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Constitution and of the Cherokee Constitution as reasoning for adopting the federal standing doctrine. Article II, Section 1 of the Cherokee Constitution reads: The judicial process of the Cherokee Nation shall be open to every member of the Cherokee Nation. Speedy and certain remedy shall be afforded under the terms of this Constitution for every wrong and injury to person, property and reputation wherein said remedy does not conflict with the laws of the United States.

Article III, Section 2 of the United States Constitution reads: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another

3 Neither party cited Cornsilk in the original briefs. The Court asked each party, at oral argument, to compare and distinguish the case in light of the present matter. Respondent attorney Michael McBride requested an opportunity to provide supplemental briefing and the Court granted his oral motion. Providing both parties expedited briefing. state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. 4 The federal standing doctrine, the Mayes Court noted, springs from the "case and Controversy" language found in Article III of the United State Constitution. The term "case" presupposes the litigants are real parties in interest and have been harmed by the parties they seek to recover. A party only has standing if that party has a legitimate stake in the outcome of the controversy. Although the Cherokee Constitution does not contain the same "case or controversy" language, the Mayes Court found the provisions similar enough to support a standing requirement in the Cherokee system. The Court reasoned that the "every wrong and injury" language in the Cherokee Constitution implies a requisite showing of "injury-in-fact" before a remedy can be sought.

Two years later, the Court's decision in Phillips v. Eagle, expressly modified Mayes with respect to the applicability of the doctrine of standing as developed by federal courts. In Phillips, the Court held a member of the Tribal Council has standing, if not the duty, to seek injunctive and declaratory relief in challenging the actions of the Deputy Principal Chief in allegedly interfering with the operations of the Tribal Council. The Phillips Court cautioned, however, against the wholesale adoption of "a legal doctrine from the federal courts, based on federal law" into the Cherokee judiciary.

Agreeing with Mayes, the Phillips Court noted the sources found in Cherokee law for adopting the standing doctrine are "plausibly constitutional" (Art. II, §1) as well as "prudent and practical." Of utmost importance to the Phillips Court was that the cause of action, initiated by a member of the Tribal Council in his official capacity, sought to protect against actions that impaired, or threatened to impair, the constitutional authority of the Tribal Council. On that premise, the Court modified Mayes strict adherence to the federal standing doctrine as follows: In summary, while this Court generally follows the Federal Standing Doctrine, this Court will not allow the hyper-technical, federal complexities pertaining to standing prevail over a Just and expeditious resolution of a case on its merits. This Court will balance the guidance provided by federal and state court decisions in the

interest of fundamental Justice, tempered by prudence, and guided both by the entirety of our Cherokee Constitution. The holding in Mayes, regarding standing, is therefore modified, accordingly.

The Phillips Court further noted that under this refinement, the Mayes decision would not have changed in terms of outcome, given this modification. Mayes and Phillips read together, indicate that this Court will apply the standing doctrine, as developed in the federal system, as a guiding principle. This Court, does however, on a case-by-case basis, have the duty to balance the standing doctrine with concepts of fundamental fairness and justice as it is intended under the Cherokee Constitution and laws.

4 Art. III of the U.S. Constitution, it should well be remembered, denied the Cherokee Nation access to federal courts to challenge an assault on Cherokee sovereignty at the hands of the State of the of Georgia. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The following year, a non-Indian missionary was permitted access to federal court to argue the merits of the Cherokee Nation's claims. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

There is an additional case precedent to consider on the issue of standing in the Cherokee system, Cornsilk v. Cherokee Nation. Cornsilk, which was decided after Mayes but before Phillips, is similar in many respects to the present matter.5 Unfortunately, although decided in the same year, Cornsilk is mysteriously silent as to Mayes. To complicate matters, Phillips is silent as to Cornsilk. At issue in Cornsilk is whether an individual tribal member of the Cherokee Nation has standing to sue the Tribal Council to challenge the legislative process of filling a vacant Tribal Council seat. The Tribal Council filled the vacancy by majority vote in a meeting open to the public, but did so by secret ballot. Cornsilk, as an individual tribal member, filed action against the Tribal Council seeking injunctive relief prohibiting the new Councilor from being sworn into office. Other remedies requested were declaratory orders deeming the selection of the new Councilor invalid, and declaring the use of secret ballots by the Tribal Council violated the Cherokee Nation Constitution, Article V, Section 6. The Court resolved the standing issue in Cornsilk's favor with little discussion of the standing doctrine. The Cornsilk Court's only pronouncement on standing follows: Inasmuch as Cornsilk, like any individual citizen of the Cherokee Nation, has a vested Constitutional right to know how each Council Member votes on legislative issues, he has legal standing to complain when such rights are violated. Therefore, he has a personal stake in the outcome of this case, and can maintain the action.

