, they preserved the statute by finding that the statute was vague as applied. *Howard*, 6 Nav. R. 380-383. When a statute is vague or confusing, this Court can save the statute by interpreting it so as to avoid unfairness. *Howard*, 6 Nav. R. at 382. This Court can also direct the relevant authority to develop, for future cases, a consistent and fair interpretation and procedure. In the present case we decline to find the statute itself void for vagueness. Rather, we follow the approach of the majority in *Howard* and find it vague as applied because the statute could be read in several ways. It was read one way for two candidates, read differently for Appellant, and not read at all for a third candidate. If law is to mean anything, it must be consistent in the way people are treated. In this case, the candidacy definitions were unequally applied. We recommend that the NNEA develop a consistent and fair procedure for enforcing these provisions of the Election Code. We emphasize the importance of developing such a procedure well in advance of the next election.

VI. The Remedy

The appropriate remedy, when candidacy requirements have been unequally applied, is to order the candidate placed on the ballot. This does not mean that the Court finds that the candidate meets the candidacy requirements. Rather, it amounts to a conclusion that because the process was so badly flawed, it is unfair to exclude a candidate regardless of whether he would qualify or not.

For example, in *Deswood v. Navajo Board of Election Supervisors*, 1 Nav. R. 306 (1978), this Court was faced with a claim that candidacy requirements had

been selectively applied. In that case, Peter Deswood had been disqualified from running for Navajo Tribal Council because he did not meet the age requirements. We found that the Navajo Board of Election Supervisors ("NBOES") had only examined the qualifications of four of 161 candidates. We therefore found that NBOES had "selectively applied its powers to decide candidates' qualifications." *Id.* at 311. Because NBOES had not consistently applied the law, this Court declined to address the actual question of Mr. Deswood's age. Rather, we ordered Mr. Deswood placed on the ballot, regardless of his age, because "the selective application of the power to disqualify candidates in the Navajo election requires this Court to void any use of the power by the Board of Election Supervisors." *Id.* at 311.

Therefore, and in accord with our precedent, we find that the appropriate remedy for the unequal application of the candidacy requirements is to order the Appellant placed on the ballot for the primary election for Navajo Nation President. We do so without addressing whether the Appellant would have qualified under the statutory requirements had they been fairly enforced. Rather, we find the unequal application of the laws was so unfair that the Appellant must be placed on the ballot regardless of whether he met the requirements or not. . . .

KING-BEN, Associate Justice, concurring opinion.

I concur with the holding of the majority. I agree that the statute was unevenly enforced. I write separately to express my belief that the requirements of 11 N.N.C. §8(A)(l) are clear on its face. . . .

As discussed in the majority opinion, it is not exactly clear what process the Navajo Election Administration applied in determining candidacy. However, if the election laws were applied equally as set out in 11 N.N.C. §8(A), the NNEA should have disqualified all the candidates who do not reside within the Navajo Nation as defined by 7 N.N.C. §254. In essence, this would mean that candidates Curley, Badaanii, and Begay would not qualify under the first prong of 11 N.N.C. §8(A) as they are not residents of the Navajo Nation as defined by 7 N.N.C. §254. If the election laws were applied strictly and equally, of the candidates in issue, the only candidate who would have qualified as a presidential candidate is Yellowhorse[. T]he NNEA, upon determining that she met the first prong of the test for determining residency would then determine why she has not been continually present within the Navajo Nation for the last three years. Yellowhorse met the "continually present" exception as her extended absence from Navajo Country is due to purposes of attending school at the University of New Mexico-Gallup Branch.

NOTES

1. The *Begay* Court addresses two difficult questions for Indian nations: who should represent Indian people in tribal government as elected officials, and where they should reside. On-reservation residents reasonably feel underrepresented when off-reservation residents are elected to tribal legislatures, especially when those legislatures are enacting criminal and regulatory laws that apply only to on-reservation residents.

However, modern tribal governments must contend with the fact that many of the best young and future leaders have left Indian country to earn an education at off-reservation colleges, universities, and professional schools. As the *Begay* Court notes, residency requirements can be used in an abusive fashion to exclude these Indians from leadership positions upon their return.

2. The Navajo Nation Supreme Court also confronted the interesting question whether candidates for elected office can also serve as elected officials in state government in *In the Matter of the Grievance of Wagner*, 7 Navajo Rep. 528 (Navajo Nation Supreme Court 2007). There, the Court held that tribal candidates cannot simultaneously serve in both governments:

> Tsosie also contends that [the Office of Hearings and Appeals] erred when it upheld the Navajo Nation Code's prohibition on serving simultaneously as a council delegate and a member of a state legislature. . . . Tsosie's primary contention is that the prohibition is in irreconcilable conflict with the Fundamental Law statute's provision that voters may choose leaders of their choice, 1 N.N.C. §203(A) (2005). He also argues that the exemption for school boards and county commissions violates the Equal Protection Clause of the Navajo Bill of Rights. See 1 N.N.C. §3 (2005). . . .
>
> It is true that under Fundamental Law, voters have the right to choose leaders of their choice. 1 N.N.C. §203(A) (2005). Candidates also have a Fundamental Law right to participate in the political system by running for office. *Begay v. Navajo Nation Election Administration*, No. SC-CV-27-02, slip op. at 3 (Nav. Sup. Ct. July 31, 2002). Tsosie points to this Court's recent opinion, *In re Appeal of Vern Lee*, No. SC-CV-32-06 (Nav. Sup. Ct. August 11, 2006), as precedent for striking down the simultaneous service prohibition under these fundamental rights. In *Lee*, this Court ruled that the residency requirement in the Election Code, which required presidential candidates to reside within the modem boundaries of the Navajo Nation as defined by the Navajo Nation Code, violated the rights of voters and candidates. *Id.*, slip op. at 7-8. Tsosie states the bar on simultaneous service similarly violates those rights.
>
> Tsosie misreads *Lee*, as the prohibition is consistent with Dine bi beenahaz'aanii. . . . In Navajo thinking, the selection of a person by voters is one of two requirements for a candidate to become a naat'aanii. That person must also accept the position, and, to accept, must take an oath to serve the laws of the sovereign government within whose system he or she will serve the people—"naat'aanii adee hadidziih." Only when a person accepts through an oath will all of the Navajo people say that a person has been properly installed as a naat'aanii—"naat'aanii idli bee bitooszii." In other words, "Dine binant'a'i bee bi'doosztiid" or "Dine binaat'aanii bee bi'doosziid." The oath for council delegates explicitly requires an incoming delegate to swear that "I will support, obey, and defend the Navajo Nation and all the laws of the Navajo Nation." . . . In Navajo the delegate swears "Dine hi naat'a do bibee nahaz'aanii bee seziidoo, bik'eh anisht'ee doo, bich'aah sezii dooleel." The Dine people will keep that delegate to his or her words. *See Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 5-6 (Nav. Sup. Ct. October 12, 2005) ("Words are sacred and never frivolous in Navajo thinking."); *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV37-00, slip op. at 5 (Nav. Sup. Ct. June 23,

> 2004) (same). The oath is absolute, and allows no conflict in loyalty. This requirement of absolute loyalty is reiterated in the Election Code itself, as one of the qualifications for a council delegate is that he or she must "maintain unswerving loyalty to the Navajo Nation." 11 N.N.C. §8(B)(5) (2005). Under these principles, a person may not swear allegiance to obey and serve simultaneously the laws of the Nation and the State of New Mexico. The prohibition is then consistent with our Fundamental Law, and it is not improper for the Election Code to require Tsosie to serve only one government.

Id., slip op. at 7-8.

C. QUALIFICATIONS OF VOTERS

1. RESIDENCY

Crowe v. Tribal Board of Elections

The Cherokee Supreme Court — Eastern Band of Cherokee Indians, No. 04-CV-530 (September 1, 2004), 2004.NACE.0000005

The opinion of the court was delivered by: Martin, Chief Justice . . .

In reviewing a final determination of the Board of Elections, this Court can only review alleged errors of law. We have no authority to make findings of fact. Chapter 7-5 (a) Cherokee Code. Our duty is to determine whether the findings of fact support the conclusion of law and decisions of the Board. . . .

The protest of Carroll Crowe states:

> The Cherokee Code at section 161-10 (C) states, "Tribal members not living on Cherokee trust lands shall register in the Township in which they or their enrolled parents last resided."
>
> The right to vote in our Tribal elections is restricted to registered voters. Each person's registration has residency requirements, and if those residency requirements are not met then you cannot register to vote. If someone votes who is not legally registered, then that vote is illegal and should not be counted.
>
> For those persons who do not live on Cherokee trust lands, I challenge the election to show that those persons either used to live in the community for which they registered and cast an absentee ballot or their parents lived in that community. If this cannot be verified then that person was not entitled to register, and if not registered, then they could not vote. The election laws DO NOT make exceptions for grandparents or other extended family. It says, "in which they or their enrolled parents last resided". If someone cannot prove that either themselves or their enrolled parents resided in that particular community, then they cannot be legally registered to vote. . . . The law further places the restriction that both the parents must be or have been enrolled AND previously resided in the community for which the person wants to register in. Therefore, if both parents were not enrolled members then that person can only register under the single criteria that is based upon their own previous residency in that community. The law does not make allowances for a person's

> ancestry. It specifically restricts persons not living on Cherokee trust lands to their former residency or that of their enrolled parents. . . .

Appellant contends that, "Many of the absentee voters were not qualified (to vote) under Section 161-10." However, the evidence at this hearing shows that only two persons may have voted illegally in the election for Principal Chief. The appellant's evidence is unclear whether these two voted by absentee ballot, but does show that they voted for appellant. Although appellant argues that illegal absentee ballots were cast by voters, the transcript in this hearing contains no evidence to sustain this contention. Yet appellant urges the Board to review the entire voter registration list to determine whether anyone voted who was improperly registered. This overlooks that the burden of proof is upon the person protesting the election results. Appellant has the burden to show that illegal ballots were cast and that they affected the results of the election, that is, that without the challenged ballots the result of the election would have been different, in this case, that appellant would have been elected. This, appellant has failed to do. . . .

