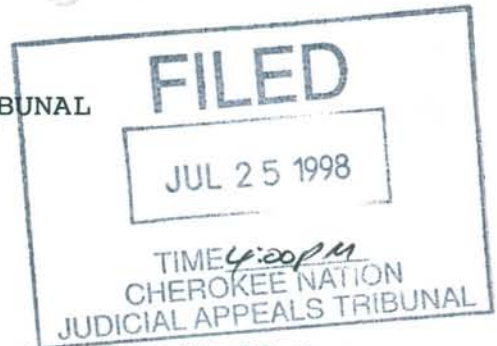


IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION



HAROLD "JIGGS" PHILLIPS,)
COUNCIL MEMBER,)
)
Plaintiff,)
)
v.)
)
J. GARLAND EAGLE, DEPUTY)
PRINCIPAL CHIEF,)
)
Defendant.)

Case No. JAT-98-09-B

FOR THE PLAINTIFF: James G. Wilcoxon
Wilcoxon, Wilcoxon & Primomo
P.O. Box 357
Muskogee, OK 74402-0357

FOR THE DEFENDANT: Janice Walters Purcell
Staff Attorney, Department of
Law and Justice, Cherokee Nation
Rex Earl Starr, General
Counsel, Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465-0948

BEFORE: Dwight W. Birdwell, Justice

ORDER

Plaintiff, Harold "Jiggs" Phillips, brings this lawsuit, in his official capacity as a member of the Cherokee Nation Tribal Council, against J. Garland Eagle, Defendant, in his official capacity as the Deputy Principal Chief of the Cherokee Nation. This action arises out of a memorandum, dated June 16, 1998, from J. Garland Eagle, acting in his capacity as Council President, to all Tribal Council Members. The body of the memorandum is as follows:

Pursuant to Chief Byrds [sic] recommendation that all eight (8) Council committee meetings be canceled and rescheduled to take place during the regular scheduled monthly Council meetings. Please be advised that as President of the Tribal Council, I have accepted his recommendation with the support of the majority of the Council members present on Monday, June 15, 1998.

Effective today, I hereby suspend all Council committee meetings and all appointments of all chairpersons and co-chairpersons of all eight (8) committees. All business/resolutions by Department Directors and/or Managers will be presented at the regularly scheduled Council meetings. I believe that these actions will provide for more efficient and effective productivity of the Council members while saving valuable time and money. (emphasis added).

Councilor Phillips alleges that the Deputy Principal Chief lacks the authority, under Cherokee law, to take the action described in the memorandum. Councilor Phillips further alleges that such action by Deputy Chief Eagle is a constitutionally impermissible interference by the office of the Deputy Principal Chief in the lawful operations and conduct of the Cherokee Nation Council. Councilor Phillips seeks injunctive and declaratory relief, in essence, asking this Court to find the actions of the Deputy Principal Chief in this matter to be contrary to law, and void.

The Deputy Principal Chief has raised two principal defenses and objections, which are:

1. Plaintiff lacks standing to bring this action in his official capacity as a member of the Cherokee Nation Council.
2. Plaintiff has failed to meet the requirements for obtaining a preliminary injunction. (Within this objection, Defendant has addressed the merits of Plaintiff's lawsuit).

On July 2, 1998, the lawyers for all parties agreed that the issues before the Court concern only an interpretation of the law

of the Cherokee Nation; there is no dispute between the parties as to facts in this lawsuit which would require a hearing. Therefore, by concurrence of the parties, the matter has been submitted to the Court for a decision on the pleadings, briefs and associated documents. Article VII of the Cherokee Constitution grants jurisdiction in this Court *to resolve any disagreements arising under any provisions of [the] Constitution or any enactment of the Council.*

STANDING

Deputy Chief Eagle urges the Court to find that Councilor Phillips lacks "standing" to bring this lawsuit. In *Mayer v. Thompson*,¹ this Court generally adopted the doctrine of "Standing" as it has been developed in the federal courts of the United States of America. Unfortunately, such pronouncement by the court may not have given the members of the Cherokee Bar, nor the lay citizens of our Cherokee Nation, the guidance that the court had hoped it would. This observation is not made as a criticism of the Bar, nor of the lay Cherokee citizenry.² First, there is always a problem with adoption of a legal doctrine from the federal courts, based upon the federal law, into the Cherokee legal system, considering

¹JAT No. 95-15.

²"However reassuring it may seem to describe the elements of standing . . . , the doctrines have changed continually in recent years. Even at any single moment, there are almost unlimited opportunities to disagree in applying the currently fashionable phrases. Several years ago, [United States Supreme Court] Justice Douglas observed that '[g]eneralizations about standing to sue are largely worthless as such.' Many exasperated courts and commentators have echoed the thought, often adding that standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3531 (citations omitted).

that while both systems are remarkably similar, yet there are some differences.³ Second, the doctrine of standing is highly technical, complex, and not easily described nor often well-understood. Indeed, as to the doctrine of standing, and more particularly on its proper application, there is currently disagreement within the Supreme Court of the United States.⁴

Regarding the standing doctrine, as strictly applied by the federal courts, it has been stated that: *Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial determination.*⁵ *The function of the standing doctrine is to determine whether the Plaintiff is the proper person to raise the issues in a suit and to present them in an adversary context, thereby bringing the legal questions sharply into focus. The [United States] Supreme Court has therefore construed the case or controversy requirement of Article III of the [United States] Constitution to preclude standing unless the Plaintiff alleges*

³A side-by-side, comparison reading of the Constitution of the United States of America and the Constitution of the Cherokee Nation makes this conclusion self-evident.

⁴e.g. *Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, ___ L. Ed.2d ___, (1997).

⁵Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3531. So stated, the Standing Doctrine may appear to some, at first, to be one of injustice or even, perhaps, stupidity. Consider, however, the probable reaction of a pro-sovereignty Cherokee citizen if the Plaintiff in this lawsuit was the Governor of the State of Oklahoma or a member of the Oklahoma Congressional delegation.

"injury in fact," which the court has characterized as a "specific present objective harm or a threat of future specific harm."⁶

It has been observed that, as judicially adopted and applied in state courts, the purpose of the law of standing is to protect against improper Plaintiffs.⁷ The adoption of the Standing Doctrine by state courts has, in reality, been an adaptation of the Federal Standing Doctrine. Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts, standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.⁸ As stated in *Mayes*, the sources found in Cherokee law for adopting standing are plausibly constitutional,⁹ and they are certainly prudent and practical.¹⁰ The constitutional "counter-

⁶90 Harv. L. Rev. 1632, 1635 (1997) (citations omitted).

⁷59 Am Jur 2d § 30.

⁸59 *Id.*

⁹Cherokee Const. art. II, § 1.

