IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

SUPREME COURT
FILED
JUL 31 2009
ROSANNA L. FACTOR, COURT CLERK
MUSCOGEE (CREEK) NATION

A.D. ELLIS, in his official capacity as Principal Chief of the Muscogee (Creek) Nation,	)	
Plaintiff / Petitioner,	)	
vs.	)	Case No. SC-09-06
MUSCOGEE (CREEK) NATION NATIONAL COUNCIL,	)	
Defendant / Respondent.	)	

PRELIMINARY ORDER
(Not for Publication or Citation)

Oral argument was held in this matter on July 24, 2009. This Court recognizes that time is of the essence in resolving key issues presented by this case, given their potential impact on the timing of the Nation's upcoming primary and general elections. Accordingly, in the interest of providing timely guidance to the parties as well as the entire Nation's citizenry, we hereby issue this Preliminary Order. This Preliminary Order only seeks to outline our holding on key issues in this case so as to minimize confusion relating to upcoming election dates and deadlines.

This Preliminary Order will be later supplemented by a final Opinion. We anticipate that our final Opinion will: 1.) provide a more detailed background of the procedural posture of this case; 2.) expand upon our rationale for the limited holdings discussed below; 3.) discuss and resolve various secondary issues relating to this case; and 4.) include any concurring or dissenting analysis provided by one or more Justices. Although this Court's final Opinion will include additional discussion pertinent to this case, the holdings discussed below have been duly

considered by this Court, will not be affected by our anticipated final Opinion, and are thus binding.

Petitioner's Request for a *Writ of Mandamus*

By a majority vote[1] on whether to issue a *Writ of Mandamus*, this Court holds that granting this extraordinary relief is justified and appropriate. The scope of this *Writ of Mandamus*, however, is limited as follows:

Writ of Mandamus

> **The National Council is hereby directed to review the Principal Chief's proposed legislation for appropriation of funds to conduct a Special Election concerning the amendments approved by the Constitutional Convention (NCA 09 – 030). This review must be conducted solely to determine whether the funds requested by the Principal Chief are reasonably calculated to cover the costs associated with such Special Election. The National Council shall not examine the proposed legislation beyond this fiscal inquiry, and specifically, shall not review or consider the wisdom or legality of the language of any proposed Constitutional amendments, nor shall it review or consider the validity of the process by which such proposed amendments were approved by the Constitutional Convention. If the proposed legislation's appropriation request appears fiscally reasonable on its face, the National Council is directed to appropriate such funds. If, however, the National Council, in good faith and upon reliable and quantifiable information, determines that the requested appropriation is fiscally excessive, the National Council is directed to appropriate reasonable funding so that a Special Election concerning the proposed amendments may be effectively conducted. This appropriation review shall be conducted as expeditiously as possible, and under no circumstances shall the National Council delay funding the Special Election beyond thirty (30) days of this Preliminary Order.**
>
> **Similarly, the National Council is directed to review the proposed resolution to approve absentee counters (TR 09 – 016) as expeditiously as possible. Absent a good faith, reliable, and articulable finding that one or more of the proposed absentee counters is not eligible to serve, the National Council is directed to approve TR 09 – 16. If, however, the National Council does find one or more individuals on this list is not eligible to serve, the National Council is directed to immediately refer its finding to the Election Board so that the Election Board may submit an alternative individual or individuals. Under no circumstances shall the initial review take longer than**

[1] The Court voted four (4) in favor of and one (1) opposed to granting a *Writ of Mandamus*.

thirty (30) days from the date of this Preliminary Order. Should alternative names be considered, such names shall be reviewed and voted upon at the National Council's first opportunity.

The National Council shall amend the language of NCA 09 – 030 and TR 09 – 016 to reflect that the Special Election will be held at the new date provided by the Principal Chief.

In short, this Court seeks to ensure, consistent with Article IX, Section 2(f) of the Constitution, that a Special Election take place to give the eligible voters of the Nation an opportunity to vote on the proposed Constitutional amendments approved by the Constitutional Convention. The above language mandating National Council action is deemed reasonably targeted to achieve this goal.