[B]efore an absentee ballot can be issued a Board member must certify that the voter is a registered and qualified voter of a Cherokee township. This certification raises a presumption of regularity as to the issuance of the absentee ballot. A protester of an election based on irregular absentee ballots has the burden to produce evidence before the Board to overcome this presumption and support the protest. This, appellant has failed to do. . . .

Mr. Crowe, a candidate for Chief, filed a timely protest of Chief's race in the 2003 general election. His protest is based on a literal interpretation of §161-10 (C), Cherokee Code, which states that "Tribal members not living on Cherokee trust lands shall register in the Township in which they or their enrolled parents last resided." He alleges that many absentee voters registered in the wrong township, so were improperly registered, and their vote cannot be counted. . . .

Our records indicate that a large number of absentee voters improperly registered in the wrong township. However, we are faced with an impossible task. All votes are cast anonymously. We can determine if an absentee voter voted. But we cannot determine who they voted for, unless further evidence is provided. Mr. Crowe has not met his burden in this regard.

A literal interpretation of §161-10 (C) would void the votes cast by improperly registered absentee voters. However, we must not read the election ordinance in isolation, but in the context of §2 of the Tribal Charter, which says:

> The Principal Chief or Vice-Chief and members of Council shall be elected to their respective offices by the enrolled members of the Eastern Band of Cherokee Indians, who have attained the age of eighteen (18) years.

If we read §161-10 (C) literally, we allow it to impose a restriction that is greater than that allowed in the Charter. The Charter imposes only two restrictions: that a person be a tribal member, and that they be at least 18 years of age. Any further restriction — such as that suggested by the protesters — would violate Tribal law.

We must recognize the role township registration plays in an at-large election. At-large candidates are elected by all of the voters, regardless of township.

A vote cast in one township carries the same weight as a vote cast in another township. All absentee votes are mailed to the same place — the Election Board office in Cherokee. Changing registration from one township to another would make no difference in where the votes are cast in an at-large election. . . .

Also, interpreting the township registration requirement as eligibility standard instead of a rule for registration seems contrary to Tribal history and custom.

The Election Board relies on personal representations of voters on their registration card, and information provided by the Enrollment Office. The Enrollment Office also relies on personal representations of members. That office does not have comprehensive residency lists for enrolled members. A person could live on the Qualla Boundary and then move away, and the Enrollment Office may or may not have a record of their residence here. A member's representation to the Election Board is the best information we have, and we must rely on it.

For the foregoing reasons, we deny Mr. Crowe's protest. . . .

Associate Justice Toineeta and Chief Judge Philo, sitting by designation, Concur.

NOTES

1. What is the purpose of a residency requirement in a tribal election? Would the reasons for a residency requirement in a tribal election be different from those in a non-tribal election?
2. Note the court stating that the election board's certification of the tribal election depended on the "personal representations of voters," and that it may in fact have serious errors. Does the petitioner's claim have additional merit, given this factual possibility?
3. The court asserts that tribal "history and custom" supports the outcome. How might this be so, especially since the court does not elaborate on Cherokee history and custom that might be relevant?
4. The Grand Traverse Band of Ottawa and Chippewa Indians prohibits tribal citizens residing outside of a six-county area within the Grand Traverse Band's traditional territories from voting in tribal elections. *See Russell v. Grand Traverse Band of Ottawa and Chippewa Indians Election Board*, 2000 WL 3579799, at *1 (Grand Traverse Band Tribal Court 2000) (discussing the six-county area residency requirement for eligibility to run for tribal office).

   The Grand Traverse Band constitution provides that

   > [a]ny member duly enrolled in the Grand Traverse Band who is at least eighteen (18) years old, has been a resident for a period of at least six (6) months in the six-county area of Antrim, Benzie, Charlevoix, Grand Traverse, Leelanau, and Manistee, and is registered to vote on the date of any given tribal election shall be eligible to vote in that tribal election.

   Grand Traverse Band of Ottawa and Chippewa Indians Const. art. VII, §3(a) (1988).

Conversely, the Little Traverse Bay Bands of Odawa Indians allows any tribal citizen to run for office and to vote, regardless of residency. *See* Little Traverse Bay Bands of Odawa Indians Const. art. XII(A) ("The members of the Tribal Council, Chairperson and Vice-Chairperson shall be elected at large by popular vote.").

5. In *Jacobson v. Eastern Band of Cherokee Indians*, 2005.NACE.0000010 (Eastern Band of Cherokee Indians Supreme Court 2005), the court rejected an equal protection challenge to the Band's absentee ballot rules:

> The Plaintiff contends the Tribe has infringed on her fundamental right to vote by eliminating her ability to vote by absentee ballot. However, there is no fundamental right to vote by absentee ballot. . . . Noting that the framework of an absentee voting plan does not deny the right to vote itself, one Federal Court held as follows:
>
> > The right to vote is unquestionably basic to a democracy, but the right to an absentee ballot is not. Historically, the absentee ballot has always been viewed as a privilege, not an absolute right. It is a purely remedial measure designed to afford absentee voters the privilege as a matter of convenience, not of right.
>
> *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D. Ala. 1972).
>
> Since voting by absentee ballot is not a fundamental right, the Court does not review a challenge to C.C. §161.14(b)(6) under the "strict scrutiny" standard, but rather under the "rational basis" test. . . . Under this test, C.C. §161.14(b)(6) "must bear some rational relationship to a legitimate [Tribal] end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." . . .
>
> Having determined the appropriate standard of review for Plaintiff's claim, the Court now analyzes whether there are any genuine issues of material fact with regard to the relationship between this legislation and the legitimate ends of the Tribe. There are none. Clearly, a majority of the enrolled members voted in a plebiscite to return to the six criteria for absentee voting which originally comprised the absentee ballot procedures. Enacting an ordinance to comport with the expressed will of the people alone is a rational relationship to a legitimate Tribal end. However, the Council did more than just rubber stamp a referendum: additional debate and comment preceded and followed the vote.
>
> From this debate it is plain that the enrolled members wished their fellows who lived off of the Reservation to return to it to vote. Multiple reasons were advanced for this, but in general they amounted to a desire on the part of the enrolled members that non-residents return to Cherokee at least once during an election cycle to experience in person the flavor of what was happening politically on the Reservation. While there is an undercurrent in the record and arguments before the Court that the residents of the Reservation may have been dissatisfied with the increased political power wielded by non-residents by way of open absentee balloting, it remains, at most, a mere suggestion, unsupported by evidence or any material fact, and the Court cannot say that these rumblings represent the basis for the change in the law.
>
> Another rumbling in this record involves the tension between members who leave the Reservation to pursue a better life and those who stay.

> Plaintiff is emphatic about it and alleges that the residency component amounts to discrimination against her because she has left the reservation and made her life elsewhere. Who could argue with the Plaintiff that enrolled members who leave the Reservation to pursue careers in law, medicine or business, or, like Plaintiff, to raise and care for her children, are not serving the ultimate interests of the Cherokee people and rising up the Nation?
>
> No one. But again, this is a political decision, not a legal one, and thus, while this may feel to the Plaintiff like discrimination, legally, it is not.

Id. at ¶¶40-48.

2. AGE

Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation

United States Eighth Circuit Court of Appeals, 507 F.2d 1079 (January 3, 1975)

Matthes, Senior Circuit Judge.

Pursuant to a provision of the Indian Reorganization Act of 1934, 48 Stat. 984, specifically 25 U.S.C. §476, the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota adopted a constitution and bylaws. Pertinent to this litigation is Article 7 of the Tribe's constitution, which provides:

> Section 1. All members of the Tribe, 21 years or older who have resided on the reservation for a period of one year immediately prior to any election shall have the right to vote.
>
> Section 2. The time, place and manner, and nomination of councilmen and any other elective officers of the Council shall be determined by the Tribal Council by an appropriate ordinance.

On October 15, 1973, a tribal election official denied Garrett Wounded Head and Bernadine Nichols, Sioux tribal members 18 and 19 years of age respectively, the right to register and vote in a tribal election because they were not yet 21 years of age.[1] . . .

Acceptance of plaintiffs' trial theory necessarily requires equating tribal council action with action "by the United States, or by any state." It is authoritatively settled, however, that Indian tribes are uniquely situated within the

1. Apparently, the Solicitor was joined as a defendant because he had published an opinion which modified the Sioux tribal constitutional election provision in Secretarial elections, but not in tribal elections. Solicitor's opinion No. 36840 (November 9, 1971). In the memorandum the Solicitor concluded that the twenty-sixth amendment applies only to federal and state governments. The Solicitor resolved that Secretarial elections, those called by the Secretary of the Interior under 25 U.S.C. §476 to allow an Indian tribe to amend its constitution and bylaws, are a form of federal election subject to the twenty-sixth amendment, but purely internal elections of an Indian tribe, not covered by federal laws, are not subject to the limitations of that amendment. . . .

federal system. . . . In *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883), the Supreme Court stated:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government . . . that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

. . . We hold that the twenty-sixth amendment does not apply to internal tribal elections. Plaintiffs appear reconciled to this conclusion. . . .

We turn now to the contentions of plaintiffs presented on appeal. In 1968, the Indian Civil Rights Act (ICRA), also known as the Indian Bill of Rights, was enacted by Congress in language taken nearly verbatim from the United States Constitution. 82 Stat. 77, 25 U.S.C. §§1302, 1303. The effect of the Act was to impose upon Indian tribal governments restrictions applicable to federal and state governments, with specific exceptions: the fifteenth amendment, portions of the fifth, sixth, and seventh amendments, and in some respects the equal protection clause of the fourteenth amendment. The legislative history of the Act reflects an intent to protect the individual rights of Indians, while fostering tribal self-government and cultural identity. . . . In thus creating a statute with twin, and possibly conflicting, goals, the form of government and the qualifications for voting and holding office were left to the individual tribes.

