

1-1-1999

The Massad Commission Report to the Tribal Council of the Cherokee Nation

Anthony M. Massad

Robert A. Layden

Daniel G. Gibbens

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Anthony M. Massad, Robert A. Layden & Daniel G. Gibbens, *The Massad Commission Report to the Tribal Council of the Cherokee Nation*, 23 AM. INDIAN L. REV. 375 (1999),
<https://digitalcommons.law.ou.edu/air/vol23/iss2/5>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

THE MASSAD COMMISSION REPORT TO THE TRIBAL COUNCIL OF THE CHEROKEE NATION

*Anthony M. Massad, Robert A. Layden, Daniel G. Gibbens**

PREFACE

The so-called "Massad Commission" report actually was developed as two separate reports: the first generated in the weeks preceding and presented at the commencement of the hearings conducted August 27-28, 1997, at the Cherokee Tribal Headquarters auditorium; the second written in a period of approximately twelve hours following the conclusion of those hearings and presented at the same site on August 29, prior to the departure of the Commission members. Accordingly, these two parts are presented here as Part I, "Synopsis and Review of the Cherokee Nation Constitution and the Cherokee Code Law," and Part II, "Review and Factual Conclusions of Testimony Received by Special Commission Regarding Government of Cherokee Nation."

Some minor editorial work has been done to minimize grammatical and syntax problems, especially with respect to Part II because of its preparation and initial dissemination under the pressure of time.

The wording of the Commission's final recommendations has not been altered. These appear at the end of Part II.

It should be noted that the "Commission" is referred to as a "Select Committee" in Part I. In Part II it is referred to as the "Commission."

PART I: SYNOPSIS AND REVIEW OF THE CHEROKEE NATION CONSTITUTION AND THE CHEROKEE CODE LAW

Introduction

Pursuant to a Declaration of Intent made and entered into on the 17th day of June, 1997, by a majority of the members of the Tribal Council of the Cherokee Nation, a copy of which is attached hereto, an independent committee composed

**Anthony M. Massad:* Senior Partner, Massad, Evans & Kent, Frederick, Okla. President, Oklahoma Bar Association, 1989. Chairman, Oklahoma State Council on Judicial Complaints (1994-present). J.D., 1955, B.A. 1949, University of Oklahoma.

Robert A. Layden: Active Retired Judge, McAlester, Okla. Vice-Chairman, Oklahoma Judicial Ethics Advisory Panel (1998-present). J.D., 1952, B.Sc., 1949, University of Notre Dame. Elected District Judge, 18th Judicial District, 1974, served 1975-94.

Daniel G. Gibbens: Regents' Professor of Law, University of Oklahoma. LL.M., 1965, Columbia University; J.D., 1959, University of Oklahoma; B.A., 1954, Yale University.

The authors were awarded Presidential Citations from the Oklahoma Bar Association in 1997 "for Distinguished Pro Bono Service to the Cherokee Indian Nation" for their work on the Commission.

of three members were selected to make an independent survey, interpretation and description of the rights, powers, duties and obligations of each of the three divisions of government of the Cherokee Nation, and to advise the Council of the Cherokee Nation of their interpretations and opinions regarding the rights and obligations of each of the three divisions of government of said Nation.

Pursuant to the Declaration of Intent, Anthony M. Massad has selected, in addition to himself, Judge Robert Layden, supernumerary District Judge of McAlester, Oklahoma, and Regents' Professor Dan Gibbens, a professor of constitutional and allied laws of the Law Center of Oklahoma University, to serve on this Select Committee. [The resumes of the members of this Committee were attached when this document was presented to the Tribal Council.]

The Select Committee divided the three branches of government into three study areas with each Committee member assigned a specified of government area of the Cherokee Nation under their Constitution and Laws. Anthony M. Massad was assigned the legislative rights and authority, Judge Robert Layden was assigned the area of the judiciary, and Professor Dan Gibbens was assigned the area of the executive branch of government.

This interpretation of the Constitution and Laws of the Cherokee Nation is submitted to the Tribal Council with the understanding that the Tribal Council shall provide copies to the executive and judicial branches for further action as the Tribal Council deems advisable or necessary.

It is further understood by the Select Committee that the interpretation and opinions of the Select Committee based upon the Constitution and Code of the Cherokee Nation is for their benefit solely in aiding them to resolve any and all controversies between the three branches of their government. However, the Tribal Council is in no way obligated to accept the opinions and findings of the Select Committee as to interpretations and opinions of the laws of the Cherokee Nation. It is understood by the Select Committee and by the Tribal Council that the Tribal Council may accept or reject any opinions or findings of the Select Committee, and that the sole and only purpose of the efforts of the Select Committee is to attempt to aid in resolving controversies and disputes arising between the three branches of government for the betterment of the citizens of the Cherokee Nation.

It is further agreed and understood that the Select Committee shall conduct hearings wherein evidence may be presented, and at the conclusion of such evidence, the Select Committee shall render to the Tribal Council its opinion as to the application of the appropriate law to the factual situations as presented to it. Again, it is the Tribal Council's prerogative to either accept or reject the factual findings of the Select Committee and/or the application of the appropriate law to the factual situation as presented.

It is the hope of the Select Committee that their efforts in both legal and factual aspects of the dispute that has arisen among the Cherokee Nation can be resolved amicably for the benefit of the general citizenry of the Cherokee Nation as a whole. It is the further hope and desire of the Select Committee that true

leaders of the citizenry of the Cherokee Nation shall emerge from each of the three branches of the government which should set aside personal grievances, desires, retributions and other impediments which do nothing but harm the progress of the citizens of the Cherokee Nation. This Select Committee wishes the Cherokee Nation well in all of their endeavors, and trust that the interpretations and recommendations made in this report will be received by the Tribal Council as an earnest effort to aid and assist them in resolving the many facets of their disputes. Continued rancor between the three branches of government ill serves the citizens of the Cherokee Nation which should be their paramount concern.

Cherokee Nation Declaration of Intent

This Declaration of Intent made and entered on this 17th day of June, 1997, for the purpose and intent of the welfare, progress and continued improvement by and between the three branches of the Cherokee Nation, the Executive, the Legislative and the Judicial, witnessed as follows:

WHEREAS, there has arisen certain disagreements, misunderstandings and cross purposes of the three branches of the Cherokee Nation; and,

WHEREAS, it is the intention and purpose of the Tribal Council that an amicable settlement, understanding and resolution of any and all differences between the three different branches of the Cherokee Nation be resolved for the continued betterment, improvement and progress of the Cherokee Nation; and,

WHEREAS, the Tribal Council are sincere in their desire and efforts that the three branches of government of the Cherokee Nation work harmoniously for the benefit of all citizens of said Nation and for the continued improvements and progress of the rights of the individuals of said Nation:

THEREFORE BE IT AGREED AND UNDERSTOOD by the Tribal Council as follows:

1. That an independent committee composed of not more than three members be formed to make an independent survey, interpretation and description of the rights, powers, duties and obligations of each of the three divisions of government of the Cherokee Nation and to advise the hereto of the same which now exists under the Constitution and the Cherokee Nation Code. That this committee, after an in-depth study, report back to the Tribal Council of the Cherokee Nation of their interpretation of such rights and obligations of each of the divisions of government as soon as possible.

2. That the Select Committee, after report of the survey of the Cherokee Constitution and Cherokee Nation Code, make an in-depth investigation into the facts, conditions and reasons of any and all controversies now existing, heretofore existing, and currently which exist between the three different branches of the government of the Cherokee Nation. In this regard, the Select Committee shall have the power to call witnesses, examine documents, and do any and all things necessary to determine the factual truth of any and all controversies which might

exist. In this regard, all testimony by any witnesses shall be recorded and transcripts shall be presented to the Tribal Council of the Cherokee Nation.

3. That the Select Committee shall be chaired by Anthony M. Massad of Frederick, Oklahoma, who shall have the authority to select two other members to be submitted to the Tribal Council for their approval. It is understood and agreed that the services of the Select Committee shall be without compensation. However, all expenses incurred, including travel, lodging or meals, shall be reimbursed to the individual members of the committee upon their submitting proof of such expenses.

4. It is agreed by the Tribal Council that upon completion of the undertaking of the Select Committee, a final factual report shall be submitted to the Tribal Council and they shall provide copies to the executive and judicial branches for further action as the Tribal Council deems advisable or necessary.

5. It is agreed and understood by the Tribal Council that any and all findings of the Select Committee, both legal and factual, shall be the independent findings of the committee. However, any decisions based upon the legal or factual findings shall be the sole and separate responsibility of the Tribal Council.

6. It is agreed that every attempt to facilitate a resolution must be pursued, therefore, each branch of government is directed to provide full cooperation with the independent review committee.

7. The Tribal Council agrees that the Select Committee shall be free of any undue influence or free of any undue intentions or efforts to guide their investigation, and that they will receive the final report of said committee as being both legal and factual. It is the understanding of the Tribal Council that any and all decisions or actions to be made, whether based upon the report or otherwise, are solely within the hands of the Tribal Council of the Cherokee Nation.

Witness the signatures of the Tribal Council this 17th day of June, 1997.