¹⁰As we stated in *Mayes*, chief among these are:

1. Litigants relying solely on citizenship cannot demonstrate an individuated harm apart from the generalized or abstract interests of citizens.
2. The truly injured parties could be excluded from litigation without notice or opportunity to be heard (i.e., due process), and thereafter be unjustly barred from relief.
3. Recognition of citizens' standing would have "no boundaries," and could open a floodgate of frivolous, repetitious, or unnecessary constitutional adjudication.
4. The potential for abuse of the judicial process by those seeking to harass, or simply seeking a public arena to express political views.

balance" to Cherokee standing is in the same language that the court found it, to wit: *The judicial process of the Cherokee Nation shall be open to every member of the Cherokee Nation. Speedy and certain remedy shall be afforded under the terms of the Constitution wherein said remedy does not conflict with the laws of the United States.*¹¹

In summary, while this Court generally follows the Federal Standing Doctrine, this Court will not allow the hyper-technical, federal complexities pertaining to standing to prevail over a just and expeditious resolution of a case on its merits. This Court will balance the guidance provided by federal and state court decisions in the interest of fundamental justice, tempered by prudence, and guided in both by the entirety of our Cherokee Constitution. The holding in *Mayes*, regarding standing, is therefore modified, accordingly.^{12,13}

As earlier stated, Deputy Chief Eagle urges the Court to find that Councilor Phillips lacks standing to pursue this lawsuit. The arguments can be summarized as follows:

1. Councilor Phillips lacks a sufficient personal stake in the outcome of the controversy as to assure the concrete nature of the matter.

-
5. The policy decision not to allow "private attorney generals" who would attempt to police the government through private judicial process.

¹¹Cherokee Const. art. II, § 1.

¹²20 CNCA § 54.

¹³It should be noted that under this refinement, the decision in *Mayes* would not change if that case was before the Court today.

2. Councilor Phillips has not suffered an injury by the rescheduling of the committee meetings. The purpose of the Standing Committees has been thwarted by the boycott of the Council meetings by other members of the Council.
3. The alleged injury-in-fact is too remote or speculative.
4. The committee meetings have been re-scheduled, not abolished, and thus no injury-in-fact has occurred to Councilor Phillips.

The Court rejects the arguments of Deputy Chief Eagle. The Court finds that a member of the Council has standing to sue, as a councilor, when the office of the Deputy Principal Chief, or any official in the executive branch of government, or an agent thereof, acts, or attempts to act, or threatens to act, to engage itself in exercising the constitutional powers of the Cherokee Nation Council and/or dictating the rules for credentials, decorum, procedure and/or operation of the Council of the Cherokee Nation. It is not necessary for a member of the Council to allege or prove that he or she has suffered, or is threatened to suffer, a direct, personal financial loss to establish standing. To paraphrase one legal commentator: To the extent the constitutional authority and powers of the Cherokee Nation Council are impaired, so too is the authority and power of each member of the Cherokee Nation Council, since the office of councilor confers a right to participate in the exercise of the authority and powers of the Council.¹⁴ It is the Council of the Cherokee Nation, alone, that establishes its rules

¹⁴90 Harv. L. Rev. 1632, 1634 (1977) (citations omitted).

for its credentials, decorum and procedure.¹⁵ The Deputy Principal Chief has no vote in the Council except for the purpose of breaking a tie vote.¹⁶ The impairment, or threatened impairment, of the authority and powers of the Cherokee Nation Council, a separate, distinct and independent branch of government, is sufficient injury for each individual member of the Council to be invested with standing to sue. None of the concerns expressed by the Court in *Mayes* (see footnote 10) are present in this lawsuit brought by Councilor Phillips.

Lastly, on subject of standing, there is the matter of the oath of office taken by each member of the Council of the Cherokee Nation. The oath of office is stated in Article XIII of the Cherokee Constitution and the oath is required to be taken by all officers, elected or appointed, before entering upon the duties of their respective offices. The framers of the Cherokee Constitution emphasized by reiteration the importance of the oath in Article V, Section 10, to wit: *Members of the Council and all executive officers shall be bound by the oath . . . to perform the duties of their respective offices with fidelity.* In his pleadings, one of which includes his affidavit, Councilor Phillips states the importance of the oath he took and the obligations he firmly believes the oath imposes upon him. Councilor Phillips is to be commended for recognizing his responsibilities. The oath of office, which is

¹⁵Cherokee Const. art. V, § 2.

¹⁶Cherokee Const. art. VI, § 11.

a requirement before entering upon the duties of the office of Councilor, further supports the finding of this Court regarding standing for members of the Cherokee Nation Council.

CHEROKEE CONSTITUTION AND GOVERNMENT

***"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."*¹⁷**

Prior to considering the merits of this action, it is necessary, and appropriate, to analyze the frame-work of the Cherokee Constitution and government.

This lawsuit is typical of many that have been filed with this Court in the recent past in that the root cause of the dispute can be directly traced to the insidious erosion of compliance with the spirit and the letter of the Cherokee Constitution, particularly Article IV, **Distribution of Powers**. This erosion is the result of pro-active abuse and wilful neglect and both are seen in this lawsuit. The thought that the Vice President of the United States, or the Lieutenant Governor of the State of Oklahoma, or any other member of the executive branch, would, in essence, attempt to meddle or take control of the legislative branch of government, and that the members of those respective legislative bodies would be so compliant and passive with such an illegal take over, is beyond the imagination.

¹⁷James Madison, *The Federalist*, No. 47, pp. 373-374 (Hamilton ed. 1880).

The Constitution of the Cherokee Nation establishes a system in which the power of government is divided among three separate, distinct, independent and equal branches. Article IV of the Cherokee Constitution provides as follows:

The powers of the government of the Cherokee Nation shall be divided into three (3) separate departments: legislative, executive and judicial; and except as provided in this Constitution, the legislative, executive and judicial departments of government shall be separate and distinct and neither shall exercise the powers belonging to either of the others.

The legislative body, called the Council of the Cherokee Nation, was established in Article V, and unlike the system of the federal government, the Cherokee legislative body is unicameral. The Council's responsibility regarding the Cherokee Nation's fiscal affairs are extensive.¹⁸ In particular, all expenditures of money by the Cherokee Nation must be approved by a quorum of the Council prior to such expenditure, and the money so designated shall be used for no other purpose.¹⁹ In performing such a vital role, it is absolutely imperative that the Council position itself so that it can truly be an effective trustee and guardian over the Nation's financial affairs, for the benefit of the Cherokee people. The Council cannot adequately perform its constitutionally mandated role unless it has complete, reliable and timely information regarding the state of the Nation, particularly the Nation's financial affairs. Otherwise, the Council is not complying with its

¹⁸Cherokee Const. art. X.

¹⁹Cherokee Const. art. X, § 8.

constitutionally mandated responsibilities, and in particular, it is failing in performing its duties to Cherokee citizens.