This Court is hesitant to issue this *Mandamus*. A full explanation of our decision to do so will be provided in our forthcoming Opinion. For now, however, it is sufficient to state that the majority believes logic dictates that a Special Election to allow the Muscogee people to consider the proposed amendments approved by Constitutional Convention is a necessary part of the Constitutional Convention process and a fundamental function of the Convention. Accordingly, Article IX, Section 2(f) of the Constitution provides a Constitutional mandate to the National Council to enact all necessary laws and appropriate all necessary funds to ensure that a Special Election takes place.[2] This Constitutional mandate does not provide any discretion to the National Council to determine the wisdom or validity of the proposed amendments submitted by the Constitutional Convention. Therefore, the only discretion the National Council has regarding NCA 09 – 030 and TR 09 – 016 is in its role in determining whether such proposals are *necessary* to ensure as Special Election, i.e., whether the requested funds are reasonable and

[2] Article IX, Section 2(f) of the Constitution states:
"The National Council shall enact such laws as are necessary to ensure a Constitutional Convention is conducted. The National Council shall appropriate necessary funds to accomplish the Constitutional Convention."

whether the proposed absentee counters are eligible. Any review of NCA 09 – 030 and TR 09 – 016 by the National Council beyond these narrow parameters is thus prohibited.

It must be stated that this holding in no way constitutes a criticism of either the Principal Chief or the National Council. **To the contrary, this Court has every reason to believe that the National Council was acting in good faith and attempting to serve the Nation's best interests when it called into question the fact that the Convention Commission removed amendments and/or altered the language of at least one proposed amendment from the form voted upon by attendees of the Convention gatherings.** We find no evidence in the record before us of any bad acts on the part of the National Council in this matter and we refuse to speculate as to any ill motives.

We simply hold that, given the scope of its Constitutional mandate, the National Council has no discretion to review the merits of the content of the proposed Special Election ballot and/or the language of any proposed amendment contained on the Special Election ballot. This lack of discretion is consistent with the overall force of Article IX, Section 2 of our Constitution, which, at its core, is a mechanism by which the general Citizenship is supposed to be able to directly bring about Constitutional reform. In this process, none of the three branches of the Nation have anything more than a ministerial role in the Constitutional Convention process.

Correspondingly, by issuing the above *Writ of Mandamus*, we are in no way commenting upon the validity of the language of any of the proposed amendments. Without a cognizable challenge regarding any given proposed amendment – either as voted upon by participants in the Convention gathering or as approved by the Convention Commission – **this Court, too, has no discretion to review or consider the wisdom or legality of the language of any *proposed* Constitutional amendments.**

Finally, we must note that the majority's holding in this matter is not intended to interfere with the National Council's role in the process. We seek to clarify the scope of discretion that the Constitution provides the National Council with respect to ensuring a special election takes place. The timelines provided are merely practical tools to ensure that the National Council sufficiently adheres to its Constitutional mandate.

Request for Stay of Primary and General Elections

By a unanimous vote, this Court declines to issue a stay of either the upcoming primary or general elections.

It is certainly unfortunate that a special election on the proposed amendments has not been held to date. Given the language of the Constitution, Article IX, Section 2(e)[3], the citizens who participated in the Convention process clearly had a reasonable expectation that a special election would be called within one hundred eighty (180) days after the Convention first proposed its amendments. At this late stage, however, we do not find sufficient justification to merit the tremendous and unprecedented upheaval that a stay of either the primary or general elections would cause. For both practical[4] and Constitutional[5] reasons which our Opinion will expand upon, we deem a stay of the upcoming elections unworkable. For this reason, **the results of the Special Election regarding the proposed amendments will have no effect on this**

[3] This provision states: "(e) Constitutional Convention amendments, alterations, revisions, or new articles proposed by such Convention shall be submitted to the eligible voters of the Muscogee (Creek) Nation at a special election called by the Principal Chief within one hundred eighty (180) days, unless there is a general election within one hundred eighty (180) days . . . ."