Bill John Baker
Dora Mae Watie
Sam Ed Bush
Barbara Conness

Charles "Chuck" Hoskin
Harold "Jiggs" Phillips
Mary Flute Cooksey
Harold DeMoss

Harley Terrill
William Smoke
Paula Holder
Don Crittenden

COUNCIL OF THE CHEROKEE NATION

Anthony M. Massad

The Constitution of the Cherokee Nation of Oklahoma divides the powers of government into three separate departments: legislative, executive and judicial; and the Constitution further provides that each division will be separate and distinct, and neither shall exercise the powers properly belonging to either of the others. *Article IV.*

By the Constitution, the legislature consists of one legislative body which is called the "Council of the Cherokee Nation." *Article V* of the Constitution further provides that the Council shall establish its rules for credentials, decorum and procedure. The Constitution further provides that the Council shall consist of fifteen members and that there shall be at least one regular session of the Council in each calendar year. *Section 4 of Article V* of the Constitution provides that "No business shall be conducted by the Council unless at least two-thirds (2/3) of the members thereof regularly elected and qualified shall be in attendance, which number shall constitute a quorum." Normally, one does not find the number to determine a quorum in the Constitution, as this is usually found in the rules established by the Council. However, the question of a quorum being in the Constitution, neither the Council, the Principal Chief nor the judiciary has any authority to change the number constituting a quorum. This has been reserved to the general citizenry of the Cherokee Nation. Special meetings of the Council may be called by the Principal Chief or the Deputy Principal Chief when he has assumed the Principal Chief's position or upon written request of fifty-one percent of the Council or upon the written request of ten percent of the registered voters of the Cherokee Nation. In the event that a meeting is called under this provision of the Constitution, there is still the requirement that at least two-thirds of the members of the Council must be in attendance. In the event less than two-thirds of the members of the Council are in attendance, no business can be conducted by the Council. It is obvious that the citizens of the Cherokee Nation wanted to ensure that at least two-thirds of the members were present before any business was conducted. It is the opinion of this writer that this quorum must be met whether it be at regular or special sessions. Any business conducted with less than a quorum would be invalid and of no effect.

Article X of the Constitution specifically provides for the duties and obligations of the Council in the fiscal matters of the Nation. The Constitution provides that it is the Council's obligation to provide by law for funds to defray the estimated expenses of the Executive, Council, Cabinet and Departments of Government of the Cherokee Nation for each fiscal year. It is required by *Article X, Section 3* that the Secretary-Treasurer shall prepare annual financial statements reflecting the results of operations of all tribal activities and shall prepare a consolidated balance sheet in conformity with generally accepted accounting principles within sixty days after the end of the fiscal year. It is the obligation of the Council to require that all records be maintained of all funds, monies, accounts and indebtedness and all other accounts bearing upon the fiscal interest of the Cherokee Nation by the use of the uniform system of accounting which records and financial statements shall be audited by a certified public accountant or as otherwise may be prescribed by the Council prior to the submission of said accounts to the Council. *Article X, Section 3*.

It is the sole responsibility of the Council to authorize the expenditure of money by and on behalf of the Cherokee Nation and to further specify the

purposes for which all money is to be used, and the money so designated by the Council shall be used for no other purpose. *Article X, Section 4.*

That the Council has the general control of the fiscal matters of the Nation is without question, as all funds under the control of the Secretary and Treasurer shall be directed to be expended under the terms and conditions as designated by the Council and under such laws which shall provide for the protection of said funds. *Article X, Section 9.*

Other than the Constitutional provisions heretofore reviewed, the powers, duties and obligations of the Council are further set forth in the statutes, the Cherokee Nation Code. Title 51, Section 41 provides specifically as follows:

The books, papers and transactions of the Secretary-Treasurer's office shall at all times be open to the inspection of the Executive, Legislative and Judicial Officers of the Nation.

None of the three divisions of the government of the Cherokee Nation has the authority to withhold any information from the other divisions and any attempt to do so would be a violation of the laws of the Cherokee Nation.

Title 62, Section 11, et seq., establishes the office of Controller setting forth that office's powers and duties generally. By statute, the Controller is within the executive branch of the Cherokee Nation and the principal purpose for this office is the managing, accounting and finance functions to ensure that all funds are properly accounted for in accordance with generally accepted or legally required accounting principles and methods. The powers and duties of the Controller are set forth in *Title 62, Section 12*. Irrespective of the Office of Controller, the basic responsibility for appropriating, providing and ensuring the proper expenditure of all funds still rests with the Tribal Council. In this respect, it would be extremely helpful if the Tribal Council would pass such laws as are necessary to form an oversight committee to ensure that the laws they pass pertaining to fiscal matters of the Nation are properly and faithfully carried out. Both the federal government and the state legislature have oversight committees to ensure that monies that they appropriate are properly spent and they require all divisions to prove their expenditures of such monies.

Title 19, Section 11 of the Code of the Cherokee Nation provides for establishing standing committees of the Council. Within the seven committees authorized by this statute, there appears an executive and finance committee. The writer of this opinion does not have the information regarding their rights, duties and obligations; however, being they are composed of members of the Council, it is obvious that the executive and finance committee should likewise have access to all paperwork concerning appropriations and expenditures of funds properly belonging to the Nation.

As was stated above, the Council of the Cherokee Nation operates in the same manner as legislative bodies in both federal and state government. That it is a distinct and separate division of government not to be controlled by the executive and judiciary is without question. Likewise, the executive and judicial divisions

of government are not to be controlled by the legislative body. As was stated above, very seldom has the writer of this opinion seen the designation of a quorum in the Constitution of any body. However, it goes without question that no legislative body, including the executive or judicial branch, can release or refuse to recognize a Constitutional requirement setting forth the quorum of the legislature. In this respect, there being fifteen members of the Council, ten members would have to be in attendance at either regular or special meetings in order for the Council to conduct business. Evidently, the citizens of the Cherokee Nation felt that at least two-thirds of the members ought to be present in tending to the Nation's business before any laws are to be passed. Any law or action taken by the Council where less than ten members are present in attendance could be null and void and of no effect. It must be stated by the writer of this opinion, that in his service in the Oklahoma State Senate, each member of the Senate felt an obligation to the people that they were elected to represent to be in attendance at any and all meetings regardless of the nature of the meeting. Attempts to defeat the actions of the Council or the workings thereof by boycotting and refusing to attend regular or special called meetings does not bode well for the citizens that depend upon their elected officials to represent them at all meetings. In any democratic form of government, duly elected representatives of the people should attend any and all regular and special called meetings, irrespective of their personal feelings, in order to ensure that the people that they are elected to represent have true representation at such meetings.

Again, it should be noted that the legislative branch of any government is authorized to enact any and all laws not otherwise restricted by the Constitution. Many areas of government are not covered by either the Constitution or the Code Books of the Cherokee Nation. A recommendation would be that a complete review and reworking of the Codes of the Cherokee Nation would be helpful in alleviating much of the controversy caused by misunderstanding and areas not covered by appropriate laws.

Perhaps it was best said by Joe Byrd, Principal Chief of the Cherokee Nation, in his introductory letter to the Constitution of the Cherokee Nation, wherein he said, "We must focus on solutions rather than dwelling on problems, and forever envision the future and how to achieve the things we will be proud of, things that last." With this statement, the writer of this opinion wholly concurs.

JUDICIAL DEPARTMENT OF THE CHEROKEE NATION

Robert A. Layden

I. General

In a democracy the will of the people is set out in a written Constitution. The American model of a Constitution, to provide a "limited government," establishes three independent branches of government: the Legislative, Executive and

Judicial. The philosophy is that each branch is limited by the Constitution and is a check and balance on the other branches.

Traditionally, the Judicial branch is the weakest of the three, it having been said that it is the least dangerous to the people's rights as it has neither the sword of the Executive nor the purse of the Legislative: having "neither force nor will, but merely judgment." (Federalist Papers No. 78).

Judicial Independence

It is generally recognized that the Judicial branch, to be a co-equal branch of government, must be independent. How this is achieved has been a continuing problem for a Democratic form of government.

The United States Constitution provides for appointment of Judges by the Executive branch, confirmation by the Legislative branch, but establishes independence by lifetime appointments. The Oklahoma Constitution originally provided for direct election of judges with limited terms of office. This created a Judicial branch of government independent of the Legislative and Executive branches, but was subject to occasional whims and notions of the voters. A compromise was made by adoption of what is called the "Modified Missouri Plan" for appointment and retention of appellate Judges. While appointment is generally made by the Executive, continuation in office is by retention ballot, and Judges are never elected on a partisan ballot.

II. Constitution of the Cherokee Nation

General

The Constitution of the Cherokee Nation establishes three Departments of Government (Article IV), the Legislative, Executive and Judicial, providing they shall be separate and distinct and shall not exercise powers properly belonging to either of the others.

Judiciary

Like the United States Constitution, Article VII of the Constitution of the Cherokee Nation creating the Judicial department, is brief; it created the Judicial Appeals Tribunal, the Appellate Court of the Nation, setting out the number and requisites of membership.

Appointment

Article VII provides that the three members of the Judicial Appeals Tribunal must be members of the Cherokee Nation and admitted to the practice of law before the highest Court of their residency. The Justices are appointed by the Principal Chief and approved by the Council. (Title 20, § 32, Cherokee Nation Code).

Term

The term of the Judicial Appeals Tribunal is to be set by enactment of the Council.

Jurisdiction

The Judicial Appeals Tribunal is to "hear and resolve any disagreement arising under any provision of the Constitution or any enactments of the Council." The Council is required to establish procedures to implement the jurisdiction of the Judicial Appeals Tribunal.