The executive department was created in Article VI of the Cherokee Constitution. It establishes the offices of Principal Chief and Deputy Principal Chief, which are roughly equivalent to the offices of President and Vice President of the United States, and Governor and Lieutenant Governor in some of the states of the United States of America. Also within the executive department is the cabinet, which was created by Article VII of the Cherokee Constitution.²⁰ Members of the cabinet are to be appointed by the Principal Chief and approved, or rejected, by the Council. The Principal Chief prescribes the duties and responsibilities of the cabinet members; provided, that such prescriptions cannot be such as to invade the non-assignable constitutional duties of the Principal Chief, and do not infringe upon, impair, or diminish the office of Deputy Principal Chief; and, provided that such prescriptions, by their terms or by their application, do not attempt to grant power or duties properly belonging to another branch of government. The Council may create cabinet positions and departments in addition to the original five (shown in footnote 20) but it can do so only upon the recommendation of the Principal Chief. "The Council may, with recommendation of the Principal Chief, abolish any established cabinet position or function or revise the

²⁰The original five (5) constitutionally mandated cabinet positions were: Secretary-Treasurer; Secretary of Health, Education and Welfare; Secretary of Commerce and Industrial Development; General Counsel; and Secretary of Communications. Cherokee Const. art. VIII.

title or responsibilities of any foregoing department or function."²¹

The constitutional duties, powers and responsibilities of the Deputy Principal Chief are rather limited; they are found in Article VI of the Cherokee Constitution. The office of the Deputy Principal Chief is within the executive branch of government.²² Obviously, the Deputy Principal Chief does not, and cannot, assume the power or duties of the Principal Chief on those occasions when the Principal Chief is away from the Cherokee Nation. The powers and duties of the Principal Chief devolve to the Deputy Principal Chief upon, and only upon, the absence of the Principal Chief from office due to death, resignation, removal, or inability to discharge the powers and duties of the office.²³ Absence from the Tribal Complex or the Cherokee Nation by the Principal Chief does not constitute an inability to discharge the powers and duties of the office. The Deputy Principal Chief shall, by virtue of his office, aid and advise the Principal Chief in the administration of the government and shall be President of the Council but shall vote only for the purpose of breaking a tie vote.²⁴ The duties of the Deputy Principal Chief, in the role of the titular head of the

²¹*Id.*

²²*Id.*

²³*Id.* § 4.

²⁴*Id.* § 11.

Council, as its President, are only ceremonial in nature, and this will be discussed later.

The powers of the Deputy Principal Chief should not be confused with the powers of the Principal Chief under Section 5 of Article V of the Cherokee Constitution. By way of example, unless the Principal Chief dies, resigns from office, is removed from office, or is unable to discharge the duties and powers of the office, the Deputy Principal Chief cannot call a Special Meeting of the Cherokee Nation Council.²⁵ The power to do so cannot be delegated to him by the Principal Chief.²⁶

The duties of the Deputy Principal Chief are not necessarily limited to those specifically enumerated in the Constitution. For example, the Principal Chief could delegate some duties to the Deputy Principal Chief, the performance of which might be of assistance to the Principal Chief, so long as the tasks delegated do not constitute an evasion of the responsibilities which can only be performed by the Principal Chief, pursuant to the Cherokee Constitution.

In some instances, the legislative branch could validly grant additional responsibilities to the Deputy Principal Chief, provided such legislation does not infringe upon, impair, or diminish the office of Principal Chief, and provided such legislation does not constitute, by its terms or by its application, a grant or

²⁵Cherokee Const. art. VI, § 8.

²⁶Cherokee Const. art. XIII.

delegation of power or duties properly belonging to another branch of government, including the Council itself.

In essence, the powers, duties and responsibilities of the Deputy Principal Chief are very narrow in scope, and are limited to providing assistance and advice to the Principal Chief, performing only the delegable duties assigned by the Principal Chief and/or Council, if any, and acting in a ceremonial role as President of the Council. This does not mean that the office of Deputy Principal Chief is insignificant insofar as the government of the Cherokee Nation is concerned. To the contrary, the responsibilities of the Deputy Chief as set forth above are very important. Moreover, the individual occupying that office is only one heartbeat away from becoming Principal Chief in the event the Principal Chief dies, resigns, is removed from office, or is unable to function.²⁷ Therefore, it is critical that the occupant of that office be aware of, and involved in, all issues facing the Cherokee Nation. That duty is performed by conferring regularly with the Principal Chief, and acting as a liaison from the executive branch with the Tribal Council in the ceremonial role as its president.

The judicial branch, called the Judicial Appeals Tribunal, was created in Article VII of the Cherokee Constitution. *Unlike the Constitution of the United States, there is no explicit provision in the Cherokee Constitution for the establishment of any inferior courts* (e.g. state and federal district courts). Therefore, the

²⁷Cherokee Const. art. VI, § 4.

Judicial Appeals Tribunal is both the supreme court and the court of original jurisdiction within the Cherokee Nation. There is no appeal from a decision of the Judicial Appeals Tribunal and a decision of this Court is final insofar as the judicial process of the Cherokee Nation is concerned.²⁸ This does not violate any rights under the United States Constitution, for as the United States Supreme Court has stated, there is no constitutional right to appeal.²⁹ The Cherokee Constitution does not grant either the legislative, or executive branch the power to limit, regulate, or otherwise curtail the jurisdiction vested in the judicial branch by Article VII.

Having no constitutional basis, but rather being purely a creature of statute, a district court system has been established in the Cherokee Nation. The district court is a court of limited jurisdiction within the Cherokee system of jurisprudence. This Court held in *Mayes*:

1. Jurisdiction granted to the district court is concurrent with that of this Court and this Court has applied the Abstention Doctrine to those limited cases that were specifically listed in Legislative Act 11-90.³⁰
2. The jurisdiction of the district court to hear and decide cases of the nature covered by Act 11-90 will be strictly construed, as to not infringe upon the constitutional authority of the Judicial Appeals Tribunal.

²⁸Cherokee Const. art. VII.

²⁹*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

³⁰In general, by category: (1) crimes, (2) civil causes of action, (3) domestic relations, and (4) "miscellaneous."

3. The district court has no jurisdiction to hear and determine issues where a violation of the Constitution is alleged, or cases where the Constitution or legislative acts must be interpreted.³¹

This Court has not ruled that the legislation creating the district court is an unconstitutional infringement upon the authority of the Judicial Appeals Tribunal, in violation of Article IV of the Cherokee Constitution. Instead, the legislation has been construed to create a district court system which is, in effect, the trial division of the Judicial Appeals Tribunal. This treatment has been given in deference to the Council. When there are two possible interpretations of an enactment by the Council, one of which would render it unconstitutional, this Court, if at all possible, will adopt the alternative construction which will uphold the enactment.³² Consequently, Legislative Act 11-90, in order to avoid being declared unconstitutional, must be construed in this manner.

All decisions of the Cherokee Nation district court are subject to review by the Cherokee Nation Judicial Appeals Tribunal as a court of final review.³³ "District judges and associate district judges shall attend and participate in the Annual Judicial

³¹In addition to matters involving disagreements arising under the Cherokee Constitution and/or enactments of the Council, the Judicial Appeals Tribunal has original and exclusive jurisdiction over decisions made by the Registration Committee (tribal membership) under Article III, and Employee Rights under Article XII of the Cherokee Constitution.

³²*City of Norman v. Liddell*, 596 P.2d 879 (Okla. 1979).

³³20 C.N.C.A. § 11.

