

NOTE: It was no surprise as to Chief Justice Darrel Matlock's ruling or the two new Justice's Wilcoxon & Hosklins. Most Cherokees view them as Chief Smith puppets and will vote however Chief Smith & Chief Justice Matlock want. Plus they may not even be legal to rule on any matter. After you read all three opinions you really see how little effort Chief Justice Matlock, Justice Wilcoxon & Hosklins put into this issue. **Not Much!**

IN THE SUPREME COURT OF THE CHEROKEE NATION

In Re the Matter of the Written Protest)
 Against the Initiative Petition "Proposing)
 an Amendment to Article IV, Section 1) SC-06-12
 of the Cherokee Constitution of 1999)
 and Article III, Section 1 of the Cherokee)
 Constitution of 1975")

DISSENTING OPINION OF JUSTICE LEEDS

This case involves a challenge to the sufficiency of an initiative petition. The proposed initiative seeks to place a constitutional amendment on the ballot at a special election. The amendment, if passed, will exclude a class of Cherokee citizens known as the Freedmen and invalidate the effect of this Court's decision in *Allen v. Cherokee Nation*. JAT 04-09 (2006). There is no doubt that the Cherokee people have the legal right to amend the Constitution to redefine citizenship. The Cherokee people must, however, abide by Cherokee law in exercising that right.

In this initiative petition process, there are numerous irregularities, clear violations of Cherokee law, and it has been shown that some of the circulators perjured their sworn affidavits. I cannot, in good conscience, join in the majority opinion.

We must be concerned for the rights of two groups of Cherokee citizens. We must preserve the right of Cherokee citizens to propose constitutional amendments through the lawful initiative process. In doing so, we must also be cognizant of the rights of Cherokee citizens who stand to be excluded. The integrity of our democratic process is at stake.

The Challenges to the Petition This Court is asked to invalidate the initiative petition on the following grounds:

- (1) some individuals who circulated the petitions violated Cherokee law in their attempts to collect the required number of signatures;
- (2) the petition is void on its face because it is vague and misleading;
- (3) the petition violates the Constitution because the Cherokee people do not have the power to request a special election on an initiative petition;
- (4) the action of the Principal Chief, in setting a special election for February 10, 2006, is unconstitutional because he lacks the power to call a special election for initiatives.

Cherokee Laws Governing Initiative Petitions Article XV of the Constitution governs initiative, referendum, and constitutional amendments. The Tribal Council is thereby constitutionally required to enact procedures

to govern the initiative and referendum process. In 2004, the Tribal Council passed "The Referendum and Initiative Procedures Act," LA 15-04.

The Act sets forth mandatory procedures that must be followed in order to properly exercise the right of initiative. The Act includes criminal and civil sanctions for violations of the law and permits this Court to hear challenges. The legislation also requires this Court to set procedures for reviewing challenges.

The Act sets forth very basic requirements that are designed to guarantee that the process is fair and honest. The three most critical requirements to ensure integrity are:

1. I agree with the majority that the wording of the petition, although not perfect, substantially complies with the LA 15-04. The average person reading the petition can ascertain that it proposes a constitutional amendment to limit membership/citizenship to persons who are listed on the Dawes Rolls as Cherokee by blood, Delaware and Shawnee and their descendants. I would not invalidate the petition on this challenge. At the time the proponents began circulating the petitions, it was not clear whether we were operating under the 1975 or 1999 Constitution. I would not fault the voters for mentioning both constitutions, given that the membership/citizenship provisions are virtually the same in both constitutions.

- (1) petitions must be assembled and circulated in a pamphlet containing an external warning page alerting individuals that it is a crime to sign another person's name, to sign your own name twice, or to otherwise provide false information on the petition.
- (2) petitions must be signed by registered Cherokee voters and the voter's address and registration number must appear on the petition; and
- (3) petition circulators must sign a sworn affidavit before a notary that they are a registered voter and that all signatures on each page were signed in their presence.

These simple requirements are not burdensome, nor do they impair the rights of the Cherokee people to advance initiatives. The requirements protect the initiative process against fraud, mistake and irregularities. These requirements create a presumption in favor of the proponents of the petitions. For this reason, we must presume the signatures are valid, and the burden falls on the challengers to prove otherwise. In the present case, the challenger has met that burden and introduced enough evidence to cause this Court to question the integrity of the process.

