Cherokee Nation Election of 1995

Ahnawake Carroll[1]

INTRODUCTION

> *"[I]t is clear that the Framers of the 1975 Constitution intended, as did the Tribal Council, to set up a functioning Judicial branch of government, separate and distinct from the Legislative (Tribal Council) and Executive (Chief and Deputy Chief) branches of the government."*[2]

The 1995 Cherokee Nation tribal election precipitated a test of the constitutional distribution of powers within the Cherokee government. As a result, the tripartite Cherokee government resolved the constitutional test by relying on the judiciary to adjudicate various controversies arising out of the election. Specifically, the Cherokee judiciary was called upon to interpret both the Cherokee Constitution as well as codified Cherokee law regarding election issues affecting the entire Cherokee Nation for the next four years. The immediate effect was the Cherokee judiciary actively exercising its constitutionally delegated authority to rule on cases falling within its jurisdiction. The broader effect of this exercise of judicial power, however, served as an aggressive check on the legislative and executive powers of the Cherokee government for the first time in Cherokee history.

Separation of powers is one of the basic principles of American constitutionalism. [3] Although the "Constitution created separate executive, legislative, and judicial departments, it established no air tight compartmentalization of the branches."[4] As a result, the constitutional principle of checks and balances was established to "ensure the political independence of each branch and to prevent the accumulation of power in a single department."[5] Although these concepts of American constitutional law are found in form within the Cherokee Nation, tension often exists between these principles in the context of tribal application.

This paper will discuss the role of the Cherokee judiciary in the greater scheme of this distribution of power between the branches of Cherokee government. In addition, the role of the Cherokee judiciary will be considered in regard to judicial checks upon abuses of power by the legislative and executive branches of government. The mechanism through which this analysis will be filtered is the 1995 Cherokee tribal election. Using five selected rulings arising from the 1995 election, this paper will discuss ways in which certain judicial rulings served as an assertive check upon the independent powers of the Cherokee legislative and executive branches pursuant to the notion of governmental checks

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[2] Letter from Dwight Birdwell, Cherokee Nation Judicial Appeals Tribunal Chief Justice, to Joe Byrd, Principal Chief of the Cherokee Nation (Sept. 5, 1995) in GREGORY UPTON, A HISTORY OF THE JUDICIAL APPEALS TRIBUNAL (SUPREME COURT) OF THE CHEROKEE NATION 1990-1996 app. at Letters and Related Documents (1996) (on file with author) [hereinafter HISTORY OF THE JUDICIAL APPEALS TRIBUNAL].

[3] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.5 (6th ed. 2000).

[4] *Id.*

[5] *Id.*

and balances. In addition, the rulings will illustrate ways in which the judiciary either affirmatively exercised and firmly established its own separate power to interpret the Cherokee Constitution and the Cherokee Code, or acknowledged the independent powers of the other two branches of government to act in certain circumstances pursuant to the separation of powers doctrine. In addition, discussion will focus upon the perceptions and responses by the executive and legislative branches of Cherokee government to each successive judicial ruling, as well as the perceptions and responses of the Cherokee community at large.

To set the judicial rulings in proper context, this paper will offer a brief history of the Cherokee judiciary, the Judicial Appeals Tribunal, as well as the Cherokee Nation election process. The next section of the paper explains why the 1995 election was particularly significant. Finally, the paper will provide an overview of each judicial ruling; explore the perceptions and responses to the ruling; and analyze the importance of each case to the separation of powers, or checks and balances doctrines. Each case analysis will also consider factors that may have influenced the court's rationale, or have persuaded the court to rule a certain way in a particular case.

I. History of the Judicial Appeals Tribunal

A full understanding of the status and workings of the modern day Cherokee judiciary is impossible without some background regarding the development of the Cherokee Nation judicial system. The traditional territory of the Cherokee Nation originally encompassed the southeastern portion of the United States.[6] The Cherokee people originally had no written laws in the manner of the United States at large, but rather relied upon mutual submission to customary procedures as defined by clan membership.[7] In fact, during the eighteenth century, the Cherokee people at large had no centralized political system, police system, or formal court system.[8]

Although the traditional law governing the Cherokee tribe was well established and well adhered to by its members, external influences upon Cherokee life commenced as early as 1690.[9] Perhaps the greatest transforming factor upon Cherokee jurisprudence was the need to centralize the political power of the tribe in an effort to deal with external mechanisms such as encroachment on Cherokee land, intermarriage with non-Cherokees, and significant declines in Cherokee populations due to disease and warfare.[10] To that end, the Cherokee at different times adopted written constitutions and legal codes, a formal court, a general

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6 TILLER'S GUIDE TO INDIAN COUNTRY 502 (Veronica E. Velarde Tiller ed., 1996) [hereinafter TILLER'S].

7 JOHN PHILLIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION 231 (1970).

8 WILLIAM G. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 10-11 (1986).

9 *Id.* at 3.

10 V. RICHARD PERSICO, JR., *Early Nineteenth-Century Cherokee Political Organization, in* THE CHEROKEE INDIAN NATION 96 (1979).

council, and an internal policing system.[11] Although the Cherokee adopted many aspects of a western legal system, it should be noted that the important functions of the "clan relationships and responsibilities" were retained, albeit in a role secondary to that of the centralized government.[12] Thus, the Cherokee Nation was deeply entrenched in a modified system that included centralized government and formal codification of laws.

During the period 1838-1839, despite Cherokee protests in federal court, the Cherokee people were displaced to Indian Territory in what is now the state of Oklahoma.[13] Unfortunately, "[f]rom the end of the 19th Century until 1907, the Oklahoma Territory was being prepared for statehood."[14] Thus, despite the fact that "[b]y the time of Oklahoma statehood the Five Civilized Tribes had been operating their constitutional republics for more than three-quarters of a century,"[15] the grant of statehood in 1907 imparted a complete shutdown of the formal Cherokee government.[16] This termination of the Cherokee government effectively lasted for sixty-eight years.

In 1975, however, the Cherokee Nation began to reorganize itself pursuant to the federal Indian policy of self-determination.[17] The Cherokee Nation adopted its own governing Constitution in 1975 after a draft was submitted to the Cherokee populace for approval.[18] One specific area the Cherokee tribe targeted for revitalization was its judiciary.[19] In fact, according to one noted scholar, "[t]he most important Indian event since statehood [was] the rebirth of Indian tribal courts in Oklahoma."[20]

The 1975 Constitution adopted by the Cherokee people superceded the 1839 Constitution and specifically provided for the existence of a judicial branch of government.[21] Article VII of the Constitution states:

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11 *See* McLOUGHLIN, *supra* note 7, at 45, 287; See RENNARD STRICKLAND, FIRE AND THE SPIRITS 56, 58, 64, 65 (1975).

12 McLOUGHLIN, *supra* note 7, at 226.

13 TILLER'S, *supra* note 5, at 502.

14 Justice Philip H. Viles, Jr., Keynote Address at the Second Annual Native American Symposium at the University of Arkansas (Nov. 1995), in HISTORY OF THE JUDICIAL APPEALS TRIBUNAL, *supra* note 1, at app. at Newspaper Articles.

15 RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA 51 (1980).

16 Viles, supra note 13, at app. at Newspaper Articles. *See also* Chadwick Smith & Stephanie Birdwell, Cherokee Courts: A Historical and Modern Perspective 17 (1993) (on file with author) (specifically, "[t]he Cherokee people were bureaucratically prevented from electing their own Principal Chief and legislature" while "[s]chools and services previously controlled by the Cherokee Nation were administered through the Bureau of Indian Affairs" as a result of the Dawes Commission, the Oklahoma Enabling Act of 1907, and fluctuating federal Indian policies).

17 *See* generally DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 224-233 (4th ed. 1998).

18 GREGORY UPTON, *A History of the Judicial Appeals Tribunal (Supreme Court) of the Cherokee Nation 1990-1996, in* HISTORY OF THE JUDICIAL APPEALS TRIBUNAL, *supra* note 1, at 2.

19 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. VII.

20 STRICKLAND, *supra* note 14, at 76.

21 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. VII .

