IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

A.D. ELLIS, in his official capacity as Principal Chief of the Muscogee (Creek) Nation,	)	
Plaintiff-Appellee,	)	
v.	)	Case No. SC-10-01
	)	(District Court Case No. CV 2009-33)
CHECOTAH MUSCOGEE CREEK INDIAN COMMUNITY, et al.	)	
Defendants-Appellants.	)	

OPINION AND ORDER DENYING MOTION TO VACATE

Before: LERBLANCE, *C.J.*; ADAMS, *V.C.J.*; HARJO-WARE, SUPERNAW, DEER, and THOMPSON, *JJ.*

PER CURIAM.

DEER, *J.*, concurring specially as to Part II.

HARJO-WARE, *J.*, concurring specially as to Part I, dissenting as to Part II, and dissenting in judgment.

Defendant-Appellants Checotah, Duck Creek and Okemah Indian Communities (Appellants) move to have us vacate the Opinion and Order previously filed in this matter. Based on our conclusion that M(C)NCA Title 27, § 3-101, requires Supreme Court decisions to be delivered by the simple majority of a participating quorum, we must deny Appellants' motions to vacate.

BACKGROUND

On July 20, 2011, this Court delivered its Opinion and Order (Order) in the above-captioned matter. The Order upheld a District Court grant of permanent injunctive relief in favor of Plaintiff-

Appellee. Six justices were properly seated as of July 20, 2011; however, only five justices participated in the decision.[1] The Order was delivered by a three-justice majority. A fourth justice filed a separate opinion which partially concurred with the majority on a narrow finding of fact, but dissented on affirming the District Court's conclusions of law. A fifth justice issued a separate, dissenting opinion.

Appellants assert that the Order lacks lawful force and effect because it was filed pursuant to two errors: (1) under M(C)NCA Title 27, § 3-101, an insufficient number of justices joined in the Order's majority opinion; and (2) two of the three justices who joined the Order's majority opinion were ineligible and lacked judicial authority because their appointed terms on the Court had expired prior to July 20, 2011. In response, Plaintiff-Appellee expressly declines to endorse the briefs filed by the previous administration and agrees with Appellants' first assertion of error under Title 27, § 3-101.[2] Plaintiff-Appellee's response does not address Appellants' second assertion of error.

JURISDICTION, SCOPE AND STANDARD OF REVIEW

Jurisdiction is proper under M(C)NCA Title 27, § 1-101.C.[3] Although Appellants' motions are captioned as motions to vacate, the filings are essentially petitions for rehearing and will be treated as such under M(C)NCA Title 27, App. 2, Rule 24.B.2.[4] Our review is limited solely to the

[1] Justice Montie Deer did not participate.

[2] Approximately five months after the Supreme Court's Order dated July 20, 2011, was filed and the instant appeal seemingly closed, A.D. Ellis' second term as Principal Chief ended. On November 5, 2011, the Nation's citizens elected George Tiger to the office of Principal Chief of the Muscogee (Creek) Nation. Chief Tiger's term as Principal Chief began in January 2012.

[3] Appellants' motions to vacate, viewed as petitions for rehearing, were untimely filed under Title 27, App. 2, Rule 24.A; however, this Court's authority to impose penalties for party non-compliance with the appellate rules under Rule 20.C. is permissive rather than mandatory. Party non-compliance with the appellate rules has no effect on this Court's jurisdiction. Additionally, we decline to dismiss Appellants' motions as untimely due to the nature of the procedural errors asserted by the Appellants and in order to resolve purported confusion regarding the lawful effect of this Court's Order dated July 20, 2011.

[4] M(C)NCA Title 27, App. 2, Rule 24.B.2 ("A petition for rehearing may be presented [if the Court's] decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed.").

procedural errors alleged and does not include reconsideration of the underlying substantive issues resolved by the July 20, 2011, Order. Appellants' motions present questions of law which we review *de novo*.[5]

ISSUES PRESENTED

Part I. Under M(C)NCA Title 27, § 3-101, does a decision delivered by a three-justice majority carry the force of law when less than six justices are available to participate in the decision?

Part II. When the Order was filed on July 20, 2011, did Muscogee (Creek) Nation law operate to remove judicial authority from multiple members of the Supreme Court, rendering them unqualified to participate in the decision?

DISCUSSION

It is well settled in modern Mvskoke jurisprudence that our Constitution establishes a separation of authority between the three branches of our Nation's government.[6] It is also well settled that Article VII vests this Court with the Nation's judicial power,[7] including, *inter alia*, the power of judicial review,[8] and the authority to establish procedures which provide due process.[9]

---

[5] *See Fife v. M(C)N Health Systems Board*, et al., 4 Mvs. L. R. 149 (July 21, 1995); *In the Matter of Adoption of R.A.W.*, 4 Mvs. L. R. 194 (October 5, 1999); *Preferred Management Corporation v. National Council of the Muscogee (Creek) Nation*, 4 Mvs. L. R. 55 (May 2, 1990). *See also Oliver v. M(C)N National Council*, 4 Mvs. L. R. 281 (September 22, 2006); *Alexander v. Gouge & Hufft*, 4 Mvs. L. R. 225 (January 16, 2003).

[6] *Beaver v. National Council*, 4 Mvs. L. R. 19, 23 (January 18, 1985); *Cox v. Childers*, 4 Mvs. L. R. 71, 74 (June 19, 1991); *Cox v. Kamp*, 4 Mvs. L. R. 75, 79 (June 27, 1991); *Oliver v. National Council*, 4 Mvs. L. R. 281, 291 (September 22, 2006); *Ellis v. National Council*, 4 Mvs. L. R. 305, 308 (July 12, 2007).