Plaintiffs advance several grounds to support their argument in favor of enfranchising all adults 18 years of age or older. The most important is that the equal protection clause of the ICRA requires the tribal council to set the minimum voting age at 18. The equal protection clause of the Act, 25 U.S.C. §1302(8) provides:

> No Indian Tribes in exercising powers of self-government shall—
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

In approaching the equal protection question under the ICRA, two separate questions are presented: 1) whether the substantive meaning of the equal protection clause of the fourteenth amendment should be utilized to determine the scope of the equal protection clause of the ICRA in matters of internal tribal government; and 2) if so utilized, whether the age qualification is in fact violative of the equal protection clause of the ICRA. . . .

In any case, we regard *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970), as dispositive of the equal protection issue. In *Oregon*, the majority, writing in five separate opinions, upheld the power of the federal government to set the age for voting in national elections, but concluded that the equal protection clause of the fourteenth amendment did not limit the power otherwise inherent in the states to fix the voting age at twenty-one for state and local elections. As a direct result of this decision, the twenty-sixth amendment, which we have held above does not apply to Indian tribal elections, was adopted to remedy the obvious logistical problems that would

accompany concurrent federal, state, and local elections at the same voting place with electorates of different ages able to vote in some elections but not in others. The Solicitor and the Tribe properly conclude that, in light of *Oregon*, to apply the equal protection clause in the instant case would restrict the tribes to an even greater extent than the states and the federal government are restricted by the fourteenth amendment. Such an incongruous result is untenable in the absence of an express congressional intent to so intervene in Indian tribal affairs. But even if the full scope of the equal protection clause of the fourteenth amendment were applied to the facts of this case, it is questionable if that constitutional provision would mandate that 18 to 21 year-old Indians be allowed to vote. . . .

In summary, we hold in line with established authority that Congress has exclusive and plenary power to enact legislation with respect to the Indian tribes. In the absence of a constitutional mandate or express legislation by Congress to the contrary, a tribe has complete authority to determine questions such as the one here under consideration. Congress has failed to enact legislation authorizing members of the Sioux Tribe between the ages of eighteen and twenty-one to vote, and the ICRA does not expressly or impliedly require the Tribal Council to permit plaintiffs to vote at a tribal election. Finally, we note that the constitution of the Sioux Tribe is subject to amendment and plaintiffs have the right to participate in seeking to change the tribal constitution provision under attack. . . .

The judgment is affirmed.

NOTES

1. Tribal constitutions may set a minimum age limit for eligible voters different than that required under the United States Constitution for American elections, but not without difficulty in some instances. The Twenty-sixth Amendment to the United States Constitution, ratified in 1971, set the age limit at 18 as a result of the realization that a large percentage of Americans fighting in the Vietnam War were under the age of 21 and therefore ineligible to vote under the law at that time. *See* William Funk, Introduction to American Constitutional Structure 23 (2008); *cf. Oregon v. Mitchell*, 400 U.S. 112 (1970) (striking down the 1970 Voting Rights Act Amendments in which Congress attempted to reduce the voting age to 18).
2. Cases such as *Wounded Head* are historical footnotes now, since the United States Supreme Court held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that federal courts do not have subject matter jurisdiction over civil suits brought under the Indian Civil Rights Act.
3. Modern tribal courts rarely have addressed the question left open in *Wounded Head*; namely, whether the voting age requirement would violate a tribal equal protection clause or the Indian Civil Rights Act's equal protection clause. At least tribal court held without discussion, and relying upon *Wounded Head*, that it would not. *See Jones v. Election Board of the Fort McDowell Yavapai Nation*, No. CV-2000-005, 2000.NAFM.0000001, at ¶¶40-42 (Trial Court of the Fort McDowell Yavapai Nation, Feb. 1, 2000).

D. TRIBAL CONSTITUTIONAL AMENDMENT ELECTIONS

1. ELECTION PROCEDURES

KAVENA v. HOPI INDIAN TRIBAL COURT

Hopi Tribal Appellate Court, 1989.NAHT.0000002 (March 21, 1989)

Before SEKAQUAPTEWA, Chief Judge, and ABBEY and BENDER, Judges
Per Curiam.

1. Factual and Procedural Background

This case arises out of the effort of a group of residents of First Mesa Village, a part of the Hopi Tribal Reservation, to change the traditional form of government of that village through a village referendum election pursuant to procedures established by the Hopi Constitution.

The Hopi Tribe is "a union of self-governing villages" (Hopi Const. Art. III, Sec. 1). There are nine such villages, of which First Mesa (the consolidated villages of Walpi, Sitchomovi and Tewa (sometimes also known as Hano)) is one. With respect to the form of government of the villages, the Hopi constitution provides (Hopi Const., Art. III, Sec. 3):

> Each village shall decide for itself how it shall be organized. Until a village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader." (Hopi Const., Art. III, Sec. 3)

The Hopi constitutional provisions for changing the form of village government are as follows (Hopi Const., Art. IV, Sec. 4):

> Any village which . . . wishes to make a change in [the traditional Hopi organization] . . . may adopt a village Constitution in the following manner: A Constitution, consistent with this Constitution and By-Laws, shall be drawn up, and made known to all the voting members of such village, and a copy shall be given to the Superintendent of the Hopi jurisdiction. Upon the request of the Kikmongwi of such village, or of 25% of the voting members thereof, for an election on such Constitution, the Superintendent shall make sure that all members have had ample opportunity to study the proposed Constitution. He shall then call a special meeting of the voting members of such village for the purpose of voting on the adoption of the proposed Constitution and shall see that there is a fair vote. If at such referendum not less than half of the voting members of the village cast their votes, and if a majority of those voting accept the proposed Constitution, it shall then become the Constitution of that village. . . .

First Mesa Village has, since its settlement, been governed according to the traditional form of Hopi village government, with a Kikmongwi as its leader. In October, 1987, a group of First Mesa residents called the People's Rights Committee (PRC) initiated an effort to change the traditional form of village government by filing a petition with the Superintendent of the Hopi

jurisdiction, [an official of the Bureau of Indian Affairs]. The petition requested that an election be called for the purpose of voting on a proposed new constitution for the Village.

The petition filed by the PRC contained 297 signatures, 269 of which were subsequently determined by the Superintendent to be valid signatures. In ascertaining the number of voting members of the village, the Superintendent used a list of residents of the village who had registered to vote in the last previous election for Hopi tribal Chairman. This list contained 705 names. The Superintendent thereupon determined that the PRC's Petition represented a request by more than 25% of the voting members of the village for a referendum election as required by the Hopi Constitution. The Superintendent ultimately set such an election for June 7, 1988.

A second group of First Mesa residents, calling themselves the Walpi Hopi Sovereign Rights Committee (SRC) and seeking to retain the traditional form of village government, opposed the Superintendent's decision to call an election. . . .

[SRC sought federal court relief, but that case was dismissed on July 27, 1988.]

The Superintendent then re-scheduled the election for August 16, 1988. In response, the SRC filed an action in the Tribal Court of the Hopi Tribe, seeking once again to prevent the election from taking place. This Tribal Court action, *Kavena v. Hamilton*, was heard by Chief Judge Ames of the Tribal Court. In an opinion dated August 15, 1988, Chief Judge Ames agreed with the SRC's primary contention that the Superintendent had not used a correct list of the voting members of the village. . . .

Chief Judge Ames concluded that the referendum election should be stayed for an additional 90 days, until November 14, 1988: "[I]t is apparent more time and patience should be extended before a traditional form of government, which has existed for centuries, is placed in jeopardy. . . . Once eliminated, traditional organization most probably can never be recovered. That is irreparable harm and damage in its truest sense. More time should be allowed to make certain that a way of life does not fade into the past while making certain that the standards of the [Indian Civil Rights Act] are observed." . . .

2. Proceedings in this Court

This Court heard argument on the Petition for Extraordinary Relief via a telephone conference call held on November 11, 1988. At the conclusion of this telephone argument we issued an order staying the November 14 election.

Despite our stay order, a majority of the Election Board apparently decided to proceed with the November 14 election as scheduled. . . .

At the hearing before this Court on January 27, 1989, all counsel agreed that the November 14 election should not be treated as a valid village referendum election. We accept this agreement for the following two reasons:

First, the Hopi Constitution provides that a village referendum election can change the form of village government only if "not less than half of the voting members of the village cast their votes." We have been informed by the General Counsel of the Hopi Tribe that 389 ballots were cast on November 14. We are further informed that the final eligible voters list, as determined by the

Election Board appointed by the Tribal Court, consisted of 998 eligible voters and 319 challenged voters. Even if we were to assume that all voter challenges would be successful, the votes cast would not total the constitutionally required half of the eligible voters.

Second, this Court clearly had jurisdiction to issue its November 11, 1988, Order staying the November 14 election.

A valid election cannot be held in the face of such a stay. Thus, the November 14 election could not have effected a change in the form of village government no matter how many votes had been cast in it. . . .

The Constitution of the Hopi Tribe provides the only method by which a village which is under the traditional Hopi organization may adopt a different form of village government. A decision by a village to adopt a new form of government is a decision with extremely important potential consequences for the village, its members and residents, and the entire Hopi Tribe. It is essential, therefore, that the procedures provided by the Hopi Constitution be strictly followed.

Those procedures, however, were not adequately followed in this case. The most fundamental defect in the procedures that were used here concerns the BIA Superintendent's determination of whether enough voting members of the village had petitioned to ask for a village referendum election.