Under Article XII, the Judicial Appeals Tribunal also has jurisdiction to hear cases where an employee of the Cherokee Nation has been removed from employment after having served in a position for at least one year. The procedures for such hearings are to be provided by the Council but must generally follow provisions of the Oklahoma Administrative Procedures Act, Title 75, Oklahoma Statutes §§ 301 et. seq.

Removal from Office

The Constitution provides in Article XI, for removal from office but this Article does not apply to the Justices of the Judicial Appeals Tribunal. It provides for cause of removal for the Principal Chief and the Deputy Principal Chief and provides for the removal of all other *elective officers* as provided by laws passed by the Council. It makes no provision for removal of appointed officers.

III. Statutes of the Cherokee Nation

The Constitution of the Cherokee Nation (Article VII) authorized the Council to provide for procedures to ensure that litigants receive due process of law and prompt and speedy relief. This has been done by enactment of Titles 20 and 22 of the Cherokee Nation Code.

A. Trial Court

Title 20 established the Cherokee Nation District Court, an inferior Court of general jurisdiction. All decisions of the District Court are subject to review by the Judicial Appeals Tribunal.

Appointment to the District Court is made by the Principal Chief confirmed by the Council. The judges serve a term of four years. Removal from the office of District Judge is provided in Title 20, § 17, which states that a District Judge of the Cherokee Nation may be removed after any District Judge of the Cherokee Nation, or the Council of the Cherokee Nation, recommends removal based on the opinion that there is reasonable cause to believe a Judge to be guilty of malfeasance or misfeasance of office, neglect of duty, mental or physical incompetence to perform the duties of the office, or if the Judge has been

convicted of a felony in State or Federal court while serving as a Judge of the Cherokee Nation or committed a crime under the Cherokee Law, which if committed under the laws of Oklahoma would be a felony. The recommendation for removal must be submitted promptly to the Council and the Judge whose removal is sought is afforded an opportunity to appear and present evidence in his own defense before the Council. Removal can only be by a two-thirds vote of the Council.

The Trial Courts have general jurisdiction over all violations of the criminal code of the Cherokee Nation committed within its territorial jurisdiction committed by an Indian; civil jurisdiction of all causes of action arising within the territorial jurisdiction of the Cherokee Nation between all parties who by their actions have submitted themselves to the jurisdiction of the Court and where the Defendant in the case is an Indian. The District Court has jurisdiction in domestic relations cases involving Indians as provided by the Indian Child Welfare Act and jurisdiction of miscellaneous matters which have or will be placed within the jurisdiction of the Court by resolution of the Council.

Title 22 of the Cherokee Nation Code Annotated makes more specific the jurisdiction and venue of public offenses. It also provides that the District Judges, Associate Judges of the District Court and Special Judges have authority to act as Magistrates, who are officers that have power to issue warrants of arrest and search warrants. (Title 22, §§ 161, 162, and 1221).

B. Judicial Appeals Tribunal — Statutory Enactments

The organization and administration of the Judicial Appeals Tribunal was established by the Council in Chapter 3 of Title 20 of the Cherokee Nation Code. It provided the Tribunal shall consist of a Chief Justice and two Justices, any two of whom shall constitute a majority.

Within ninety days of the expiration of a Justice's term, the Principal Chief is directed to submit a nomination to fill such term to the Council which shall either confirm or disapprove said nomination (Title 20, § 32).

The term is for six years from the date of appointment and § 33 provides when said term shall expire. This was amended by Legislative Act 7-95 which provided that the term of office will be for a period of six years, provided that office number one shall expire December 31, 1996, office number two expires December 31, 1998, and office number three expires December 31, 2000. It provided that office number one was at the time (November 13, 1995) occupied by Justice Birdwell, office number two occupied by Justice Keen and office number three occupied by Justice Viles, Jr. It provided that if a Justice resigned, dies or is otherwise unable to complete his or her term of office, the replacement shall serve the balance of the remaining term.

The removal of any Justice of the Judicial Appeals Tribunal may be commenced upon the recommendation of the Chief Justice of the Cherokee Nation, or the Council of the Cherokee Nation, if there is reasonable cause to believe the Justice to be guilty of malfeasance or misfeasance in office, neglect

of duty, mental or physical incompetence to perform the duties of the office, or the Justice being convicted of a felony in a state or federal court after becoming a Justice. The recommendation is to be presented promptly to the Council and the Justice whose removal is sought is afforded an opportunity to appear before the Council and present evidence in his own defense. The Justice may be removed from office by a two-thirds vote of the Council. (Title 20, § 38).

It has been reported that on May 2, 1997, at a special meeting of the Council, Sections 17 and 38 of Title 20 of the Cherokee Nation Code were amended. The amendment provided for removal of District Court Judges and Justices of the Judicial Appeals Tribunal by a *majority vote* of the Council. It should be noted this special meeting was convened with only nine (9) members of the Council present.

Again, at the special meeting of the Council on April 15, 1998, with less than ten (10) members of the Council present, the President of the Council ruled that the presence of nine (9) members of the Council was sufficient to constitute a quorum.

The powers and duties of the Judicial Appeals Tribunal are generally set up in Chapter 4, Title 20 of the Cherokee Nation Code. In prior sections, the Council provided that the Judicial Appeals Tribunal should maintain an office at the seat of government to conduct its regular business affairs, that it should hold Court at the seat of government and that the Tribunal shall be deemed always open for the purpose of filing papers, issuing and returning process and making motions and orders. The Chief Justice of the Cherokee Nation is required to hold a conference with the other Justices of the Cherokee Nation annually, the Chief Justice being required to preside at such a conference, to make a comprehensive survey of the conditions of business of the Tribunal and to prepare plans and submit suggestions for the expeditious performance of business. The Chief Justice is also required to submit an annual report to the Council with recommendations for legislation.

The Tribunal is given authority to continuously survey the operation and effect of the general rules of practice and procedure and to make such changes and additions to the rules as they deem desirable. These procedures are established in the appendix to Title 20 of the Cherokee Nation Code.

The Judicial Appeals Tribunal has original and exclusive jurisdiction over:

- A. Any disagreement arising under the provisions of the Constitution;
- B. Any disagreement arising under enactments of the Tribal Council; and
- C. Any decision of the Registration Committee established by the Constitution regarding Tribal Membership.

This statute also provides that the Tribunal have original and exclusive jurisdiction concerning any decision affecting an employee of the Nation who has served in the position for at least one year. (Title 20, § 51).

It would appear that the original jurisdiction of the Judicial Appeals Tribunal concerning employee rights has been amended by Legislative Act No. 12-96. This Act is entitled, "The Employee Administrative Procedures Act," and is

codified in Title 51, Chapter 10, § 1001 et. seq. of the Cherokee Nation Code. It does not suggest that the Tribunal no longer has original jurisdiction, but, LA-12-96 sets up a comprehensive procedure when there is a contest concerning wrongful termination of employment beginning with an Employee Appeals Board, which designates a hearing officer. An appeal from the hearing officer can be made to the Employee Appeals Review Board and it would appear that the Judicial Appeals Tribunal serves only as a final reviewing authority.

The Judicial Appeals Tribunal has authority to exercise general superintendence of the Inferior Courts and to prescribe rules of procedure for the Courts of Inferior Jurisdiction. The decisions of the Judicial Appeals Tribunal have the force of law, all decisions are published and the Court is directed to render written decisions setting out the issues in the case and the laws governing the case and the interpretation and application of the law. A Justice of the Cherokee Nation is required to disqualify himself in any case in which he has a substantial interest, has been of counsel, or is or has been a material witness or is in any way related to or connected with the parties or their attorneys.

Title 22, § 161 provides that the Justices of the Judicial Appeals Tribunal are considered as Magistrates. Therefore, they have the same authority as the judges of the inferior courts to issue arrest warrants and search warrants.

IV. Answers to Particular Questions

1. *Jurisdiction.* The question possibly arises concerning the status of the Courts with reference to jurisdiction. The Statutes give the Trial Court "general jurisdiction" over various civil, criminal and other cases and controversies. The Code gives the Judicial Appeals Tribunal "original and exclusive jurisdiction" over various controversies, specifically those involving disagreements of the Constitution, Tribal Council Enactments, decisions of the Registration Committee and concerning employee rights.

General jurisdiction extends to all controversies within the usual limitation of Courts and basically it is jurisdiction distinguished from *special* or *limited* which cover only a particular class of cases.

Original jurisdiction is the authority of a Court to take cognizance of a case at its inception, and is distinguished from "appellate" jurisdiction.

Exclusive jurisdiction is the authority to adjudicate particular kinds of cases and often other Courts are excluded from authority in such cases. For example, Federal Courts have exclusive jurisdiction to hear matters concerning various Federal agencies so that State Courts have no authority to consider such controversies. Exclusive jurisdiction is usually distinguished from "concurrent" jurisdiction.

The statutory wording giving the Judicial Appeals Tribunal "original and exclusive jurisdiction" over various matters would create some confusion as to whether this excludes the Trial Court from its original and general jurisdiction.

Basically, Title 20, Section 51, gives the Judicial Appeals Tribunal original and exclusive jurisdiction over disagreements arising under any provisions of the

Constitution or enactments of the Tribal Council, or decisions of the Registration Committee. This effectively removes the Trial Courts from these matters.

A possible problem arises with the Judicial Appeals Court being granted original jurisdiction as to decisions affecting an employee of the Nation who has served in a position at least one year. However, this Statute applies only to "original jurisdiction" in the Court system, and does not affect proceedings concerning termination prior to Court action.