[7] M(C)NCA Const. Art. VII, § 1 ("The judicial power of the Muscogee (Creek) Nation shall be vested in one Supreme Court limited to matters of the Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain."). Article III, Sect. 1, of the 1867 Muscogee (Creek) Nation Constitution referred to this authority as the "supreme law defining power." *Constitution and Laws of the Muscogee (Creek) Nation* 5 (Scholarly Resources, Inc. 1975).

[8] *Beaver v. National Council*, 4 Mvs. L. R. 19, 23 (January 18, 1985); *Cox v. Kamp*, 4 Mvs. L. R. 75, 79 (June 27, 1991); *Oliver v. National Council*, 4 Mvs. L. R. 281, 291 (September 22, 2006); *Ellis v. National Council*, 4 Mvs. L. R. 305, 308 (July 12, 2007).

A. Judicial Review and Statutory Construction

When properly called upon to exercise judicial review, we look first to whether the text of the statutory provision in question has plain meaning. If the words are unambiguous, we presume the National Council intended that meaning and apply the statute according to its terms.[10] Use of the "plain-meaning rule" is both an appropriate judicial deference to the National Council's law-making authority and an analytical hurdle which limits unnecessary judicial encroachment into the law-making function. If, however, statutory text at issue is determined to be ambiguous, this Court's constitutional mandate is to resolve the ambiguity.[11] Ambiguity may appear as a contradictory arrangement of text on the face of a statute, or it may be created by statutory language that is seemingly clear on its face, but ambiguous as to its application in various contexts.[12] If a statute lacks plain meaning, we seek to determine the National Council's intent and desired effect behind the legislation by considering any available legislative history. If available legislative history is insufficient or fails to be completely instructive regarding legislative intent, any remaining ambiguity is resolved by way of canons of statutory construction.[13]

B. Procedural Due Process

Article VII, Sect. 3, of the Nation's Constitution requires the Supreme Court to "establish procedures which [e]nsure that the appellant receives due process of law and prompt and speedy

---

[9] M(C)NCA Const. Art. VII, § 3 ("The Supreme Court shall, with the approval of the Muscogee (Creek) National Council[,] establish procedures to insure that the appellant receives due process of law and prompt and speedy relief."); Title 27, § 3-108 (as amended by NCA 10-190, enacted by veto-override on November 22, 2010) ("The Supreme Court shall establish procedures for all cases and other matters before the Supreme Court."). *See also* Title 27, § 1-106 (as amended by NCA 10-190).

[10] *See Cox v. Kamp*, 4 Mvs. L. R. 75, 79 (June 27, 1991).

[11] *See Cox v. Kamp*, 4 Mvs. L. R. at 79 (June 27, 1991); *Courtwright v. July, et al.*, 4 Mvs. L. R. 105, 112 (June 28, 1993).

[12] *See Cox v. Kamp*, 4 Mvs. L. R. at 79 (June 27, 1991) ("The duty of this Court is not to merely give definition to words within the law but it is foruse, as a group, to determine the intent and scope *behind* the words.").

[13] *See Foster v. Indian Country USA, et al.*, 4 Mvs. L. R. 35, 37 (May 1, 1987); *Oliver v. National Council*, 4 Mvs. L. R. 281, 297 (September 22, 2006).

relief." Traditional Mvskoke ideals of justice and fairness have historically embodied the principles of due process.[14] In keeping with that tradition, modern Mvskoke jurisprudence evaluates questions of sufficiency of procedural due process in court proceedings by balancing three factual elements: (1) the strength and nature of the private interest involved; (2) the risk of an erroneous outcome if additional procedure isn't afforded; and (3) the Nation's interest in proceeding with no more process than already afforded.[15] The appellate rules also provide an additional due process protection by requiring the rules to be "liberally construed . . . to [e]nsure that the appellant receives due process of law[.]"[16]

C. Impact of Vacancies and Recusals

A review of Supreme Court decisions delivered since the Court's first modern era opinion was filed in 1985 reveals a historical reality: The Muscogee (Creek) Nation Supreme Court is required to decide most cases with fewer than six justices. Prior to the instant appeal being filed, this Court delivered sixty-seven substantive decisions. Only nineteen opinions (28%) were delivered by a six-justice Court. Forty-eight of the sixty-seven opinions (72%) were delivered by either four or five justices. Although the Constitution specifies the Court "shall be composed of six (6) members appointed by the Principal Chief, subject to majority approval by the . . . National Council",[17] vacancies and recusals routinely prevent a full constitutional compliment of six justices from participating in most decisions.

---

[14] *Beaver, et al. v. Okmulgee Indian Community*, 4 Mvs. L. R. 183, 185 (September 1, 1999); and *Ellis v. National Council*, 4 Mvs. L. R. 322, 344 (August 30, 2007).
[15] *In the Matter of R.F. & J.F.*, 4 Mvs. L. R. 198, 202 (January 8, 2000); *Oliver v. National Council*, 4 Mvs. L. R. 281, 297 (September 22, 2006); and *Beaver, et al. v. Okmulgee Indian Community*, 4 Mvs. L. R. 183, 184 (September 1, 1999).
[16] M(C)NCA Title 27, Appendix 2, Rule 1.E. (although amended by NCA 10-190 via veto-override on November 22, 2010, NCA 10-190 was subsequently repealed by NCA 12-126 on July 5, 2012).
[17] M(C)NCA Const. Art. VII, § 2.

