IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

A.D. ELLIS, in his official capacity as Principal Chief of the Muscogee (Creek) Nation,

Plaintiff / Petitioner,

v.

MUSCOGEE (CREEK) NATION NATIONAL COUNCIL,

Defendant /Respondent.

Case No. **SC-09-06**

MEMORANDUM OPINION [1]

Before: CHAUDHURI, SHIRLEY, and HARJO-WARE, *JJ.* SUPERNAW, *C.J.* and DEER, *V.C.J.* not participating.

CHAUDHURI, *J.*, with whom SHIRLEY, *J.*, joins:

Oral argument was held in this matter on July 24, 2009. Recognizing that the issues presented in this case were extremely time-sensitive, this Court issued a *Preliminary Order* on July 31, 2009, ("Preliminary Order") that included, among other things, a *Writ of Mandamus* requiring Respondent to fund a Special Election on various proposed constitutional amendments as approved by the Muscogee (Creek) Nation's Constitutional Convention.

Subsequent to this Court's Preliminary Order, Petitioner set the date of the Special Election to coincide with the MCN General Election on November 7, 2009. Once funded by the Respondent, the Special Election was conducted by the MCN Election Board. As a result, the issues raised in this matter as they relate to the Special Election are technically moot. Although

[1] A Preliminary Order, made final by this Memorandum Opinion, was issued pursuant to a 4-1 vote. There were no dissenting opinions other than the one appended. The Justices remaining on the Court who deliberated and voted on the instant matter provide this explanatory footnote solely to inform the parties to the litigation. The substantive points set forth in the Preliminary Order, however, stand on their own individual merit.

the issues presented by this case have been effectively resolved by completion of the Special Election and related litigation, in the interest of closing open matters on the Court's docket, this Memorandum Opinion is issued for the purpose of finalizing the July 31, 2009, Preliminary Order.

Regarding the threshold issues of jurisdiction, Petitioner's standing, and Respondent's sovereign immunity, it is sufficient to state none presented a bar for the Court to consider Petitioner's requested relief. Jurisdiction was clear. The instant case involved constitutional interpretation which, if assigned to a Special District Judge due to the District Court's conflict in this matter, would have ultimately resulted in *de novo* review by this Court. Such unnecessary delay in this instance was impracticable and unwarranted. Additionally, Petitioner clearly had standing due to the constitutional mandate for the Executive Branch to both call for and coordinate the execution of the Special Election. Lastly, sovereign immunity failed to create a bar to jurisdiction in this instance because Petitioner sought only injunctive relief.

DELIVERED AND FILED: January 19, 2012.

Houston Shirley
Associate Justice

Jonodev O. Chaudhuri
Associate Justice

HARJO-WARE, *J.*, dissenting:

This case involved a request from the Principal Chief seeking to force the Muscogee National Council to appropriate funds and enact legislation. The Muscogee Constitution Article IX, Section 2, (Amendment),[2] provided a method for amending the Muscogee Constitution and

[2] Muscogee (Creek) Nation Constitution, art. IX, § 2 (repealed 2009 by M(C)N Const. amend. A105, eff. November 7, 2009).

outlined a number of steps which culminated in a Constitutional Convention. The Amendment also identified the steps to be taken after a Convention for the adoption of proposed amendments to the Muscogee Constitution. The Convention was held on November 7-8, 2009. Afterward, the Principal Chief fulfilled his duty under the Amendment by setting a date for a Special Election to have the Muscogee citizenry consider the proposed amendments. Pursuant to its duty under Articles IV and IX of the Muscogee Constitution and Title 19, Chapter 3 of the Election Code, the Muscogee Election Board (Election Board) requested an appropriation of funds to conduct a Special Election for the adoption of constitutional amendments proposed during the Convention and the appointment of counters for the Special Election.

The National Council did not immediately appropriate funds or appoint counters as requested by the Election Board. Rather, it began an inquiry into the differences in language between what Convention attendees adopted for proposed Amendment 67 (A67) and the way the ballot was written by the Constitutional Convention Commission (Commission). In the midst of this inquiry, the Principal Chief filed the instant case requesting a writ of mandamus to force the National Council to appropriate the funds and appoint the nominees as requested by the Election Board.[3] The National Council did not answer his Petition, but instead filed a pre-answer pleading, namely a Motion to Dismiss, raising a number of significant issues. By a Preliminary Order, the majority issued a Writ of Mandamus which forced the National Council to appropriate funds and appoint persons as absentee counters. The Preliminary Order also impliedly and summarily dismissed all issues raised in the Motion to Dismiss and severely limited the inquiry authority and responsibility of the National Council during its appropriation and legislative processes.

[3] The Principal Chief also requested a stay of the upcoming election. By unanimous vote, the Petition for Stay of Election was denied.