The method prescribed by the Hopi Constitution for changing the form of village government is the adoption, through such an election, of a village constitution. Such an election is to be held only if either the Kikmongwi of the village or "25% of the voting members thereof" request that an election be conducted. In this case the PRC submitted a petition to the Superintendent of the Hopi jurisdiction asking that a referendum election by held. That petition contained 269 valid signatures.

The Superintendent correctly decided that, in determining whether this petition was sufficient, it would be necessary to ascertain the total number of voting members of First Mesa village. The Superintendent sought to find this number, however, by asking the Hopi Tribal Council for a list of the First Mesa residents who were registered to vote in the last election for Tribal Chairman and Vice Chairman. Despite explicit contrary advice given by the Tribal Chairman, the Superintendent used this list as the basic list of First Mesa village voting members.

The Superintendent's use of this list was an incorrect implementation of the procedures provided by the Hopi Constitution. Hopi Village membership for purposes of ascertaining those eligible to vote in a referendum on a proposed village constitution is a special concept that is not equivalent to residence in the village at the time of a Tribal election. Village membership in a village, such as First Mesa, with the traditional Hopi organization, is a concept with much deeper meaning than mere physical presence or residence. Such membership involves the maintenance of religious and cultural ties and relationships with the village and its ceremonies. Many village members, for example, do not reside in the village of their membership. This can occur for a number of reasons, including the Hopi matrilineal tradition pursuant to which a husband will reside in the village of his wife's membership while retaining membership in his mother's village. Hopis may also reside off the

reservation at their place of employment, while retaining membership in the village of their birth. Conversely, some of those who do physically reside in a traditional Hopi village may not be village members, often because they are members of other villages.

The proper procedure for the Superintendent to use in determining who are the voting members of a village is for him to ask the Kikmongwi of that village to provide a list of the voting membership. The Kikmongwi is explicitly recognized in the Hopi Constitution as the leader of a village that is still under a traditional form of organization. The Kikmongwi, moreover, has an explicit constitutional role to play in admitting individuals to village and tribal membership.[6] . . .

In this case, Chief Judge Ames correctly held that the list of village members for referendum voting purposes should have been based on a list supplied by the Kikmongwi. We believe, however, that the decision of whether a sufficient percentage (25%) of the voting members of a village had signed the election petition should then have been made before the election was held.

An election on so fundamental a matter as whether the traditional form of Hopi village organization should be abandoned is a major event in the history of a Hopi village and in the lives of many village members. A matter of such importance and potential disruptive effect should not go forward unless it is clear that the preconditions required by the Hopi Constitution have been met. It would also be extremely unfortunate to hold an election on a matter of such importance to the daily lives of village residents and then to place the outcome in doubt for a protracted period while legal proceedings took place. This is especially true if the "results" of the challenged election were announced or became known.

In addition to the fact that the adequacy of the referendum petition was not properly determined prior to the election, there were other important defects in the procedures leading up to the scheduled November 14 election. We mention them briefly here in order to provide guidance should the referendum election procedure be invoked in the future. . . .

2. In this case it appears that the Superintendent may have set a date for the election solely upon his determination that a sufficient number of signatures was present on the petition submitted to him. There is, however, a second finding that the Hopi Constitution requires to be made prior to the setting of a referendum election. Upon the submission of an adequate petition "the Superintendent shall make sure that all members have had an ample opportunity to study the proposed Constitution. He shall then call a special meeting of the voting members of such village, for the purpose of voting on the adoption of the proposed Constitution . . ." (Art. IV, Sec.4) (emphasis added).

The determination that there has been ample opportunity to study the proposed constitution must thus be made before the election is called. This

6. Under Art. II, Section 2, of the Hopi Constitution certain persons may be adopted into the Hopi tribe "in the following manner: Such person may apply to the Kikmongwi of the village to which he is to belong, for acceptance. According to the way of doing established in that village, the Kikmongwi may accept him. . . ."

requirement is not merely a technicality. The words of the Hopi Constitution undoubtedly reflect an understanding of the importance to village life of the decision to change its form of government. The Constitution requires that there be ample opportunity for all members to study the proposed change even before an election date is set, in order to make sure that there has been adequate time to consider the proposed change. . . .

4. Finally, as we read the Hopi Constitution the process of making a proposed change in village government know[n] to village members must start even before a petition is circulated and signatures gathered. After a proposed constitution is drawn up, it must "be made known to all the voting members of such village" at the same time as a copy is submitted to the Superintendent. Only after that publicity, does the Hopi Constitution contemplate the submission of an election petition. The preferable procedure would clearly seem to be to make the proposed change known to all village members before signatures are gathered, so that village members can hear both sides of the matter before deciding whether to sign a petition. Once again, in a matter of this importance, it is best to give as much opportunity as possible for reflection, study and discussion before a decision is made.

[A]ny future referendum election to change the form of government of First Mesa Village should not be called unless the procedures provided by the Hopi Constitution are newly initiated and followed, starting with the first step of those procedures — the submission of the proposed village constitution to the Superintendent at the same time as it is made known to all voting members of the village. We note further that, for these purposes, it may be necessary for those proposing a village constitution to obtain a list of voting village members from the Kikmongwi at the outset of their efforts, so that those not residing in the village can be informed of the proposal from the beginning. . . .

NOTE

The election over whether the First Mesa would adopt a nontraditional form of village government was a secretarial election. Federal regulations promulgated under 25 U.S.C. §476(c) provide procedures for the holding of secretarial elections required under federal statute, *see* 25 CFR Part 81, and these procedures may also be used by tribes for other secretarial elections involving tribal constitutions, *see* 25 CFR §81.2(b).

2. AMENDMENT BY PETITION AND REFERENDUM PROCESS

In Re Protest against Initiative Petition

Cherokee Nation of Oklahoma Supreme Court, No. SC-06-12, 6 Am. Tribal Law 39, 9 Okla. Tribal Court Rep. 584 (December 19, 2006)

Chief Justice Matlock delivered the Opinion and Order of the Court, in which Justices Haskins and Wilcoxen join.

[I.] Jurisdiction

This matter is properly before this Court pursuant to Article VIII of the Cherokee Constitution of 1999 and Legislative Act 15-04, Section XVII.

[II.] The Anatomy of the Litigation

1. This Court on October 5, 2006, [in *In re Numerical Sufficiency of Signatures,* 9 Okla. Trib. 507 (Cherokee 2006),] . . . approved the Election Commission's certification of the numerical sufficiency of signatures on the Initiative Petition which is the subject of these proceedings, and ordered the Election Commission to cause the publication of the filing of the Initiative Petition and determination of the apparent sufficiency of the required number of signatures and to further notice the citizens of their rights to protest the Initiative Petition.

2. In response to the Publication of Notice, the Petitioner/Protestant, Vicki Dee Baker, timely filed her protest . . . on November 1, 2006, setting forth her elements of protest against the Initiative Petition. The four (4) elements of protest were:

(1) Fraud,
(2) Insufficiency of Signatures,
(3) Petition Wording is Vague and Misleading, and
(4) Petition Violates the Constitution. . . .
(5) The Court, after examining the Volumes of the Initiative Petition and the language of the Initiative Petition, made a summary finding as a matter of law that the language of the Initiative Petition was constitutionally sufficient.
(6) The Court also found as a matter of law that there is a presumption that the signers read the Petition, and that this Court will not interfere with the action of electors under the theory that some may have been verbally deceived.
(7) The Cherokee Nation Election Commission, by their attorney James Cosby, on November 22, 2006 filed a Motion for Declaratory Judgment to determine whether or not the Principal Chief has the authority to call a Special Election concerning Initiative Petitions. . . .

[III.] Findings

. . .

B.

The Court further finds that the Principal Chief of the Cherokee Nation has the authority to call a "Special Election" concerning Initiative Petitions pursuant to Article XV, Section 4 of the Cherokee Nation Constitution of 1999 and Legislative Act 15-04, Section VII.

C.

The Court further finds that the evidence presented by the Petitioner/Protestant, considered in the most favorable light to the Petitioner, fails to

overcome the burden of proof required to prove the Initiative Petition insufficient, and the Petition of Protest is therefore DENIED.

[IV.] Discussion

. . .

B.

Article XV, Section 4 of the Cherokee Nation Constitution of 1999 sets forth the following language concerning the calling of a Special Election:

> All elections on measures referred to the People of the Cherokee Nation shall be had at the next regular general election *except when the Council or the Principal Chief shall order a special election for the express purpose of making such reference.* Any measure referred to the People by the initiative. . . .

([E]mphasis added.) Legislative Act 15-04, Section VII sets forth:

> Whenever any *measure* shall be initiated by the People in the manner provided by law . . . , same shall be submitted to the People for their approval or rejection at the next regular *or special election as provided at Article XV, Section 4* of the Cherokee Nation Constitution.

([E]mphasis added.)

The word "measure" is defined by BLACK'S LAW DICTIONARY (4th ed. 1951), at page 1132, as "[t]he Rule by which anything is adjusted or proportioned." It is obvious that the word "measure," as used in Article XV, Section 4 of the Cherokee Nation Constitution of 1999 and Legislative Act 15-04, Section VII, is referring to proposed amendments to the Cherokee Nation Constitution by the Initiative.

C.

This Supreme Court in formulating the rules to govern proceedings to apply to this challenge of an Initiative Petition gave great deference to the strength of the direction of the Cherokee People in Article XV, Section 1 of the Cherokee Nation Constitution of 1999:

> *[T]he People of Cherokee Nation reserve to themselves the power to propose laws and amendments to this Constitution and to enact or reject the same at the polls independent of Council.*

([E]mphasis added.) . . .

The Court made rulings of law that the form of the Initiative Petition met the constitutional requirements, and that there must be a presumption that the signers of the Initiative Petition read the Initiative Petition and that an action for verbal fraud would not defeat an Initiative Petition.