Vacancies occur when a duly qualified successor is not nominated and confirmed prior to the departure of a seated member of the Court. Although vacancy may occur suddenly due to exigent or unforeseen circumstances, such instances are exceedingly rare. Typically, members of the Court serve a six-year term, so succession planning is largely predictable. A lengthy lapse in time between the departure of one Court member and the arrival of a duly qualified successor does, however, decrease the number of justices available to participate in deliberation and, in some circumstances, may interfere with the Court's ability to establish a quorum.

Voluntary judicial recusals, while serving an essential function in maintaining public confidence in the integrity and independence of the judicial branch, also regularly subtract from the total number of justices available to decide a case. If a Supreme Court justice individually determines that a proceeding involves parties or subject matter which would reasonably bring his or her impartiality into question, the justice is required to recuse from participation in that proceeding.[18] Rule 3 of the Judicial Code of Ethics identifies over twenty-five individual conditions which require recusal once a justice determines that any one or more of the conditions are personally or professionally applicable.[19] Unlike vacancies, periodic recusals by members of

[18] NCA 12-033, §4-103.E.1 (April 10, 2012) (repealing Title 26 in its entirety and creating a new Title 26 establishing the District Trial Court Civil, Criminal, and Family Divisions) (as amended by NCA 12-128 (August 9, 2012)).
[19] *Id.* at §4-103.E., Disqualification.

1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
    a. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or first-hand knowledge of disputed evidentiary facts concerning the proceeding;
    b. the judge served as a lawyer, advocate, or personal representative in the matter before the Court or a person with whom the Judge has been associated in a professional capacity served as a lawyer, advocate or personal representative concerning the matter;
    c. the judge knows that the judge, individually or as a fiduciary, or the judge's extended family, wherever residing, or any other person residing in the judge's household has a financial interest in the subject matter in controversy, is a party to the proceeding or has any other interest that could be substantially affected by the outcome of the proceeding;
    d. the judge, the judge's spouse, or the judge's extended family, wherever residing, or any other person residing in the judge's household:
        i. is a party to the proceeding, or an officer, director or trustee of a party;

the Supreme Court are required, necessary and unavoidable. When viewed together, the collective impact of vacancies and recusals on the Supreme Court's ability to deliver decisions is abundantly clear. Almost three-quarters of all Muscogee (Creek) Nation Supreme Court decisions are delivered by less than six justices. Such an impact must necessarily be considered in our analysis of Appellants' claims.

D. Analysis

Part I

Appellants' first assert that an insufficient number of justices joined in the Order's three-justice majority opinion because under Title 27, § 3-101, "[a] judgment or decision of the Supreme Court requires the approval of a minimum of four justices." Appellants' first assertion would seemingly have us find plain meaning by reading § 3-101's four-justice requirement in isolation from the other provisions of § 3-101 and the other eight sections within Title 27, Chapter 3. Rather than discover plain meaning by excluding the statutory text surrounding § 3-101's requirement for a four-justice agreement, we find the text and structure of Title 27, Chapter 3, requires § 3-101 and § 3-103 to be read together. Each section, individually, clearly establishes a minimum number of justices necessary for certain Supreme Court actions. The collective effect of both sections

---

ii. is acting as a lawyer in the proceeding;
iii. is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
iv. is to the judge's knowledge, likely to be a material witness in the proceeding.

e. the judge, while a judge, has made a public statement that commits, or appears to commit, the judge with respect to:
i. an issue in the proceeding; or
ii. the controversy in the proceeding.

2. A judge shall keep informed about the judge's personal and fiduciary economic interests, and make reasonable efforts to keep informed about the personal economic interests of the judge's extended family, wherever residing.

NCA 12-033 (April 10, 2012) (repealing Title 26 in its entirety and creating a new Title 26 establishing the District Trial Court Civil, Criminal, and Family Divisions) (as amended by NCA 12-128 (August 9, 2012)).

together, however, potentially affects the Court's ability to exercise the Nation's judicial power and perform its constitutionally mandated function.

It is clear that Title 27, § 3-103 creates a quorum requirement because it specifies that four qualified justices must be available to participate before the Court can properly hear any action or appeal (the quorum rule). It is also clear that Title 27, § 3-101 requires four justices to agree at the conclusion of proceedings (the four-in-agreement rule). When both sections are read together, however, and in light of the historical reality that most Supreme Court cases are decided by only four or five justices, it is contextually ambiguous whether § 3-101's four-in-agreement rule was intended to apply when less than six justices are available to participate in rendering a decision.[20] To resolve the contextual ambiguity created by § 3-101 and § 3-103, we turn to the legislative history of both provisions in an effort to preserve the National Council's intent behind enacting each section.

The legislative history of Title 27, Chapter 3, prior to 1999, clearly reveals that a simple majority of participating justices could deliver a Supreme Court decision after a quorum was established. The first modern judicial code, adopted in 1982, recognized the use of a four-justice panel to hear both civil and criminal appeals, as well as habeas corpus petitions. The 1982 Judicial Code's chapter on court procedures provided that "[t]he Chief Justice shall . . . appoint four justices to hear the case[,]"[21] and "[t]here must be at least four (4) Justices sitting together as a body to hear any case appealed, including writs of [h]abeas [c]orpus."[22] For civil appeals, the Code lacked any express requirement for a minimum number of judicial votes sufficient for a Supreme Court decision. In a curious and direct contradiction to the four-justice panel procedure, however, the

[20] M(C)NCA Const. Art. VII, § 2 ("[t]he Supreme Court shall be composed of six (6) members appointed by the Principal Chief, subject to majority approval by the Muscogee (Creek) National Council. . . [.]").
[21] NCA 82-30, § 259 (Sept. 13, 1982) (adopting the Judicial Code of 1982).
[22] *Id.* at § 202.

