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**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** The Rules Committee of the Cherokee Nation Tribal Council

**Opinion Number:** 2007-CNAG-3

**Date Decided:** December 5, 2007

**To:** Todd Hembree, Counsel  
Rules Committee of the Tribal Council of the Cherokee Nation

**From:** A. Diane Hammons, Attorney General  
Cherokee Nation

**Date:** December 5, 2007

This office has received an official request from the Rules Committee of the Cherokee Nation Tribal Council, seeking an Attorney General's Opinion upon the question of the application of the term limits imposed by the 1999 Constitution upon present elected officials. Your question is:

Are elected officials who took office in August of 2007, who were previously elected in 2003, serving their first term in office under the 1999 Constitution?

**Analysis of Question Presented**

The 1999 Constitution instituted term limits for elected officials that were not included in the previous Constitution. The Council limitation states that "All Council members shall be limited to two (2) consecutive elected terms on the Council. All Council members having served two consecutive terms must sit out one (1) term before seeking any seat on the Council." *Cherokee Nation Const. art. VI, § 3 (2003)*. The Principal Chief and Deputy Principal Chief are similarly limited although the language is slightly different. The Constitution provides that, "No person having been elected to the office of Principal Chief in two (2) consecutive elections shall be eligible to file for the office of Principal Chief in the election next following his or her second term of office." *Cherokee Nation Const. art. VII, § 1*. The Deputy Chief is subject to the same term limitations as the Principal

Chief. *Cherokee Nation Const. art. VII, § 3*. The Constitutional provisions on term limits specifically refer to the election of the officials rather than to the term itself, and thus the date of election to a term is the pertinent date.

Since the Cherokee Nation has never before had term limitations on office holding, there is no prior Cherokee Nation case law concerning this issue. The term limit provisions do not specifically address the date upon which counting of elected terms begins, and thus the express terms of those provisions are of little assistance in determining the issue.

Pursuant to the Cherokee Nation Supreme Court's most recent pronouncement on Constitutional interpretation, the Court looks at the entire document when interpreting the meaning of Constitutional provisions. *Allen v. Cherokee Nation Tribal Council, JAT-04-09 (Mar. 7, 2006)*. The 1999 Constitution states that it "shall become effective when ratified by the registered voters of the Cherokee Nation." *Cherokee Nation Const. art. XVIII*. The Supreme Court, in determining the 1999 Constitution to be in effect, held that the 1999 Constitution became effective on July 26, 2003. *In re: Status and Implementation of 1999 Constitution of Cherokee Nation, JAT-05-04 at 5, 8 (June 7, 2006)*. The Court also determined that all elected officials currently holding office were elected under the 1975 Constitution rather than the 1999 Constitution, stating:

The present (elected officials) were elected to office under the authority of the 1975 Constitution and before the 1999 Constitution was adopted by the people of the Cherokee Nation on July 26, 2003.

*Id.* at 7 (*pars. 13 and 15*). Thus, the issue is whether elected terms under the 1975 Constitution count towards the term limits provided for in the amended Constitution.

Because there is no date specifying when to begin the counting of elected terms towards the limitation, the provision is ambiguous as to the benchmark date for counting. There are three possibilities for when the counting begins: 1) all elected terms ever served, including those prior to the effective date of the 1999 Constitution, could be counted towards the limitation; 2) the counting of elected terms could begin immediately upon the effective date of the 1999 Constitution which would include the 2003 – 2007 term; or 3) terms could be counted to include only those elected terms where the election occurs on or after the effective date of the 1999 Constitution (e.g., include only elected terms occurring under the 1999 Constitution).

Only one case was found where term limits were imposed by a constitutional amendment where the amendment did not specify the date upon which terms would begin to count towards the limitation. *U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994)*. The Arkansas amendment included an effective date but did not express how the effective date should be used in the counting of terms for limitation purposes. *Id.* at 361. The Arkansas amendment was slightly different than the 1999 Constitution in that the Arkansas amendment referred to terms of service rather than elected terms. *Id.* at 352. The Arkansas court first noted that other states that provided for term limits via constitutional amendment included dates certain to be used in calculating the terms toward the eligibility limit. *Id.*

The Arkansas court then determined that because no benchmark date was provided in the plain language of the amendment, the amendment was ambiguous, thus requiring the Court to apply rules of construction to determine the benchmark date. *Id.* at 360-61. The court applied the rule of construction that “Constitutional amendments operate prospectively unless the language used or the purpose of the provision indicates otherwise.” *U.S. Term Limits* at 361. The Court also stated that the amendment would not be construed as retroactive when it may be reasonably construed otherwise. *Id.* Because of the amendment’s lack of a benchmark date for counting terms and the rule against construing laws to be retroactive without a specific statement requiring such, the Court held that only those terms commencing after the amendment’s effective date would count towards term limits. *Id.*

Applying the *U.S. Term Limits* rule here, only terms where an individual was elected after the effective date of the 1999 Constitution would be counted as terms towards the term limitations. Such a rule would be consistent with the intentions of the Constitutional framers. The term limits were placed into the Constitution by the delegates of the Constitutional Convention after the Constitutional Convention Committee presented its initial draft to the delegates; the Committee’s initial draft does not include the term limits. The transcripts of the delegate proceedings specifically address how the term limits would be applied to then-sitting officials.