Conference called by the Chief Justice of the Judicial Appeals Tribunal."³⁴ The Judicial Appeals Tribunal exercises general superintendence over the district courts, and prescribes the rules of practice in the trial of district court cases, pursuant to its inherent constitutional powers, and also 20 C.N.C.A. §§ 52 and 53. "All decisions made by the Judicial Appeals Tribunal shall have the force of law, as to the construction and application thereof, in all the courts of this Nation, until such construction or application shall be limited, altered, or in any manner amended, by the subsequent decision of a subsequent case by the Judicial Appeals Tribunal."³⁵ Inasmuch as decisions of the Judicial Appeals Tribunal are part of the law of the Cherokee Nation, the Principal Chief, pursuant to art. 6, § 10 of the Constitution, must comply with, obey and follow the decisions and orders of the Judicial Appeals Tribunal. The same is true for all elected and appointed officials, pursuant to their oaths of office, as provided for in art. XIII, § 1.

The Judicial Appeals Tribunal, and not the executive and/or legislative branches, possesses the ultimate responsibility for and the final word in interpreting the law of the Cherokee Nation, just as the United States Supreme Court has in the federal system.³⁶ Furthermore, "All decisions of the Judicial Appeals Tribunal,

³⁴20 C.N.C.A § 23.

³⁵20 C.N.C.A. § 54.

³⁶*Marbury v. Madison*, 1 Cranch 137, 2 L.Ed.60 (1803).

*(intermediate and final) shall be made and rendered, as well for the government and guidance of the lower courts and the citizens of this Nation in general, as for the just and true interpretation of the law, and the settlement of the dispute and administration of justice between the parties."*³⁷

The Constitution of the United States of America provides for division of governmental powers between three branches, or departments, of government. The government of the United States has been in operation under that Constitution since March 4, 1789.³⁸ A vast amount of tradition, experience, and law has been developed since that date regarding the operation of such a government, and the proper roles to be performed by each branch. From this heritage, valuable guidance can be obtained and used for the benefit of the government of the Cherokee Nation, in particular, and the Cherokee people, in general. (Much can also be learned as to what should not be done). One of the doctrines that has developed over the last 209 years is that of "separation of powers."

The Constitution divides the National Government into three branches — legislative, executive and judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

³⁷20 C.N.C.A. § 56, (emphasis added).

³⁸5 Wheat 420, 5 L. Ed. 124.

"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is not to be performed by a given branch. For example, Article III's grant of the "Judicial Power of the United States" to federal courts has been interpreted both as a grant of exclusive authority over certain areas,³⁹ and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by the courts.

The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the executive department is the branch most likely to forget the bounds of its authority, "in a representative republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions . . .," barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments.⁴⁰

With history, and the guidance provided by the doctrine of separation of powers, which is a fundamental element of the Cherokee Constitution, the following is clear: To fully perform their respective duties, each of the three departments of government must be free⁴¹ from the direct control of the others in accomplishing

³⁹*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, [1803].

⁴⁰*United States v. Brown* 381 U.S. 437, 85 S.Ct. 1707, 1712 (1965) (citations omitted).

⁴¹This is not to suggest that any department be unaccountable to the Nation for its actions. To the contrary, timely and thorough audits by truly independent, skilled and licensed auditors are an absolute necessity for good governance of the Cherokee Nation.

their day-to-day tasks and business, within the bounds of the law.

In order to be free of the direct control of the other branches, and to avoid the tyranny which always develops when too much power is concentrated in one branch, each of the three branches of the government of the Cherokee Nation must be adequately funded so that the constitutionally mandated duties of each can be performed. The failure to properly fund any one or more of the three branches of government is, in itself improper, and results in the entire government operating on an unconstitutional basis. Moreover, each branch must have complete independent control over, and responsibility for, the funds allocated for its operation, without any interference whatsoever by the other branches.

The "golden rule" of the cynic is: He who has the gold, *rules*. And so it is in any government system where one branch has complete control over the daily expenditures of the other branches. Applying the principles of James Madison, such control cannot be permitted to exist in a democratic form of government as established by the Cherokee people in their Constitution. As long as one branch alone holds the checkbook, the only checkbook, the constitutional independence of the other branches is in constant jeopardy of being destroyed, and tyranny will rule.

The reality is, where only one branch has control over the expenditures of another branch, for the continued operations of the other branches, such funding can be terminated in a heartbeat. To say that such a situation puts a chill on constitutionally mandated

independence of the other branches is not inaccurate. All three branches should have their own, respective, support personnel and their own, respective, bank accounts out of which they can fund their day-to-day operations. A democratic form of government, such as the one the Cherokee Nation utilizes, is not operating in compliance with the spirit of the Separation of Powers Doctrine if one branch alone controls the checkbook. If only one branch has complete control over the funds allocated to the other branches of government, then the spirit of the Separation of Powers Doctrine is being violated, and then so are the constitutional freedoms of all Cherokee citizens.

In the Cherokee Nation, the Tribal Council should have a well-trained, skilled, independent, intelligent and dedicated accountant to advise it in performing its responsibilities of controlling the finances of the Cherokee Nation. The power to select, retain and dismiss the chosen accountant, and related staff members, must reside in the Council itself, free of influence and control of any other branch of government. One branch of Cherokee government, whether by influence or any other means, including statutory enactments, cannot select the personnel to be utilized by another branch.

Currently the quality and quantity of financial and other information provided to the Council by the executive branch (if provided at all) appears to be dismal according to verified complaints filed by various Councilors with this Court. The establishment, and independent operation, of something equivalent to the

Federal Office of Management and Budget and/or the General Accounting Office, would certainly not be inappropriate. The Council should also have an independent legal counsel who is "all their own," who does not possess a personal or political agenda, and who is not under the direct or indirect control or influence of another branch of government.⁴² Those who make the laws should have lawyers, free of control and influence of any other branch, to provide competent advice.

Whether, of course, the members of the Council wish to heed these suggestions is up to them; neither the judiciary nor the executive can make the Council "do its job," absent a legal controversy before this Court. The converse is that neither the Court nor the administration can keep the Council from performing its duties, assuming nothing the Council is doing is unconstitutional.

⁴²Councilor Phillips is being represented by a lawyer in private practice, James G. Wilcoxon. The Defendant has a pending Motion to Disqualify Mr. Wilcoxon on the grounds of conflict of interest. That Motion will be dealt with in another Order. Deputy Principal Chief Eagle is being represented by Janice Walters Purcell, staff attorney with the Department of Law and Justice, and Rex Earl Starr, General Counsel of the Cherokee Nation; Ms. Purcell has signed the pleadings. In the Motion to Dismiss this lawsuit, Defendant cites this Court's decision in *Mayes*. In *Mayes*, one of the defendants was Councilor Troy Wayne Poteete. Councilor Poteete's lawyers were L. Susan Work and James G. Wilcoxon, who were also representing the other defendants (except one) in the case, who were Administration officials/employees, and the Cherokee Nation, itself. All pleadings for Councilor Poteete were signed by Ms. Work, except for an Entry of Appearance signed by Mr. Wilcoxon. At the time, Ms. Work was a lawyer with the Department of Law and Justice, and Mr. Wilcoxon was the General Counsel of the Cherokee Nation.