Code expressly allowed for less than four justices to hear and decide criminal appeals and habeas petitions.

The Code's chapter on criminal appeal procedure required that, for habeas petitions, "[t]hree justices must sit at the hearing. . . [.]"[23] To render a decision in criminal appeals, the Code further specified that

> [t]here must be at least a majority of the Justices sitting on any appeals case who agree on a decision of the court before such decision become final. If five Justices sit on a case, at least three (3) must concur to make a final decision; if four Justices sit on a case, at least three (3) must concur to make a final decision; if three Justices sit on a case, at least two (2) must concur to make a final decision.[24]

A review of Muscogee (Creek) Nation Supreme Court decisions filed from January 1985 through June 1999 reveals, however, these statutory contradictions had no impact on the Court's ability to function.[25] Notwithstanding the statutory contradictions, it is abundantly clear that the 1982 Judicial Code sought to establish a quorum: some minimum number of available, qualified justices sufficient to begin hearing a case, but some number less than a full, six-member Court. It is also clear that, once a quorum was established under the 1982 Judicial Code, a simple majority of the participating, qualified justices was sufficient to deliver a decision.[26]

---

[23] *Id.* at § 267.B.

[24] *Id.* at § 261 (emphasis added). Although the last provision of this section seemingly contradicts the requirement for a four-justice quorum created in § 202, we note the requirement for a mere simple majority remained consistent even within the contradiction.

[25] Forty-three substantive decisions were issued from January 1985 through June 1999. All forty-three decisions involved only civil appeals, so the contradiction between the Code's four-justice panel for "any" appeal or petition and the three-justice panel seemingly allowed for criminal appeals and habeas petitions never became problematic. Review of the same forty-three decisions also indicates that, rather than use a four-justice panel, all available, qualified justices on the Court would hear, deliberate and decide the case. Of the forty-three decisions reviewed, ten were decided by a six-justice panel, twenty-six were decided by a five-justice panel, and seven were decided by a four-justice panel. Forty-one of the forty-three decisions were unanimous and two were decided 4-1.

[26] Although the 1982 Judicial Code lacked any express requirement for a minimum number of judicial votes in civil appeals, we conclude the inherent differences in the nature of the civil and criminal appeals makes it exceedingly improbable that NCA 82-30 was intended to create a more stringent standard for delivery of decisions in civil appeals than in criminal appeals or habeas petitions. It is more probable that either; (1) a simple majority requirement was intended to apply to both types of appeals, or (2) due to the nature of criminal appeals and an appellant's potential loss

In 1999, NCA 99-85 added the four-in-agreement rule by requiring "[a] judgment or decision of the Supreme Court [to have] the approval of a minimum of four justices."[27] Although it seemingly imposed a new requirement in addition to the quorum rule, NCA 99-85 failed to correct the contradictions within the 1982 Judicial Code. In 2001, NCA 01-88[28] removed from Title 27 all provisions related to judicial voting procedures except § 3-101's four-in-agreement rule, and § 3-103's quorum rule.[29] Ultimately, the legislative history presents two possible interpretations by which to resolve the contextual ambiguity created by § 3-101 and § 3-103. First, § 3-101's four-in-agreement rule may be interpreted to be independent from § 3-103's quorum rule and applicable without regard to the number of qualified, participating justices. Alternatively, § 3-101 may be read to require only a simple majority to render a decision because the four-in-agreement rule, when read in conjunction with § 3-103's quorum rule, includes an inherent presumption of six qualified, participating justices. We find that due process considerations and the canon of constitutional avoidance require us to conclude the latter interpretation and resulting construction are proper.[30]

The first possible interpretation resolves the contextual ambiguity by reading the four-in-agreement rule as separate and unrelated to the quorum rule. The resulting construction and legal effect is problematic; however, as this interpretation of § 3-101 necessarily creates an increased burden of persuasion for any party seeking relief before the Court when less than six justices are

---

of liberty and/or property, criminal appeals must necessarily involve additional requirements as compared to civil appeals. We find it more likely that the drafters viewed a simple majority requirement as a default rule and intended it to apply to both types of appeals within Title Two of NCA 82-30. Additionally, the contradictory provision at § 261 which allowed a three-justice quorum and a two-justice simple majority especially supports the conclusion that NCA 82-30 was drafted to require only a simple majority of a quorum for Supreme Court decisions.

[27] NCA 99-85, § 103 (July 1, 1999).

[28] NCA 01-88 (May 24, 2001) (amending §§ 206-208, 251-291 of NCA 82-30).

[29] The instant appeal was initially filed on April 5, 2010. As of that date, the Supreme Court continued to be unimpaired by statutory ambiguities related to judicial voting. Twenty-four substantive decisions were issued from July 1999 through March 2010. Nine decisions were made by a six-justice panel with six decisions made unanimously and three decided by a 5-1 vote. Eight decisions were issued by five-justice panel with six decisions made unanimously and two decided by a 4-1 vote. Seven decisions were issued by a unanimous four-justice panel.