> There is hereby created a Judicial Appeals Tribunal composed of three (3) members all of whom must be admitted to practice law before the highest Court of the State of which they are residents, and all of whom shall be members of the Cherokee Nation, appointed by the Principal Chief and approved by the Council for such terms as the Council may provide. The purpose of this Tribunal shall be to hear and resolve any disagreements arising under any provisions of this Constitution or any enactment of the Council. The Council shall provide for a procedure which shall insure that any litigant receives due process of law together with prompt and speedy relief… The decision of the Judicial Appeals Tribunal shall be final insofar as the judicial process of the Cherokee Nation is concerned.[22]

The judicial branch of the Cherokee government was constitutionally mandated to exist as a "separate and distinct" branch of Cherokee government.[23] Article IV of the Constitution specifically directly addresses distribution of powers within the Cherokee Nation.[24] The language states that

> the powers of the government of the Cherokee Nation shall be divided into three (3) separate departments: the 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 properly belonging to either of the others.[25]

Notwithstanding the fact that the Cherokee Constitution delegated to the judicial branch the power to hear and resolve disagreements arising under any constitutional provision or any legislative enactment, the modern day embodiment of the Cherokee judiciary proved to be a relatively quiet entity in its formative years. Even as the Court matured, the most modern history of the Judicial Appeals Tribunal was a relatively peaceful time.[26] In fact, "[w]ith the exception of the annual judicial conferences, appearances before the Tribal Council, ceremonial functions and the presentations of annual reports, little else occurred."[27] Although the Tribunal caseload would increase slightly in the years after 1992, the subject matter of litigation was limited mostly to isolated incidents involving tribal employment issues, and one child custody dispute.[28]

In 1995, however, things changed when the Court heard over twenty cases.[29] This increased tender of cases before the Tribunal was partly due to the

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22 *Id.*

23 *Id.* at art. IV.

24 *Id.*

25 *Id.*

26 UPTON, *supra* note 17, at 1.

27 *Id.*

28 *Id.* at 8-9.

29 *Id.* at 11.

fact that 1995 was a tribal election year.[30] In fact, one-fourth of all actions filed for adjudication before the Tribunal in 1995 were "election controversies."[31]

In 1995, the Tribunal was composed of Chief Justice Dwight Birdwell, Justice Ralph Keen, and Justice Philip Viles. As this paper will demonstrate, these "three justices of the Cherokee Nation Judicial Appeals Tribunal were called upon by the Cherokee government and people more than ever in 1995, to make important decisions that effected [sic] the future of the Cherokee Nation."[32]

II. History of Cherokee Nation Election Process

The importance of the 1995 election to the Cherokee people, as well as to the increased utilization of the Cherokee Tribunal, can only be understood in the historical context of the Cherokee election process. When the Cherokee tribe historically moved to a more centralized form of government, the necessary outcome was recognition of "a strong principal chief with veto power over Council actions."[33] Accordingly, "[s]ome of the power formerly centered in the Council" was now held by the Principal Chief.[34] This centralized governmental structure continued well into the post-removal era as evidenced by the fact that "[e]lections for Principal Chief and for other offices were held at regular intervals from 1839 until Oklahoma's statehood in 1907, just as regular elections had been held for many, many years in the ancestral lands of the Cherokees."[35]

As noted earlier, however, the advent of statehood eradicated all forms of Cherokee self- government derived from an election process by the general Cherokee populous.[36] Although the Cherokee government did continue to exist, it was "on a very limited, appointed type basis."[37] In fact, from statehood through 1975 "the Principal Chief of the Cherokee Nation was appointed by the President of the United States on an 'as-needed' basis. These appointments in the early years were for one day at a time, when the Chief would sign documents, purporting to be acting as head of the Cherokee Nation."[38] In 1941, however, the President of the United States, Franklin Roosevelt, changed course of action and appointed a Cherokee Principal Chief to serve for an entire year, although without the support of a Deputy Chief or legislative body.[39] J.B. Milam served in this capacity as appointed Principal Chief until his death in 1949, whereupon United States

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30 *Id.*

31 *Id.*

32 *Cherokee tribunal called upon to make important decisions in 1995,* CHEROKEE ADVOCATE, Jan. 1996.

33 PERSICO, *supra* note 9, at 101.

34 *Id.*

35 Viles, *supra* note 13, at app. at Newspaper Articles.

36 *Id.* at 2.

37 Birdwell, *supra* note 1, at app. at Letters and Related Documents.

38 Viles, *supra* note 13, at app. at Newspaper Articles.

39 *Id. See also* Smith & Birdwell, *supra* note 15, at 19.

President Harry Truman named his successor W.W. Keeler.[40] Principal Chief Keeler held office as a presidential appointee until 1971.[41] In 1971, however, the Cherokee people held "the first election for Chief since statehood."[42] As a result Keeler "became the first chief elected by all of the Cherokee people since 1903."[43]

At the end of Keeler's term in 1975, another tribal election narrowly named Ross Swimmer as the new Principal Chief of the Cherokee Nation.[44] At this point, however, the Cherokee Nation was still a "one-person government."[45] Consequently, Principal Chief Swimmer quickly moved

> for the adoption of a new constitution because the election for principal chief had been so close and contentious. It was his hope that the constitution would have a unifying effect. It would also show [the Cherokee] people that he did not intend to usurp the government, but rather to lead as an executive with the power of the tribe divided among three separate entities.[46]

Overall, this new "constitution promised 'speedy and certain remedy' to all Cherokees who suffered wrong and injury. It also established a check-and-balance system within [the] tribal government, and allowed for all registered Cherokees to vote in tribal elections."[47] Although the adopted constitution failed to unite the tribe as hoped[48], it did result in the immediate election for a Deputy Chief and a fifteen member tribal council.[49]

The aspect of the Cherokee Constitution that is most relevant to our discussion here, however, is the section providing "a basic framework for holding elections."[50] The constitutional mandate is that "the Council shall enact an appropriate law not inconsistent with the provisions of this Constitution that will govern the conduct of all elections."[51] In addition, the Constitution states specific qualifications for a Tribal Council candidate to be a "member by blood of the Cherokee Nation," and to have attained "at least twenty-five (25) years of age on that date of the election."[52] In addition, "no person who shall have been convicted of or has pled guilty or has pled no defense to a felony charge under the laws of the

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40 Viles, *supra* note 13, at app. at Newspaper Articles. *See also* STANLEY W. HOIG, THE CHEROKEE AND THEIR CHIEFS 262 (1998).

41 Viles, *supra* note 13, at app. at Newspaper Articles.

42 *Id.*

43 WILMA MANKILLER & MICHAEL WALLIS, MANKILLER: A CHIEF AND HER PEOPLE 217 (1993).

44 *Id.* at 218.

45 Viles, *supra* note 13, at app. at Newspaper Articles.

46 MANKILLER & WALLIS, *supra* note 42, at 218.

47 *Id.*

48 *Id.*

49 Viles, *supra* note 13, at app. at Newspaper Articles.

50 *Id.*

51 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. IX, § 1.

52 *Id.* § 2.

United States of America, or of any State, Territory, or Possession thereof, shall be eligible to hold any office or appointment of honor, profit or trust within this Nation unless such person has received a pardon."[53] The Constitution further dictates that a person cannot simultaneously hold "any office of honor, profit or trust" in another tribe and in the Cherokee Nation without prior Council approval.[54] Finally, the Constitution declares that "all elections shall be determined by secret balloting."[55]

Additionally, the Cherokee Tribal Council has promulgated enactments per its constitutional authority over the years that serve to regulate the election process. These enactments "served for the elections of 1979, 1983, 1987 and 1991."[56] The legislative enactments were eventually codified for the express "purpose of conducting all Cherokee tribal elections, e.g., Principal Chief, Deputy Principal Chief, Council and Constitutional amendments and referenda of the Cherokee Nation."[57] Specifically, Title 26 of the Cherokee Nation Code regulates such election issues as: the tenure of elected officials; representation by district; voting by district; tribal election supervisory bodies; qualifications and registration of voters; qualifications of and filing by candidates; and conduct of elections.[58]

One specific election entity created by Cherokee legislation meriting mention is the Tribal Election Commission. The Tribal Election Commission is

> composed of five (5) members, two (2) appointed by the Council, two (2) appointed by the Chief and one (1) by those four (4), who shall have the sole responsibility and explicit authority for the conduction of all elections conducted by the Cherokee Nation, and shall serve for a period from the day of appointment until (6) months following the general election or as extended by the council.[59]

More specifically, "[i]t is the responsibility of this Commission to carry out the election laws as passed by the Council, supervise the declarations of candidacy, arrange the printing of the ballots and perform the background checks of the candidates as required by the election rules."[60] Furthermore, the "Tribal Election Commission shall be empowered to develop rules and regulations necessary to conduct tribal elections."[61] It should be noted that group members are unpaid and have "periodic meetings before the election and then intensive meetings during the actual election and counting of votes."[62]

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53 *Id.*

54 *Id.*

55 *Id.* § 3.