The vested constitutional right in Cornsilk flows from Article V, Section 6 which requires, with certain exception, "all meetings of the Council and of its committees shall be open to the public" and that if a vote should take place in an Executive Session "the vote shall take place in an open meeting." The Court reasoned that there was "little choice but to logically conclude" that the Council is required "not only to vote in public, but to vote in a way in which citizens of the Cherokee Nation can ascertain how each Councilor voted." The Court noted that Cornsilk would indeed lack jurisdiction to request the removal of Council members. However, the remedy requested was that the Court declare invalid, the process in which the Council member was selected. The Cornsilk Court's decision, following by a mere five months the Mayes decision did not address the five factors articulated in Mayes and urged to restrain the Court in the present manner. As a result, the Court permitted David Cornsilk, acting only as an individual tribal member, standing to sue the Tribal Council. Petitioner

Mayes, in the present cause of action, alleges violation of the legislative process by which a new Council member was selected. Like Cornsilk, he is not asking the Court to remove Anglen. He has asking the Court to declare invalid the process in which Anglen was selected.

Petitioner alleges that the legislatively mandated process for filling the seat was not followed and further, he alleges that Respondents' individual conduct impeded that process. Specifically, Petitioner argues that his rights, and the rights of all Cherokee citizens were violated when LA-802, legislation passed pursuant to Cherokee Constitution. Article V, Section

5 The casea are similar in that they challenge the process by which a vacant Tribal Council seat is filled. It should be noted, however, that LA08-02, the legislation that presently mandates vacancies was not in existence at the time Cornsilk was filed.

2 states: "The Council shall establish its rules for its credentials, decorum and procedure." Implicit in Article V, Section 2 of the Cherokee Constitution is the duty of the Council to follow and faithfully implement the rules and procedures it enacts under that Constitutional authority. Petitioner alleges this has not been done, and as a result, he and all tribal members have suffered injury.

Petitioner does not allege a minor violation of a trivial legislative procedure. Petitioner alleges that the Tribal Council violated its own laws that strictly dictate the process for filling a vacant Council seat and that the actions of those named as Respondents further caused the process to fail. If a Tribal Council member was, in fact, seated in violation of a the laws passed under authority of the Cherokee Constitution, all members of the Cherokee Nation suffer direct harm and there must be an adequate means to remedy that injury. This is one of those rare instances, as foreshadowed in Phillips, where the procedural frustration of the federal standing doctrine should be counterbalanced to allow a just and expeditious determination on the merits. For this reason, the Court denies Respondents Motion to Dismiss for Lack of Standing. The practical concerns articulated in Mayes under the federal standing doctrine continue to concern this Court. The Court does not intend the recognition of citizens' standing to have no boundaries. To the contrary, the Court deems the instances of citizen standing to be quite narrow. The Court is cognitive of the potential for the abuse of judicial process by those "seeking to, or simply seeking a public arena to express their political views." It should be noted that both Cornsilk and the present case are limited to allegations of illegality and irregularity in the process of filling Tribal Council vacancies. Both instances involve alleged violations of specific constitutional provisions or specific legislative mandates that are passed pursuant to the Constitution. Both instances call into question the right of the Cherokee people to question the process by which their Tribal Council members are seated.

At oral argument, the Court asked Respondent to dictate under what circumstances a member of the Cherokee Nation would have standing to challenge the process in which a Tribal Council seat was filled. Respondents' attorney indicated that even if Petitioner was a resident of District 8, which he is not, the same standing doctrine as articulated in Mayes should apply to bar litigation. It is argued that even if the Petitioner was a resident of District 8, standing should be denied because tribal member should not have standing by virtue of their citizenship alone. The Court agrees that there can be no distinction based on residence in District 8, for to do so would undermine the rights of ever tribal member residing outside the territorial boundaries of the Cherokee Nation.