[30] *See infra* note 34.

available to participate in the decision. Such an additional burden is suspect, as it is influenced solely by external factors unrelated to the merits of an appeal. Under this interpretation, a party appearing before all six justices needs only to persuade a simple majority of the Court to win on appeal. If, however, the same party seeks identical relief when one Court seat remains vacant or when one justice determines that recusal is proper under one of the many conditions sufficient to warrant disqualification under Rule 3 of the Judicial Code of Ethics,[31] that party would be required to secure a supermajority of the Court for a successful appeal. The four-in-agreement rule, under this interpretation, would be most unforgiving to the unfortunate party required to secure a unanimous Court due to multiple vacant seats or multiple recusals.

No comparative balancing of private interests and interests of the Nation is necessary to determine whether the first interpretation of the four-in-agreement rule sufficiently protects an appellant's right to due process. The first interpretation results in a construction that, at its core, is fundamentally counter to the principle that due process includes the right to an impartial tribunal.[32] Although individual Court members' impartiality would remain unaffected by this interpretation, the four-in-agreement rule, as applied here, erodes the impartiality of the Court sitting as a body. The inverse correlation between burden of persuasion and number of participating justices created

---

[31] *See supra* note 19.

[32] M(C)NCA Const. Art. VII, § 3. *In Re: the Practice of Law Before the Courts of the Muscogee (Creek) Nation*, 4 Mvs. L. R. 249, 252 (February 14, 2005) ("The responsibility to perform judicial duties with impartiality extends to all cases and all persons before the Mvskoke Courts . . . [t]his is true under both [t]raditional Mvskoke law and under the Code of Conduct for Judges."); *Ellis v. National Council*, 4 Mvs. L. R. 305, 310 (July 12, 2007) ("Indian tribes were not made subject to the Bill of Rights. However, the laws of the Muscogee Nation are subject to the limitation imposed upon the tribal governments by the Indian Civil Rights Act . . . [.]"). *See also* 25 U.S.C. § 1302(a)(8) (2010) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process."); *and Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("[Due process] entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness by ensuring that . . . no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.") (internal citations omitted).

under this reading of the four-in-agreement rule is constitutionally suspect and lacks sufficient due process protections.[33] We need not reach the question of whether § 3-101 is constitutional under this reading, however, because the legislative history offers a second possible interpretation which avoids constitutional problems.

In deference to the National Council's legislative authority, modern Mvskoke jurisprudence has implicitly incorporated the canon of constitutional avoidance.[34] The avoidance canon provides that "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to [legislative] intent[.]"[35] Under the second possible interpretation offered by the legislative history, § 3-101's four-in-agreement rule may be read in conjunction with § 3-103's quorum rule to create an inherent presumption that six qualified justices will participate in each decision. An inherent presumption of six participating justices both resolves § 3-101's ambiguity and results in statutory construction that allows Supreme Court decisions to be delivered by a simple majority of participating justices after a quorum is established. Under this interpretation, four justices may deliver a decision if six justices participate. If only four or five justices participate, then three may render a decision. A consistent simple majority requirement serves to

---

[33] *See supra* notes 8, 9 and 32.

[34] *See Oliver v. National Council*, 4 Mvs. L. R. at 289 ("[t]his Court does not believe that the above record of repeated litigation reflects an intentional attempt by the National Council to usurp the [constitutionally conferred] authority of either of the other two branches of government of this Nation."); *In the Matter of the Constitutionality of NCA 98-02*, 4 Mvs. L. R. 175, 182 (August 19, 1999) (declining to assume original jurisdiction over a National Council member's claim seeking declaratory relief based on lack of standing and noting in dicta that "[w]hile the exercise of [judicial review] is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of . . . courts performing that role." (internal citations omitted)); *Ellis v. National Council*, 4 Mvs. L. R. 305, 311 (July 12, 2007) (Harjo-Ware, J., concurring in-part and dissenting in-part) (declaring a statutory requirement for the M(C)N Supreme Court to provide a jury trial on demand by either party in original jurisdiction cases "void on inapplicability grounds utilize[ing] a least restrictive statutory construction. . .", thereby avoiding the constitutional question reached by the majority.).

[35] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

protect an appellant's right to due process and ensures that the burden of persuasion is unaffected by external, unrelated factors such as vacancies and recusals.

Although the history of NCA 99-85 and NCA 01-88 fails to offer a clear legislative intent, a recent amendment to Title 26 is instructive and reinforces our conclusion that the second interpretation of § 3-101 is proper. In April 2012, NCA 12-033 created a new Title 26 which, *inter alia*, established a new organizational structure for the District Court.[36] Title 26 previously specified that appointment of a special District Court judge required "[a] majority of the Supreme Court Justices [to] approve the appointment [.]"[37] NCA 12-033 amended the procedure, however, to require "the Supreme Court, by majority with a quorum present, [to] appoint a Special Judge" when no District Court judge is available to preside over a specific case or matter.[38] Our construction of § 3-101 is consistent with NCA 12-033's clear, unambiguous expression of the simple majority requirement. Additionally, the National Council's findings included within NCA 12-033 do not suggest that the legislation was intended to alter judicial procedure already in place. We conclude that, rather than alter or create new requirements, NCA 12-033's effect was to clarify the pre-existing requirement for Supreme Court decisions to be made by a simple majority of justices after the Court establishes a quorum.