There is nothing in the record regarding whether a lawyer(s) is, or has been, preparing the language for legislation, resolutions and the like for consideration by the Council, at the Council's request *or otherwise*. Nor is there anything in the record on whether the Council has, or is, receiving any general legal assistance from a lawyer(s). Certainly such services are, or should be, of great importance to the Council. In any event, given the ethics position taken by Law and Justice regarding Mr. Wilcoxon, it is the Court's hope that the current Law and Justice lawyers have not been providing services for the Council.

One of the Court's roles is to adjudicate disputes regarding the procedure utilized in conducting the business of Council. The Court's obligation in this regard is only performed within the framework of a lawsuit and then this Court only makes judgment as to whether procedure used passes the test of the law, and not whether that which is being done is wise. In like measure, the Court does not pass judgment on the wisdom of enacted legislation, within the framework of a lawsuit, but rather, on whether the legislation can pass the test of being constitutional.

In this delicate, three-way exercise of power, the task of the executive branch is enormous. It is the executive branch's right, responsibility and solemn duty to implement the enactments of the Council, and to comply with the interpretations of those enactments and interpretations of the Cherokee Constitution by the Judicial Appeals Tribunal, with vigor, skill, integrity and fidelity; no more, no less.

THE PRESENT CONTROVERSY

The heart of Councilor Phillips' lawsuit is the June 16, 1998, memorandum from J. Garland Eagle, Deputy Principal Chief. The contents of this memorandum are set forth above.

The June 16, 1998, memorandum by Deputy Chief Eagle uses the words "reschedule, cancel and suspend," in describing his actions regarding the meetings of the Standing Committees, and the status of the appointments of the chairpersons and co-chairpersons of those committees. Councilor Phillips argues that this memorandum in effect "suspends" the scheduled meetings of those committees,

and likewise "suspends" the appointments of those Council members who chair those committees. In opposition, Deputy Chief Eagle argues that he did not suspend anything, he only "rescheduled" those matters. Regardless of the words used in the memorandum, and the characterization of these terms by Councilor Phillips and Deputy Chief Eagle, the issue is:

Does the Deputy Principal Chief, as President of the Tribal Council, have the legal right, under Cherokee law, to reschedule, cancel and/or suspend Standing Committee meetings of the Council, and also suspend, revoke or prohibit the appointments of Standing Committee chairpersons and co-chairpersons?

As previously discussed, the government of the Cherokee Nation is divided into three equal but separate branches.⁴³ Under the separation of powers doctrine which is an inherent part of the Cherokee Constitution, the members or employees of one branch cannot exercise control or dominion over another branch.⁴⁴

Pursuant to the Cherokee Constitution, the Deputy Principal Chief is designated as President of the Council.⁴⁵ Other than being granted the constitutional responsibility of voting in case of a tie, the Constitution grants no other power to the Deputy Principal Chief, acting in the capacity of President of the Council.⁴⁶ It certainly does not bestow upon the occupant of that office the right to reschedule, cancel and/or suspend any activi-

⁴³Cherokee Const. art. IV.

⁴⁴*United States v. Brown*, supra.

⁴⁵Cherokee Const. art. VI, § 11.

⁴⁶*Id.*

ties of the Council, including Standing Committee meetings. Moreover, the Cherokee Constitution does not grant the Deputy Principal Chief the power to suspend, revoke or prohibit the appointment of Standing Committee chairpersons and co-chairpersons. Furthermore, under the Cherokee Constitution, the Deputy Principal Chief, acting as President of the Council, does not possess the power to determine what items of business, will, or will not be, placed for consideration, on the agenda of any Tribal Council meeting, nor does the Deputy Principal Chief have any control over the budget allocated for Tribal Council operations, or expenditures from that source of funds by individual Council members. That responsibility belongs to the Tribal Council exclusively, as does the responsibility of hiring, retaining and terminating the staff members of the Council. The Tribal Council is a separate, distinct and independent branch of government, and must, in order to satisfy its constitutionally mandated responsibilities, be free of control and influence of any other branch of government in any manner or fashion whatsoever. For the Deputy Principal Chief to exercise any influence over the Tribal Council by rescheduling, canceling and/or suspending any meetings of the Council, suspending any appointments of the Council, including Standing Committee chairpersons and co-chairpersons, and by having control over the Tribal Council agenda or control over expenditures from the Council budget by individual Council members, is constitutionally impermissible.

As noted earlier, the legislative branch may validly grant rights, duties and powers to the Deputy Principal Chief, provided

such legislation does not infringe upon, impair or diminish the office of Principal Chief, and provided such legislation does not constitute, by its terms or by its application, a grant of power or duties properly belonging to another branch of government, including the Tribal Council.⁴⁷

The Deputy Chief argues that a statute, 19 C.N.C.A. § 12, constitutes part of the authority upon which he relied in the issuance of his memorandum. This statute provides:

Membership on all Standing Committees shall be by appointment of the Deputy Principal Chief with nominations for the appointments coming from the Council of the Cherokee Nation. Without good cause shown, no appointment of a nominee shall be denied. All nominations shall be brought before the Council for approval and confirmation. The Principal Chief and Deputy Principal Chief shall serve as non-voting Ex Officio members of any Standing Committee. The Council shall set the number of members to serve on each Standing Committee.

The Deputy Principal Chief seems to suggest that inasmuch as this statute grants him the authority to appoint members to all Standing Committees, he also has the power to remove the members and, basically, do whatever he wishes relative to the Committees. The statute does not support such a construction. However, the problem here is not whether the statute supports the interpretation as urged by Deputy Chief Eagle. The problem is more basic: 19 C.N.C.A. § 12 violates Article V, § 2⁴⁸ and Article IV⁴⁹ of the

⁴⁷Cherokee Const. art. IV.

⁴⁸The Council shall establish its rules for its credentials, decorum and procedure.

⁴⁹... the Legislative, Executive and Judicial departments of government shall be separate and distinct and neither shall exercise the powers belonging to either of the others.

Cherokee Constitution and is void.⁵⁰ ⁵¹ No branch of government may delegate, assign, transfer or convey its constitutional rights, duties and/or obligations to any other branch of government.⁵²

The provisions of 19 C.N.C.A. § 12 which provide that the Deputy Principal Chief appoints members, to Standing Committees, and by implication, can remove them, is an impermissible delegation of the inherent constitutional power of the Tribal Council to select its own Committee members, and is void. The defect apparent on the face of the statute cannot be cured, and has not been cured, by custom or tradition, or acceptance over a period of time, if this practice has in fact been accepted, as alleged by the Deputy Principal Chief. Any accepted custom or tradition, regardless of the length of time of such acceptance, which is legally wrong, must ultimately fail when properly challenged and appealed to a court of strong character which possesses the will to follow the law, regardless of the personal consequences.⁵³ Here, the practice and tradition, memorialized by statute, of allowing the Deputy

⁵⁰*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).

⁵¹When there are two possible interpretations of an enactment by the Council, one of which would render it unconstitutional, this Court will adopt the alternative construction which will uphold the enactment. *City of Norman v. Liddell*, supra. There is only one intellectually honest interpretation that can be given to this statute, and it leads to the inescapable conclusion that, the statute violates the Cherokee Constitution.

⁵²Cherokee Const. art. IV.