2. *Employee Rights.* The Constitution of the Cherokee Nation and its Statutes are very explicit in setting out the rights of employees who have been employed by the Cherokee Nation for a period of at least one year. LA 12-96 sets out a comprehensive and specific procedure for employees to contest their termination. This is not in violation of the Constitution which provides that the Judicial Appeals Tribunal must afford a hearing for such employees as the Constitution provides that the rules and procedures are to be prescribed by the Council. These rules comply with the Constitution as the Judicial Appeals Tribunal has the final word in such cases.

3. *Arrest Warrant.* An arrest warrant may be issued by a Magistrate where a complaint, verified by oath or affirmation is presented to the Magistrate. The Magistrate must be satisfied that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it. (Title 22, § 171). All judges of the Cherokee Nation, including the Judicial Appeals Tribunal, are designated as Magistrates and therefore have the power to issue warrants of arrest.

4. *Search Warrants.* Search warrants may be issued by any judge of the Cherokee Nation, including the Justices of the Judicial Appeals Tribunal. They can only be issued upon probable cause, supported by affidavit, naming or describing the person involved and particularly describing the property and the place to be searched. The specific requirements concerning search warrants are provided in Title 22, § 1221 et. seq.

5. *Inherent Powers of the Court.* The courts have inherent power to effectuate the functions and duties imposed upon them by Constitutions and Statutes. These powers that exist outside of the provisions of a Constitution or Statute, but which are necessary for the fair and efficient administration of justice. These are powers that are essential for the Court to maintain its existence, dignity and function. (See 20 Am.Jur.2d COURTS, § 43).

6. *Impeachment of The Justices of Judicial Appeals Tribunal.* Based on the opinion of Mr. Massad, *supra*, that the Tribal Council cannot effectively act without a quorum, and that a quorum must consist of ten members of the Council, the Council did not effectively impeach the Justices of the Judicial Appeals Tribunal. I agree with the opinion of Mr. Massad. On this basis, the Justices still serve as the Judicial Appeals Tribunal.

7. *Discharge of Marshals.* The general rule would seem to be that an official who appoints officers has the right to terminate them if there is just cause. It is noted that marshals are appointed by the Principal Chief. It is recognized that the

marshals perform certain duties for the courts, but there does not seem to be any authority suggesting that the Courts may appoint Marshals.

If a Marshal is terminated, and he has been employed in the position for at least a year, he has the right to proceed under the statutory provisions provided in LA 12-96, as mentioned earlier. While the Judicial Appeals Tribunal is given original jurisdiction in these matters in Title 20, Section 51, the later provisions enacted in 1996 would take precedence even though they do not specifically overrule Section 51.

8. *Basis to Impeach Justices of The Judicial Appeals Tribunal.* Title 20, Section 38, clearly sets out the grounds to remove a Justice of the Judicial Appeals Tribunal. Obviously, if a Justice exceeds his authority, as alleged in the various removal proceedings, this could constitute a basis for removal under the general ground of neglect of duty. However, the various allegations to remove the Justices raise questions of fact and both sides of said questions have not been presented.

EXECUTIVE POWER OF THE CHEROKEE NATION

Daniel G. Gibbens

1. "The executive power shall be vested in a Principal Chief, who shall be styled 'The Principal Chief of the Cherokee Nation', and is elected for terms of four years." Article VI, § 1. The central duty of the Principal Chief is that he "shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as shall be prescribed by law, all communications and business of the Cherokee Nation." Article VI, § 10. Similarly, along with members of the Council, "all Executive Officers shall be bound by oath, provided in Article XIII, to support the Constitution of the Cherokee Nation, the Constitution of the United States of America, do everything within the individual's power to promote the culture, heritage and traditions of the Cherokee Nation and to perform the duties of their respective offices with fidelity." Article V, § 10; see also Article VI, § 7 [Note: wherever the powers and restrictions related to the Principal Chief are stated, they are generally applicable also to the Deputy Principal Chief when he has the full powers of the Principal Chief. See, e.g., Article VI, § 4.]

2. The Principal Chief appoints the Judicial Appeals Tribunal subject to the approval of the Council. Similarly, the Principal Chief appoints, subject to the approval by the Council, the six cabinet officers specified in Article VIII. Further, there will not be any additional cabinet members unless recommended by the Principal Chief. Further, the Principal Chief "shall prescribe the duties and responsibilities of cabinet members." The Council with the Principal Chief may "abolish any established cabinet position or function or revise the title or responsibilities of" them. Article VIII. The Principal Chief is also permitted to appoint "such administrative assistants as he deems proper." Article VI, § 12.

51 CNCA § 61 authorizes the Principal Chief to "appoint a marshal" and "deputize such number of Cherokee Nation law enforcement officers, as needed, for the effective enforcement of tribal law" 51 CNCA § 62 provides: "It shall be the duty of the marshal to attend upon the courts, to serve all summons and other processes which may be placed in his hands according to the tenor of the mandates therein contained, and to take all necessary and lawful measures in the execution of the judgment of the courts committed to him to execute, and also to arrest and cause to be tried, all persons who may be charged with criminal offenses."

51 CNCA § 71 authorizes the Principal Chief to "appoint as many reserve force deputy marshals as are necessary to preserve the peace and dignity of the Nation. A current list of each person holding such appointment shall be maintained by the Marshal and the District Court Clerk and shall be available to the public."

3. Although the Deputy Principal Chief is the "President of the Council" and votes "for the purpose of breaking a tie vote," Article VI, § 11, the Principal Chief "[a]t every session of the Council and immediately upon its organization, . . . shall communicate by message, delivered to the Council upon the condition of the Cherokee Nation; and shall recommend such matters to the Council as he shall judge expedient." Article VI, § 9.

4. With respect to legislation passed by the Council, the Principal Chief has veto power which can be overcome by a vote of two-thirds of the entire Council. There is a provision for Council legislation to become a law "without the approval of the Principal Chief" if he does not exercise his veto power within five days, with a fifteen-day opportunity for Council enactments passed within five days of a Council adjournment. Article V, § 11.

5. Regular sessions of the Council are set by the Council, Article V, § 4. Along with 51% of the members of the Council and 10% of the registered voters of the Cherokee Nation, the Principal Chief has power to call "special" meetings of the Council. For each special meeting, "[t]he purposes of said meeting shall be stated in a notice published not less than ten days prior to the meeting, and the Council may not consider any other subject not within such purposes." Such a "special" meeting cannot be convened until thirty days have "elapsed after the adjournment of a prior session or meeting, unless called" by the Principal Chief. Article V, § 5; see also Article VI, § 8. Actually, the language of Article VI, Section 8 states that the Principal Chief "may on extraordinary occasions convene the Council" but this authority is merely repetitive of the authority in Article V, Section 5; because the Article VI language specifies in the sentence granting this power to the Principal Chief "pursuant to Article V, Section 5." Further, the notice requirement and the limit on the agenda are identical to the requirement and limit stated in Article V, Section 5. Also specified in Article VI, Section 8, "[b]efore the extraordinary meetings may be legally sufficient to conduct business, a quorum of the Council must be present." Article V, § 5.

6. The Principal Chief shall receive for his service "a compensation not inconsistent with Article X," which is a lengthy provision dealing with "fiscal" matters. Article VI, § 6.

7. The Constitution places the Principal Chief and Deputy Principal Chief in a category by themselves with respect to removal from office. Article XI provides "All other elective officers shall be subject to removal from office in such manner and for such causes as may be provided by laws passed by the Council." With respect to the Principal Chief and the Deputy, they "shall be subject to removal from office for willful neglect of duty, corruption in office, habitual drunkenness, incompetency or any conviction involving moral turpitude committed while in office." The Council is responsible for providing "such laws as are necessary for carrying into effect" these provisions, consistent with due process. Article XI, § 3.

8. "The Council shall have the power of removal and said removal must be conducted in accordance with Article XI of this Constitution." Article V, § 9. Article XI states specifics for the Principal Chief, the Deputy, and "other *elective* officers," (emphasis added) but has no language applicable to the members of the Judicial Appeals Tribunal. Thus the only provision in the Constitution which otherwise might seem applicable to removal of these justices is Article XII, which applies to all employees who have "served in a position for at least one (1) year." But this provision cannot be applicable because it specifically provides that such employees, "shall be afforded a hearing by the Judicial Appeals Tribunal." Of course it makes no sense that the members of the Judicial Appeals Tribunal would have a hearing on their own removal. Thus, there is no Constitutional provision specifying how the Judicial Appeals Tribunal justices are removed from office. But likewise it is not sensible to suppose that the members of this Tribunal are therefore not subject to removal. All other members of the government are subject to removal for cause. The point is that these justices cannot be understood under this Constitution to be "above the law." To fill in the specifics of how they can be removed, Article V, § 9, and the general principles in Article XI are sufficient to empower the Council to provide the "manner" and "causes" for removal, and ensure that "due process is afforded the accused." This the Council has done in 20 CNCA § 38. This statute authorizes only the Chief Justice and the Council to recommend removal of a member of the Judicial Appeals Tribunal. However, the Principal Chief's duty under Article VI, Section 9, "to recommend such matters to the Council as he shall deem expedient," is surely sufficient to authorize his recommendation to the Council.