56 Viles, *supra* note 13, at app. at Newspaper Articles.

57 26 CHEROKEE NATION CODE ANNOTATED § 1 (1993) [hereinafter CNCA].

58 *See* 26 CNCA (Supp. 1994).

59 26 CNCA § 11(A) (1993).

60 Viles, *supra* note 13, at app. at Newspaper Articles.

61 26 CNCA § 11(F) (1993).

62 Viles, *supra* note 13, at app. at Newspaper Articles.

Nevertheless, in spite of the passage of legislative enactments aimed at facilitating tribal elections and the use of the Tribal Election Commission, all elections subsequent to the adoption of the Constitution in 1975 gave rise to litigation with the exception of the 1991 election.[63] The nature of the Cherokee elections is best illustrated by a former Principal Chief who stated that "because [the] tribe is so large, running for tribal office is much like running for Congress, or even a national political post. It is very much a mainstream process, complete with print and broadcast advertising, campaign billboards, rallies, and all that sort of thing."[64] Perhaps as a result, election controversies continue to emerge despite efforts at comprehensive constitutional and codified election law.

II. History of Cherokee Nation Election Process

The next step in this analysis requires examining the significance of the 1995 election and why this particular election garnered more attention and resulted in more legal disputes than previous election cycles. This issue can best be addressed by a quick explanation of the historical events leading up to the 1995 election.

As stated previously, Ross Swimmer was elected Principal Chief in 1975. Chief Swimmer won another term in 1979 and sought reelection for his third four-year term in 1983.[65] Swimmer chose Wilma Mankiller as his running mate, and the Swimmer-Mankiller ticket won the 1983 election.[66] In 1985, however, Swimmer resigned his post as Cherokee Principal Chief "to head the BIA [after] he was nominated by President Ronald Reagan to serve as [A]ssistant [S]ecretary of the [I]nterior for Indian [A]ffairs." [67] Mankiller finished out the remainder of Swimmer's term pursuant to a constitutional mandate that the deputy chief automatically replace a resigning chief who leaves prior the expiration of his or her term of office.[68] Mankiller subsequently ran for the office of Principal Chief and won on her own accord in 1987.[69] Notably, this was first time that the Cherokee Nation had elected a woman as Principal Chief.[70] Chief Mankiller then won a second term in 1991 with "no election disputes and no recounts because of Chief Mankiller's great margin of victory," a lack of opposition for the office of Deputy Chief, and the fact that the "Tribal Council members were finally elected by district, rather than at large.[71]

The 1991 tribal election created a wake of tranquility in the Cherokee Nation. The executive branch had the overwhelming support of the Cherokee

63 *Id.*

64 MANKILLER & WALLIS, *supra* note 42, at 240.

65 *Id.* at 238.

66 *Id.* at 242.

67 *Id.* at 243.

68 *Id.* at 244.

69 *Id.* at 249.

70 MANKILLER & WALLIS, *supra* note 42, at 249.

71 Viles, *supra* note 13, at Newspaper Articles.

people as evidenced by it winning 82.7 percent of all votes in the election.[72] Additionally, the judiciary caseload was minimal.[73] In fact, the 1991 inaugural speech of Chief Mankiller opined that

> [a]s we approach the twenty-first century, the Cherokee Nation still has a strong, viable tribal government. Not only do we have a government that has continued to exist, we have a tribal government that's growing and progressing and getting stronger. We've managed not to just barely hang on, we've managed to move forward in a very strong, very affirmative way.[74]

Unfortunately, this era would prove to be the calm before the storm. In 1995, Mankiller chose not to seek reelection for Principal Chief, and the ensuing election became extremely contentious. There were many variables that made the 1995 election significant. This was only the fourth election for Principal Chief since 1975.[75] In addition, a new Principal Chief and Deputy Principal Chief would be chosen by the Cherokee people from a field of candidates that, for the first time since 1975, did not include an incumbent, but rather a diverse mixture of nine candidates.[76]

Perhaps the most viable candidate for election was George Bearpaw, a former director of tribal services staunchly supported by the incumbent Mankiller, who would presumably maintain the status quo of the tribe.[77] The other feasible candidate was Joe Byrd, a former eight- year member of the tribal council, who if elected would become the first bilingual, full-blood Principal Chief of the Cherokee Nation in modern history.[78] Byrd based his platform on representing "the grassroots," and saw the lack of incumbents on the ticket as providing the Cherokee people with "new hope for a fresh beginning" because "a lot of Cherokees [wanted] to see a change of focus."[79] The diverging viewpoints of the leading candidates were of significant consequence to the election. In fact, Chief Mankiller was quoted as saying, "There's a lot of anxiety at the Cherokee Nation. Someone could come up with a new perspective and rechange the focus, and people are concerned about that. It's not going to be traumatic, just a little stressful."[80] The stakes were also considered high regarding the election of the Principal Chief because this person would lead the second largest tribe in the United States to the cusp of the twenty-

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72 MANKILLER & WALLIS, *supra* note 42, at 255.

73 UPTON, *supra* note 17, at 1.

74 MANKILLER & WALLIS, *supra* note 42, at 255.

75 Manny Gamallo, *Cherokee Chief Sworn In,* TULSA WORLD, Aug. 15, 1995.

76 Donna Hales, *Cherokees to select new leaders Saturday,* MUSKOGEE PHOENIX, June 16, 1995.

77 Donna Hales, *Chief hopeful admits felony,* MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, July 17, 1995.

78 Gamallo, *supra* note 74.

79 Hales, *supra* note 75.

80 *Id.*

first century, in addition to heading "the oversight of a $150 million annual budget."[81]

As the 1995 election season progressed, however, the election became significant for a much different reason. Upon the emergence of various first-impression election issues, disputing parties sought resolution through the internal judicial process of the Cherokee Nation. Although the judiciary had been called on to resolve other election disputes, this particular election resulted in a series of judicial decisions that served as an assertion by the judiciary of its authority to interpret constitutional and legislative provisions regarding election law, as well as its authority to affirmatively check the power of the other governmental branches. These rulings caused increased attention to be focused on the role of the judiciary and its place within the Cherokee government because of the far-reaching impact these particular election decisions would have upon the Cherokee government and people. These rulings of the Court would serve as an impetus for one newspaper to declare the election as "one of the most bitter and controversial election cycles in modern times," producing "a general atmosphere of chaos, with no one appearing too sure about who was responsible for what."[82]

IV. Case Discussions

The election controversies started almost immediately at the beginning of 1995. In February of that year, approximately four months prior to the scheduled tribal election, the Tribunal heard its first case. In *Leach v. Tribal Election Commission of the Cherokee Nation*[83], the Court addressed the constitutionality of codified Cherokee law establishing a residency requirement for otherwise constitutionally qualified Principal Chief and Deputy Principal Chief candidates.[84]

The Cherokee Constitution requires the Principal and Deputy Principal Chief to be citizens of the Cherokee Nation; to have been born within the boundaries of the United States, its territories or possessions; to have reached the age of thirty at the time of the election; and to be a member by blood of the Cherokee Nation of Oklahoma.[85] In addition, the Cherokee legislature enacted a residency requirement that all "qualified candidates for the offices of Principal Chief and Deputy Principal Chief shall have established a bona fide permanent residence within any one of the 9 districts… for no less than 182 days immediately preceding the beginning filing date of that particular election year."[86]

In this case, the plaintiff Leach was a resident of Albuquerque, New Mexico, and a citizen of the Cherokee Nation, who expressed interest in running

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81 *Id.*

82 *Court reform is least of tribe's woes,* MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, Oct. 24, 1995.