Construction which reads § 3-101 and § 3-103 as functionally equivalent to the simple majority rule also comports with the historical reality that the Supreme Court is required to decide most cases with less than six justices. In light of this reality, it would be nonsensical to construct § 3-101 in a manner that ignores its history and interrelatedness with § 3-103. The only constitutionally acceptable construction requires both sections to be read together and require only a

[36] NCA 12-033 (April 10, 2012) (repealing Title 26 in its entirety and creating a new Title 26 establishing the District Trial Court Civil, Criminal, and Family Divisions) (as amended by NCA 12-128 (August 9, 2012)).
[37] M(C)NCA Title 26, § 3-102.C (repealed 2012).
[38] NCA 12-033, § 2-202.A (April 10, 2012) (emphasis added).

simple majority of a quorum for Supreme Court decisions. A three-justice majority is sufficient for a decision when only four or five justices are participating. Due process sufficiency and deference to the National Council's legislative authority dictate that we adopt this interpretation. The legislative history of the Judicial Code and recent revisions to Title 26 evince no other conclusion.

Part II

Appellants' second proposition of error asserts that two of the three justices who joined in the Order's majority opinion were ineligible and lacked judicial authority because their terms on the Court had expired prior to July 20, 2011. Appellants' motions to vacate failed to cite authority in support of the second proposition of error; however, we presume Appellants seek to invoke M(C)NCA Title 26, § 3-204. This section states that "[a] justice or judge whose term of office has expired and who has not been reconfirmed by the National Council shall not be permitted to sit as a justice or judge and shall receive no compensation."[39]

Appellants' second proposition is without merit. Title 26 was repealed numerous times during a sixteen-month period which preceded delivery of this Court's Order dated July 20, 2011. NCA 10-189 constituted the version of Title 26 in effect at the time the Order was filed.[40] NCA 10-189, unlike previous versions of Title 26, contained no provision similar to § 3-204 regarding Supreme Court justices and no subsequent amendment has replaced it. Appellants' assertion that

[39] M(C)NCA Title 26, § 3-204 (enacted as a provision of NCA 88-17 by veto-override, May 7, 1988) (superseded 2010 by NCA 10-189).

[40] NCA 10-189, (enacted by veto-override on November 22, 2010) (repealing Title 26 in its entirety and creating a new Title 26 establishing a criminal trial court, civil trial court and family trial court) (superseded 2011 by NCA 11-213) (superseded by NCA 12-033 (April 10, 2012) as amended by NCA 12-128 (August 9, 2012)).

Justice Shirley and Justice McNac lacked judicial authority fails because the § 3-204 was repealed seven months prior to the anticipated end date of both justices' terms on the Court.[41]

IT IS HEREBY ORDERED that Defendant-Appellants' Motions to Vacate and Motions to Suspend the District Court's Judgment Pending Reconsideration are **DENIED.**

IT IS FURTHER ORDERED that Appellants' claims of procedural error, to the extent each are inconsistent with the foregoing Opinion and Order, are **DISMISSED WITH PREJUDICE.** We emphasize that neither this Opinion, nor the Order of July 20, 2011, should be read to expand the terms of the permanent injunction issued by the District Court in the underlying matter. The proper forum for any future substantive claims which seek relief from the permanent injunction granted in the District Court's Final Judgment and Order dated March 19, 2010, is the Muscogee (Creek) Nation District Court.

DELIVERED AND FILED: May 22, 2013.

Richard C. LeBlance
Chief Justice

Andrew Adams III
Vice-Chief Justice

Kathleen R. Supernaw
Associate Justice

George Thompson
Associate Justice

[41] Justice Shirley and Justice McNac's six-year terms were anticipated to end on June 30, 2011. Faced with the absence of two successors and in an effort to preserve the Court's ability to establish a quorum sufficient to operate, both justices chose to remain on the Court until two replacement justices were duly nominated by the Principal Chief and confirmed by the National Council as required by Article VII, § 2 of the Muscogee (Creek) Nation Constitution. In choosing to remain on the Court, Justice Shirley and Justice McNac relied on this Court's previous decision from two decades earlier in SC 86-04. In SC 86-04, a unanimous five-justice Court held that, when faced with diminishment of its constitutionally vested judicial power due to failure of another branch to perform its constitutional obligations, each justice "shall and do retain their position and authority and shall continue to serve as Justice until their successor is duly qualified." *In re: the Supreme Court of the Muscogee (Creek) Nation*, 1 Okla. Trib. 89, 91 (October 31, 1986).

Deer, *J.*, concurring specially as to Part II.

I concur with the result reached by the majority; however, in my view, the majority opinion resolves Appellants' second proposition of error by relying on irrelevant legislative history. Appellants' second proposition asserts that two of the three justices who joined in the majority were ineligible due to expired terms. The issue of Supreme Court vacancies created solely by lack of a duly qualified successor was settled over twenty-five years ago. In SC 86-04, a unanimous five-justice Court held that, when faced with diminishment of its constitutionally vested judicial power due to failure of another branch to perform its constitutional obligations, each justice "shall and do retain their position and authority and shall continue to serve as Justice until their successor is duly qualified." *In re: the Supreme Court of the Muscogee (Creek) Nation*, 1 Okla. Trib. 89, 91 (October 31, 1986). Rather than relegate SC 86-04 to a footnote and rely on the absence of a constitutionally suspect statutory prohibition to resolve Appellant's second proposition of error, I would rely solely on SC 86-04 as primary authority.

Our Nation's Constitution specifies the Supreme Court "shall be composed of six (6) members appointed by the Principal Chief, subject to majority approval by the . . . National Council, and whose term shall be for six (6) years beginning July 1."[42] This simple mandate emphasizes no single component at the expense of the other. The requirement for a six member Court is equal to the requirement for Court members to serve six-year terms. Likewise, both of the preceding requirements are equal to the nomination and confirmation requirement. Any statutory mechanism creating a bypass to these requirements would be constitutionally suspect. When a vacancy on the Supreme Court is allowed to occur solely due to the completion of a justice's six

[42] M(C)NCA Const. Art. VII, § 2.

year term before a successor has been nominated and confirmed, it upsets the balance struck by Article VII, § 2, and runs counter to the bedrock democratic principle of an unbiased judiciary.