9. Constitutional limits on the powers of the Principal Chief include:

(a) Article IV is a separation of powers provision limiting each of the three departments, Legislative, Executive, and Judicial, stating that each "shall be separate and distinct and neither shall exercise the powers properly belonging to either of the others," unless otherwise provided in Constitutional language. Thus, the Principal Chief's powers are limited by the powers granted in the Constitution to the other two departments. With respect to which department has authority to

interpret the Constitution, Article VII is quite clear: "The purpose of [the Judicial Appeals Tribunal] shall be to hear and resolve any disagreements arising under any provisions of this Constitution." Further, "[t]he decision of the Judicial Appeals Tribunal shall be final insofar as the judicial process of the Cherokee Nation is concerned." If the Tribunal is deemed to be in error in performing this task, the remedy is not in the hands of either the Council or the Principal Chief. Rather, it is in the provisions of Article XV for amending the Constitution.

(b) Although the Principal Chief has broad powers in hiring (see paragraph 2, above), his power to remove Cherokee employees from their positions is limited by the provisions of Articles XI and XII (see paragraphs 7 and 8, above). Not covered by these Articles are employees who have served less than a year in their position. Absent such restrictions, general law permits an official to remove those he appoints, and the Principal Chief has this authority.

(c) Among the key provisions of the fiscal Article X is Section 10, providing, "No official . . . or any person employed in any capacity by the Cherokee Nation shall receive from any individual, partnership, corporation, or entity doing business with the Cherokee Nation directly or indirectly, any interest, profit, benefits or gratuity, other than wages, salary, per diem, or expenses, specifically provided by law."

*PART II: REVIEW AND FACTUAL CONCLUSIONS OF TESTIMONY
RECEIVED BY SPECIAL COMMISSION REGARDING GOVERNMENT OF
CHEROKEE NATION AUGUST 1997*

Introduction

Following is the factual report of the Special Commission authorized by the Tribal Council of the Cherokee Nation. This report supplements the previous report of the Commission regarding a synopsis and review of the Cherokee Nation Constitution and Code Laws which was presented to the Council on Tuesday, August 26, 1997.

Prior to receiving testimony, the Commission requested the Council to notify as many members of the Cherokee Nation as possible of their opportunity to appear and give testimony regarding any facts of the Nation's controversy.

The Commission was advised by the Council that widespread notification was given and that persons wanting to appear and testify had signified their desire by registering at the Council Complex.

Times for appearance were assigned to each registrant. Attached hereto is a list of all persons who appeared and testified.

Each witness was sworn under oath and was allowed to make any factual presentation they desired. At the conclusion a witness's presentation, questions were allowed to be asked by each of the Commission members and any Council person in attendance.

All testimony was recorded by a certified court reporter and will be presented to the Council for their use and safekeeping. The Council will receive the only copy of the transcribed testimony, and its use or distribution will be controlled by them.

Needless to say, time schedules were difficult to control and additional late requests to testify had to be denied. On Wednesday, August 27, 1997, the hearings did not conclude until after 10:15 p.m., although they were scheduled to end at 8:30 p.m. On Thursday, August 28, 1997, the hearings were to terminate at 2:00 p.m., but due to additional requests and rescheduling problems, testimony did not end until 6:15 p.m.

The factual conclusions contained herein and the recommendations of this Commission are respectfully submitted by each member as an attempt to be of some aid and assistance in helping the Cherokee Nation through its troubling times.

As was stated in the legal reports, findings and recommendations of this report are only the *opinions* of the Commission. The Council has the right and power, and should make their own determinations as to any decision they believe is in the best interest of the Cherokee Nation.

Our final hopes and prayers will continually be with each and every one of you as your struggle to restore peace and unity to the Cherokee Nation government.

"do-da-go-hv"

MASSAD COMMISSION TESTIMONY
WEDNESDAY, AUGUST 27, 1997

Pat Ragsdale	Ross Swimmer, Former Chief
Sharon Wright	Angela Barker
Troy Poteete	Robin Mayes/David Cornsilk
Ervin Rock	Jennie Battles
Harvey Chaffin	Annette Jenkins
Paul Thomas	Janice Walters Purcell
Dianne Barker Harrold	Jerry Holderby
Phil Givens	Rex Earl Starr
George Thomas	Leigh Ann McGee
Gene Stipe	Bill Bliss

MASSAD COMMISSION TESTIMONY
THURSDAY, AUGUST 28, 1997

A. Diane Blalock	Barbara Starr-Scott
Agnes Cowan	R. Thomas Seymour
Jim Wilcoxon	Wilma Mankiller, Former Chief
Ralph Keen, Jr.	Chief Joe Byrd
Deputy Chief Eagle	

THE LEGISLATIVE BRANCH

Anthony M. Massad

After eighteen hours of testimony by over thirty witnesses, it became obviously clear that one of the paramount problems of the governing body of the Cherokee Nation was the relationship between the three branches of government, i.e., Legislative, Executive and Judicial. Without some degree of harmony and an attitude of working together for the betterment of the citizens of the Cherokee Nation, it became apparent that without drastic and improved cooperation and trust between the different branches the results would be utter destruction of the Nation and its sovereignty.

The testimony received from many witnesses depicted a condition of non-cooperation, distrust, and in most cases actual hostility between the Legislative Branch and the other branches of government. Testimony was received that much information concerning the operation of the Nation was either being withheld, secreted or not made available to the Legislative Branch of government. This results in the inability of the Legislature to enact the laws necessary for the proper operation of the Nation. Without having the necessary documentation and information upon which to base their important decisions and actions, it is obvious that the problems now facing the Nation were and are inevitable.

As a matter fact, the only evidence the Commission received was that the Council only had such information, documents and audits as might be provided to them by the Executive Branch. This makes it impossible for the Legislature to properly submit balances for expenditures and for a correct determination of available revenues to operate the government of the Nation. It is strongly recommended that the Legislative Branch create its own "oversight staff" capable of audit, accountability, and other needed information for budgetary matters which is the sole responsibility of the Council.

In this regard, it appears the present Council is using personnel from the Executive Branch of government which is not the proper way to determine the use of the Nation's funds nor of determining the need for the different divisions of the Nation's government.

The Council needs independent legal advice on matters which they are held accountable. At the present time the Council has no independent legal assistance, nor do they have accounting apparatus which this Commission feels is absolutely necessary for the proper handling of the Nation's business.

Successful operation of any government is directly dependent upon the amount of time and effort the elected officials can afford to give. In this regard, it would be extremely helpful and advantageous to the government of the Nation for the several legislative committees to be provided with such support personnel that will enable them to properly discharge their duties. These support personnel should be directly responsible and answerable to the Council free of any

interference or control by either of the other two branches of government. This is especially true in the area of accountability of appropriated funds. This would ensure that appropriated funds passed by the Legislature are actually spent on those obligations for which they were intended.

Again, it is obvious from the testimony that the Council should not depend upon nor use figures and data given it by another branch of government in determining whether or not their directions for expenditure of funds have been followed. They need their own audit and oversight capabilities.

Much evidence was received regarding legislation which was passed by the Council which is either not strictly followed or ignored completely. To illustrate this point, the Legislature passed an Employee Administrative Procedures Act some six months ago which requires the establishment of Appeals Board. Compliance with the Administrative Procedures Act was made mandatory; however, the Legislature did not follow up to ensure that an Appeals Board was put in place. This denied employees of the Nation their right to appeal terminations for cause or otherwise.

Perhaps most of the problems uncovered in the Judicial branch of government could have been corrected by remedial legislation enacted as needed and which the members of the judiciary would have to obey. An obvious case in point is the fact that appeals judge also acts as a committing magistrate. This denies the citizens of the Cherokee Nation their right to appeal a judgment of the lower court. This creates a situation where the Trial Judge and the Appellate Judge are one and the same with no chance for review of the rendered decision. It should be the Council's duty to provide a tiered judicial system wherein the citizens of the Cherokee Nation can have their cases tried in a trial decision and then have the right of appeal to different Appellate Judges. The present system needs to be corrected by the Council by the enacting of jurisdictional and procedural laws.

Perhaps one of the most shocking revelations from the testimony presented was the inability of the Council to determine the actual and truthful financial condition of the Cherokee Nation. This is created because of their inability to obtain records which were verifiable and complete.

The Council should also have its own independent legal advisor and not rely upon the legal advisors of other divisions of government. The present system provides conflicts where one division of government uses the legal personnel of another division. The Commission realized that this created additional expenses, but this is the only way known for the Legislature to receive independent legal advice.

The Commission was greatly disturbed by the fact that members of the duly instituted Legislature had not, or could not, obtain financial records of many divisions of the Nation. This should be one of the paramount concerns of the Council and this is why it is recommended that the Council have its own oversight staff with its own auditors and support personnel to verify the financial condition of the Nation.

It became apparent that some legislators had access to more information, both financial and otherwise, than other legislators. This in itself creates distrust among the various members of the same body. Each legislator should have access to full, final and complete records of whatever nature affecting the Cherokee Nation.

Likewise, public documents of the Nation should be available to any division of government and indeed to any citizen who might request them. The denial of public records breeds distrust as to the things contained therein.

It was discovered during the factual phase that very few legislators knew of the operation nor the condition of the many and varied interests of the Cherokee Nation. This was especially true in Cherokee Nation Enterprises and Cherokee Nation Industries. These being two of the largest endeavors of the Cherokee Nation, legislators should be provided with complete detailed and updated materials at all times. As a matter of fact, this should be *demanded* by the legislators.