⁵³Compare *Plessy v. Ferguson*, 163 U.S. 537, 165 S.Ct. 1138, 41 L.Ed. 256 (1896) to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Principal Chief to select members of Standing Committees, and by implication, remove them, is void, and must cease, immediately.

The statute also states that the Principal Chief and the Deputy Principal Chief shall serve as non-voting Ex Officio members of any Standing Committee. The legislative branch cannot command, order, or direct any member of the executive branch to serve on any Council committee.⁵⁴ Likewise, the Council cannot allow any member of any other branch of the Cherokee government to serve on its Standing Committees, Ex Officio, or in any capacity whatsoever. Let there be no mistake, this Court is not saying that the Principal Chief, the Deputy Principal Chief, their representatives, or officials from the judicial branch, cannot be invited to participate in discussions during, or testify at, Council committee meetings. Indeed, communication between the legislative and the other branches is an important component toward promoting good governance, and is encouraged.

Those who drafted and approved the Cherokee Constitution were well aware of the Constitution of the United States of America, and fashioned the Cherokee Constitution similar to the United States Constitution.⁵⁵ As to the office of Deputy Principal Chief, this becomes readily apparent when one compares the language in the Cherokee Constitution: *The Deputy Principal Chief . . . shall be President of the Council but shall vote only for the purpose of*

⁵⁴Cherokee Const. art. IV.

⁵⁵Cherokee Const. art. I.

breaking a tie vote,⁵⁶ to the following language in the United States Constitution: *The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.*⁵⁷ It is apparent, and this Court so finds, that those who drafted and approved the Cherokee Constitution intended that the powers and duties of the Deputy Principal Chief, in the capacity as President of the Council, be strictly limited to presiding as the Chair of the Council, under rules for credentials, decorum, and procedure to be established by the Council, to vote only in the event of a tie, and no more. The Deputy Principal Chief is not the alter ego of the Council of the Cherokee Nation by virtue of having the title of President of the Council of the Cherokee Nation.⁵⁸ In the capacity as President of the Council, as part of the ceremonial functions of that position, the Deputy Principal Chief must accept the appointment of Standing Committee chairpersons and co-chairpersons, once such appointments have been made by the Council, but in no event does the Deputy Principal Chief have the power to reject such appointments. Likewise, the Deputy Principal Chief, nor any other member of the executive branch, cannot remove such members once selected by the Council.

⁵⁶Cherokee Const. art. VI, § 11.

⁵⁷U.S. Const. art. I § 3.

⁵⁸Cherokee Const. art. V, art. VI.

COUNCIL COMMITTEES

Section 6 of Article V of the Cherokee Constitution begins: *All meetings of the Council and its committees . . .* By implication it is obvious that the framers of the Cherokee Constitution intended, and anticipated that, as part of business of the Council, the Council would establish committees. With 19 C.N.C.A. § 11, the Council established "Standing Committees."⁵⁹

As attachment to Plaintiff's "Brief in Support of Petition . . .," are the "Minutes of Tribal Council Meeting --- Special Session --- September 21, 1995 --- 5:00 p.m." Those minutes reflect that the Chairpersons and membership of the Standing Committees were established by the Council at that Special Meeting of the Cherokee Nation Council.⁶⁰ In Defendant's "Motion to Dismiss . . .," and therein referring to 19 C.N.C.A. § 12 as authority, the Defendant states: "Currently, the proscribed procedure has not been followed, thus the membership of the Standing Committees needs to be established at the next regularly scheduled Council meeting." Enough has been said about § 12.

There is nothing in the Council minutes to reflect any irregularity in the Special Meeting on September 21, 1995. Unless clear

⁵⁹A) Community Development/Tribal Services; B) Rules Committee; C) Resources Committee; D) Employment Committee; E) Executive and Finance Committee; F) Education Committee; and G) Health Committee. *Id.* Nothing in the statute, nor the Constitution, prevents the creation of additional committees by the Council.

⁶⁰"President Eagle recommended confirmation of those named and members of all standing committees. Council member Scott motioned for approval. Councilman Lay seconded the motion. Motion carried." *Id.*

and convincing evidence is presented to the contrary, the Court always presumes that the Cherokee Nation Council has conducted its business properly. Consequently, the election of the Chairpersons, and the membership of the Tribal Council Standing Committees, as accepted by the Deputy Principal Chief acting in his ceremonial role as President of the Council, was proper. Therefore, the chairpersons and membership of the various Council committees shall remain as so established for the remainder of the respective terms on the Tribal Council of the Councilors so chosen, absent death or resignation.

POLITICAL QUESTION AND DIVISIVENESS

As part of the rationale stated in support of the Motion to Dismiss filed by the Deputy Principal Chief, he states that granting the relief the Plaintiff requests could be divisive to the Cherokee Nation. The "divisiveness" argument is curious and illogical. In this case, the divisiveness already exists. That is why the parties are before the Court. And granting the Defendant the relief he requests, a dismissal, would be no less divisive than granting the Plaintiff the relief which he requests.

The United States Supreme Court was presented with a similar argument in *Powell v. McCormack*.⁶¹ *Powell* concerned an intra-branch (the House of Representatives) dispute. The question before the Supreme Court was whether the House of Representatives had the power to exclude from its membership the Plaintiff who had been

⁶¹395 U.S. 498, 89 S.Ct. 1944 (1969).

duly elected by the voters of his district and who was not ineligible to serve under the United States Constitution. The argument was made that the case should be dismissed as it raised a political question "because judicial resolution of petitioner's claim would produce a "potentially embarrassing confrontation between coordinate branches" of the federal government.⁶² The Supreme Court stated, however, that a determination of the case would require no more than an interpretation of the Constitution. "Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial determination of a kind clearly for nonjudicial discretion.'"⁶³

The following words from the *Powell* decision state the position of this Court: Our system of government requires that . . . courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts avoiding their constitutional responsibility.⁶⁴ This Court will not dismiss a lawsuit between officials in two separate branches, or within one branch, of the government regarding their respective lawful roles for no reason other than

⁶²89 S.Ct. 1944, 1978 (emphasis added).

⁶³*Id.* (citations omitted).

⁶⁴*Id.* (citations omitted) (emphasis added).

the granting of the relief requested might be divisive, in general, and/or unsettling to some official(s), in particular.

RELIEF REQUESTED

Councilor Phillips has requested a preliminary and permanent injunction, and a "declaratory ruling that the actions taken by the Deputy Principal Chief are unconstitutional, and, as such, void."

"The Federal Rules of Civil Procedure shall be used in the Cherokee Nation Courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of civil procedure".⁶⁵ (The Federal Rules of Civil Procedure shall be referred to herein as "FRCP"). FRCP Rule 65 concerns injunctions and FRCP Rule 57 concerns declaratory judgments. Neither Rule has been superseded by a Cherokee Nation rule of civil procedure.