Montie R. Deer
Associate Justice

Harjo-Ware, *J.*, concurring specially as to Part I, dissenting as to Part II, and dissenting in judgment.

The Muscogee Constitution plainly states that the Supreme Court "shall be composed of six (6) members . . . [.]"[43] I concur with the majority that so long as six justices are seated and available to participate on a given case, the Title 27, § 3-101 (four-in-agreement rule)[44] is valid. I further concur that when less than six justices are available to deliberate and decide cases, Title 27, § 3-101 becomes constitutionally problematic. The majority relies on Title 27, § 3-103 (four-justice quorum rule) to avoid reaching the constitutional question. I would rely on other statutory grounds.

For a time, a statutory mechanism existed by which Title 27, § 3-101's four-in–agreement requirement could consistently be met. From October 1988 to April 2010, the Muscogee Code allowed for appointment of special (temporary) justices by the Principal Chief, Speaker of the National Council and Chief Justice of the Supreme Court "acting jointly."[45] From August 2, 2010 to November 22, 2010, another statutory provision allowed for the appointment of special justices by the Principal Chief and the National Council.[46] In my opinion, § 3-101's four-in-agreement requirement was valid while it coexisted with the statutory methods for appointment of special justices. The option to seek appointment of a special justice was, however, unavailable when the

---

[43] M(C)NCA Const. Art. VII. § 2.

[44] Title 27, § 3-101's "four-in–agreement" requirement originates from NCA 99-85 (July 1, 1999), which was, perhaps, a true legislative act adopted by the Muscogee National Council. NCA 01-88 (May 24, 2001) perpetuated the four-in-agreement requirement, after the Muscogee Supreme Court presented proposed revisions to certain sections of Title 27 which were subsequently approved by the National Council. The proposed revisions were forwarded to the National Council presumably pursuant to Muscogee Constitution Art. VII, § 3.

[45] NCA 88-69 (October 18, 1988) (providing a temporary justice could be appointed by the Principal Chief, Speaker and Chief Justice acting jointly for a single case or conflicting issue) (provision for appointment by joint action codified at M(C)NCA Title 27, App. 1, Rule 15.A, and subsequently repealed in 2010 by NCA 10-050 (enacted by veto-override on April 26, 2010)).

[46] NCA 10-111 (enacted by veto-override on August 2, 2010) (Section 3-103 provided that "[i]f illness, conflict of interest, disqualification or other considerations prevent a . . . justice from hearing cases for an extended period of time (not including any vacancy created by the expiration of the term of a . . . Supreme Court justice), then a Special [justice] may be appointed after following the process of nomination by the Principal Chief and confirmation by the National Council . . . [.]").

Supreme Court deliberated the merits of the underlying appeal and delivered the Order of July 20, 2011. In the absence of the appointment of special justice to achieve § 3-101's super majority requirement, I must concur with the majority's analysis in Part I that § 3-101 creates an unconstitutional burden on appellants. The super majority requirement makes it harder for appellants to overturn a District Court decision.

In the instant matter, neither party received the requisite number of concurring justices to have a valid decision under § 3-101. The validity of this Court's Order dated July 20, 2011, was infected with doubt because it was delivered pursuant to a purported 3:2 decision and no previous case or controversy had interpreted § 3-101 while meeting its requirement. The effect of the clouded Order was to leave undisturbed the permanent injunction granted by the District Court against Defendant-Appellants. It is clearly evident, however, that the four-in-agreement rule places an unfair burden on any appellant when the Supreme Court consists of less than six justices. Absent the previous statutory mechanism for appointment of special justices, the four in-agreement rule renders it impossible for an appellant to win on appeal by persuading only a simple majority of the Court. This is most unfair to appellants because it creates an inconsistent burden of persuasion based solely on the number of seated justices available to participate. In the absence of a mechanism to appoint special justices, I agree with the majority's analysis which concludes that such procedure necessarily fails to sufficiently protect an appellant's right to due process.

As to Part II of the majority opinion, the majority holds that there is no longer a Muscogee statute prohibiting judicial holdovers, therefore participation of former justices whose terms had expired was proper. I respectfully disagree. No statutory provision prohibiting Supreme Court justice holdover is necessary because the prohibition originates from the Muscogee Constitution itself. Article VII, § 2, provides, *inter alia*, "[t]he Supreme Court shall be composed of six (6)

members ***appointed by the Principal Chief, subject to majority approval by the Muscogee (Creek) National Council***, and whose term shall be for six (6) years beginning July 1."[47] Constitutional prerequisites to serve on the Supreme Court are nomination and confirmation. Both nomination and confirmation are qualifiers to being validly seated term justices of the Muscogee Supreme Court.[48]

The majority opinion lets stand without comment a 1986 administrative order (1986 Order) delivered by three (3) validly seated term justices of the Supreme Court and in the absence of any real case or controversy properly presented to the Supreme Court. Two former justices whose terms had expired approximately three months prior to delivery of the Order participated in legislating the extension of their own terms.[49] The order, as-delivered, contained no factual background regarding the circumstances which led to the need for a Supreme Court administrative order. When the 1986 Order was later published in Oklahoma Tribal Court Reports, the general editor included a syllabus which attempted to compensate for the absence of factual background.[50] The syllabus indicated that the 1986 Order was delivered *sua sponte* by the Supreme Court in response to legislation which required tribal judges to be one-quarter Muscogee (Creek) by blood.[51] Rather than address the constitutionality of legislation regarding a statutory requirement for members of the judiciary to be full-citizens, the 1986 Order consisted of a sweeping statement unrelated to any quarter blood

---

[47] M(C)NCA Const. Art. VII. § 2 (emphasis added).