The Election Commission's Report
 The Election Commission is charged with counting the petitions and reporting the number of valid signatures to this Court. The Election Commission certified that 3,029 signatures appeared and that 2,217 signatures were valid. The Election Commission invalidated 812 signatures on the following grounds:

- (1) the person was not registered to vote, or
- (2) the person did not provide an address or registration number, or
- (3) the person signed the petition twice, or
- 2 The Election Commission improperly interpreted the law and included signatures that have either an address or a registration number. The language states that each voter "shall" write their name and address and registration number. LA 15-04, ? XV.

- (4) the writing was illegible; or
- (5) the signatures appeared on sheets that were not true and exact copies of the original petition filed with the election commission.

The Election Commission's review of the petitions was very limited. The Election Commission did not remove any names that appear to be forged or names that were printed rather than signed. The Election Commission did not remove any petitions for improper circulator's affidavits or for any impropriety in the way the pamphlets were assembled or circulated.

The Election Commission's report reveals that there are 131 signatures in excess of what is required to place the initiative on the February ballot. Therefore, if more than 131 signatures should be excluded on the basis of this Court's review, the initiative petition fails. Supreme Court Review

LA 15-04 allows challenges to be brought before this Court. The legislation requires this Court to set procedures for reviewing petitions. To date, no procedures have been set. This Court accepted all the petition pamphlets into the evidentiary record for de novo review. This Court has a duty to review the petition pamphlets.

Falsification of Affidavits
 The challenger introduced evidence that some individuals who circulated the petitions violated Cherokee law by falsifying affidavits. The proponents offered no evidence to rebut this testimony.

A few petition pamphlets were presented to the Election Commission on "short" sheets of paper. The original copy filed with the election commission was properly printed on legal size paper as required by

law for uniformity. The Election Commission properly excluded these signatures because the petitions circulated were not true and correct copies of the petition pamphlet.

It was shown that two of the circulators, Darren Buzzard and Dwayne Barrett, falsified petition affidavits. They violated the requirement that each circulator must swear before a notary that they personally witnessed all the signatures on a given petition. They swore before a notary that they personally circulated petitions that they did not in fact circulate. In doing so, they perjured themselves and their credibility as truthful circulators is impeached. This is particularly bothersome given the fact that Darren Buzzard attested to over 520 signatures.

Darren Buzzard and Dwayne Barrett falsified affidavits as follows:

1. John Summerfield testified that Harley Buzzard actually circulated the petition he and his wife signed, yet Darren Buzzard signed the affidavit that he personally witnessed each of the signatures. Darren Buzzard was not present when the signatures were collected. The petition was therefore falsely attested and must be discounted in its entirety.

2. Carol Wyatt, an employee of Cherokee Nation Enterprises, testified that she is actually the person who carried a petition to her parents' home to obtain their signatures. Dwayne Barrett signed the affidavit swearing that he was the person who witnessed all the signatures on that page. Dwayne Barrett was not present when the signatures were collected. The petition was therefore falsely attested and must be discounted in its entirety.

3. Melvin Gamer, who is not a Cherokee citizen, testified that he nonetheless signed the petition and that he also signed his wife's name to the petition. Darren Buzzard was the circulator of this petition and once again he swore that he witnessed each person sign the 4 Volume 5 petition] contained 20 signatures. The Election Commission previously rejected 1 signature. s Volume I petition 7 contained 13 signatures. The Election Commission previously rejected 4 signatures.

petition, when in fact he did not. The petition was therefore falsely attested and must be discounted in its entirety.

What is equally troubling, with respect to the integrity of the process, is that neither Carol Wyatt, John Summerfield, or Melvin Gamer recalled seeing the required warning page on the external petitions pamphlets that were presented to them. Melvin Gamer did not know that as a non-citizen, he was not allowed to sign the petition. He also was unaware that it was crime to sign someone else's name to the petition. Viewed in the very best light, these testimonies suggest that the circulators did not assemble and circulate the petitions in the manner required by law. The testimony also shows that these two circulators were dishonest about their collection efforts. These are not inadvertent mistakes or mere technicalities this Court can overlook. These actions are conscious and deliberate and show a disregard for following the law.

In exercising their right of initiative, the voters and petition circulators must respect the laws enacted by the Council. The requirement that voters must sign the petition before a circulator, who then swears that the electors signed in his presence, is the most important requirement in preventing fraud and irregularity in the process. The falsification of affidavits is not a matter to be treated lightly. Election laws exist to preserve the integrity of our government and the Council thought this so important as to criminalize the falsification of initiative petitions.