The fact that legislators were unable to obtain information, both financial and otherwise, needed for their effective representation of their people was borne out by the problems of the corporate entities of the Nation. This is one aspect of the legislators' duty that they should demand that they receive any and all information necessary to keep them apprised of the financial condition of the Nation.

Rather than go into further repetitive details, this Commission finds that the Council realized that they are perhaps the most important and powerful part of the tripartite form of government. It should not be denied the necessary information, documents or other items necessary to properly perform their very important functions.

Fifteen members of the Cherokee Council should bond together for one purpose and one purpose only, viz., the proper functioning operation of the Cherokee Nation and the establishment of laws for the betterment of the citizens. Several factions now appear on the Council who are intent upon having their way rather than working together for the betterment of the Nation as a whole. It should be remembered that the Legislative division of any government is perhaps the most important and the most powerful. The Council should demand those ingredients which are necessary for them to perform the services which they were elected to perform.

THE JUDICIAL BRANCH

Robert A. Layden

Judiciary

This Commission has previously determined the removal proceedings of the Justices of the Judicial Appeals Tribunal conducted by this Council were void, as no quorum was present. Therefore, we make no further comments concerning that.

We heard many witnesses who made strong accusations against the present Justices and criticism of the existing judicial system. We find defects in the judicial system and will make recommendations that we hope might cause a better judicial system to be fashioned by the Council.

Trial Courts and Appellate Courts

Almost all judicial systems have two or three tiers of court levels: generally, a trial level and an appellate level. The problem in the Cherokee Nation judicial system is the "original" jurisdiction provided by statute for the court established as an Appellate Court by the Constitution. When an Appellate Court takes jurisdiction of a case at its inception, that is, at the trial level, there is no appeal from the decision at the trial level. This has occurred in several critical cases in 1997.

The trial court system provided for in Title 20, Cherokee National Code, Section 11 and following sections, with establishment of a District Judge, Associate District Judge, and later provision for Magistrates, is adequate if fully implemented. The proper number of District Judges and Associate District Judges could be determined after a careful study of the case load.

The problem seems to be a lack of clarity in the provisions for jurisdiction of the Judicial Appeals Tribunal. As former Principal Chief Swimmer stated, the Judicial Appeals Tribunal was originally set up in the Constitution to resolve disputes between the Legislative and Executive departments. The District Courts were established in 1990 because of the changes in federal laws which created a greater burden on the trial courts.

We believe the judicial system could function expeditiously if the jurisdiction of the Judicial Appeals Tribunal were clearly designated. We will recommend that the Judicial Appeals Tribunal be an appellate court and that it have original and exclusive jurisdiction over disagreements in interpretation of the Constitution or of the statutes of the Cherokee Nation. It should continue to exercise original and exclusive jurisdiction as to decisions of the Registration Committee, and it should have exclusive and original jurisdiction over appeals from final decisions of the Employee Appeals Review Board. It should have appellate jurisdiction over all other decisions of the lower court (that is, the trial court). This is consistent with Constitution Articles VII and XII, and consistent with the intention of the Council in 1990, in enacting Title 20 of the Cherokee Nation Code.

Removal of Justices

We have stated the Council has a right to remove a Justice of the Judicial Appeals Tribunal by two-thirds vote of the Council. (Note: *not* two-thirds of those voting.) Obviously, this is a drastic remedy and should be used sparingly. However, there must be some procedure to control an incompetent judge, a criminal judge, or a rogue who is unfit to sit on a judicial bench. We have no

criticism of the procedures utilized by the Council in its abortive efforts to remove judges.

We observe that the process for removal of a District Judge, as set out in Title 20, Section 17 of the Cherokee Nation Code, is commenced upon recommendation for removal by a member of the Council or by any District Judge. We note at this time there is only one District Judge in the Cherokee Nation courts. While it is not a major revision, we would suggest that the statute be changed to provide the initial proceedings to remove a District Judge be made on recommendation of a Justice of the Judicial Appeals Tribunal or a member of the Council.

Conduct of Justices

It has been said that judges should be as pure as Caesar's wife - - with not even the appearance of impropriety. We have heard testimony of gross misconduct by the Justices of the Judicial Appeals Tribunal. We recognize there are two sides to almost all disputes, and we regret the Justices did not see fit to come before us in open meeting and frankly discuss, or possibly explain or defend, the harsh charges against them. We have not heard their view of the incidents reported. Perhaps they felt they were under attack by the Legislative and Executive Branches of government, and possibly their actions were taken in the heat of combat.

In any event, we must note the many instances where due process was blatantly denied; where the Justices of the Judicial Appeals Tribunal seemed to ignore a litigant's right to an attorney, his right to a hearing, his right to notice. In too many instances, the Justices have exceeded their authority, have exercised powers of other departments of government, and have failed to follow their own Code of Judicial Ethics. Without going into the minute details graphically described in the testimony over the past few days, we must deplore situations where the Justices of the Judicial Appeals Tribunal improperly held citizens in contempt and imprisoned them without giving them a right to make a defense, not setting bond, not setting the cases of trial. We deplore cases where sanctions were imposed for presentation of legal arguments the Court found incorrect, without giving the victims the right to an attorney.

The Court seemed to become a Board of Directors of the Cherokee Nation Enterprises when it found all of the Directors were serving illegally. Conducting the business of the Cherokee Nation Enterprises was certainly the function of the Executive Department of government. Oddly enough, the Justices determined that officials of the Cherokee Nation could not legally serve on the Board of Directors and then made themselves the Board of Directors.

The Justices reinstated Marshals who had been discharged by the Principal Chief, and did so without a hearing, without notice, and from the evidence, without even a petition or a motion being filed by the discharged Marshals.

The Judiciary does not have the power of the purse nor the power of the sword. Its power must rest in the perception of its integrity and wisdom. It must

have the respect of the citizens of the Cherokee Nation and the confidence of citizens so that even in controversial decisions it will be respected.

The Oklahoma courts oversee the conduct of judges, trial and appellate judges, by a council on judicial complaints (of which Mr. Massad is a member at this time), and, when deemed appropriate, there is a constitutional provision for a Court of the Judiciary (Judge Layden having served on this Court), made up of eight judges and one lawyer who can conduct a trial of the judge accused and, in an appropriate case, remove the judge from office. This is an elaborate system that we do not recommend for the Cherokee Nation because of the limited number of judges in the Nation and the expense and complexity of the system. But all judges should be cognizant of the possibility of penalty for misconduct and the power of removal held by the Council remains the proper means of judicial control at this time.

Recusal of Judges

A judge should never sit on a case where he has a personal interest that could be substantially affected by the outcome of the case. There are, of course, many other reasons for a judge to disqualify himself from a case. Likewise, a judge who disqualifies himself, should not be involved in deciding what judge should hear the case. There are close cases involving recusal, but the basic principles set out above are simple common sense. The testimony mentioned cases where a Justice who was a defendant in a case assigned the case to a friendly judge. In another case, arising from the publication of the name of a juvenile, a criminal charge was filed against the Justice involved in that act, and the case was remanded from the Trial Court to the Judicial Appeals Tribunal where the defendant sat as a Justice.

The limited number of judges in the Cherokee Nation judiciary creates a problem when a judge recuses, but it could be handled easily by a code provision for assigning a retired judge or a local attorney to sit as a judge in the case.

We recommend the judges follow the canons of judicial ethics; that where they recuse themselves or where they are ordered by another judge to recuse, the Justices of the Judicial Appeals Tribunal not involved in the case assign another judge to the case if another judge is available; if not, assign an attorney licensed to practice in the Nation to sit as Specially Assigned Judge. If all three Justices recuse, the assignment should be made by the Principal Chief; and if he is implicated, the Council should make the assignment.

A proper statutory provision should be adopted with consultation between a committee of the Council and a committee from the Judiciary.

Appointment of a Justice

We call your attention to a rather unusual situation: this is a question of whether Justice Keen has been appointed to the position he now holds on the Judicial Appeals Tribunal. It was presented to this Council in the removal

proceedings and the Commission heard testimony concerning it from the witness, Tom Seymour. The testimony was that Justice Keen was appointed a Justice of the Judicial Appeals Tribunal in 1990, so that his term should have expired December 31st, 1996.

Legislative Act 7-95, which provided for terms of office of Justices of the Judicial Appeals Tribunal, set out that Justice Keen occupied office number two (as of the date of the Act, November 13, 1995) and that the term of office number two expired December 31st, 1998. Apparently this was taken to mean that Justice Keen was to serve until December 31st, 1998. However, the Constitution is clear that a Justice is to be appointed by the Principal Chief and approved by the Council. There is nothing to indicate Justice Keen was appointed to serve any term after expiration of his term in December 1996.

It is recommended by the Commission that a committee of the Council be assigned to determine the facts in this situation and, if appropriate, Justice Keen should be asked to leave the bench.

Office of Public Prosecutor

The testimony before the Commission revealed problems in the office of the public prosecutor. The prosecutor is appointed by the Principal Chief and is in the Executive Branch of government. However, occasions arise where the prosecutor must proceed with cases against people in the Executive department. There was evidence to indicate that the prosecutor was discharged when the prosecutor attempted to proceed against officials of the administration. On the other hand, there was testimony to indicate that the prosecutor was simply an agent of the Judicial Appeals Tribunal.

Clearly, the office of public prosecutor is one requiring maximum independence. It is difficult to see how a prosecutor can maintain independence when the appointment is by the Principal Chief and the work must be done so closely connected with the Judiciary.

