



**CHEROKEE NATION
OFFICE OF THE ATTORNEY
GENERAL**

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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question submitted by: Keith Austin, Cherokee Nation Tribal Council Member

Opinion Number: 2020-CNAG-03

Date Decided: November 16, 2020

You have asked for an opinion answering the following:

Would the legislation filed as number 20-080, amending Title 28 adding §22 “Donations for Appointments and/or Employment Unlawful” under Chapter 2, be considered a constitutional enactment if passed by the Tribal Council and signed by the Principal Chief?

ANSWER AND ANALYSIS

Short Answer:

No, the legislation filed as number 20-080, amending Title 28 adding §22 “Donations for Appointments and/or Employment Unlawful” under Chapter 2, would not be considered a constitutional enactment if passed by the Tribal Council and signed by the Principal Chief.

Analysis:

The legislative branch of government has seventeen members, all of whom are empowered to propose resolutions and vote on matters that come before the Tribal Council. There is a question of whether the Council can, by legislative act, prohibit members of its own body from voting on the confirmation of an appointee if that appointee has donated any amount of money to any political campaign of the official when he or she was a candidate. Further, the additional question has arisen of whether the Tribal Council may prohibit the Principal Chief from nominating classes of individuals to positions within the Cherokee Nation and its businesses for the same reason.

- 1) The Constitution requires elected officials to use their best judgment and allows them to be held accountable by their electorate.

When someone becomes an elected official in the Cherokee Nation, significant power to make decisions regarding the Cherokee Nation is placed in his or her hands. The election process is designed to ensure that the person with such power has the popular support of the electorate. Taking away the right of an individual elected official to vote on an issue – whether it be to confirm an appointment or pursuant to the execution of any other constitutional duty of the office – is a serious limitation on the power of an individual elected official. It should be done neither lightly nor routinely.

There is evidence that the Council itself has not historically taken the matter lightly. In its own censure rules, the Tribal Council requires a unanimous vote – absent the offending Council member – to remove a Tribal Council member from the Council’s Chambers for violating the rules of conduct. Section III (B), Tribal Council Rules. The Council has respected the right of each member to participate fully, even until the behavior of the Tribal Council member has become so egregious that it is found to be intolerable by every other Tribal Council member in attendance. Id. Such an attitude is wise, given that each Tribal Council member represents a group of citizens entitled to representation by their chosen official.

The proposed legislation takes a heavy hand to this long-observed rule in the Tribal Council. Rather than trusting individual Tribal Council members to abstain if their judgment is compromised due to relationships or political ties, this legislative act, if passed, seeks to impose a uniform rule on all Councilors. That rule would require the individual Councilor to surrender his or her own judgment on confirmation of an appointee, and force them to abstain from the vote – even if the individual Councilor felt his or her judgment was in no way compromised. Moreover, under the procedural rules of the Tribal Council, an abstention is procedurally a vote against the confirmation.

If Tribal Council members vote in ways that their electorate find inappropriate, the voters can and should hold those Councilors accountable for that at the polls. But while they are seated as representatives for their individual districts or as representatives for the at-large community, they must – absent the most extraordinary circumstances – be permitted to vote as their own conscience and the Constitution demands. To do otherwise is to silence the voters who sent the Councilor to Tahlequah on their behalf in the first place, and to leave thousands of citizens represented by the Councilor without a voice in critical decisions.

- 2) If passed, the legislative act would represent an unconstitutional violation of the separation of powers.

This legislation would unconstitutionally limit the power of the Principal Chief to appoint officials within the Cherokee Nation. The Constitution of the Cherokee Nation provides that certain powers belong to the Principal Chief, including the power to appoint certain officials. Article IV of the Cherokee Constitution provides for “distribution” of powers in the three branches of government. Although similar to the federal separation of powers doctrine, the Cherokee Constitution requires that neither branch “exercise the powers properly belonging to either of the others.” Art. IV, Cherokee Constitution.