83 *Leach v. Tribal Election Comm'n of the Cherokee Nation,* 4 Okla. Trib. 225 (Cherokee Nation J.A.T. No. 94-01 July 24, 1995).

84 *Id.* at 227.

85 *Id.* at 228.

86 26 CNCA § 37(B) (1993).

for either the office of Principal Chief or Deputy Principal Chief.[87] Leach alleged that although he was eligible to run for those offices under the Cherokee Constitution, the enacted residency requirement deprived him of the right to run.[88] Leach argued that the Constitution "established the requirements for the office of Principal Chief or Deputy Chief, and as such, the challenged legislation added an additional requirement above and beyond those set forth in the Cherokee Constitution."[89] Leach's attorney further explained during hearing that "such a residency requirement would create a discriminatory hardship upon candidates living outside the jurisdiction that would not be encountered by those candidates who already live within the tribe's jurisdictional boundaries."[90]

After establishing the judicial branch's jurisdiction to hear the case under Article VII of the Cherokee Constitution[91], the Court held that the residency requirement found in the Cherokee code regarding "candidates for the offices of Principal Chief and Deputy Principal Chief, [was] in violation of the Constitution of the Cherokee Nation and as such [was] void and unenforceable."[92]

The Tribunal addressed two issues in its reasoning. First, although the Court interpreted the constitutional grant of power to the Tribal Council as a broad power "…to establish laws which it shall deem necessary and proper for the good of the Nation"[93] this grant of legislative power was necessarily limited by the language in the Constitution restricting the Tribal Council from passing laws contrary to the Constitution.[94]

Second, the Court looked at whether the residency requirement enacted by the tribal legislature contravened the Constitution.[95] Here the Court concluded that "[b]y ratifying the Constitution, the people of the Cherokee Nation declared that if a person meets these qualifications, that person is eligible to be Principal Chief or Deputy Principal Chief of the Cherokee Nation. The people established no residency requirement for these offices."[96] Consequently, the legislative acts that established "requirements over and above those in the Constitution are 'contrary' to

87 *Leach,* 4 Okla. Trib. at 227.

88 *Id.*

89 UPTON, *supra* note 17, at 12.

90 *Ruling could affect leadership of tribe,* CHEROKEE ADVOCATE, March 1995.

91 *Leach,* 4 Okla. Trib. at 227 (Constitution Art. VII "provides that the Tribunal shall have original jurisdiction to hear and resolve any disagreements arising under provisions of the Constitution, or any enactments of the Council."). E-mail from Stacy Leeds, Associate Justice, Cherokee Nation Judicial Appeals Tribunal, to author (April 17, 2003, 09:19 MST) (on file with author) (noting, however, that original jurisdiction would not exist with the Tribunal in a situation where the Constitution stated that the Council shall enact laws to govern the conduct of elections, and in those enacted laws the Council created a subordinate commission with jurisdiction to hear election issues, then the Tribunal would not have original jurisdiction).

92 *Id.* at 228.

93 *Id.* at 230.

94 *Id.*

95 *Id.* at 228.

96 *Id.*

the Constitution, and as such, are unconstitutional."[97] In reaching this conclusion, the Court rejected an argument that the enacted law was constitutional because of its sole application to *candidates* for those offices.[98] The Court reasoned that the "requirements for the office and for candidacy do not differ"[99] because the only means of becoming Principal or Deputy Chief was to go through the election process.[100] Therefore, it was "unrealistic to require more restrictive qualifications on a candidate than upon a holder of that office. Given the election procedure, the only difference between 'a candidate for Principal Chief' and the 'Principal Chief' is that the latter was a successful candidate."[101]

Despite the holding, the Court itself was not taking a position as to the desirability of a residency requirement.[102] The Court stated that "[i]f the Cherokee people desire to have a residency requirement for the Principal Chief and Deputy Principal Chief, then the people must vote to change the Constitution."[103]

The reception to this judicial opinion was relatively quiet. The only comment by the Cherokee legislative branch was via a tribal attorney stating "the defendants [were] disappointed but respectful of the Tribunal's decision…"[104] Although the overall response was relatively quiet, the Cherokee tribal newspaper viewed the ruling of the court as one that "could dramatically affect the leadership of the Cherokee Nation."[105] On the whole, however, it seems that this first ruling by the Tribunal received little fanfare from the Cherokee people or from the other branches of Cherokee government.

In this first election case, the Tribunal took a simple, pragmatic approach to solving the residency requirement controversy before it. Not only did the Court opt to strictly uphold the authority of the Constitution as the "fundamental law" of the Cherokee Nation [[106]], but the language of the opinion also reflected a strict adherence by the Tribunal to its singular role as the final arbiter of disagreements involving either the Cherokee Constitution or enacted Cherokee law. The court explicitly stated at the end of the opinion that despite holding that the residency requirement for Principal Chief violated the Constitution, the court was not taking a position as "to whether or not a residency requirement [was] desirable. There are those who believe such a requirement is desirable, and those who believe it is not desirable."[107] The Tribunal clearly refused to go beyond its constitutionally

97 *Leach,* 4 Okla. Trib. at 229-230.
98 *Id.* at 229.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 225, 230.
103 *Leach,* 4 Okla. Trib. at 230-231.
104 *Ruling could affect leadership of tribe, supra* note 89.
105 *Id.*
106 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. XVIII.
107 *Leach,* 4 Okla. Trib. at 225, 230.

mandated role and refused to engage in dicta or policy recommendations in the opinion.

Another interesting aspect of the opinion was the great emphasis placed by the Court upon the intent and will of the Cherokee people. For example, in the Court's holding that the enacted residency requirement was contrary to the Constitution, the Court specifically mentioned that "[b]y ratifying the Constitution, the people of the Cherokee Nation declared" the qualifications for election candidates.[108] In addition, the Court stated at the end of the opinion that it is up to the Cherokee people, not the Tribal Council, to amend the Constitution if "the people" want to have a residency requirement.[109]

The context in which this opinion was delivered may provide some insight into the various emphases of the Court. One factor may be the nature of the controversy itself. The Court was required to rule upon an election issue with potentially far reaching implications as to the future leadership of the entire tribe. Perhaps this is one reason that the Court considers so strongly the intent of the Cherokee people in their constitutional ratification of the candidacy requirements of potential future Cherokee leaders. Another factor may be the very nascent nature of the Court itself. The Court was just coming out of a very tranquil and judicially inactive period when it was faced with this very complex issue involving election procedure and exercises of governmental power. Thus, it could be argued that in an effort to establish itself as a viable and legitimate branch of Cherokee government, the Court is cautiously exercising its judicial power when called upon to rule on cases of far-reaching impact, as well as cases that involve action by another branch of government. By strictly adhering to its constitutionally mandated role and placing great reliance upon the will of the Cherokee people as manifested in the Constitution, the Court is perhaps taking the sting out of the assertive check it placed upon the Tribal Council's abuse of legislative power of enacting laws contrary to the Constitution.

It seems, however, that Court may also have had an unspoken line of reasoning for its ruling. According to a speech by one of the sitting Justices made subsequent to the election the Court considered in its decision that there were "nearly 140,000 Tribal members scattered in all 50 states and many foreign countries who had vested interest in running for office and, indeed, in voting for someone from their respective geographic area." [110] In addition, the Court considered the historical dispersal of Cherokee citizens, as well as the potential contemporary need to seek employment and education outside of the historic boundaries of the Cherokee Nation.[111] Thus, although the Court took a strictly interpretive approach when authoring its opinion, there seem to be normative ideas of fairness, as well as tribal historical considerations, underlying the reasoning. It is unclear why these considerations by the Court were not mentioned in the opinion itself. Perhaps this is due to the fact that the Court wanted to present a direct and uncomplicated opinion that focused upon a constitutional basis for its ruling in an

108 *Id.* at 228.

109 *Id.* at 230-31.