The majority held that the National Council has no authority to conduct an inquiry during the appropriation process, but provided no justification for such holding. By its Preliminary Order, the majority simply forced the National Council to "rubber-stamp" the expenditure and inquire only as to the "reasonableness" of the funding request. This dissenting opinion posits that inquiry by the National Council in this instance simply represented an attempt to limit appropriation authorization to appropriate purposes. An appropriation request for an illegal or improper purpose should not be funded. This request was no different. On its face, the language of A67 as it appeared on the ballot was contrary to the language adopted by Muscogee citizens at the Convention. A request to fund a proposed enactment contrary to the directives of the citizenry should be denied absent sufficient justification for the change. It is precisely this issue that the National Council sought to vet during the appropriation and legislative process. Such efforts were, unfortunately, interrupted by judicial intrusion into what amounted to a political question under any of the identifying hallmarks. *Baker v. Carr*, 82 S.Ct. 691, 710 (1962).

Respondent was never given an opportunity to answer or file any counter or cross claims sufficient to preserve its rights or prosecute its case. Under factually similar circumstances, this Court has held that the District Court erred in issuing a stay before a defendant had an opportunity to respond and before the twenty (20) days allowed by Rule 8 to file an answer. In that case, this Court vacated the District Court's order and remanded the case as violation of due process owed to the defendant. *Beaver v. Okmulgee Indian Community,* 4 Mvs. L. Rep. 174, 175 (1999).

WRIT OF MANDAMUS

Writs of mandamus have previously been issued by the Muscogee Supreme Court. *Cox v. Crow & Foster*, 4 Mvs. L. Rep. 66, 67 (1991) (mandating the Hospital Board submit to an annual audit); *Cox v. McIntosh*, 4 Mvs. L. R. 88 (1991) (mandating Agribusiness submit to an annual audit); *S.W., C.W.,C.W., & R.W. v. Frye*, 4 Mvs. L. Rep. 137, 138 (1995) (mandating District Judge make his findings and rule on a case); *M(C)N v. C.P., B.R.P. & C.P.*, 4 Mvs. L. Rep. 147 (1995) (mandating District Judge make his findings and rule on a case). However, this litany of cases provides limited guidance and fails to provide adequate standards for the issuance of writs of mandamus. The lone case which discusses standards for issue of writs of mandamus presented a request by litigants to ignore the final order rule and entertain an interlocutory appeal under the guise of mandamus relief. *Brown & Williams Tobacco Corporation v. District Court of the Muscogee (Creek) Nation*, 4 Mvs. L. Rep. 164, 171 (1998). Due to the particular facts of the case, the Supreme Court adopted, as guidance, one prong of the suggested federal standard for issuance of mandamus as follows:

> Ultimately, the 10th Circuit in *U.S. v. Roberts*, held that mandamus was not an appropriate remedy in the federal system when petitioners have adequate remedies for appeal. Additionally, the court in *U.S. v. Roberts* held that parties cannot use mandamus to expand the statutory scope of interlocutory appeals. This Court finds this aspect of the 10th Circuit's approach to be sensible and will use it as guidance as a matter of tribal law.

Brown & Williams Tobacco Corporation v. District Court of the Muscogee (Creek) Nation, 4 Mvs. L. Rep. 164, 171 (1998), citing *U.S. v. Roberts*, 88 F. 3d 872.

A. STANDARD FOR ISSUANCE OF WRITS OF MANDAMUS

Petitioner, the Muscogee Principal Chief, advocates this Court adopt the federal standard for issuance of mandamus relief as set forth in *Johnson v. Rogers,* 917 F. 2d 1283 (10th Cir. 1990) which provides:

> For mandamus to issue, there must be **a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available.** Citations omitted. Petitioner must also show that his **right to the writ is "clear and indisputable.** Citations omitted.

Johnson v. Rogers, 917 F.2d 1283, 1285 (10 Cir. 1990). [Emphasis added.]

With the exception of *Brown*, our Nation's case law is ad-hoc and not based on any uniform standard. Such haphazard decision making provides no useful precedent upon which litigants can rely. I agree with the Petitioner that this three prong standard should be utilized as guidance in Muscogee jurisprudence and applied in this case.

1. PETITIONER'S RIGHT TO THE WRIT IS NEITHER CLEAR NOR INDISPUTABLE.

Under the Amendment, the Principal Chief has the duty to call an election. He did. Petitioner, himself, admits that he has exercised his right by declaring May 2, 2009, as the date for a Special Election. Petitioner's Brief, p. 5. He argues, however, that he has an additional right and duty to ensure that the Special Election be held. Petitioner's Brief, p. 5. In *Begley v. Constitutional Commission*, Mvs. L. Rep. 298 (2008), this Court interpreted the Principal Chief's duty under Article IX § 1(b) was to simply name a date for an election. His constitutional authorization under this Amendment is the same, he simply names a date. Neither the Constitution nor the Amendment grants him the right or duty to seek the enforcement of this provision. The Principal Chief does not have a clear and indisputable right to the relief he has requested. Accordingly, the first requirement for a writ of mandamus fails.