The majority acknowledges that these individuals should be referred to the Attorney General for possible criminal prosecution for their fraudulent conduct. The majority is nonetheless willing to presume that these individuals were truthful in gathering the remaining signatures and attesting to the rest of the affidavits.

1 Volume 6 petition 6 contained 5 signatures. The Election Commission previously rejected 2 signatures.

this is only the first part of the document (it is 21 pages long)

Conclusion

The power to propose constitutional amendments is an awesome power. If we are going to amend our fundamental laws, we must ensure that the proper procedures are followed and that the integrity of the process is safeguarded.

² LA 15-04 does little to clarify this issue. Section IV of the Act mentions general elections only when providing a sample form for initiative petitions to follow. In contrast, Section VII mentions both regular and special election in reference to "any measure" that is either "initiated by the people" or "whenever the referendum shall be demanded against any measure passed by the Tribal Council." The legislation is unclear whether an initiative petition can ever be set for a special election.

This Court is the final gatekeeper of the integrity of the initiative process. In the interest of justice, this Court should have invalidated the initiative or, at the very least, conducted a more thorough review. To allow the initiative to move forward under this cloud of inequity is unconscionable. The majority has sent a clear message to the Cherokee people that our laws can be disregarded.

My decision does not preclude a future vote on this issue. The voters are already properly scheduled to vote on this constitutional amendment in the upcoming general election in June 2006. In the future, it may very well come to pass that the Freedmen or other classes of Cherokee citizens are excluded by majority vote. If this occurs, let it happen only after full compliance with, and respect for, our own laws.

I respectfully dissent.
 Stacy L. Leeds, Justice

IN THE SUPREME COURT OF THE CHEROKEE NATION

In Re the Matter of the Written Protest)
 Against the Initiative Petition "Proposing)
 an Amendment to Article IV, Section 1) SC-2006-012
 of the Cherokee Constitution of 1999 and)
 Article III, Section 1 of the Cherokee)
 Constitution of 1975".)

Justice Dowty, Dissenting in Part/Concurring in Part

1. Led by Chief Justice Matlock, our Court has endeavored to give prompt and timely consideration to this important case. We have engaged in serious and stimulating debate on this matter and we have differing views on what the outcome should be, all in the best traditions of this Court. In this litigation, we are balancing the Constitutional right of the citizens to exercise the initiative against the stability provided by a bedrock document through which we are governed.

2. We have heard the testimony and received into evidence the Petitions from the Cherokee Nation Election Commission. We have also heard from the Protestants and the Proponents of the Petition and received their documentary evidence. It falls on us to conduct a *de novo* review and determine the sufficiency of the signatures on the Petitions. Since we have not adopted a specific procedure with regard to this review, we have differing opinions as well regarding the extent to which we should examine the Petitions. In my opinion, we should be thorough in our review, both as to signatures which may have been either excluded or included in error, as shown by the face of the documents, giving

due consideration to the procedural law enacted by the Council in LA 15-04.

3. Having heard the testimony and evidence, having reviewed the Petitions and considered the debate and opinions of my colleagues, I have reached the conclusion that the process evidenced by these Petitions is so flawed that the sufficiency of signatures cannot be certified by this Court. Accordingly, I must respectfully dissent to the majority opinion.

4. I concur with Justice Leeds that the conduct of some of the circulators is such that their certification cannot be relied upon and I agree that there should be referrals for further investigation and prosecution. The circulators stand in a position of trust with regard to the integrity of the process and have a duty to those who lawfully sign the Petitions to assure that individual exercise of the power of initiative is not impaired. In this, some circulators have grievously failed and should be held accountable. I agree that where the certificate of a circulator is impeached for fraud, the presumption of genuineness is removed, and individual signatures on that page must be excluded unless independently supported as genuine. However, I do not go so far as to exclude all of the petitions of that circulator.

5. Likewise, the proponents have a duty to those who sign the Petitions to assure that the petition is in proper form; that the circulators are qualified; that the integrity of the pamphlets is maintained and that all necessary information is obtained from those who sign the petition.

6. The Council has enacted appropriate procedures to accomplish this purpose. The Statute is reasonable and not burdensome and is modeled after the corresponding Act of the State of Oklahoma. We have reviewed many Petitions in proper form containing all of the information required. For instance, the Petitions circulated by proponent John Ketcher were excellent

examples. Unfortunately, too many of the Petitions fall short of the requirements and many signatures must be discounted.