This Court has considered the "rule of substantial compliance" formulated by the Oklahoma courts in the proceedings, *see In Re Referendum Petition for a Referendum Vote on Legislative Act 28-99,* No. JAT 01-06, [7 Okla. Trib. 382, 388 (Cherokee 2001)] and while not necessarily adopting the rule in total, it would appear that part of the rule which forgives technical and clerical defects as long

as the critical requirement of notice to the electorate is accomplished should be adopted by this Court. . . .

In order to protect each qualified elector's right to participate in the Initiative, the Court applied the following presumptions and burdens of proof which must be overcome by the Petitioner/Protestant:

1. The certificate of each packet which composed a part of the total Initiative Petition is *prima facie* correct and imports a verity and presumption that must be rebutted by competent evidence.

2. If a certificate of a circulator is impeached, the probative value of that certificate is destroyed, and none of the signatures appearing on that page of the Petition will be counted unless affirmatively proven to be genuine.

3. The constitutional rights of qualified electors who sign the Initiative Petition must be protected by this Court, tempered only by the safeguard of the integrity of the process. Therefore, the Petitioner/Protestant must present sufficient evidence as to each certificate to overcome the presumptions set forth hereinbefore even though one or more certificates of a circulator has been impeached. The Court is charged with determining the validity of the process in these proceedings, and not to punish a circulator's indiscretions by disqualifying all his packets. If the Court were to invalidate signatures on certificates that the Petitioner/Protestant fails to impeach with competent sufficient evidence, then the Court would be violating the constitutional guarantees of those qualified electors who happen to be on such certificates. The proper conduct of the Court is to refer the persons suspected of violating Legislative Act 15-04, Section VI to the Department of Justice for investigation and possible prosecution, and such referrals will be made.

The Petitioner/Protestant presented John Summerfield as a witness, who along with his wife signed a signature page of a packet (identified as Petitioner's Exhibit 2) circulated by a person who was different than the named circulator, Darren Buzzard, on the packet, and the named circulator was the person who executed the verification certificate. There were nineteen (19) qualified signatures on this particular packet and the only signatures affirmatively proven were the signatures of John Summerfield and his wife Josephine Summerfield. Therefore, eighteen (18) signatures of the packet must be disqualified. The Petitioner then presented testimony from Carol Wyatt, who testified that she took a packet (identified as Petitioner's Exhibit 3) being circulated by Dwayne A. Barrett to her parents to obtain their signatures, and they did sign the signature page. Dwayne A. Barrett executed the verification certificate. There were nine (9) qualified signatures on this signature page, and the only signatures affirmatively proven were the signatures of Carol Wyatt's parents. Therefore, nine (9) signatures of this packet must be disqualified.

The Petitioner then presented sufficient evidence to disqualify the two (2) qualified signatures on the packet identified as Petitioner's Exhibit 4.

The Petitioner presented Marilyn Vann's testimony, wherein she testified that she discovered thirteen (13) signatures that were not on the voters list received by her from the Election Commission. The Court feels that her testimony was less than convincing, but will disqualify the thirteen (13) signatures on Petitioner's Exhibit 5 for purposes of considering a demurrer to the Petitioner/Protestant's evidence. The total number of signatures disqualified by

the Petitioner/Protestant's witnesses and exhibits was forty-two (42). The Cherokee Nation Election Commission verified that there were three thousand and twenty-nine (3,029) signatures collected, and certified two thousand two hundred seventeen (2,217) of the signatures. The Cherokee Nation further certified that there were thirteen thousand nine hundred fourteen (13,914) votes cast in the last general election.

In order for the proposed amendment to the Constitution to be presented to the Cherokee People for approval or disapproval, the valid signatures must total at least fifteen percent (15%) of the total number of votes cast in the last general election. CHEROKEE CONST. [1999] art. XV, §3; LA 15-04, §XV.

The Court determines that fifteen percent (15%) of thirteen thousand nine hundred seventeen (13,917) is two thousand eighty-seven (2,087). The figure of two thousand eighty-seven (2,087) valid signatures is the number required to send the proposed constitutional amendment to a vote of the Cherokee People.

The Court subtracted the forty-two signatures from the number of two thousand two hundred seventeen (2,217) signatures verified by the Cherokee Nation Election Commission for a balance of two thousand one hundred seventy-five (2,175) qualifying signatures, which are more than the necessary figure of two thousand eighty-seven (2,087) signatures necessary to submit the proposed constitutional amendment to the Cherokee People for consideration.

IT IS THEREFORE ORDERED by the Court that the Petition of Protest is DENIED.

Justice DOWTY, dissenting in part and concurring in part. . . .

2. We have heard the testimony and received into evidence the Petitions from the Cherokee Nation Election Commission. We have also heard from the Protestants and the Proponents of the Petition and received their documentary evidence. It falls on us to conduct a *de novo* review and determine the sufficiency of the signatures on the Petitions. Since we have not adopted a specific procedure with regard to this review, we have differing opinions as well regarding the extent to which we should examine the Petitions. In my opinion, we should be thorough in our review, both as to signatures which may have been either excluded or included in error, as shown by the face of the documents, giving due consideration to the procedural law enacted by the Council in LA 15-04.

3. Having heard the testimony and evidence, having reviewed the Petitions and considered the debate and opinions of my colleagues, I have reached the conclusion that the process evidenced by these Petitions is so flawed that the sufficiency of signatures cannot be certified by this Court. Accordingly, I must respectfully dissent to the majority opinion. . . .

11. Hundreds of signature pages properly completed shows that the process is not burdensome and can be easily done right. However, the actions of a few have placed the process in jeopardy. Bringing to a vote a change in the organic document governing a sovereign Nation should require effort, and should be subject to safeguards that assure that the election is the will of the people in the exercise of the initiative. The requirements of LA 15-04 are not difficult if undertaken and carried out by competent, honest and conscientious

citizens, especially in the circulation of the Petitions. The conduct shown by the evidence and cited by my colleagues shows how the conduct of a few can undermine the hard work and good faith of others. Accordingly, given the totality of error shown by the evidence, and giving due regard to the doctrine of substantial compliance, I must decline to vote to certify the Initiative Petition of the Proponents and would find that the proposition should not go before the Citizens of the Cherokee Nation at the Special Election now scheduled. . . .

Justice Leeds, dissenting.

This case involves a challenge to the sufficiency of an initiative petition. The proposed initiative seeks to place a constitutional amendment on the ballot at a special election. The amendment, if passed, will exclude a class of Cherokee citizens known as the Freedmen and invalidate the effect of this Court's decision in *Allen v. Cherokee Nation,* No. JAT 04-09[, 9 Okla. Trib. 255 (Cherokee] 2006). There is no doubt that the Cherokee people have the legal right to amend the Constitution to redefine citizenship. The Cherokee people must, however, abide by Cherokee law in exercising that right.

In this initiative petition process, there are numerous irregularities, clear violations of Cherokee law, and it has been shown that some of the circulators perjured their sworn affidavits. I cannot, in good conscience, join in the majority opinion.

We must be concerned for the rights of two groups of Cherokee citizens. We must preserve the right of Cherokee citizens to propose constitutional amendments through the lawful initiative process. In doing so, we must also be cognizant of the rights of Cherokee citizens who stand to be excluded. The integrity of our democratic process is at stake.

[I.] The Challenges to the Petition

This Court is asked to invalidate the initiative petition on the following grounds:

(1) some individuals who circulated the petitions violated Cherokee law in their attempts to collect the required number of signatures; . . .

[III.] The Election Commission's Report

. . . The Election Commission is charged with counting the petitions and reporting the number of valid signatures to this Court. The Election Commission certified that 3,029 signatures appeared and that 2,217 signatures were valid. The Election Commission invalidated 812 signatures. . . .

The Election Commission's report reveals that there are 131 signatures in excess of what is required to place the initiative on the February ballot. Therefore, if more than 131 signatures should be excluded on the basis of this Court's review, the initiative petition fails. . . .

[V.] Falsification of Affidavits

The challenger introduced evidence that some individuals who circulated the petitions violated Cherokee law by falsifying affidavits. The proponents offered no evidence to rebut this testimony.

It was shown that two of the circulators, Darren Buzzard and Dwayne Barrett, falsified petition affidavits. They violated the requirement that each circulator must swear before a notary that they personally witnessed all the signatures on a given petition. They swore before a notary that they personally circulated petitions that they did not in fact circulate. In doing so, they perjured themselves and their credibility as truthful circulators is impeached. This is particularly bothersome given the fact that Darren Buzzard attested to over 520 signatures.

Darrell Buzzard and Dwayne Barrett falsified affidavits as follows:

1. John Summerfield testified that Harley Buzzard actually circulated the petition that he and his wife signed, yet Darren Buzzard signed the affidavit that he personally witnessed each of the signatures. Darren Buzzard was not present when the signatures were collected. The petition was therefore falsely attested and must be discounted in its entirety.

2. Carol Wyatt, an employee of Cherokee Nation Enterprises, testified that she is actually the person who carried a petition to her parents' home to obtain their signatures. Dwayne Barrett signed the affidavit swearing that he was the person who witnessed all the signatures on that page. Dwayne Barrett was not present when the signatures were collected. The petition was therefore falsely attested and must be discounted in its entirety.

3. Melvin Garner, who is not a Cherokee citizen, testified that he nonetheless signed the petition and that he also signed his wife's name to the petition. Darren Buzzard was the circulator of this petition, and once again he swore that he witnessed each person sign the petition when in fact he did not. The petition was therefore falsely attested and must be discounted in its entirety.