110 Viles, *supra* note 13, at app. at Newspaper Articles.

111 *See id.*

effort to validate itself as a separate, distinct branch of government carrying out its duty of constitutional and statutory interpretation. Or the exclusion may simply be a function of the calm tribal political climate at the time the opinion was rendered which made additional justification for the court holding unnecessary in the view of the Court.

Overall, this case provided an opportunity for the Court to assertively exercise its separate and distinct constitutional power to interpret the Constitution and enacted law, while simultaneously placing a check upon the power of the legislative branch of Cherokee government in response to its enactment of laws violating the Constitution.

There was no other judicial involvement in the election until after the June 19, 1995 primary. The primary election outcome resulted in two front-runners; Bearpaw led after receiving thirty-nine percent of the vote while Byrd followed after receiving approximately twenty-nine percent of the vote.[112] As a result of no candidate receiving a majority of the votes as stipulated by Cherokee codified law, a run-off election was required.[113] Before the run-off election could take place, however, the Tribunal was called upon to make some of the most controversial decisions in its short existence.

The second case before the Tribunal stemmed directly from the primary election. In *Pritchett v. Cherokee Nation*[114], the Tribunal encountered an issue that directly affected every tribal member seeking to vote in a Cherokee tribal election. The plaintiffs in this case attempted to vote in the primary election by presenting Tribal Membership Cards at the polling place, but were summarily denied because they were not also registered to vote in a particular district as required by the Tribal Election Commission.[115] Although the presentation of a Tribal Membership Card allowed a cardholder to vote in tribal elections in the early days when Cherokee Nation elections used an "at large" voting process, this was no longer considered a viable method because of a change to Tribal Council members being elected from districts pursuant to a 1987 Constitutional amendment revoking at-large elections.[116] Thus, "in order to make sure that constituents voted only for the proper candidates, voters who lived within the Cherokee Nation were placed in districts according to their residence" when they registered to vote.[117]

The plaintiffs filed a class action lawsuit claiming that "the Election Commission rule that required all voters to be registered was implemented without

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112 Viles, *supra* note 13, at app. at Newspaper Articles.

113 *See* 26 CNCA § 83 ("There shall be a runoff for the offices of Principal Chief and Deputy Principal Chief for the two top candidates in each of the respective offices unless one man for each of the respective positions should obtain a simple majority of the votes cast for the respective office, a simple majority meaning over 50 percent or any fraction thereof.").

114 *Pritchett v. Cherokee Nation,* 4 Okla. Trib. 334 (Cherokee Nation J.A.T. No. 95-06 July 24, 1995).

115 *Id.* at 337.

116 Viles, *supra* note 13, at app. at Newspaper Articles.

117 Viles, *supra* note 13, at app. at Newspaper Articles. *See also* 16 CNCA § 5 ("All tribal members who reside within the historical boundaries of the Cherokee Nation must be registered to vote in the district of their residence" and "[e]very Cherokee tribal member registered to vote, who resides within the historical boundaries of the Cherokee Nation, shall have the right to vote for the district representative of his choice who is a candidate for Council within that member's district.").

authority, and was, therefore, unconstitutional."[118] The remedy sought by the plaintiffs included invalidation of the primary election, as well as the granting of a new election in which tribal members could validly use their Tribal Membership cards to vote without additional registration.[119] The plaintiffs claimed that it "was impossible to determine the outcome of the primary election because the number of Cherokees that were denied the opportunity to vote was so vast. Therefore, the election results could not stand."[120] The plaintiffs fostered their argument by focusing upon the "hardships that such a registration required," and several times raised the "specter of an all-day visit to the Election Commission by an elderly Cherokee, in order to properly register."[121]

After establishing jurisdiction[122] and before certifying a class, the Court addressed the preliminary question of whether "the Election Commission's requirement that voters must be registered by districts [was] a valid exercise of power."[123] The Court held that the Cherokee Constitution "grants broad general powers to the Tribal Council to establish laws which the Council shall deem necessary for the good of the Nation."[124] The Court reasoned that the 1987 Constitutional amendment requiring "Council Members to be elected from districts instead of at-large, necessarily included the authority for the Tribal Council to enact laws requiring registration by the voters."[125] Therefore, the Court interpreted the Constitutional amendment as giving the Tribal Council the power and discretion "to decide in favor of a registration process, as opposed to districting by any other method."[126]

Thus, the Court found that delegation of power from the Council to the Tribal Election Commission via a series of legislative enactments "to develop and implement regulations necessary to require registration of all voters in tribal elections" was a legitimate exercise of the legislative power of the Tribal Council[127] in light of the fact that the Cherokee Code also "grant[ed] to the Election Commission the power to develop regulations necessary to conduct elections."[128] In addition, there was a legislative requirement that "all tribal members who reside within the historical boundaries of the Cherokee Nation must

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118 *Pritchett,* 4 Okla. Trib. at 337.

119 *Id.*

120 UPTON, *supra* note 17, at 17.

121 Viles, *supra* note 13, at app. at Newspaper Articles.

122 *Pritchett,* 4 Okla. Trib. at 336-37 ("The Court finds that jurisdiction of the Judicial Appeals Tribunal to hear this case is based upon Article VII of the Constitution of the Cherokee Nation.").

123 *Id.* at 337.

124 *Id.* at 338.

125 *Id.*

126 *Id.*

127 *Id.* at 339.

128 *Pritchett,* 4 Okla. Trib. at 339. *See also* 26 CNCA § 11 (F) ("The Tribal Election Commission shall be empowered to develop regulations necessary to conduct tribal elections. The regulations shall be approved by the Tribal Council no later than the March monthly session of the year of the election.").

be registered to vote in the district of their residence."[129] Thus, subsequent registration requirements adopted by the Tribal Election Commission "were a legitimate exercise" of authority.[130] All in all, the Court held that "registration and enrollment of voters was not improper, and there was nothing arbitrary or capricious about the way in which the Election Commission had done its job."[131]

The reception to this ruling garnered little more attention than that of the previous case. In fact, most of the attention came in the immediate aftermath of the election, but prior to the judicial ruling. Yet, there were some sentiments expressed by the community that included the idea that "citizens of the Cherokee Nation don't have the rights that citizens of Oklahoma or citizens of America have…Cherokee citizens do not have access to voting that other people have."[132] Another newspaper article quoted one candidate as saying "I feel like we confused the people with the voting process… I feel like we have deprived the people of the right to vote."[133] These comments perhaps reflect a sense of disenfranchisement from the tribal election process after being denied the ability to vote, which may have then translated into a feeling of disconnection by tribal members from the Cherokee Nation in general. Another candidate told the Tribal Election Committee that "[t]his election has lost us the confidence of the Cherokee people."[134] This feeling seems to be reflective of a sense that the Cherokee voting process, and thus the Cherokee government, was unduly oppressing its members by not allowing them to vote in a certain manner, and thus removed the members from active participation in their own governmental process.

In contrast, the only comment to come from a branch of Cherokee government was from the Principal Chief stating that "we are looking at what went wrong so it won't happen again in future elections… [o]bviously, none of us did enough to see that people were properly registered."[135] According to the Election Commission chairman, just prior to the 1995 election there were about 80,000 Cherokee citizens who were of voting age, but there were only 30,004 out of that number who were registered to vote.[136] Interestingly, and perhaps as evidence of the importance of this particular election to the Cherokee voters, even though these same registration requirements had been in place during the prior election, no controversy or comment arose regarding any denial of voting rights.[137] Regardless, there was little other comment either positive or negative on the judicial ruling.

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129 *Pritchett,* 4 Okla. Trib. at 338.

130 *Id.* at 334, 339. *See generally* 26 CNCA § 5.

131 Viles, *supra* note 13, at app. at Newspaper Articles.

132 Connie Webb, *Hundreds of Cherokees Turned Away at Polls,* THE TAHLEQUAH DAILY TIMES JOURNAL, June 1995.

133 *Id.*

134 *Id.*

135 Connie Webb, *Mankiller Says Voters That Were Turned Away Did Not Register,* THE TAHLEQUAH DAILY TIMES JOURNAL, July 1995.

136 Hales, *supra* note 75.

137 *See* Viles, *supra* note 13, at app. at Newspaper Articles.