The Cherokee Constitution, by virtue of the Article III membership provisions, extends membership to individuals regardless of where they reside. The election provision of Article IX extends voting rights to adult tribal members with no residential requirement to live within the fourteen county territorial jurisdiction of the Nation. To make a residential distinction for purposes of standing would be inconsistent.

Individual Capacity Claims Petitioner brings this suit against Respondents in their individual capacities. Respondents Hammons, Shade, Fife and Smith filed a Motion to Dismiss noting that Petitioner seeks unnamed relief against Respondents in their individual capacities. Respondents argue that, official action, even if it is wrong, is the action of the sovereign. Petitioner alleges that Respondents exceeded the scope of their authority under Cherokee law and committed acts which they were not authorized to do. As such, he urges, they should be held individually liable for their actions. Although there is no discussion in Cherokee case law, in federal cases, "individual" capacity claims are easily distinguishable from "official" capacity suits based on the remedy sought by the Petitioner. In *Hafer v. Melo*, 502 U.S. 21 (1991), the distinction is made by the United States Supreme Court. "Personal" or "Individual" capacity suits are those brought against the individual who was acting under the color or authority of law. "Official" capacity suits, on the other hand, are merely another way of suing the particular government, of which the official is merely an agent. It can be ascertained from the remedies sought, which type of action is truly at hand.

The proper question for this Court, in distinguishing whether a particular Respondent is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the Petitioner seeks an injunction requiring the Respondents to take an action involving the exercise of a governmental power, the Respondent is named in an official capacity. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

In the present case Respondents, when they allegedly obstructed or otherwise failed to follow the appropriate process for filling the vacant Tribal Council seat, were acting in their official capacities as Tribal Council members, Executive Branch members and/or employees of the Nation and this is evident from the relief requested by the Petitioner. Petitioner does not seek damages or individual relief from any particular Respondent, rather he is seeking injunctive and declaratory relief that could only be followed by Respondents in their official capacities. The Petitioner requests injunctive relief "prohibiting Respondents from acting outside the scope of their position and illegally impacting imbalance of powers in the three branches of government." The Petitioner also requests "declaratory relief finding the June 28, 2002 Cherokee Nation of Oklahoma Tribal Council action filling the vacancy in District #8 void" and "immediate injunctive relief which prohibits any effort to allow official participation of Respondent Anglen in the business of the Cherokee Nation of Oklahoma." Further, Petitioner asks for injunctive relief "providing for and requiring a proper appointment within a reasonable time limit." The only other relief requested is that Respondents be held personally accountable for the costs, presumably monetary court costs, that result from Respondents actions.

Reviewing the relief requested one-by-one, the Court sees no relief, with exception of perhaps court costs, that could be directed at the Respondents

in anything but their official capacities. If this Court entered injunctive relief prohibiting Respondents from acting outside the scope of their authority, the Court would be ordering nothing more than to order tribal officials and tribal employees to abide by their oaths and job descriptions. If this Court granted injunctive relief that voided the Council vote, the relief would bind the Tribal Council as an official entity of the Nation, not as individuals. In short, this Court is asked to order the Nation to do certain things to correct a breach of process. There is simply no requested relief the Court could order an individual Respondent to do that would remedy the injury alleged in the Petition. With respect to individual claims. Respondents' Motion to Dismiss is hereby granted, in part, by the dismissal of Respondents in their sing the individual capacities. The Court does not, however, dismiss the cause of action entirely.

Federal courts routinely construe pro se complaints liberally in these types of cases to read the petition as against Respondents in both their official and individual capacities based on the type of relief sought.6 This occurs in cases where the capacity is unspecified and in cases where, based on the relief sought, there are cognizable claims that the complaint does not properly assign as "individual" or "official." Because the Cherokee judiciary allows non-attorney pro se litigants, the Cherokee construction should be as liberal as the federal standard. In this case, the Court will exercise the discretion to treat Petitioner's pro se complaint as attempting to bring claims against all Respondents both in their official and individual capacities. After hereby dismissing the individual capacity claims against Respondents Hammons, Fite, Shade and Smith, the official capacity claims, seeking prospective injunctive relief remain. As to the additional Respondents, there is no motion properly before the Court seeking dismissal of individual claims.