What is equally troubling, with respect to the integrity of the process, is that neither Carol Wyatt, John Summerfield, or Melvin Garner recalled seeing the required warning page on the external petition pamphlets that were presented to them. Melvin Garner did not know that as a non-citizen, he was not allowed to sign the petition. He also was unaware that it was crime to sign someone else's name to the petition. Viewed in the very best light, these testimonies suggest that the circulators did not assemble and circulate the petitions in the manner required by law. The testimony also shows that these two circulators were dishonest about their collection efforts. These are not inadvertent mistakes or mere technicalities this Court can overlook. These actions are conscious and deliberate and show a disregard for following the law. . . .

The majority acknowledges that these individuals should be referred to the Attorney General for possible criminal prosecution for their fraudulent conduct. The majority is nonetheless willing to presume that these individuals were truthful in gathering the remaining signatures and attesting to the rest of the affidavits.

[VI.] Presumptions of Signature Validity

In giving the full effect to the initiative power of the Cherokee people, I agree that we must first presume that the signatures verified by the Election Commission are valid. The party that challenges the initiative process has the burden to show that the initiative petition should be invalidated. Once it is

proven that either fraud or irregularities have occurred, the burden must then shift to the proponents of the petition to revive the signatures as valid and to rehabilitate the credibility of certain circulators.

In the present case, it has been proven that two of the circulators have filed false affidavits. It has been shown that Darren Buzzard falsified an affidavit on more than one occasion. This type of misconduct calls into question the verity of all the petitions that were carried by Darren Buzzard. The burden must shift to the proponents to show why the remaining signatures he allegedly collected should be counted.

A sworn statement before a notary is an oath that carries considerable weight. It is akin to the oath taken by witnesses who testify before this Court. If a witness is proven to have lied to this Court, the credibility of that particular[] witness is impeached. This is magnified when it is shown that the witness has lied to this Court more than once. We would no longer presume the witness to be trustworthy. The credibility of the circulators of a petition should be equally judged.

There is no Cherokee precedent for what a Court should do in this situation. Should the Court only disallow the signatures on the actual petitions that were specifically referenced at trial? Should the repeated falsification of circulator's affidavits lead to the disallowance of all the signatures gathered by that circulator on the grounds that he cannot be trusted? . . .

[Parts VII and VIII of Justice Leeds' dissenting opinion concludes that . . . "[e]ven if we adopt Oklahoma law as persuasive authority, as the majority urges, this Court [must still disallow 137 signatures], a number that would require us to invalidate the initiative petition."] . . .

[X.] Remedies

Although not alone in his failure to abide by the law, it is clear that Darren Buzzard, the most prolific circulator in the process, disregarded the rules and falsified affidavits. In the interest of justice, this Court has three viable options: (1) Disallow all signatures carried by Darren Buzzard because he cannot be trusted; (2) Disallow no less than 137 signatures that are specifically referenced in this opinion; or (3) Conduct a more thorough review to give the proponents a chance to rehabilitate the impeached circulators and give the challenger the opportunity to present the testimony of witnesses that were disallowed by this Court.

Options one and two would result in the invalidation of the petition and the cancellation of the February election. Option three would provide an adequate opportunity for both sides to address the problems raised in this petition. There are ten weeks before the special election and ample time to exercise this option. It is not reasonable to turn a blind eye and let the special election go forward under this cloud.

[XI.] Due Process

I am concerned about one of the majority's summary rulings in this case. During this expedited trial, the Court refused to allow the challenger to call certain witnesses. There was no pretrial conference or opportunity for the parties to challenge or defend a witness list. Instead, the challenger found

out on the morning of the hearing that the Court would exclude certain witnesses.

The majority ruled that the challenger would not be permitted to proffer testimony to support her allegations of fraud and misrepresentations by the circulators of the petitions. The majority ruled that it is absolutely irrelevant what the circulators might have said to induce signatures. While I agree that we must presume that Cherokee voters can read a petition and decide for themselves whether they want to sign the petition, this rule is not without limitation. Other jurisdictions have invalidated entire initiative petitions based on the fact that some circulators misrepresented the legal effect of initiative petitions.[20]

I would certainly limit testimony to the sole issue of whether the effect of the petition was misrepresented. I would honor the right of the Cherokee voters to voice their opinions about the initiative. I would always honor the right of the Cherokee voters to strongly advocate for their position. However, if there was testimony that the circulators misrepresented the ultimate effect of the petition as a means to induce more signatures, the Court should have allowed that testimony. As it stands, we will never know what occurred because the majority refused to allow any testimony on this issue. . . .

[XIII.] Conclusion

The power to propose constitutional amendments is an awesome power. If we are going to amend our fundamental laws, we must ensure that the proper procedures are followed and that the integrity of the process is safeguarded.

This Court is the final gatekeeper of the integrity of the initiative process. In the interest of justice, this Court should have invalidated the initiative or, at the very least, conducted a more thorough review. To allow the initiative to move forward under this cloud of inequity is unconscionable. The majority has sent a clear message to the Cherokee people that our laws can be disregarded.

My decision does not preclude a future vote on this issue. The voters are already properly scheduled to vote on this constitutional amendment in the upcoming general election in June 2006. In the future, it may be very welcome to pass that the Freedmen or other classes of Cherokee citizens are excluded by majority vote. If this occurs, let it happen only after full compliance with, and respect for, our own laws.

I respectfully dissent.

NOTE

The Cherokee Nation electorate voted overwhelmingly to approve the amendment at issue in this case in 2007. *See* S. Alan Ray, *A Race or a Nation?*

20. In *Citizens Committee for D. C. Lottery Terminal Petition v. District of Columbia Board of Elections and Ethics*, 860 A.2d 813 (D.C. App. 2004), all signatures gathered by a citizens' group were stricken based on fraud where some of the circulators falsified affidavits and made false statements to voters about the ultimate effect of the petition. In *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. 2006), a federal district court in Michigan found that voter fraud existed where petition circulators told the voters they were signing a petition supporting affirmative action, when in fact the petition was to do away with affirmative action.

Cherokee National Identity and the Status of Freedmen's Descendants, 12 MICH. J. RACE & L. 387, 389 (2007).

E. THE PROBLEM OF HOLDOVER COUNCILS

CHAMBERLAIN V. PETERS

Saginaw Chippewa Tribe of Michigan Appellate Court, No. 99-CI-771, 27 Indian L. Rep. 6085 (January 5, 2000)

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I. Factual Summary

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A. Historical Background

. . . In November of 1995 Kevin Chamberlain and nine others (the Chamberlain Council), some of whom are signatory to the present petition, were elected to represent District 1 by the base voter rolls represented in the 1986 Constitution which included those persons also named in the TM Resolutions. Part of the platform of this Council included a promise to reform membership problems and a commitment to effectuate constitutional reforms. During these years, though, scant progress was made toward these intended reforms. Instead, the Council proved itself more successful in constructing the expanded Soaring Eagle Casino, the economic cornerstone of the Tribe. After two years had passed, it was time for new elections to take place, as required by the Saginaw Chippewa Tribal Constitution.

B. The Elections

On October 16, 1997, a primary election was held for District 1. The field of candidates was reduced to twenty as the law required. The following month, on November 4, the General Election was held. Only four of the sitting members of the Chamberlin Council were re-elected. The election results were challenged, and, as was the procedure of the time, the Council examined the results. The Council ruled the election was invalid. This declaration led next to a curative General Election. This election, held on January 27, 1998, had virtually the same results. The Chamberlain Council, again, declared the election to be invalid. This occurred as their terms of office expired and their mandate of reform came to an end.

From this point, and precisely beginning on February 18, 1998, a series of tribal court challenges advanced toward what appeared to be a cure to the problem of membership and the proper legal succession to office. In fulfillment of the court's directions to complete both its membership examination and the election process, the Chamberlain Council tried unsuccessfully to secure the services of genealogist Betty Bell. It then successfully secured the services of James Mills. Mr. Mills produced his recommendations citing what he perceived to be shortcomings in various categories of documents that

should be produced in order to bring finality to questions of membership in the Tribe. Acting upon these recommendations, the Chamberlain Council issued notices in October of 1998 to more than 140 persons who previously had been considered members of the Tribe telling them that they had been "temporarily suspended" from membership unless they could produce documentation which would satisfy Mr. Mills and the Enrollment Advisory Board (EAB). The subsequent cascade of documentation, involving some 500 files, led Mr. Mills and the EAB to conclude that only six individuals truly appeared to have been questionably enrolled. After notification, two of these voluntarily relinquished membership in the Tribe. This, arguably, set the stage for a valid election.

On November 24, 1998, a second primary election was held for District 1. Surprisingly, the persons who had been temporarily suspended from membership were disallowed from either voting or running for office in this election. The election took place leading to the selection of 20 finalists. Of these 20, only one person was a member of the Chamberlain Council. The suspended members, all except for the questionable remaining four, were then inexplicably restored to membership. Before a general election cold be held, acting upon protests submitted by several members of the Tribe, the Chamberlain Council acted on December 15, 1998 to again nullify the election process. But, also in that month the Council enacted law that established an appellate court to hear appeals from the Community Court. It is this resolution that created this Court and the original jurisdiction contemplated in this case.

The day following the Council's nullification, the Community Court issued notices that hearing would be convened to determine whether the Chamberlain Council should be held in contempt of court for its apparent failure to hold a curative election. On December 29, 1998, Judge Bruce Havens convened the Community Court. After a disruptive proceeding the Chief Judge prepared his ruling. He determined that "the Tribal Council Defendants have shown a consistent pattern of disregard for the Constitutional and Ordinance mandates [of the Tribe] and they are acting outside of the scope of employment with the Tribe thereby subjecting themselves to individual liability for their conduct." Members of the Chamberlain Council found themselves under prosecution for criminal contempt before Associate Judge Ronald Douglas, after Judge Havens summarily recused himself, and subsequently resigned.