The question, then, is whether the Cherokee Nation Tribal Council, by limiting the pool of potential appointees, is unconstitutionally exercising the authority of the executive branch. These issues have been previously considered by the Judicial Appeals Tribunal and in a previous Attorney General Opinion. See *Smith v. Tribal Council*, JAT 03-15 and 2012 CNAG-05. The Tribal Council, as the legislative branch, cannot narrow the pool of potential appointees provided for in the Constitution. It might be tempting, for instance, for a Tribal Council member to require that only citizens living within his or her district be appointed by the Principal Chief, but the Tribal Council cannot usurp the appointment function; it can only exercise its constitutional authority through the confirmation process.

3) This law is unconstitutionally broad and vague.

The legislation's language is so vague that it leaves uncertainty regarding its applicability. This legislation makes it unlawful for any elected official to "appoint or vote for the appointment or employment of any person" that donated to the campaign of that elected official to any position within the nation or its instrumentalities. The wording of this paragraph implies that any person who donated money to an elected official cannot be employed by that official. Because the Principal Chief is the head of the entire executive branch, every employee at the Nation is employed indirectly by the Principal Chief. This is a significant burden to place on a large group of people for simply supporting one candidate over another in an election in which every Cherokee citizen had a constitutionally protected right to participate.

This legislation also lacks any time bound or monetary restrictions, making any donation to an elected official for any position sufficient to disqualify them from voting on an appointee. There are many people on the Tribal Council who have served for decades and have run for multiple elections. Speaker Byrd, for instance, has been running for office and has been accepting donations from supporters for more than 25 years. Sharp though his mind no doubt is, it would be difficult for anyone to recall every single donation made to him or her over a span of a twenty-five year career in public service. If passed, this legislation would prohibit Speaker Byrd from considering, supporting, or voting for any person who ever made a donation to one of his campaigns. It strains the imagination that a \$5 dollar donation in 1995 could be considered by anyone to create even a perceived conflict on an appointment vote in 2020, yet under this legislation a Councilor who accepted such a donation would be prohibited from voting for the appointee who had made such a contribution.¹

The proposed legislation at §22 states that "[i]t shall be unlawful for any elected official to appoint or vote for the appointment or employment of any person that donated to the campaign of that elected official to any position within the Nation and/or the Nation's instrumentalities."

¹ This Legislation also lends itself to gamesmanship in a way likely not anticipated. If a current appointed official is eligible for re-nomination and s/he suspects that a specific Councilor may not support the appointment, that individual could make a de minimis contribution to a Tribal Councilor to avoid having any Councilor vote against the confirmation. Surely, this would be an unintended consequence of the proposed legislation.

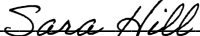
This incredibly broad language would disqualify hundreds of people from serving in appointed positions at all, and would deprive potentially thousands of people of support from Tribal Council members even if there is no actual or perceived conflict of interest.

- 4) This law has an unconstitutional retroactive effect.

The Cherokee Nation's Constitution states at Article VI, Section 8 that, "[n]o laws passed by the Council shall have retroactive effect or operation." The legislation would have the effect of disqualifying every person who donated to the political campaign of an elected official from being supported by that official should they ever come before them for consideration for appointment or confirmation. Creating bars to public service by disqualifying citizens from appointment or confirmation due to donations they legally made in the past is the type of legislative mischief that Article VI, Section 8 was created to prevent.

IT IS, THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:

- 1) That file number 20-080, amending Title 28 adding §22 "Donations for Appointments and/or Employment Unlawful" under Chapter 2, if it became law, would violate Article V of the Constitution of the Cherokee Nation.
- 2) That file number 20-080, amending Title 28 adding §22 "Donations for Appointments and/or Employment Unlawful" under Chapter 2, if it became law, would violate Article VII of the Constitution of the Cherokee Nation.
- 3) That file number 20-080, amending Title 28 adding §22 "Donations for Appointments and/or Employment Unlawful" under Chapter 2, if it became law, would violate Article VI, Section 8 of the Constitution of the Cherokee Nation.



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