In this second election case, the Court retained its formal, matter-of-fact approach when rendering its opinion. Although once again faced with a potentially far-reaching issue in the form of denial of tribal voter rights, the Court strongly adhered to a strict judicial interpretation of the Constitution as well as the Court's role as constitutional interpreter. In the instant situation, the Court actively exercised its power to interpret both the Constitution and enacted law in order to determine whether the legislative branch had validly exercised its power pursuant to constitutional authority.

The Court again referred to the actions of the Cherokee people by using a constitutional amendment adopted by the Cherokee voters as supportive of the decision that the legislature had the power to act. Thus, it seemed that the Court would continue to be deferential to the voice of the Cherokee people via the Constitution when there is a constitutional question, even if the result would be extensive denial of tribal voter rights. Perhaps as further support for ruling on the authority of another branch of government to act, the Court recounted the positive legislative history of the laws in question in this case. As a result of its findings and interpretations, the Court affirmatively recognized the legitimate exercise of power by the Cherokee legislature to create enactments and to delegate authority to other entities to carry out those enactments. In addition, because the Court exercised judicial restraint in this case by allowing the tribal legislature to make enactments unfettered by a judicial check, the separation of powers doctrine was bolstered because the legislature was able to exercise its constitutionally delegated power to enact laws.

Although the Court fails to mention any external influences affecting the ruling, there is arguably a strong social interest in having a uniform election process implemented regarding the registration of voters in a tribe as populous as the Cherokee Nation. The fact that this suit was being brought as a class action could arguably have had some additional influence on the judicial opinion because of the potential consequences upon all the eligible voters within the Cherokee Nation, not just the two plaintiffs filing the complaint.

Perhaps most informative, however, is the remedy sought by the plaintiffs. The invalidation of an election, as well as the ordering of a new election, would be an enormous drain on tribal resources. In addition, there is arguably an expectation on the part of the voter that the election will be conducted in a valid and sustainable manner that will preserve the voter's choice in a particular election.

One interesting factor in this case that may or may not have had an impact on the decision of the Tribunal, but that sheds light on the political situation at this point in the election is that one of the plaintiff's attorneys was a defeated candidate in the primary election. In fact, rumblings of political unrest were beginning to surface regarding the election at this point, which may be indicative of the political atmosphere at the time. The lack of general attention paid to the outcome of this case, however, is probably found in the fact that another judicial opinion issued on the very same day "would prove to be the most publicized litigation in the Tribunal's existence."[138]

138 UPTON, *supra* note 17, at 19.

The Tribunal was called upon to determine the eligibility of the leading candidate for Principal Chief.[139] In *Mayes v. Cherokee Nation*[140], the Court consolidated two cases in which both plaintiffs sought to have the primary election leader Bearpaw stricken from the run-off ballot for the office of Principal Chief.[141] According to the facts of the case, Bearpaw shot another man in the stomach in 1975.[142] Bearpaw was subsequently charged under Oklahoma law in the District Court of Cherokee County with assault with a dangerous weapon, a sentence that carried a penalty of imprisonment of not more than ten years in the state penitentiary, or imprisonment of not more than one year in the county jail.[143] A few months later, however, Bearpaw "entered a plea of guilty, and upon recommendation of the District Attorney, was placed upon a two year deferred sentence."[144] Under Oklahoma law this process "allow[ed] expungement of the record if the defendant follow[ed] the rules and conditions of probation and the orders of the court for a period of two years. If he [did] not do so, then he [was] sentenced under the Oklahoma statutes."[145] Bearpaw apparently met the regulations because he "received an order from the District Court expunging the record in his case" in 1977.[146]

According to the plaintiffs, Bearpaw was ineligible to be a candidate or to hold the office of Principal Chief for two reasons: 1) Bearpaw had committed a shooting constituting a felony, and 2) Bearpaw had "filed his Declaration of Candidacy with the Tribal Election Commission" and yet "signed a paper certifying under oath that he had never pled guilty to any felony charges."[147] Thus, both sets of plaintiffs felt that Bearpaw should have his name stricken from the run-off ballot.[148] One set of plaintiffs in the consolidated case, however, sought to have the run-off election rescheduled, while the other set of plaintiffs sought to have any absentee ballots voting for Bearpaw held for naught while still proceeding with the election.[149]

The defendants argued, however, that Bearpaw should be allowed to remain on the ballot as a candidate for Principal Chief, and the run-off election should proceed as scheduled.[150] To that end, the defendants supported their position

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139 *See* Viles, *supra* note 13, at app. at Newspaper Articles.

140 *Mayes v. Cherokee Nation,* 4 Okla. Trib. at 324, 327 (Cherokee Nation J.A.T. No. 95- 08 July 24, 1995).

141 *Id.* at 327.

142 *Id.* at 328.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Mayes,* 4 Okla. Trib. at 328.

147 *Id.*

148 *Id.* at 327.

149 *Id.*

150 *Id.* at 330.

by citing the United States Supreme Court case *Kercheval v. United States*[151], as well as "numerous state court opinions that follow[ed] *Kercheval*." [152] The proposition emanating from those cases was that "once a defendant is allowed to withdraw a guilty plea in a criminal action, the guilty plea can never again be used against him in a subsequent criminal trial."[153]

In determining whether Bearpaw was eligible to run for or hold the Principal Chief position, the Court first established jurisdiction by acknowledging that these issues arose out of a Constitutional provision, as well as an enactment of the Tribal Council.[154] According to the Cherokee Constitution,

> no person who shall have been convicted of or has pled guilty, or has pled no defense to a felony charge under the laws of the United States of America, or any State, Territory, or Possession thereof, shall be eligible to hold any office or appointment of honor, profit or trust within this Nation unless such person has received a pardon…[155]

In addition, the Cherokee Nation Code states:

F. The candidate shall not have been convicted of or have pled guilty or no defense to a felony under the laws of the United States of America, or of any federally-recognized Indian tribe, or of any state, territory or possession thereof, unless such person has received a pardon.

G. The candidate must certify that if elected Principal Chief, said candidate shall resolve all conflicting interests and that said candidate will automatically be disqualified in the event false or misleading information or statements are made in filing for this office.[156]

> Based on interpretation of these provisions, the Court unanimously held that Bearpaw's "plea of guilty in the 1975 Cherokee County felony case render[ed] him ineligible to be a candidate for any office or appointment of honor within the Cherokee Nation."[157] In addition, the Court held that Bearpaw violated Cherokee codified law "when he filed his Declaration of Candidacy with the Tribal Election Commission when he certified under oath that he had never pled guilty to any felony charges."[158] The Court based its decision on a "clear reading" of the Cherokee Constitution and Cherokee Nation Code to determine that "neither law makes an exception for a deferred sentence, no matter how the deferred sentence is handled."[159]

151 274 U.S. 220 (1927).

152 *Mayes,* 4 Okla. Trib. at 330.

153 *Id.*

154 *Id.* at 326-27.

155 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. IX, §2.

156 26 CNCA §§ 32f, 32g.

157 *Mayes,* 4 Okla. Trib. at 330.