[48] Reference is made to term justices since there are no permanent or lifetime appointments to the Muscogee Supreme Court. There are only six year (term) appointments pursuant to the Constitution or special (temporary) appointments when statutorily authorized.

[49] It is interesting that this administrative order was not published in the 2006 edition of Volume 4 of the Muscogee Law Reporter where Muscogee Supreme Court decisions were published. It was found in Volume 1 of Oklahoma Tribal Court Reports (1 Okla. Trib. 89).

[50] The syllabus is an editorial comment which is not a part of the case.

[51] In *Bruner v. Muscogee (Creek) Nation*, 4 Mvs. L. Rep. 29, 34 (March 7, 1987), the blood quantum of the sitting District Court judge was challenged. Although the *Bruner* case was a properly filed appeal from a decision of the Muscogee (Creek) Nation District Court, the same three validly seated term justices and two former justices who held over pursuant to the 1986 Order purportedly ruled that the Muscogee Constitution addressed the qualifications required of inferior court judges which did not include a blood quantum requirement. In orbiter dicta, they also pronounced that the Muscogee Constitution did not require the Supreme Court justices to be a quarter blood or more.

issue.[52] Although the 1986 Order could have been a valid decision of the three seated term justices, in my view, the order inappropriately legislated the authority for two former members of the Court to holdover.[53]

As of July 20, 2011, this Court was comprised of three validly seated justices. In the instant case, a simple majority of those three agreed that the District Court's conclusions of law in the underlying case were erroneous and insufficient to sustain the permanent injunction against Appellants. But for Title 27, § 3-103's requirement for a quorum of four justices, Appellants obtained a simple majority. In the absence of a statutory mechanism by which the Supreme Court will consistently enjoy six validly seated members, i.e. appointment of special justices, Title 27, § 3-103 also creates a prejudicial requirement equal to that created by § 3-101. An appellant has no opportunity to obtain reversal of a District Court decision if the Supreme Court is unable to achieve a quorum to begin hearing and deliberation. This, too, is untenable. Without the ability to seek appointment of special justices when the Court is unable to meet the four-justice quorum requirement, § 3-103 must also fall to avoid an unconstitutional infringement on the rights of appellants. Accordingly, as to the majority's unstated, yet necessarily obvious, validation of the four-justice quorum requirement under Title 27 § 3-103, I respectfully dissent. I must therefore dissent to the majority's overall judgment which is based upon that premise.

In conclusion, I believe that while the authority to appoint special justices was available, §§ 3-101 and 3-103 were valid. That authority should have been utilized rather than ignored. The

[52] "The power and authority of this Court will not be decreased, nor will this court be diminished by any other branch of the tribal government by its failure to perform its duties and obligations under the Constitution of the Muscogee (Creek) Nation, and this Court finds that the Justices of this Court should retain their position and continue to perform the duties of Justice of this Supreme Court until their successors are duly qualified. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that each Justice of the Supreme Court of the Muscogee (Creek) Nation shall and do retain their position and authority and shall continue to serve as Justice until their successor is duly qualified." *In Re the Supreme Court of the Muscogee (Creek) Nation*, 1 Okla. Trib. 89, 91 (October 31, 1986).

[53] As of the date the 1986 Order was delivered, Justice Howe and Justice Berryhill had not been reconfirmed to serve on the Court for a second term.

Supreme Court should have always been comprised of six justices. Decisions should have been deliberated by four-justice quorums with decisions rendered by four-justices-in-agreement. In my opinion, decisions issued without both appointing special justices when such appointment authority was available and complying with the requirements of §§ 3-101 and 3-103 were and still are invalid. However, in the absence of the authority to appointment of special justices, there are times the Supreme Court will not be comprised of the constitutionally required six justices. In these instances, I believe the due process rights of our citizens and other appellants are jeopardized. Statutory provisions which create a higher burden on them to overturn district court decisions such as the four-in-agreement and four-justice quorum rules must fall in favor of their due process rights.

I further believe that only three term justices were validly seated during the pendency and decision of the underlying case. The authority to appoint special justices had been withdrawn. In my view, the Appellants' motion to vacate the permanent injunction should be granted because they, in fact, won on appeal by a simple majority of 2:1 when our initial deliberation on the merits was concluded in 2011.

Leah Harjo-Ward
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on May 22, 2013, I mailed a true and correct copy of the foregoing Opinion and Order Denying Motion to Vacate and two separate opinions with proper postage prepaid to the following: Gregory G. Meier, Meier & Associates, 1524 S. Denver Ave., Tulsa, OK 74119-3829; June A. Stanley, Stanley Law Firm, PLLC, 122 N. Elm Place, Broken Arrow, OK 74012; Yonne A. Tiger, Campbell & Tiger, PLLC, 2021 S. Lewis Ave, Ste. 630, Tulsa, OK 74104; O. Joseph Williams, O. Joseph Williams Law Office, PLLC, P.O. Box 1131, Okmulgee, OK 74447; and Roger Wiley, Muscogee (Creek) Nation Office of the Attorney General, P.O. Box 580, Okmulgee, OK 74447. Copy e-mailed to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Jasen Chadwick, Staff Attorney