The second year of the Chamberlain Council's "holdover" term began with a dismissal of the contempt charges. The Tribe proceeded to its third round of elections. The third primary election was held on January 19, 1999. This time the Chamberlain Council again invalidated the election in a ruling entered on February 25, 1999, stating that the TM Resolutions unconstitutionally increased the membership rolls. These two events are the most significant developments relevant to this case: first, it is from the January 19, 1999 primary election that the Peters Council comes; and second, it is the unconstitutionality of the TM Resolutions that the Chamberlain Council relies upon for its continued maintenance of control beyond the end of its term of office.

Obviously incensed by this last turn of events, a group of members of the Tribe began to organize an alternative election outside of any existing

governmental backing and purportedly authorized by Ordinance 4. They announced their intentions. The Chamberlain Council countered this initiative by enacting a law of sedition making the "simulation of governmental processes" a crime and punishable by imprisonment. On March 9, 1999, the alternative election proceeded, nonetheless, and resulted in a voter participation of approximately 37% of the voters in District 1. Several persons were then issued criminal citations, subsequently dismissed, pursuant to the sedition law.

It is important to note that the elections and court cases were not the only tracks of activity. From late in 1998 until the March 1999 alternative election both the supporters of the alternative election — which included the current Peters Council — and the Chamberlain Council were actively engaged in the pursuit of the political backing of the Assistant Secretary of the Interior Kevin B. Gover. As part of this strategy, while Assistant Secretary Gover postponed official action in this controversy, the Chamberlain Council initiated an alleged media critique of Gover's B.I.A. Administration.

On March 11, 1999, the Chamberlain Council passed a law redistricting District 1, the Isabella District, such that the District expanded beyond the boundaries of the reservation to include lands which had previously encompassed Saginaw lands as they appeared before those lands were ceded to the federal government.

On March 16, 1999, the visitors in the March 9 alternative election took the oath of office but there was no officially recognized transfer of government power. In the Community Court, on the same day, Judge Bruce S. Hinmon dismissed challenges to the Chamberlain Council's rulings that invalidated the November 1998 Primary and the December 1999 General Elections. Judge Hinmon based his decision on the sovereign immunity and political question doctrines.

Meanwhile, Assistant Secretary Gover finally weighed in on the controversy. By a letter dated June 9, 1999, he urged the Chamberlain Council to hold an election within the next 45 days. The letter implied that his office considered the January 19, 1999 primary election to have been valid — in spite of the Chamberlain Council's and the Court's rulings to the contrary. He further challenged that his Administration would be forced in the absence of such election, to "deal with the representatives of the two off-reservation districts and the ten persons from the Isabella District who received the highest number of votes in January 1999 as representatives of the Tribe."

The Chamberlain Council, aware of Gover's threatened course, nonetheless, scheduled a fourth round of elections beginning with a primary set for some time in September 1999, outside of the 45-day window established by Assistant Secretary Gover in his letter of June 9, 1999. As a result, on August 10, 1999, Assistant Secretary Gover adhered to his word and issued a letter stating:

> I am instructing the Area Director to proceed with the instructions I gave him on June 9. He is to deal with the representatives of the two off-reservation districts and the eleven persons from the Isabella District who received the highest votes in January 1999 as representatives of the Tribe on an interim basis.

Assistant Secretary Gover, letter of August 10, 1999.

It is not entirely clear what had happened at this juncture. Copies of the Assistant Secretary's letter were provided to tribal and BIA law enforcement, as well as the Federal Bureau of Investigation and the United States Marshall Service. Many of the tribal law enforcement personnel were employed directly by the BIA and also held supervisory positions. There is some suggestion in the record that Attorney Michael Phelan, who served in the capacity of legal counsel to the Tribe during the Chamberlain Administration had advised the police that they should give effect to the Secretary's letter. The Peters Council was sworn into office by a notary public. Conflict and confrontation ensued in the following month. It is from these series of events that this petition emerged.

The Peters Council then went directly to produce its version of curative elections. In order to accomplish this, the Peters Council enacted laws that restored the electorate — the body of eligible voters — to the *status quo* as it existed before the Chamberlain Council took office. In addition, it set up an election challenge process which involved neither the Council nor the Courts. Primary elections were held on October 2, 1999, by which 24 finalist candidates were selected. Immediately following this election, a petition was submitted to this Court in an attempt to receive a ruling of invalidation. This Court denied the request. A general election took place on November 2, 1999, in which twelve persons were selected to take office. Five minutes before the close of business on December 6, 1999, another petition was submitted, this time by Kevin Chamberlain and Benedict Hinmon, asking this Court to issue a temporary restraining order calling for a halt to the administration of the oaths of office on December 7, 1999, to the prevailing candidates in the November election. This Court has stayed its hand pending its ruling in this case, fully aware that the two are inextricably intertwined.

A final note to this factual summary is in order regarding the participation of the federal government, or lack thereof, in these proceedings. This Court convened two sessions, the first, as a pre-trial conference, and the second, as oral argument regarding the issues presented here. In anticipation of these hearings, and, at least, in the latter hearing, at the urging of both parties, we *sua sponte* invited the participation of the federal government in these proceedings and have received a mere letter of declination. . . .

III. Discussion

A. Validity of the Actions of the "Holdover" Chamberlain Council

We begin our discussion on the question of whether the Chamberlain Council possessed an unfettered right to continue to hold over in office despite the expiration of its constitutionally defined term of office. The answer to that question lies in its constituent elements. What authority did the Chamberlain Council have to continue in office beyond the end of its term? Did the Constitution mention the prospects of a holdover? If not, is there something within the theory and structure of the Constitution that provides for such a "holdover"? What, therefore, were the limits of its authority, if any? And if there were, how do we treat such unconstitutional actions?

It takes only a minimal review to recognize that the Constitution, adopted in 1986, and the laws of the Tribe, have not a single provision regarding the transition of power from one Council to the next. It does not follow that the Council in office at the time that a transition should occur is, therefore, left with open authority to reshape the government of the Tribe. Various other provisions of the Constitution provide either direct or implied limitations against Tribal Council action, irrespective of whether it is legally or illegally constituted. The most notable of such provisions, in this case, concern Article III, regarding membership, Article VI, Section 1(m), and Article VII. In addition, the Tribe is presumptively bound by the mandates of the Indian Civil Rights Act of 1968, 25 U.S.C. §1302(8), in particular, its references to "due process of law" and "equal protection of the laws."

We recognize that at the heart of the Chamberlain Council's justification for its continued validity beyond the end of the term of office is its assertion that the membership mandate had to be fulfilled *before* any valid elections could take place. In its estimation, it was, thus, essential to change the membership of the Tribe. This was effectuated by the dual initiatives to investigate the validity of membership claims, and, to amend the Constitution to reflect its vision of an ideal profile for membership. Both are problematic on legal and theoretical grounds.

Read together Article III — which sets a base membership roll based upon the particular rolls taken on November 10, 1883, November 13, 1885, November 7, 1891, and December 10, 1982 — and Article VI, Section 1(m) — which denies the Council any authority to pass laws affecting membership — signal a clear barrier to such Council actions that would affect the status of membership. Even the attempt to force individuals by law *ex post facto* to produce proof of membership, therefore, is highly suspect. . . . From a practical perspective, however, we concede that some laws that touch upon the issue of membership are allowable, though, tempered by the "due process" and "equal protection" clauses of the ICRA. Due process and notions of fundamental fairness suggest that the status of membership cannot be assailed without ample procedures, and especially so after a person has been admitted to membership in the Tribe.

The status of nominal membership is not the sole concern raised by the Chamberlain Council's actions. Membership consists of a bundle of rights and privileges, including, but not limited to, the right to be secure in one's identity as a member, the right to receive tribal benefits on an equal footing with other members, and the right to participate in the political process. The fact that over 140 persons were denied that right strips the Chamberlain Council of any cover of innocence and righteousness.

The theory and structure of the Constitution also serve to erode the Chamberlain Council's dual initiatives and its continued occupancy of office. Article IV, Section 8 provides that the Council "*shall* be elected every two years." (Emphasis added.) This modest statement forms the foundation for the government of the Tribe. It is mandatory and not discretionary. The election *must* take place. The performance of the election is a duty incumbent upon the Council, and the failure to hold an election can be deemed a neglect of that duty thus serving as a basis for removal from office. *See* Article IV, Section 14(a).

The "two year" limitation, moreover, places a very finite limitation upon the elected Council. A candidate knows before running for office that his or her term may last only two years and not beyond. And, in order to gain the public trust, a candidate voices certain public concerns that either do or do not succeed in gaining the public validation through the voting process. *See generally* Article IV. In this case, the Chamberlain Council ran on a particular platform that did indeed gain the public trust. But there is a clear constitutional implication that such platform must be fulfilled or completed within the given two years.

The holdover actions of the Chamberlain Council were clearly in violation of the Saginaw Chippewa Indian Tribal Constitution. The Tribal Constitution makes no provisions for a holdover tribal council and implicitly rejects such a possibility. Article IV, Section 8 of the Constitution states: "The Tribal Council shall be elected every two years in the month of November." This constitutional provision clearly does not envision any holdover possibility. In fact, it constitutionally guarantees members the right to elect a tribal council every two years.

The Chamberlain Council argument that its holdover actions were constitutionally authorized rests more directly, as counsel conceded at the hearing on October 16, 1999, on language in Election Ordinance No. 4 (at that time) that stated:

> Any voter may protest an election for the district in which he/she voted. The written notice of protest must be made to the Tribal Council within seven (7) days after the election. The notice must set out the grounds of the protest. The Tribal Council shall schedule a hearing on the protest within ten days. The Tribal Council decision will be *final.* (Emphasis added.)

While this election ordinance did grant substantial authority to the Tribal Council to decide election protests, it cannot be said that it granted authority in excess of constitutional limits. To do so would render the constitutional requirement of tribal elections every two years in November as guaranteed in Art. IV, Sec. 8, a mere nullity. To state the obvious, no tribal ordinance may render constitutional provisions inoperative.