158 *Id.*

159 *Id.*

The Court further reasoned that the "the Cherokee Nation, as a quasi-sovereign, ha[d] the authority to determine the qualifications for those who would hold office within the Nation."[160] The adoption of both the constitutional and code provisions above indicated to the Court that the Cherokee Nation "wanted only those with the highest moral character to hold elected office within the Tribe."[161] The Court stated that the sole issue was whether Bearpaw made an original guilty plea, and it was inconsequential "how the court in question handled the guilty plea. The only exception that is allowed by our Constitution is if Mr. Bearpaw received a pardon, and he has not."[162]

After considering many remedies, the Court ultimately ordered the Tribal Election Commission to either strike Bearpaw's name from the ballot prior to the election, or to collect all the ballots cast for Bearpaw without counting them and "hold them for naught" after the election.[163] The Court further ordered the run-off election to continue as scheduled, "and to declare those with the highest number votes as a winner, without consideration for the votes cast for Mr. Bearpaw."[164]

The Court enumerated various policy reasons for the remedy it granted. Primarily, the Court considered the "best interest of the Cherokee Nation" and determined that it was critically important that "the Tribe continue without interruption following the expiration of the terms of the current Principal Chief and Deputy Principal Chief."[165] The Court felt that "irreparable harm" would occur if the run-off election was delayed beyond "the date set by the Constitution for the swearing-in of new officers."[166] In addition, the Court rejected scheduling an entirely new run-off election because it would be "impossible to carry out such a schedule when absentee ballots must go through the mails to the voters and back to the Election Commission."[167] Consequently, the Court held that to allow "the current run-off to continue without counting the votes cast for Mr. Bearpaw" to be "in the best interests of the Cherokee Nation."[168]

It should be noted that one Justice differed in his determination of what the remedy should be.[169] Justice Viles favored a new general election "with all the previous candidates for Principal Chief except George Bearpaw (and then a run-off, if necessary)" because those who voted for Bearpaw in the primary election "ha[d] been disenfranchised through no fault of their own."[170] The Justice acknowledged, however, that a new election "would be expensive, time-consuming, and perhaps

160 *Id.* at 330-31.
161 *Id.* at 331.
162 *Id.*
163 *Mayes,* 4 Okla. Trib. at 331
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.* at 332.
169 *Mayes,* 4 Okla. Trib. at 332.
170 *Id.*

confusing to the voting public," in addition to the fact that the election could not take place by the constitutionally mandated date for swearing-in.[171] These factors would cause additional problems "in terms of leadership, authority, succession, etc."[172]

The perception of this issue within the Cherokee Nation seemed to show a reliance upon the Cherokee Constitution as the final arbiter of the dispute. One Tribal Council member was quoted before the Court's decision as saying "if we can't follow the Constitution, we might as well throw it out. Sometimes, I think we already have." [173] Another candidate commented, "[e]ither we enforce our constitution or we throw it away."[174] Finally, the Chairman of the Cherokee National Party was quoted as saying "[t]he framers of the (Cherokee) constitution enunciated the sound public policy that felons shall be ineligible to hold office in the Cherokee Nation."[175] This case also elicited comments regarding the idea of separation of powers, as evidenced by one newspaper's statement that the fact "[t]hat the tribunal eventually interceded in the election process and disqualified a candidate for chief speaks volumes for the increasing separation of powers between the executive and judicial branches of the Cherokee Nation."[176]

The third case to come before the Tribunal during the 1995 election cycle was a marked departure by the Court from the strictly practical and interpretive opinions rendered in the two previous cases. The Court did not completely dispose of its interpretive approach, however, as evidenced by the Court expressly stating the basis for its decision as predicated upon a "clear reading" of the Constitution and the Code.[177] The Court again relied upon the voice of the Cherokee people echoing through the Constitution because, according to one Justice's statement in a speech after the election, "the framers of the Constitution and the voters who approved it had chosen their words carefully and, although there were numerous opportunities in the succeeding 20 years to change the wording, none of those opportunities had been seized."[178] Interestingly, the Court failed to mention in its written opinion this use of the framer's intent in its interpretation of the Constitution.

The Court did expressly mention for the first time, however, an interpretation beyond the plain language of the constitutional provision at issue when it stated that the Cherokee Nation in "[a]dopting a constitutional provision that bar[red] convicted felons, and anyone else who has pled guilty or no defense to a felony in any state, tribal or federal court means that it wanted only those with the

171 *Id.*

172 *Id.*

173 Hales, *supra* note 76.

174 Lynn Adair, *Suit Filed to Remove Bearpaw from Ballot,* SEQUOYAH COUNTY TIMES, July 20, 1995.

175 *Id.*

176 *Court reform is least of tribe's woes, supra* note 81.

177 *Mayes,* 4 Okla. Trib. at 330.

178 Viles, *supra* note 13, at app. at Newspaper Articles.

highest moral character to hold elected office within the Tribe."[179] This reference to moral character could either suggest a shift from the court's prior strict adherence to an interpretive approach in the election opinions toward a more social policy basis for its holding, or suggest merely a recognition of the value found in the text of the Constitution.

The Court also departed here from its prior refusal to give any additional justification for a holding expressly within the language of the opinion. In this case, the Court enumerated the various policy reasons supporting the Court's remedy. The Court seemed to see its role as one of facilitating a smooth and minimally disruptive effectuation of the tribal election process. The Court thus sought a smooth transition of the executive officials that would "continue without interruption"; sought to prevent "irreparable harm to the Tribe" by facilitating a delay of the run-off election; and, finally, sought to prevent the impossibility of carrying out a new run-off election because of the time needed to process absentee ballots.[180] One could argue here that the ruling was an effort by the Court to recognize the power of the legislative branch to enact, without judicial interference, laws deemed necessary for the good of all the Cherokee people, thereby giving great deference to the separation of powers between the branches of the Cherokee government.

Also of interest was the court's reaction to the use of a United States Supreme Court case and numerous state opinions as precedent for the defendant's position. The Tribunal seemed to take this opportunity to actively assert the sovereignty of the tribe, as well as the Court. For example, the Court rejected the use of the federal and state opinions when it stated that "[t]he Cherokee Nation, as a quasi-sovereign, has the authority to determine the qualifications for those who would hold office within the Nation."[181] In addition, the Court remarked that the only exception to Cherokee tribal candidate qualifications was to be found in *our* Constitution (emphasis added).[182] The Court clearly asserted the tribe's judicial independence from foreign judicial forums. As such, the Court identified a separation of power, not from other Cherokee branches of government, but from the potential encroaching influence of both the federal and state courts.

The context in which this decision was made was also of importance. As this case was decided just six days prior to the run-off election, the Court was under tremendous time pressure to render a verdict. Thus, the closeness of the run-off election clearly affected the decision and reasoning of the court regarding its choice of remedial measures. In fact, the proximity to the run-off election caused the Chief Justice of the Tribunal to schedule "an unprecedented Sunday session" in order to adjudicate the case.[183]

This case was also meaningful because the Court was not just deciding the eligibility of any candidate for Principal Chief, but rather was deciding the

179 *Mayes,* 4 Okla. Trib. at 331.

180 *Id.* at 331.

181 *Id.* at 330-31.

182 *Id.* at 331.

183 Viles, *supra* note 13, at app. at Newspaper Articles.

eligibility of the frontrunner in this election. The fact that the Cherokee people had voted Bearpaw the leader after the primary election meant that his exclusion from candidacy would nullify the vote of many Cherokee. The importance of this case was exemplified by the fact that on the day the case was decided, "[m]ore than 100 Cherokees filled every seat in the tribal courtroom, … lined the walls and stood six deep in the hallway in order to hear legal arguments."[184] Perhaps in part, it was this high degree of interest in this decision that caused the Court to elaborate the policy considerations underlying the remedy it granted in this case.

Above all, however, this case tested the Court's ability to resolve controversial issues having substantial consequences. The Court acted as an aggressive and enduring branch of the Cherokee government. It forcefully exerted its power to interpret internal Cherokee law, even though a leading candidate for Principal Chief was excluded from the election process. In addition, the Court exhibited adaptability to the changing circumstances of each case because of the ability to move away from a rigid, interpretive analysis toward a more flexible, explanatory analysis when the issue or the public impact created a need for further justification for the Court's judgment.

The most important repercussion of the Tribunal's decision, however, occurred the day after it rendered its opinion when Principal Chief Mankiller issued a pardon for Bearpaw.[185] Not only was the granting of a pardon by the Principal Chief a "very rare occurrence in the modern Cherokee Nation"; it was the first of Mankiller's administration and "indeed the first since statehood that anyone could remember."[186] Mankiller stated that the Tribunal "opened the door for a pardon when they asserted in their ruling that [Bearpaw] wasn't eligible for office without one."[187] Bearpaw immediately filed for a rehearing based on the fact "that new events had occurred since the court's decision was published that altered the basis upon which the court's decision was reached."[188]

The Tribunal addressed the new issue of the executive pardon in the consolidated case of *Mayes v. Cherokee Nation*[189]. In this case, the Tribunal returned to the language of the Constitution, specifically the provision stating that no person who has pled guilty to a felony charge shall be eligible to hold any office in the Cherokee Nation "unless such person has received a pardon."[190] The Court held that this section of the Constitution "in using the word 'pardon,' refers to the jurisdiction in which the felony was committed. Consequently, an appropriate pardon in this situation should come from the State of Oklahoma. Therefore, the

184 Donna Hales, *Tribunal will decide today whether Bearpaw eligible,* MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, July 24, 1995.