The pertinent discussion as to the term limits for tribal Councilors is as follows:

MR. LITTLEJOHN: Would this apply to the present Council members seated, or will it begin with the next elected?

MR. HANNAH: A most astute question. Mr. Smith.

MR. SMITH: I anticipate that we will certainly include the ex-post facto provision, so this will be prospective rather than retroactive. So, yes, it would add two more terms.

MR. KEEN JR.: I would agree with that. This requirement can only come into effect prospectively [sic], not retroactively.

*1999 Cherokee Nation Const. Convention, Tr. Vol. III (Microsoft Word version) at 81 (Feb. 28, 1999).*  
The pertinent discussion as to the Principal Chief is as follows:

MR. ROBINSON: Rick Robinson, delegate from Tahlequah. This is probably more – I’m not quite sure if I’m in support or not. I think I am in support, but I just wanted to make a clarification.

MR. HANNAH: Okay. Point of clarification.

MR. ROBINSON: As I remember with the Council, if this is passed, it would not take – it would come into effect obviously later this year, and it would not be retroactive. In other words, you have – well, just say Principal Chief Byrd who has been in one term now, he would still be able to run for two more terms, because I think somewhere we have in the language it is not retroactive.<sup>1</sup>

MR. HANNAH: That would be correct, sir. Thank you. Mr. Keen, you are recognized.

MR. JOHN KEEN: John Keen, delegate from Iowa. It's my understanding we have already passed the term limits for the Council. We have accepted the language in an amendment.

MR. HANNAH: They have been accepted, sir.

MR. JOHN KEEN: I think it's imperative to keep the term limits the same. If we're going to impose it [on] one elected office, then they should be identical, if we're going to impose term limits on any other office.

*1999 Cherokee Nation Const. Convention, Tr. Vol. V (Microsoft Word version) at 15-16 (Mar. 2, 1999).* At the time this discussion occurred, Principal Chief Joe Byrd was the incumbent serving his first term of office. The agreement among the delegates outlined above was that the incumbent Principal Chief was eligible to run for and be elected to an additional two (2) elected terms after the end of the term he was serving at the time the Constitution would become effective (apparently the delegates assumed the Constitution would be voted on in late 1999 rather than in 2003). The discussion also indicates that the counting of terms for limitation purposes was to apply equally to the Principal Chief, the Deputy Principal Chief, and the Council members.

Based on the discussions of the Constitutional Framers, it is clear that the counting of terms toward the limits is to begin upon elections occurring pursuant to the 1999 Constitution. Because the first elections to occur pursuant to the 1999 Constitution are those that occurred in June 2007, no previous terms, including the term being served when the Supreme Court made its decision on the Constitution, count towards the term limitations. As such, all individuals are eligible to be elected to and to serve two (2) consecutive terms beginning with the term starting in 2007.

### CONCLUSION

Based upon constitutional construction principles, including the clear intent of the framers of our Constitution, and the rule against retroactivity, the counting of terms for purposes of determining term limitations only includes those terms where the election to that term occurs after July 26, 2003, the effective date of the 1999 Constitution. Thus, any elected official who was elected in 2003 and then re-elected in 2007 is, for purposes of counting term limits, serving their first term in office at this time.

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<sup>1</sup> It is assumed that both delegate Smith's and delegate Robinson's references to the lack of retroactivity of laws is that found in Article VI of the Constitution. *Cherokee Nation Const. art. VI, § 8.*

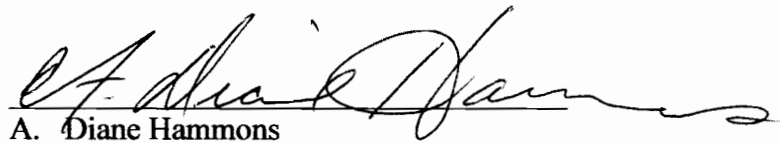
**It is, therefore, the official Opinion of the Attorney General that:**

**The first term in office for any elected official, under the 1999 Constitution,  
is the term that began in August, 2007.**

Respectfully submitted by:



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A. Diane Hammons  
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