Summary As set forth herein, THE COURT DENIES Respondents' Motion to Dismiss for Lack of Standing. THE COURT GRANTS Respondent Blackfox's Motion to Dismiss for Failure to State a Claim. FUTHER, THE COURT GRANTS IN PART, DENIES IN PART, the Motion to Dismiss of Respondents Hammons, Fite, Shade and Smith.

IT IS THEREFORE ORDERED that the style of the case shall remain as against Respondents Hammons, Fite, Shade, and Smith in their official capacities only; and against Anglen, Starr-Scott, and Hembree in both their official and individual capacities. IT IS SO ORDERED on this 7th day of October, 2002.

Signature STACY L. LEEDS ASSOCIATE JUSTICE

6 Innumerable federal cases employ this approach when reviewing complaints of non-attorney pro se litigants. The cases uniformly consider the suit to be brought in both individual and official capacity regardless of what the petition states. See e.g. *Fenner v. Suthers*, 194 F. Supp. (D.Colo 2002).

We will keep you informed on this issue. It is a travesty in our Cherokee History.

For the first time in Cherokee history, the Chief's office now has control of the budget of the Housing Authority and all of its employees.

Following an hour of debate, Deputy Chief Joe Grayson handed **\$13,462,703** of Housing Authority of the Cherokee Nation (HACN), funds to the CNO administration by breaking a 7-7 tie in the September Regular Council Meeting.

The puppet tribal council rubberstamps just gave Chief Smith the money with NO plan as to what it would be used for, just that he wanted it and they gave it to him on a silver platter, with puppet Joe Grayson vote to break the tie.

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Who's pulling Chad's string?

For centuries word of mouth has moved the message of truth through our communities. Today we have this newspaper, the Internet and a few other affordable means to transmit the message of truth and needs through the hills to the Cherokee people. The administration spends \$84,000 of the peoples' money each month on the Cherokee Advocate/Phoenix primarily as a political tool full of pretty pictures to convince the absentee voters that everything is great within the 14 counties back home. That is over a million dollars a year for a newspaper that Resident Cherokees know is simply a Chief's propaganda rag. Cherokees who live in the Nation know that inside those pretty buildings there has been a decrease in actual services over the last six years of the Smith administration. So what can we do to change it all? Read and make an effort find out more about what is happening inside the government. Having the attitude that no one can change it falls ever so deeply into the sleep of ignorance and feeds corruptions' fire. Seek the truth and then make an effort to spread the word to your friends and relatives. Seek to find out for yourself who the puppets are within our government and those who are the puppet masters. Then you will begin to understand why the government feeds itself instead of the peoples needs. When you are finished reading the Observer take it to someone else who will read it. Learn the current issues and how your Council member is voting on those issues and how they will affect you and your children's' destiny. If you find you have no representation or what voice you do have is being blocked by another Councilor in your district you have realized half of the problem. Make a phone call to them and speak your mind. They represent and work for you and they must realize that it is as much your government as it is theirs. Whenever a Councilor forgets those two facts for very long, it is the peoples' fault within that district. We are guaranteed the politicians' attention when many people come together and speak with one voice. When enough people become informed and become willing to work together in support of specific issues can we change the government back into what our ancestors intended it to be, a government of quality services to the Cherokee people now, so that Cherokee people today can enjoy a better quality of life rather than empty promises of visions into the future with Chad's so-called 100 year plan. Can we the Cherokee people can wait that long ?

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Election Commissioner claims harrassment

and approved shows a statement by the Chief informing the Council of his approval of several attached resolutions, which included the resolution confirming Hathaway.

Immediately following the filing of the lawsuit by the Principal Chief, his two appointees to the Commission, Rita Bunch and Kyle Haskins, resigned their commissions. The Principal Chief has also suspended the monthly stipend of the remaining three appointees.

"This is clearly interference in the election commissions work, Hathaway stated. "The chief wants a commission he can control and I and the Cherokee people want a commission that is independent and doesn't allow dishonesty in the electoral process."

There is already a full blown case in the tribal court against the Principal Chief for interfering in with the Election Commission. That case is pending.

Still, if you will not fight for the right when you can easily win without bloodshed, if you will not fight when your victory will be sure and not so costly, you may come to the moment when you will have to fight with all the odds against you and only a precarious chance for survival. There may be a worse case. You may have to fight when there is no chance of victory, because it is better to perish than to live as slaves.

Sir Winston Churchill (1874-1965) Prime Minister of England