It is recommended that laws be enacted to provide the public prosecutor to be an elected position and that the prosecutor be authorized and funded to hire a necessary staff to perform the duties of the office, including a trained investigator.

Misplaced Funds

The Commission heard testimony concerning the missing, or misplaced, \$200,000. It would appear that this money belonged to the Cherokee Nation Enterprises; and while the Judicial Appeals Tribunal was acting as "interim directors" of the Enterprises, \$200,000 was taken out of the account, and instead of being used as a dividend for the Cherokee Nation, it was placed in a special account in a Muskogee bank.

Later, June 9, 1997, when Mr. Holderby became CEO of Cherokee Nation Enterprises, he discovered that the \$200,000 had been removed from the bank and the Judicial Appeals Tribunal advised the Council that it was holding the

funds in trust. The testimony was that Justice Keen suggested that since the Principal Chief and eight members of the Council were not following the court orders, the Judicial Appeals Tribunal would hold the \$200,000 until the Principal Chief and the Council members began to "act legally." The testimony was that the signature card controlling the account was in the name of "Ralph Keen, Chief Justice." It was claimed that the Justices held the money "in our capacity as temporary members of the Board of Trustees" of the Cherokee Nation Enterprises.

It would seem the matter could be taken care of very quickly by the issuance of a check and returning the money where it belonged. On August 12, Justice Keen told the Council the money could be returned at any time. As of the date of the testimony this week, an attorney representing Cherokee Nation Enterprises had been unable to secure the return of the money from the Justices of the Judicial Appeals Council.

The Commission makes no recommendation in this bizarre case, as it seems rather obvious that legal action should be instituted if the money is not returned forthwith.

THE EXECUTIVE BRANCH

Daniel G. Gibbens

1. The removal of Marshal Pat Ragsdale and his deputies by the authority of the Principal Chief on or about February 25, 1997, was valid. Similarly valid is his appointment of a new Marshal and deputies. The subsequent action by the Judicial Appeals Tribunal reinstating Marshal Pat Ragsdale and his deputies was invalid inasmuch as the high court has no such power. The termination review procedure provided by LA 12-96 was not fully implemented and available to Marshal Ragsdale and his deputies at the appropriate times. Therefore, it should be made available now to the extent they are not fully returned to their previous positions.

2. The Commission finds the removal of Pat Ragsdale and his deputies was caused by what was perceived as the Marshal's insubordination in executing a search warrant in the Nation's executive offices, the warrant having been issued by the Judicial Appeals Tribunal. Some persons in the Executive Department apparently believed Marshal Ragsdale should have sought the approval of his immediate supervisor or otherwise deferred to the Principal Chief's authority prior to conducting the search. However, it is clear that such conduct by Marshal Ragsdale would have been inconsistent with his duties under 51 CNCA, Sec. 62. Further, the Commission finds the search was conducted in an orderly and courteous manner, with cooperation from the administrative employees in the area at the time of the search, and by obtaining copies of the documents sought without removal of any original documents from the offices searched.

3. Regardless of whether the search might ultimately have been declared invalid if challenged in court, the reprisal of terminating the Marshal, his deputies, and others associated with the search was not in the best interests of the Cherokee Nation. These terminations sent the message that the Principal Chief was above the applicable law and indeed that persons who sought to challenge his authority and actions in lawful ways were subject to termination. We add, however, that the reaction of the Principal Chief under these extraordinary circumstances, and with the valuable tradition of the strength of his office, is understandable and in this one instance perhaps excusable. He should in the future ensure the Cherokee citizens understand that he is fully supportive of the laws of the Cherokee Nation. He should refrain from terminating the employment of persons who in some peaceful fashion challenge the correctness of lawfulness of his performance as Principal Chief. The Commission further finds that in the days following the search, documents requested by Ms. Blalock were promptly provided, a significant indication of Chief Byrd's good faith commitment to see that the laws are faithfully executed.

4. The removal of the Justices of the Judicial Appeals Tribunal by action of the Council was invalid because it was done without a quorum as specified in the Constitution. Accordingly, the Justices should be promptly returned to their offices, and with speedy provision of the needed furnishings, files, and support services. Further, to ensure the independence of the judicial department, the Constitution should be amended to provide that the Justices of the Judicial Appeals Tribunal cannot be removed without the approval of ten members of the Council (this amendment should probably go in Article VII).

5. The Principal Chief should revise the procedures of his office so that all documents pertaining to the governmental operations are readily available to the members of the Council. This is required for the performance of his duty to "cause the laws of the Cherokee Nation to be faithfully executed" (Article VI, § 10), and particularly the Article IV provisions that the legislative and judicial departments shall be properly empowered to exercise their distinct powers. In particular, documents relating to the financial affairs of the Cherokee Nation are especially important to be readily available to the Council because of the Council's primary responsibility for appropriations and monitoring the financial affairs of the Cherokee Nation. Specifically, it is inappropriate to require Council members to fill out forms to request such documents. If privacy concerns are ever present, the Council members and their staff should be advised of these and their compliance with such restrictions can be expected to the same extent as with persons in administrative positions. Further, because key parts of the business affairs of the Cherokee Nation are performed by separate Cherokee Nation corporations, created under Cherokee law for proper business purposes, all documents relating to those corporations' financial affairs should be treated exactly the same as documents related to the other of the Cherokee Nation's financial affairs. The Commission understands the ownership of these corporations is entirely by the Cherokee Nation, and the citizens' interest in these

corporate transactions is the same as in the other governmental financial matters. In the Commission's opinion, this kind of routine openness is essential to remove the suspicions which are now rampant, and create the mutual trust among citizens and officials in all three departments that the Nation so desperately needs. Because of patterns of the past, the Commission realizes that this sort of openness will take concentrated and persistent effort by the Principal Chief and his staff before it becomes comfortable and routine. It is the Commission's strong belief that without this sort of complete openness, suspicion and distrust will continue to frustrate any attempts at peace and unity. To be sure, there is a certain price in tedious explanations and fear of vulnerability that goes with openness. That price needs to be paid in order to achieve the good government the Cherokee people need.

6. Since the Council members are not expected to make Council duties their full-time employment, they cannot be expected to perform their assigned tasks, especially concerning preparation of appropriations and monitoring of financial affairs, without the assistance of full-time staff professionals. Further, in order to properly exercise their independent powers and duties, the Council members need to have the advice of an attorney whose employment is entirely controlled by the Council's staff or the Council itself. The Commission recommends the Council should promptly appropriate funds as necessary to employ such staff assistance and the Principal Chief should promptly assure that such funds are readily available. The cost of appropriate office space, equipment, and secretarial assistance should also be provided.

7. When Council members are provided routinely with the financial documents as here recommended, they should understand that this does not put them in the same position as members of the respective Boards of Directors of the Nation's corporations, nor does it mean they should seek to perform the duties properly assigned to persons in the Executive department (i.e., they should not "micro-manage" either the corporations or the Principal Chief's administrative assistants). This is required by the Constitutional separation of powers. Correspondingly, the Principal Chief and his administrative assistants can expect a heightened amount of annoyance that accompanies the proper inquiries and follow-up communications that will necessarily flow from the increased information supplied to Council members and their staff.

8. The Principal Chief in exercising his power to appoint such administrative assistants as he deems proper, is expected to employ persons who have a high degree of loyalty to him and his duties. It appears to the Commission that the Principal Chief has been quite successful in this to date. However, these assistants should also be sensitive to the Principal Chief's constitutional duty and personal commitment to perform his duties in strict compliance with applicable laws and should understand that this may require some change in their patterns of work. It is clear to the Commission that previous Principal Chiefs have been persons of strong personality, so that the other two branches of government became accustomed to a lower level of activity and responsibility than is

Constitutionally required. Accordingly, the Principal Chief's key advisors need to be sensitive to the needed change to conformity with legal requirements and full empowerment of the Council and Judicial Appeals Tribunal.

9. While the Principal Chief should expect full loyalty from the personnel in his department, he should likewise expect and indeed encourage criticism as well as support from persons in the other two branches. The independence of the three branches and their respective personnel is expected to result in "checks" and "balances," resulting in better government. Accordingly, the Principal Chief, whose office has been accustomed to exercising power superior to the other two branches, must reform itself and "bend over backwards" to avoid sending the message that criticism will result in loss of jobs or other benefits by the critic's family members or friends. In other words, the Principal Chief and his staff should seek to avoid even the "appearance of evil." Further, the Principal Chief is commended for this regular attendance at Council meetings. However, in this new environment, he should expect increasing questions and criticism as well as support of him and his staff.

10. It is recommended that the Justices of the Judicial Appeals Tribunal perform their activities in significant ways including recusing themselves from all cases implicating the Principal Chief and his staff and avoid any actions which would tend to impede the performance of the Principal Chief and his staff. With respect to others who appear before them, they should adopt a new level of courtesy. Correspondingly, it is recommended that the Principal Chief at the meetings of the Council, recommend to the Council that they refrain at this time and in the foreseeable future from initiating any efforts to remove any of the Justices, in effect giving the Justices an opportunity over time to create an improved environment in the workings of their Tribunal and in their relations with the other two branches of government. Recommendations of the Commission for additional adjustments in the performance of the Judicial department appear elsewhere in this report. The point is that in light of the considerable personal wounds inflicted by the mutual reprisals in recent months, each department should seek to "go the extra mile" in seeking to restore mutual respect, regardless of continuing disagreements which will surely be present.