7. I agree with Justice Leeds that LA 15-04, §XV requires that both the address and registration number must be included with each signature.² The statutory language is clear, unambiguous and mandatory. Further, the mandatory language that must be included in the petition form under LA 15-04, Section IV, requires that each signer affirm that he has signed his name; is a legal voter, and, that his physical address, post office address and voter identification number are correctly written after his name. There is a discrepancy in the Act between these requirements and the counting provisions applicable to Election Commission review which appear to exclude a signature only if both the address and registry number are missing.³ This is unfortunate and has resulted in many signatures being counted by the Election Commission that should be excluded.

8. The inclusion of an address with each signature is mandatory and serves not only to assist the Election Commission in identifying the person and verifying voter registry, but also to allow a challenger of the petition to trace the signer for the purpose of determining his qualification to sign the petition.⁴ Without this inclusion, the ability to effectively challenge the Petition in a timely manner, given the accelerated nature of the proceedings, would be impaired, if not impossible. Safeguards afforded challengers are as necessary to protect the integrity of the process as are

¹ Title 34 Oklahoma Statutes, Section 1, et seq
² LA 15-04, Section XV. "... The electors shall and Chciokcc Nation Re^istn identification number LA 15-04, Section XV. "... The electors shall sign their legally registered name, their address or post office box.

LA 15-04, Section XHI. "The Election Commission shall make or cause to be made a physical count of the number of signatures on the petitions, hi making such count, the Commission shall noi include in such physical count: ... 2. All signatures of persons who do not list an address or Cherokee Nation Registry Number. ..."

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 In Re Referendum Petition No. 35, 1920 OK 7,^10. "The aimofhe statute requiring correct addresses of the signers is to enable a protestant of the petition to trace the signer for the purpose of determining his qualification to sign the petition, and when this cannot be done, on account of the procedure adopted here, the statute is not substantially complied with, and the presumption that the signatures were those of legally qualified electors is prima facie destroyed." See also In Re Referendum Petition no. 18, State Question No. 437, 1966 OK 152,19.

those granted the proponent.⁵ The inclusion of a current address (either physical address or post office box) and the registration number is required for each signature. My review discloses that the number included by the Election Commission failing to meet this mandatory requirement exceeds 365 signatures.

9. I also agree with Justice Leeds that the signatures which were allowed by the Commission on Petitions that Mr Buzzard did not certify by his signature, must be excluded from the final count. This total was 55 signatures. Further, we must exclude those signatures which were impeached by the witnesses Summerfield and Wyatt on Protestants' Exhibits 2 and 3. Adjusting these exclusions for signatures previously excluded under paragraph 8 above, the total excluded would be 28 signatures.

10. We have discussed allowing some signatures that were excluded by the Commission, including those contained on "short sheets", those excluded for duplication and those excluded because the certification was not found on the back of the signature sheet. I would not allow the signatures where the certification was not on the back of the signature page. This requirement is not merely for convenience but is essential to assure the integrity of the pamphlets. The total excluded by the Commission for duplication was 36 and I would add back 18 because only one of the duplicate signatures should have been excluded.⁶ Also, I have examined the number of signatures excluded solely for being on short sheets. This total of 12 signatures I would add back into the count in this case. However, the sheet length is also important to the integrity of the pamphlets and proponents should comply with this requirement. Giving credit for these numbers, the Petition still fails, lacking 287 signatures.

11. Hundreds of signature pages properly completed shows that the process is not burdensome and can be easily done right. However, the actions of a few have placed the process in jeopardy. Bringing to a vote a change in the organic document governing a sovereign Nation should require effort and should be subject to safeguards that assure the election is the will of the people in the exercise of the initiative. The requirements of LA 15-04 are not difficult if undertaken and carried out by competent, honest and conscientious citizens, especially in the circulation of the petitions. The conduct shown by the evidence and cited by my colleagues shows how the conduct of a few can undermine the hard work and good faith of others. Accordingly, given the totality of error shown by the evidence, and giving due regard to the doctrine of substantial compliance, I must decline to vote to certify the Initiative Petition of the Proponents and would find that the proposition should not go before the Citizens of the Cherokee Nation at the Special Election now scheduled.

⁵ In Re: Initiative Petition No. 379, State Question 726, 2006 OK 89,117 "... the right of the initiative is not absolute. It is subject to constitutional and statutory limitations. Each citizen has a right to protest the sufficiency and legality of an initiative petition and the safeguards afforded the individual challenging a measure are as necessary to the protection of the right as are those granted the proponent. ..."

To read the entire dissent from justice Leeds & Justice Dowty goto The Cherokee Nation Judicial Branch has rulings on this issue.