INJUNCTIONS

....[I]t should be noted that there are basically three types of injunctions that can be issued by a federal court and that, at least to some extent, [they] are governed by the rule [that is, FRCP Rule 65] --- the temporary restraining order, the preliminary injunction⁶⁶, and the permanent injunction. All three orders are similar in their effect since they require a party to either do or to refrain from doing some act, and are enforceable by contempt. However, they differ in that the rule specifies special procedural requirements for temporary restraining orders and preliminary injunctions and the timing, as well as the duration, of each of the three orders varies. A temporary restraining order typically is sought and issued on an ex parte [that is, without notice to the other side] basis and operates to prevent immediate irreparable injury until a hearing can be held to determine the need for a preliminary injunc-

⁶⁵12 C.N.C.A. § 1, Cherokee Const. art. VII.

⁶⁶A "preliminary injunction" is referred to in some state courts as a "temporary injunction" or an "interlocutory injunction." 42 Am Jur 2d, Injunctions, § 13.

tion. A preliminary injunction is effective pendente lite [that is, while the lawsuit is pending] until a decision has been reached at a trial on the merits. A permanent injunction will issue only after a right thereto has been established at a trial on the merits. Indeed, in deciding whether to grant permanent injunctive relief, a trial court is bound neither by its own decision respecting preliminary injunctive relief, nor by that of the appellate court. In some actions all three types of relief may be ordered by the court.⁶⁷

The Court finds that Councilor Phillips has shown present and continuing irreparable harm to the operations of the Council of the Cherokee Nation, and his participation therein as a member of the Council, through the impermissible interference with Council operations caused by the June 16, 1998, memorandum, issued by the Deputy Principal Chief, and the actions taken thereunder. The Court further finds that a legal remedy (money damages) has not been requested and, even if it were, it would probably be inappropriate and it would clearly be inadequate.

The Court has not previously granted any injunctive relief in this lawsuit. The reasons are simple. Often, the Court must weigh and adjust its actions against competing considerations. The issues in this lawsuit are of enormous magnitude to the parties, the government and the people of the Cherokee Nation. The granting of a preliminary injunction before giving a full explanation of the law would not be prudent. In this lawsuit, Councilor Phillips' cause demands an injunction; on the other hand, Deputy Principal Chief Eagle is entitled to an explanation as to why the injunction is being granted.

⁶⁷Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2941. (citations omitted).

With the concurrence of the parties, the case has been submitted to the Court on the pleadings, briefs and associated materials. There is no need for a determination of Councilor Phillips' claims at a "trial on the merits". The reason for this, as earlier noted, is simple: as a matter of law, there is no dispute between the parties as to the facts in the case which would require a hearing; a decision in this case, by the Court, requires an interpretation of Cherokee law, only. Therefore, the injunction issued herewith is permanent, and not "preliminary." Consequently, the considerable discussion in Deputy Chief Eagle's brief, in regards to the law pertaining to preliminary injunctions, is moot.

DECLARATORY JUDGMENTS

"A declaratory judgment is one which declares the rights and duties, or the status, of the parties."^{68, 69} FRCP Rule 57 provides that the procedure for obtaining a declaratory judgment⁷⁰ is

⁶⁸22 Am Jur 2d Declaratory Judgments, § 1. (citation omitted).

⁶⁹This definition describes the "end product," that is, the judgment, and it does not create a cause of action. The elements necessary to be present for a party to successfully pursue the cause of action are stated in 28 U.S.C. § 2201.

⁷⁰Actions for declaratory judgments represent a comparatively recent development in American jurisprudence. The traditional and conventional concept of the judicial process has been that the courts may act only when a [plaintiff] is entitled to a coercive remedy, such as a judgment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act.

At times, however, this approach created an undue hardship. There may be an actual dispute about the rights and obligations of the parties, and yet the controversy may not have ripened to a point at which an affirmative remedy is needed. Conversely, this stage may have been reached, but the party entitled to seek the remedy may fail to take the necessary steps. For example, the maker of a promissory note may have stated to the payee that the instrument would not be honored at maturity because, perhaps, his signature is claimed to have been forged or procured by fraud or affixed without his authority . . . [In this situation] the declaratory-

to be in accordance with the Federal Rules of Civil Procedure. The federal statute creating, in general, the cause of action for a declaratory judgment, is 28 U.S.C. § 2201, and it provides:

In a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

FRCP Rule 57 also provides that: "The existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate."

It is clear in the present lawsuit that there exists an actual controversy which concerns the legal relationship and rights associated therewith, between the Deputy Principal Chief acting in his capacity as president of the Council of the Cherokee Nation on the one hand, and the Council, itself, and Council members, themselves, on the other. This Court has found that Councilor Phillips has Cherokee standing to pursue the controversy in his official capacity as a member of the Council of the Cherokee Nation. It is also clear that FRCP Rule 57 does not prohibit one from pursuing a legal remedy (such as money damages) or an equitable remedy (such as an injunction) and also pursuing a declaratory judgment, or vice versa; thus it is an independent remedy. ". . . [T]he factors

judgment remedy . . . gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which a party who could sue for coercive relief has not yet done so. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2751. (citations omitted).

relevant to wise administration of the Federal Declaratory Judgment Act are equitable in nature. The propriety of issuing a declaratory judgment may depend upon equitable considerations. However, the traditional prerequisite for the granting of injunctive relief, demonstration of irreparable injury, is not a prerequisite to the granting of declaratory relief, since the statute clearly provides an adequate remedy at law, and hence irreparable injury is unnecessary."⁷¹

The factors under the Federal Declaratory Judgment Act, being equitable in nature, confer discretion upon the court as to whether to allow an action for declaratory judgment. "A declaratory judgement, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest."⁷²

A . . . court has the discretion to refuse declaratory relief when:

- the relief sought will not terminate the controversy giving rise to the proceedings;
- the action is being used for procedural fencing;
- an alternative remedy is better or more effective;
- another pending action will dispose of all controverted issues;
- a municipality of suite have been undertaken to harass the government or delay enforcement of a federal regulation;

⁷¹22A Am Jur 2d, Declaratory Judgments, § 3. (citations omitted).

⁷²22A Am Jur 2d, Declaratory Judgments, § 21.

- the relief is sought in anticipation of trial on the issue in a court of coordinate jurisdiction.⁷³

In this lawsuit between Councilor Phillips and Deputy Principal Chief Eagle, all of the proper elements are present in favor of this Court granting declaratory relief, and none of the discretionary factors against granting declaratory relief are present.

DECLARATORY RELIEF GRANTED

IT IS THEREFORE ORDERED, ADJUDGED, DECREED AND DECLARED, that:

1. To the extent the constitutional authority and powers of the Cherokee Nation Council are impaired, so too is the authority and power of each member of the Cherokee Nation Council, since the office of councilor confers a right to participate in the exercise of the authority and powers of the Council. The impairment, or threatened impairment, of the authority and powers of the Cherokee Nation Council is sufficient injury for each individual member of the Council to be invested with standing to sue.

2. The memorandum, dated June 16th, 1998, from J. Garland Eagle, Deputy Principal Chief, acting in his ceremonial capacity as Council president, constitutes an unconstitutional act as being an insidious violation of Article IV of the Cherokee Constitution.