185 UPTON, *supra* note 17, at 22.

186 Viles, *supra* note 13, at app. at Newspaper Articles.

187 Randy Pease, *Pardon me Ms. Mankiller?,* THE TAHLEQUAH DAILY TIMES JOURNAL, July 26, 1995 and September 2, 1995.

188 UPTON, *supra* note 17, at 21.

189 *Mayes v. Cherokee Nation,* 4 Okla. Trib. 340, 343-44 (Cherokee J.A.T. No. 95-08 July 30, 1995).

190 CONST. OF THE CHEROKEE NATION OF OKLAHOMA art. IX, § 2.

pardon issued by Wilma P. Mankiller is a nullity…"[191] The Court held that its prior decision stood.[192]

One dissenting opinion that challenged both the need for an Oklahoma pardon, as well as the remedy. Justice Viles disagreed that an Oklahoma pardon was needed, and believed that a "valid Cherokee pardon would say that 'whatever Mr. Bearpaw has done under another legal system, he is forgiven under the Cherokee legal system.'"[193] In addition, Justice Viles supported a new election for Principal Chief because the "holding of the majority, which would appear to make Joe Byrd Principal Chief means that he will be 'elected' without having received a majority of the votes, as our legislation requires."[194] This dissenting Justice felt that the "Court should not usurp the electors' function."[195] Nevertheless, the Justice concurred in the holding of the court by stating that pardons "operate only from their effective date forward," so Mankiller's pardon did not cure Bearpaw's defective candidacy in this election.[196] Bearpaw would have had to receive the pardon prior to his filing for office for it to be effective.[197]

This particular case garnered intense attention regarding the issue of separation of powers. Many negative remarks concerned the behavior of the Principal Chief in issuing a pardon. According to one attorney, "Mankiller's pardon was a 'blatant attempt to tear jurisdiction from the [judiciary].'"[198] One candidate for the office of Principal Chief stated that the executive branch was making "attempts to subvert the system in order to win."[199] In addition, another candidate for Principal Chief believed "the Cherokee Nation needs to do the right thing because the constitution was written for a reason…and even Wilma Mankiller [the incumbent Principal Chief] is not above the law."[200] One editorial also touched on the issue of sovereignty in its comment that "if the Cherokee Nation is a sovereign nation, than [sic] the ruling of its highest judicial authority should stand. And if Wilma Mankiller is the leader of a sovereign nation, she should be willing to uphold the law."[201] Another sentiment viewed the executive as all controlling entity because "[t]he way it stands, there is no way for the Cherokee people to resist an incumbent party when the chief controls everything." [[202]] Finally, one tribal

191 *Mayes,* 4 Okla. Trib. at 343-44.

192 *Id.* at 344.

193 *Id.* at 345.

194 *Id.*

195 *Id.* at 346.

196 *Id.* at 344.

197 *Mayes,* 4 Okla. Trib. at 344.

198 Donna Hales, *Mankiller pardons Bearpaw/Mankiller 'is chief of all of us',* MUSKOGEE PHOENIX, July 27, 1995.

199 Donna Hales, *Last-ditch responses to Bearpaw candidacy due today,* MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, July 28, 1995.

200 Adair, *supra* note 173.

201 *Sovereignty isn't a Matter of Convenience,* MUSKOGEE DAILY PHOENIX AND TIMES-DEMOCRAT, July 28, 1995.

202 Adair, *supra* note 173.

member stated "the administration is trashing the Cherokee Constitution after taking an oath to uphold it. If you can't (uphold the Constitution), you need to step aside."[203] Members of the legislative branch also criticized the executive branch for its "refusal to accept the decision of the three tribal justices" to remove Bearpaw from the election. [[204]]

In contrast, there were many who supported the redoubtable exercise of judicial power by the Tribunal. One local newspaper reported a source as claiming "the Cherokee people have voiced an overwhelming support for the decision made by the justices," and "[t]he Cherokee people are saying the decision of the justices has restored their faith in our tribe's judicial system."[205] One Cherokee tribal member thanked "the tribunal justices for their courage in standing up for the Cherokee Constitution. I hope they continue to do so,"[206] while another offered that "these judges are to be complimented on this decision as it has restored great faith in Cherokee Justice which has been questioned in the past."[207] Even former Principal Chief Swimmer was moved to express the opinion that "[Cherokees] should all respect the final decision and be proud that our supreme court distinguished itself through independence of thought, reasoned judgment and hard work. Our justices, all lawyers, are not compensated, yet they take time to uphold the constitution of the Cherokee Nation."[208]

Nevertheless, the executive branch held fast to the notion of its inherent power to extend a pardon in this situation. The executive branch disparaged the ruling of the Court by accusing "the Cherokee Nation Judicial Appeals Tribunal court of ignoring case law and robbing thousands of voters by disqualifying Bearpaw."[209] In addition, the Principal Chief stated that "[t]hree lawyers think they are running the tribe. They have taken away the voice of the Cherokee people."[210] Bearpaw also harshly criticized the Tribunal in a statement that "the Cherokee Nation Judicial Appeals Tribunal …disenfranchised the Cherokee people. They postponed a ruling long enough to let deliberate confusion reign and take the process away from the people. Regardless of what the Tribunal tries next, they have earned their place in infamy."[211]

Of all the cases decided during the 1995 election cycle, there was arguably none more reflective of the context in which it was made than this opinion. The attention that the executive pardon received within the Cherokee community at

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203 Hales, *supra* note 183.

204 Connie Webb, *Tribal members ask about impeachment,* THE TAHLEQUAH DAILY TIMES JOURNAL, July 29, 1995.

205 *Id.*

206 Jessup J. Bryant, *The Pardon for George,* SEQUOYAH COUNTY TIMES, July 30, 1995.

207 Paul B. Thomas, *Tribunal Did The Right Thing,* SEQUOYAH COUNTY TIMES, July 30, 1995.

208 *The People's Voice: Cherokees Must Unite,* TULSA WORLD, August 5, 1995.

209 Rob Martindale, *Mankiller Raps Court Over Election,* TULSA WORLD, July 30, 1995.

210 Statement from Principal Chief Wilma Mankiller, to the Cherokee Nation (July 29, 1995), in HISTORY OF THE JUDICIAL APPEALS TRIBUNAL, *supra* note 1, at app. at Newspaper Articles.

211 Statement from George Watie Bearpaw, to the Cherokee Nation (July 29, 1995), in HISTORY OF THE JUDICIAL APPEALS TRIBUNAL, *supra* note 1, at app. at Newspaper Articles.

large was immense. As the public comments illustrate, there was a strong focus upon the separation of powers between the branches of Cherokee government, as well as the judiciary's role in ensuring that the exercise of those powers did not overflow into the power that belonged to another branch of government. The political unrest within the tribe at this point in the election had reached a zenith, and the Court was required to rule in the face of great political turmoil and public interest in its decision. It is clear from the newspaper accounts of the pardon that many Cherokee people felt that the pardon was an abuse of power by the executive branch and viewed its issuance as a mere pretext for keeping the executively endorsed candidate in the running for Principal Chief.

Yet, interestingly, the Court chose to write a simple, matter-of-fact opinion in which two short paragraphs interpreted the constitutional provision at issue in the case. The Court reverted back to its original practice of strictly focusing upon the singular role of the Court as interpreter of the Cherokee Constitution. Although this case was a case of first impression for the modern Cherokee judiciary, the Court refrained from providing any policy reasons for its decision and chose to the let the opinion stand on its own.

Perhaps the form of the opinion is a reflection of the effect of a firm check that this ruling would have upon the executive branch of Cherokee government. Although the judiciary found that the executive branch was validly exercising its power to issue a pardon, the Court analyzed the pardon under existing internal Cherokee law and determined the pardon to be ineffective to make Bearpaw an eligible candidate for office under the facts of the case.