RECOMMENDATIONS

1. The members of the Council should immediately hold an executive session, wherein all complaints should be listed and proposed solutions fully discussed. Every member should attend but no final action should be taken until every member has had ample opportunity to fully study and evaluate proposed solutions.

2. The Council should cause a list of all requests for documents to be made and copies of such requests be delivered to appropriate agencies.

3. The Council should establish a better method of advising the citizens of the Cherokee Nation of the condition and activities of their government.

4. The Council should establish a separate law enforcement agency with a full-time prosecutor to be appointed by the Principal Chief with the approval of the Council, and provided sufficient support personnel including independent investigators.

5. The Council should, over time, review, update, amend or delete outdated or ineffective statutes.

6. We recommend that the Judicial Appeals Tribunal be an Appellate Court, but have original and exclusive jurisdiction over disagreements in interpretation of the Constitution or disagreements in interpretation of the statutes of the Cherokee Nation. It should continue to exercise original and exclusive jurisdiction as to decisions of the Registration Committee and it should have exclusive and original jurisdiction over appeals from final decisions of the Employee Appeals Review Board. It should have appellate jurisdiction over all other decisions of the lower court, that is, the District Court.

7. The District Court should be considered as the trial court with original jurisdiction in all cases except those set out above for the Judicial Appeals Tribunal.

8. We recommend that Title 20, Section 17 of the Cherokee Nation Code, involving the removal of a District Judge, be amended to provide that the initial proceedings to remove a District Judge be made on recommendation of a Justice of the Judicial Appeals Tribunal or of the Council.

9. We recommend that all judges of the Cherokee Nation be bound by the Canons of Judicial Ethics. We recommend that when a judge recuses himself or is recused by an order of another judge, that the Justices of the Judicial Appeals Tribunal not involved in the case assign another judge to the case if another judge is available. If another judge is not available, we recommend provisions permitting the assignment of an attorney licensed to practice in the Nation to sit as a Specially Assigned Judge. If all Justices of the Judicial Appeals Tribunal have recused, a judge should be assigned by the Principal Chief. If he is involved in the case, the assignment should be made by the Council.

10. The termination review procedure provided by LA 12-96 should be made available now to Marshal Ragsdale and his deputies to the extent they are not fully returned to their previous positions.

11. The Principal Chief should refrain from terminating the employment of persons who in some peaceful fashion challenge the correctness or lawfulness of his performance as Principal Chief.

12. The Justices of the Judicial Appeals Tribunal should be promptly returned to their offices with speedy provision of the needed furnishings, files, and support services.

13. The Constitution should be amended to provide that the Justices of the Judicial Appeals Tribunal cannot be removed without the approval of ten members of the Council (this amendment should probably go in Article VII).

14. The Principal Chief should revise procedures to ensure that all documents pertaining to governmental operations, regardless of what department has custody

of those documents, are readily available to the members of the Council. Further, all documents relating to the Nation's corporations' financial affairs should be treated exactly the same as other governmental documents.

15. We recommend the Council should promptly appropriate funds as necessary to employ full-time financial professionals and also an attorney; these staff members' employment is to be entirely controlled by the Council.

16. The Principal Chief should promptly take such measures as necessary to ensure that the funds appropriated for these Council staff positions are readily available.

17. Council members should refrain from micro-managing either the Nation's corporations or the Principal Chief's administrative assistants.

18. The Principal Chief should ensure his assistants are sensitive to his constitutional duty and personal commitment to perform his duties in strict compliance with applicable laws, and that they understand this requires change in their patterns of work.

19. The Principal Chief should expect and encourage criticism as well as support from persons in the other two branches.

APPENDIX A: JOINT AGREEMENT OF AUGUST 22, 1997

- WHEREAS: The undersigned leaders of the Cherokee Nation wish to restore confidence in the Cherokee Government and its institutions; and
- WHEREAS: The leaders have met with the Secretary of the Interior in order to put aside differences that have undermined public confidence in the Cherokee Government and its institutions; and
- WHEREAS: The upcoming celebration of the Cherokee people is an appropriate occasion to mark the beginning of a process of reconciliation and healing;

IT IS HEREBY AGREED AS FOLLOWS:

1. Law Enforcement

Chief Byrd agrees to reinstate former Chief Marshal Ragsdale. He will provide Mr. Ragsdale with back pay, and he will place Mr. Ragsdale on administrative leave, with full rights to prosecute an appeal of his dismissal, so long as such action is not initiated until after the finalization of Massad Report. Mr. Jordan shall remain as Chief Marshal, pending the issuance of the Massad Report. Mr. Jordan shall offer employment, with back pay, to the marshals who served under Mr. Ragsdale, and who have not yet been rehired.

The undersigned leaders agree to request that the BIA undertake an orderly transition of law enforcement from the BIA to the tribe in early September. In connection with this transition, it is understood that the BIA will undertake a certification process for tribal marshals. The leaders have received assurances from the Secretary of the Interior that he will cooperate in making this transition.

*2. Judicial Branch**A. Courthouse*

The undersigned leaders of the Cherokee Nation recognize that the Courthouse is profoundly important to the Cherokee Nation for historical and constitutional reasons. In view of the courthouse's importance to the Nation, Chief Byrd has agreed to reopen the courthouse on Wednesday, August 27, 1997.

B. The Justices

It is hoped that the Massad Commission will provide its conclusion regarding the legality of the removal of the justices as soon as possible. If the Commission concludes that no action of the Council has heretofore constitutionally removed the justices from office, Chief Byrd has agreed that he will permit them to occupy their chambers and resume their duties immediately upon such a finding. Under such circumstances, the undersigned leaders agreed that the justices

possess and may exercise the powers accorded the Tribunal under the Constitution and laws, subject to the moratorium discussed below, and that they will urge all other members of the Nation to act in accordance with conclusion. The Council will retain full constitutional authority to review any charges against any justice and to act thereon, consistent with the Constitution.

If the Massad Commission concludes that the Council has constitutionally removed the justices from office, the undersigned leaders agree that the justices will not be restored to their chambers and the undersigned leaders agreed that they do not possess and may not exercise the powers accorded the Tribunal under the Constitution and laws, and will urge all other members of the Nation to act in accordance with the conclusion.

3. Moratorium of Certain Legal Actions

The undersigned leaders agree that no writs, suits, or other actions related to the activities that have caused the constitutional crisis in the Cherokee Nation shall be initiated until the Massad Report is issued and the Council takes action thereupon.

4. Investigation

The Department of Justice acknowledges that it is undertaking an investigation of alleged violations of federal law. Tribal members stress the importance of bringing this investigation to an expeditious conclusion.

SIGNED THIS DATE AUGUST 22, 1997:

Principal Chief Joe Byrd
Harold DeMoss
Harold Jiggs Phillips
Don Crittenden
Bruce Babbitt

APPENDIX B: U.S. DEPARTMENT OF THE INTERIOR
NEWS RELEASE OF AUGUST 25, 1997

**CHEROKEE LEADERS SIGN LANDMARK JOINT AGREEMENT TO
RESOLVE MONTHS OF CRISIS FOR OKLAHOMA NATION**

A joint agreement was reached at the Department of the Interior today between Principal Chief Joe Byrd, Council members of the Cherokee Nation and Secretary of the Interior Bruce Babbitt, establishing a framework to resolve months of conflict that have divided the Nation and its government.

The agreement signed today was negotiated on Friday, August 22, under the leadership of Secretary Babbitt. In a statement to news media after a marathon eight-hour negotiating session on Friday night, Babbitt expressed his fervent hope that this common-sense and rational approach would ultimately prevail.

"The agreement signed today is evidence that Chief Byrd and Councilmen Phillips, Crittenden and DeMoss have risen above past differences to take action that is in the best interest of the Cherokee Nation, its proud traditions and institutions," Babbitt said.

Joining together for a press conference at the Department of the Interior to endorse today's agreement, Chief Byrd and the tribal leaders urged citizens of the Nation to use the upcoming Cherokee National Holiday celebration over Labor Day weekend as "an appropriate occasion to mark the beginning of a process of reconciliation and healing." They urged citizens to avoid political demonstrations or other unrest. Consistent with this resolution, Chief Byrd agreed to forego any political speeches during the celebration.

Major provisions of the agreement (attached) include the reopening of the Cherokee Courthouse in Tahlequah, Oklahoma, on Wednesday, August 27; the acceptance by Chief Byrd of the opinion of the independent Massad Commission regarding the constitutionality of removing Tribal Justices from office, and an agreement to permit them to occupy their chambers and exercise the powers accorded the Tribunal if the Massad Commission Report finds that the Justices were improperly impeached. If the Massad Commission determines that the Justices were constitutionally removed, the Justices will not be restored to their chambers, and all signers of today's agreement will support this conclusion. The agreement also includes a moratorium on writs, suits, and other legal actions related to the present Cherokee Constitutional crisis until the Council acts upon the Massad Commission Report.

In addition, the agreement provides a process for the Bureau of Indian Affairs to make an orderly transition during early September from the law enforcement it is currently providing to the Cherokee Nation. Chief Marshall Ragsdale would be reinstated with back pay, and placed on administrative leave pending final action on the Massad Commission Report. Other marshals who had served under Ragsdale would be offered tribal employment as marshals with back pay. The BIA would also undertake a routine certification process, authorized under the Indian Law Enforcement Act, for all Cherokee tribal marshals.