[4] Among several examples, we note: 1.) the deadline for candidate filings has passed; 2.) whether Special Election can be conducted in sufficient time to allow for the general election to be held this year is extremely speculative; and 3.) any legal challenges to duly passed amendments could very well push the primary and general elections back many months.

[5] Article IX, Section 2(e), as cited in footnote 3, creates an exception to the requirement that the Principal Chief call a Special Election within one hundred eighty (180) days after proposed amendments are submitted by the Convention – this exception being when there is "a General Election within one hundred eighty (180) days." It is clear that this Constitutional language is in place to avoid unnecessary uncertainty relating to the Special Election's effect on an immediately impending General Election. Additionally, as discussed in oral argument, Article IV, Section 6 of the Constitution requires that "[e]lection dates for offices of the Muscogee (Creek) Nation shall be no more than four (4) years apart."

year's primary or general elections. Instead, any election-related results of the Special Election will not go into effect until after this year's elections, regardless of when such Special Election takes place.

Pursuant to Article 2(e), the Principal Chief should now call a Special Election on the proposed amendments to be held within one hundred eighty (180) days of this Preliminary Order. The act of calling this Special Election should take place as soon as possible, but no later than ten (10) days of this Preliminary Order so as to allow the National Council to comply with its *Writ of* Mandamus. The date of this Special Election must immediately be provided to the National Council so that it may amend the language of NCA 09 – 030 and TR 09 – 016 to reflect the new date of the Special Election.

The Principal Chief, pursuant to Article IX, Section 2(e), retains discretion as to the specific date of the Special Election.[6] Whether the Special Election is held before, after, or concurrently with the primary or general election is therefore a decision of the Executive Branch. This Court trusts, however, that all steps will be taken to conserve resources and avoid the appearance of political gamesmanship.

Threshold Issues

In the process of issuing the above holdings, this Court has necessarily been required to resolve a number of threshold issues, many of which are set forth in Respondent's *Motion to Dismiss*. These threshold issues include, but are not limited to, this Court's jurisdiction, Petitioner's standing, and Respondent's sovereign immunity. Many of these issues have been

[6] As discussed in footnote 5 above, the fact that Article IX, Section 2(e) does not generally *require* the Principal Chief to call a Special Election within one hundred eighty (180) days when a general election is scheduled within one hundred eighty (180) days serves to avoid unnecessary uncertainty relating to a Special Election's impact on an upcoming general election. Because we have stated however, that the present Special Election will in no way affect this year's general election, there is no risk of uncertainty present in holding the Special Election within one hundred eighty (180) days. Furthermore, given the fact that the Principal Chief initially called for a May 2, 2009 Special Election, this Court finds no reason for any additional delays in the process.

implicitly resolved by the above discussion and, as stated above, our final Opinion will fully address these issues. For the moment, we simply note that, as a majority, we have determined that none of these issues serve as a bar to the holdings set forth herein.

Conclusion

Although our forthcoming Opinion in this case will further discuss our rationale, we hereby hold as follows:

1.) A *Writ of Mandamus* is issued upon the National Council in the form set forth above;

2.) Petitioner's request for a stay of the primary and general elections is denied;

3.) The Principal Chief shall call for a Special Election on the proposed amendments to be held within one hundred eighty (180) days; and

4.) The Principal Chief shall inform the National Council of the new date of the Special Election within ten (10) days of this Preliminary Order so that it may amend the language of 09 – 030 and TR 09 – 016 to reflect this new date.

IT IS SO ORDERED this 31st day of July, 2009

JONODEV O. CHAUDHURI
CHIEF JUSTICE
For the Majority

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CERTIFICATE OF MAILING/DELIVERY

I, Connie R. Dearman, Supreme Court Deputy Court Clerk for the Muscogee (Creek) Nation, do hereby certify that on this 31st day of July, 2009, I faxed and mailed a true and correct copy of the foregoing Supreme Court's **Preliminary Order** with proper postage prepaid to the following:

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