3. The powers and duties of the Deputy Principal Chief, as president of the Council, are strictly limited to presiding as the chair of the Council, under rules for credentials, decorum, and procedure to be established by the Council, to vote only in the event of a tie, and no more. By way of example, *and not by way of*

⁷³*Id.*

limitation on the generality of the foregoing, neither the Deputy Principal Chief, nor anyone else in the executive branch, may:

- a. Suspend, cancel, call, schedule or re-schedule any Council committee meeting;
- b. In the ceremonial capacity as president of the Council, the Deputy Principal Chief must, and shall, accept all appointments of Council committee chairpersons and co-chairpersons selected by the Council on September 21, 1995. However, he cannot appoint, select, remove, approve or disapprove or in any way have any part regarding the membership of any Council committee.
- c. Approve, disapprove, select or reject any matter whatsoever on any agenda of any Council committee meeting or of any regular meeting of the Council, art. V, § 4, or any special meetings of Council, art. V, § 5, called upon written request of fifty-one percent (51%) of the members of Council [i.e. 51% of 15 being 8, art. V, § 3] or called upon written request of ten percent (10%) of the registered voters of the Cherokee Nation. [This prohibition regarding the agenda obviously does not apply to special meetings called by the Principal Chief in accordance with Article V, Section 5 coupled with Article VI, Section 8]. The Principal Chief can, of course, request of the Council that the administration's special legislation be placed on the agenda for consideration, and prudence dictates that high respect and courtesy be paid to such official request.
- d. Approve, disapprove, select or reject any rules regarding the credentials of Council members, nor the decorum, nor the procedure to be used and utilized by the Council.
- e. Interfere with, manage, control, approve or disapprove of any of the internal operations, or any components thereof, of the Council.
- f. Act of behalf of, and/or as the alter ego of, the Council of the Cherokee Nation.⁷⁴

⁷⁴Cherokee Const. art. IV.

- g. Act on behalf of the government of the Cherokee Nation when the advice and consent, review, accord, approval, acceptance, accedence, admission, authentication, certification, authority, authorization, *comprobatio*, concordance, confirmation, commendation, compliance, concession, corroboration, entitlement, grant, guarantee, legalization, license, acknowledgment, adoption, agreement, countenance, encouragement, endorsement, permit, permission, validation, sufferance, support, assurance, acquiescence, concurrence, recommendation, assent, affirmation, affirmance, allowance, recognition, ratification, endorsement, toleration, warrant, willingness, validation, verification, satisfaction, support, sanction, *approbatio*, approbation, collaboration, avowal, or blessing of the Cherokee Nation Council is required, explicitly or implicitly, without first obtaining a majority vote of Council with a quorum present at a regular or special meeting. Be there no mistake, the maxim, *qui non improbat, approbat*,⁷⁵ is rejected. No action taken by Council at a meeting, be it a regular or a special meeting, shall be valid unless notice is given as required by law and a quorum is present.⁷⁶ A quorum consists of 2/3 of 15, which is 10, and must be present before any action can be taken by the Council, whether at a regular or a special meeting of Council. There are no other categories of official Council meetings, other than "regular" and "special" as defined in Article V of the Cherokee Constitution. In computing the number present at a regular or special Council meeting, the presence of the Deputy Principal Chief, as President of the Council, is not to be counted.⁷⁷ The President of the Council can only vote for the purpose of breaking a tie vote at a properly noticed meeting at which at least ten (10) Councilors are present.⁷⁸ Neither the legislative branch, nor the executive branch, nor the legislative branch in concert with the executive branch, can change, modify, repeal or rescind these constitutional mandates.

⁷⁵He who does not disapprove, approves.

⁷⁶Cherokee Const. art. V, art. VI, § 8.

⁷⁷Cherokee Const. art. V, art. VI, §§ 8,11.

⁷⁸Cherokee Const. art. VI, § 11, art. V.

4. 19 C.N.C.A. § 12 violates Article V, § 2⁷⁹ and Article IV⁸⁰ of the Cherokee Constitution and is VOID. However, the Cherokee Constitution establishes, by implication, the right of the Council to establish such committees as it deems appropriate.⁸¹ The chairpersons and membership of the various Council committees were established by the Council on September 21, 1995. The involvement in the process by the president of the Council does not invalidate that action taken by the Council, as Deputy Chief Eagle was acting only in a ceremonial capacity in accepting the selections made by the Council. Therefore, the chairpersons and membership of the various Council Committees shall remain as established for the remainder of the respective terms of the Councilors so chosen, absent death or resignation.

5. No branch of government may delegate, assign, transfer or convey its constitutional rights, duties and/or obligations to any other branch of government.⁸²

6. This Court will not dismiss a lawsuit between officials in two separate branches, or within one branch, of the government regarding their respective lawful roles for no reason other than the granting of the relief requested might be divisive, in general, and/or unsettling to some official, in particular.

⁷⁹The Council shall establish its rules for its credentials, decorum and procedure.

⁸⁰. . . the legislative, executive and judicial departments of government shall be separate and distinct and neither shall exercise the powers belonging to either of the others.

⁸¹Cherokee Const. art. V., § 6.

⁸²Cherokee Const. art. IV.

INJUNCTIVE RELIEF GRANTED

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that:

1. J. Garland Eagle, Deputy Principal Chief of the Cherokee Nation and president of the Council of the Cherokee Nation, SHALL IMMEDIATELY CEASE AND DESIST, FROM NOW AND FOR SO LONG HEREAFTER AS HE SHALL REMAIN IN SAID OFFICE, FROM ANY AND ALL ACTIONS ARISING FROM THE MEMORANDUM OF JUNE 16, 1998, DESCRIBED HEREIN WITH PARTICULARITY, AND THAT HE IMMEDIATELY, UNEQUIVOCALLY AND UNCONDITIONALLY REVOKE IT AND ALL ACTIONS TAKEN BY HIM, OR BY OTHERS UNDER HIS CONTROL, EXPLICITLY OR IMPLICITLY, AND/OR AT HIS DIRECTION, EXPLICITLY OR IMPLICITLY, ARISING FROM, OR INCIDENTAL THERETO, OR CONSEQUENTIAL THEREFROM.

2. J. Garland Eagle, Deputy Principal Chief of the Cherokee Nation and president of the Council of the Cherokee Nation, SHALL TAKE NO ACTION, NOR CAUSE ANY TO BE DONE, NOR EXPLICITLY, NOR IMPLICITLY, APPROVE, CONDONE, NOR ASSIST ANY TO BE DONE INCONSISTENT WITH, OR CONTRARY TO, THOSE MATTERS DESCRIBED HEREIN ABOVE, UNDER THE HEADING OF DECLARATORY RELIEF GRANTED.

FURTHER IMPLEMENTATION

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Court Clerk of the Cherokee Nation, or the Deputy Court Clerk, shall immediately provide a copy of this Order by fax, or by mail, or in person, to all lawyers for the parties, and to any other person or entity requesting a copy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaratory Relief, and the Injunctive Relief, granted hereby, are both effective IMMEDIATELY.

IT IS SO ORDERED on this 25th day of July, 1998.

DWIGHT W. BIRDWELL,
JUSTICE

CHIEF JUSTICE KEEN CONCURS
JUSTICE VILES CONCURS IN THE RESULT

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