The "logic" of the Chamberlain Council argument is fatally flawed at its core. It presumes an ongoing right to set aside tribal elections without reference to the tribal constitution or potential review by a tribal court. This is profoundly undemocratic and contrary to any notion of the balance of governmental powers. The mandate for reform that originally carried the Chamberlain Council to elected office eventually became a justification for what looked more and more like despotism. Lofty motives do not excuse unconstitutional and illegal issues.

The jurisprudential implications of such matters have been noted by other tribal courts. For example, the Confederated Salish and Kootenai Tribal Court of Appeals observed:

> Interpretation and application of the law to determine the legality of a particular act is the "heart of the judicial function." [Citing *Menominee Indian Tribe ex rel. The Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court,* 20 Indian L. Rep. 6066, 6068 (Men. Tr. S. Ct. 1993)]. Among the most

> important functions of courts are constitutional interpretation and the closely connected power of determining whether law and acts of the legislature comport with the provisions of the Constitution. Courts were created to serve these purposes.

Moran v. Council of the Confederated Salish and Kootenai Tribes, 22 Indian L. Rep. 6149, 6155 (C.S. & K.T. Ct. App. 1995). *See also* the classic federal precedent of *Marbury v. Madison,* 5 U.S. (1 Cranch.) 137 (1803).

The Chamberlain Council had two years to complete its pledge of resolving membership election and constitutional issues before its term of office expired in November 1997. *See* Saginaw Chippewa Indian Tribe of Michigan Constitution and Bylaws, as amended, Article IV, Sec. 8. During its tenure, it should be noted that its primary focus was on economic development and it did achieve major success in establishing a sound economic base for the Tribe. However, the alleged necessary governmental reforms were not extensively dealt with until late in its term or until its official term of office had expired. At the end of those first two years the Chamberlain Council could only be considered a "holdover" Council.

Arguably, the political mandate that elected it to office had to be accounted for *at that time* to the voting public, leaving the question to the existing membership whether membership and constitutional reforms should be continued under the same government. The Chamberlain Council's political platform *at that time* could have been the very same assertions made before Assistant Secretary Glover and before this Court throughout these proceedings, that it had identified issues of membership which required a curative constitutional amendment, and, that it would be its electoral platform to so amend the Constitution.

Nonetheless, continuing its quest to fulfill its expired political mandate, this "holdover" Council finally began to act on the political reforms it had promised, which involved a series of meetings with the federal government. Nearly one year after its term expired, on December 23, 1998, Chief Chamberlain and several representatives of the Tribe met with the BIA requesting Assistant Secretary Gover's assistance in expediting an election on a proposed Constitution that would address the Tribe's enrollment and membership problems.

As a "holdover" body, the Chamberlain Council did have a duty at the expiration of its term to ensure a constitutionally elected government and a proper and orderly transition of that body. This "holdover" Chamberlain Council failed in its efforts to conduct a valid election and consequently has not been able, since, to effectuate an orderly transfer of government within the internal mechanisms of the Tribe's government. Both the Chamberlain Council and the Peters Council thereafter sought to rely on a political resolution of the Chamberlain-created problem from the BIA's Assistant Secretary of Interior, Kevin Gover. Both of these requests to the Assistant Secretary totally ignored the internal tribal law and institutions of the Saginaw Chippewa Indian Tribe. In sum, both the "holdover" and "interim" councils were in error. *See* discussion *infra* at pp. 19-33. Moreover, this appeal to the United States government exemplifies both the negative impact that historical federal

policy has had upon Indian tribes, and, the all-too-often tribal populist reliance on the well-established paternalistic posture of the BIA. This reliance on the federal government rather than upon the basic right and responsibility of self-government is counter to the established principles of tribal sovereignty and, as we shall see below, yielded a major intrusion into the internal governmental functions of this Tribe.

The previous discussion brings into question though, the validity of the actions of the Chamberlain Council taken from the end of its two-year term to the installation of the Peters Council — the "holdover" period. As stated above, the Tribal Constitution does not have any provision for an interim governing body or a "holdover" Council. Thus, the Chamberlain Council after its term expired apparently acted outside the scope of tribal constitutional authority. Such actions outside the scope of constitutional authority place the overall tribal government in a very tenuous position. There are a myriad of potential circumstances where a Council may be legally required to hold over. If, for instance, a major snowstorm had caused power shortages, road closures and a resultant failure of the election process, a Council may be required to hold over to endure that such elections eventually take place. Such events may require the expenditure of funds and, perhaps, an adjustment of the internal laws. But, it is clear than such "holdover" authority converts the mandate of such leadership away from initial platform concerns toward the primary duty to hold such elections. One cannot, in retrospect, say that any holdover or interim actions during such an emergency are manifestly illegal — *that* would require a case-by-case analysis. And under such analysis, the most suspect of actions must be those which accrue to the benefit of those holding office, or are contrary to the Constitution, the laws of the Tribe and applicable federal law.

Clearly, to provide the necessary continued stability and regularity in government, the actions of the "holdover" council must be deemed presumptively valid unless it can be established by clear and convincing evidence that those actions were contrary to the Tribal Constitution or applicable federal law, or, provided an undue benefit to those persons holding such "holdover" office. The most relevant areas that have surfaced as issues of concern include the adoption of an amended election code. *See* Saginaw Chippewa Indian Tribe of Michigan, Tribal Council Resolutions #99-101 & #99-104.

Even though the Chamberlain Council, in good faith, began these broad constitutional reforms, the timing for these actions was constitutionally erroneous. Its term had expired. In addition, to begin constitutional reforms during the "holdover" period is questionable as it is well-settled law that tribal officials are limited to the authority conferred upon them by their tribal constitutions or statutes. Thus the timing of the Chamberlain Council's actions is not only contestable, but the adoption of such ordinances containing provisions relating to a currently contested election is questionable.

Finally, according to the Constitution, the Tribal Council is vested with the authority to make provisions for all elections, "by *proper* ordinance." *See* SCITM Constitution, Article IV, Section 7. (Emphasis added.) Where a "holdover" or "interim" government attempts to change the constitutional democratic processes from those that existed at the time of its own election, we can only conclude that such changes are *improper* and violative of Article IV, Section 7.

These changes occurred on July 15 and 16, 1999. *See* SCITM Tribal Council Resolutions #99-101 & 104.

The timing of these actions brings to question the intent of the Chamberlain Council to cure any defect in the election process and conduct a legitimate tribal election. Once its terms had expired it was foreclosed from changing the laws of the Tribe that pertain to political succession. The Chamberlain Council was bound by the laws that installed it into office. Its primary duty was to ensure compliance with the pre-existing tribal law and to effect an orderly transition of government. To initiate any laws outside their constitutional authority, exceeded their legal and political mandate. . . .

NOTES

1. Notwithstanding the apparent illegality and impropriety of the Chamberlain Council's self-serving decisions to stay on as a "holdover" council, can you think of a time when a tribal council, or any individual tribal elected official, could legitimately remain in office beyond his or her term of office?

Consider *Bullcoming v. Cheyenne and Arapaho Tribes*, 9 Okla. Trib. 528 (Cheyenne-Arapaho Supreme Court 2006), in which the court wrote:

> When several former Business Committees failed to fill Supreme Court vacancies that would have resulted from the expiration of the then-normal eight-year Supreme Court terms of office, this Court both applied the "hold-over-in-office" provisions of CHEY.-ARAP. COURTS CODE §§103(f) and 205, and appointed Special Justices under Section 214 of that Code (and its own inherent power) in order to preserve its own jurisdiction and permit the maintenance of Supreme Court quorums. *See In re Appointment of Special Justices*, 8 Okla. Trib. 342, 368 & 485 (Cheyenne-Arapaho 2004); *In re Term of Office of the Justices*, 8 Okla. Trib. 164 (Cheyenne-Arapaho 2003). In so doing, we noted that Associate Justice Connie Hart Yellowman (appointed in 1991) and Associate Justice Dennis Belindo (re-appointed in 1997) were no longer meeting with the Court, *see id.* at 168-69, and we herein note further that Associate Justice Amos Black III (also re-appointed in 1997) has not met with the Court since May 19, 2004. Thus, the only regularly-appointed Supreme Court Justices now regularly convening as a part of this Court are Chief Justice Ryland Rivas and Associate Justice Dennis Arrow, who were appointed on the same day in 1995. Chief Justice Rivas and Associate Justice Arrow have "held over" in office under CHEY.-ARAP. COURTS CODE §§103(f) and 205.

Id. As the previous excerpt suggests, some tribal governments anticipate situations in which tribal officials may validly remain in office beyond their term of office.

2. Perhaps judges occupy a special place in governance where a judicial holdover is more necessary than the holdover of most other offices. Consider *In re Service of Office of Justices*, 6 Okla. Trib. 573 (Cherokee Judicial Appeals Tribunal 1998):

> In the time-tested, landmark case of *State ex rel. Eberle v. Clark*, 87 Conn. 537, 89 A. 172 (1913), the Connecticut Supreme Court found that a judge has a right and duty to hold over and exercise the duties and functions of the office until his successor is duly selected and qualified, even where there is no

explicit constitutional nor statutory provision regarding holdover. The Connecticut Supreme Court explained this rule of law as follows:

> The public interest requires that such officers shall hold over when no successor is ready and qualified to fill the office, otherwise important public offices might remain vacant to the public detriment in the absence of statutes providing for the filling of vacancies or through the neglect of appointing authorities to fill them. The rule has grown out of necessities of the case, so that there may be no time when such offices shall be without an incumbent.

The common law right and duty to hold over, as described by the Connecticut Supreme Court, is applicable to Justices of the Tribunal, and other appointed Cherokee Nation officials. In addition, and more importantly, under Cherokee law, the duty of a Justice to hold over is constitutionally mandated through Article XII, Section 1 of the Cherokee Constitution.

Id. at 577-78.