2. THERE IS NO PLAINLY DEFINED AND PREEMPTORY DUTY ON THE PART OF THE NATIONAL COUNCIL TO FUND THE SPECIAL ELECTION OR APPOINT ABSENTEE COUNTERS.

A Constitutional Convention is a novelty in our modern jurisprudence. The Amendment does not define this term. As always, when we adopt a concept from another sovereign, we must interpret what it means in our own Nation. Interpretation is necessary so that everyone knows what the term means and has an understanding of what their duties and responsibilities are. Until the majority issued its Preliminary Opinion, no such interpretation had heretofore existed.

Responsibility of the National Council under the Amendment is not clear. The new Constitutional Amendment (Amendment) at Article IX § 2(f) says:

> 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**.

MCN Constitution Art. IX § 2(f).

The National Council fulfilled its constitutional duty to fund the Constitutional Convention as it understood the term by appropriating $85, 000 in NCA 08-152 (September 2008).[4] NCA 08-152 provides in pertinent part:

> SECTION ONE. * * *
>
> Section 1-101. Findings. The National Council Finds that:
>
> A. The Constitutional Convention Commission is responsible for organizing and carrying out a Constitutional Convention.
>
> B. The National Council shall enact such laws as necessary to ensure a Constitutional Convention is conducted.
>
> C. The Constitutional Convention Commission has conducted public hearings throughout the Nation during 2008.

[4] The National Council appropriated $48,500 for the steps leading up the convention, i.e. the cost of public hearings and public education in NCA 06-146 (July 2006).

D. The Constitutional Convention Commission has organized and promulgated rules and regulations for a Constitutional Convention.

E. **A Constitutional Convention is scheduled for November 7 and 8, 2008 to be held in the Mound Building Auditorium, Okmulgee.**

F. An appropriation is necessary to carry out the process of a Constitutional Convention in accordance with the Muscogee (Creek) Nation Constitution.

SECTION TWO. PURPOSE. **The purpose of this Act is to appropriate the funds necessary to conduct a Constitutional Convention,** prepare a Public Report and separate ballots for each amendment, revision, alteration or addition.

* * *

NCA 08-152 [Emphasis added.]

In the budget attached to NCA 08-152, it is even clearer that the National Council funded and believed that the Constitutional Convention was a two (2) day meeting. The National Council's belief comports with the common understanding of the term convention. A convention is defined as:

> A special deliberative assembly elected for the purpose of framing, revising, or amending a constitution. Also termed constitutional convention. . . . An assembly or meeting of members belonging to an organization or having a common objective. Also termed conference.

Black's Law Dictionary, 8th Edition, West Publishing (2004).

The National Council fulfilled its duty under the Amendment as it likely understood the term. The Special Election was the step after the Constitutional Convention.

Nothing in the Constitution or the Amendment dictates or limits how the National Council should conduct its appropriation process. Neither the Constitution nor the Amendment stripped the National Council of its other duties to investigate the purpose or propriety of expenditures requested. Such a limitation on the power of the National Council was only created

through interpretation employed by the majority. The mere necessity of interpretation is a fatal flaw in the issuance of a writ of mandamus. Thus, the second requirement for mandamus fails.

3. ANOTHER ADEQUATE REMEDY WAS AVAILABLE.

Justice and fundamental fairness requires us to first interpret the meaning of the term Constitutional Convention and outline the extent of the duties and responsibilities of the executive and legislature there under prior to forcing compliance with a new interpretation. The undue embarrassment caused a sister branch of government should never have been undertaken. *Baker v. Carr,* 82 S.Ct. at 710.

Petitioner himself cites the alternate remedy available by citing *Cox v. Kamp*, 4 Mvs. L. Rep. 75 (1991), wherein the Muscogee Supreme Court issued injunctive relief. The alternate adequate remedy is through declaratory and injunctive relief. Interpretation can be issued through declaratory judgment. An injunctive order consistent with that interpretation may be issued giving the National Council the opportunity to fulfill whatever duties have then been identified. The third requirement for mandamus fails.

I respectfully disagree that a writ of mandamus should have issued.

DELIVERED AND FILED: January 19, 2012.

Leah Harjo-Ware
Associate Justice

CERTIFICATE OF MAILING/DELIVERY

I, Connie R. Dearman, Supreme Court Deputy Court Clerk for the Muscogee (Creek) Nation, do hereby certify that on this 19th day of January, 2012, I faxed and mailed a true and correct copy of the foregoing Supreme Court's **Order** with proper postage prepaid to the following:

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