



**CHEROKEE NATION**  
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**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** Tina Glory-Jordan, Cherokee Nation Tribal Council Member

**Opinion Number:** 2012-CNAG-05

**Date Decided:** August 10, 2012

This office has been asked for an opinion answering the following:

***Does 'An Act to Require Certain Tribal Positions of Authority to be Enrolled Citizens of the Cherokee Nation' (hereinafter "the Act") violate the Cherokee Nation Constitution?***

As we understand the factual basis for your question, on or about July 26, 2012 the Rules Committee of the Tribal Council voted to send the Act to full Council for final consideration at the August 13, 2012 Tribal Council Meeting. The Act requires that certain Cherokee Nation positions of authority be held exclusively by enrolled citizens of the Cherokee Nation.

**ANSWER AND ANALYSIS**

The Legislative branch of government for the Cherokee Nation consists of one legislative body called the Council of the Cherokee Nation (the Council). See Cherokee Nation Const. art. VI, Section 1 (1999). Article VI, Section 7 of the Cherokee Nation Constitution gives the Council "the power to establish laws which it shall deem necessary and proper for the good of the Nation."

The Executive power is vested in the Principal Chief. Id. at Article VII, Section 1. The Executive branch also includes the Deputy Chief and a cabinet composed of the Secretary of State, Treasurer, and Secretary of Natural Resources. Id. at Article VII, Sections 1, et seq. This Article also creates the offices of Attorney General and Marshal. Id. at Article VII, Sections 13, 14, respectively. Each position referenced in Article VII carries the requirement of Cherokee Nation citizenship for its occupant. Id. at Article VII, Sections 1, et seq.

**Cherokee Nation Precedent**

This is an issue of first impression in Cherokee Nation, but there are guiding factors present in Cherokee Nation case law and the transcript of the Cherokee Nation Constitutional

Convention.<sup>1</sup> The issue presented is whether a statutory limitation by the Tribal Council on the pool of potential candidates from which the Principal Chief may draw when filling key positions within the Cherokee Nation, or for positions working directly under the Principal Chief, is a violation of one or more provisions of the Cherokee Nation Constitution.

### **Distribution of Powers**

Article V of the Cherokee Nation Constitution provides for a "Distribution of Powers" among the branches of the Cherokee Nation government. This Article states that each branch will be separate and distinct and "no branch shall exercise the powers properly belonging to either of the others." Article V, Cherokee Constitution (1999). The Cherokee Nation Supreme Court specifically addressed "distribution of powers" in Smith v. Tribal Council, JAT-03-15. In examining Cherokee Nation "distribution of powers", the Court noted that the "only prohibition against power in the Cherokee Constitution is that neither branch 'exercise the powers properly belonging to either of the others'". Id., quoting Article IV, Cherokee Constitution (1976). While this Opinion referenced the 1976 Constitution, the "distribution of powers" language is exactly the same as the 1999 Constitution. The Smith decision indicates that if, by placing citizenship requirements on certain tribal positions of authority, the Tribal Council is exercising the power of appointment or employment granted to the Principal Chief, then that statute would be unconstitutional.

To determine whether the Tribal Council is "exercising" the Principal Chief's power of appointment or employment by placing a citizenship requirement upon certain positions of authority, it is necessary to examine the extent of the restriction. If the limitations imposed by the statute are so constrictive they effectively operate as a de facto appointment by the Tribal Council, there is no doubt the Council is actually "exercising" the power of making that appointment.<sup>2</sup> An analysis of whether such a requirement unlawfully restricts the candidate pool would be completely fact specific and would have to be addressed on a case by case basis. Accordingly, there is a possibility that by placing a citizenship requirement on certain positions of authority, the Tribal Council may be "exercising" the power of making the appointment in violation of the "Distribution of Powers" contained in Article V of the Constitution.

### **ADMINISTRATIVE ASSISTANTS**

Article VII, Section 11 of the Constitution provides that "[n]othing in this Constitution shall be construed as preventing the Principal Chief from employing such administrative assistants as deems proper."<sup>3</sup> The term "administrative assistant" is not defined within the Constitution or the laws of the Cherokee Nation and a review of the Constitutional Convention

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<sup>1</sup> The transcripts of the Constitutional Convention are available on the Cherokee Nation website: <http://www.cherokee.org/OurGovernment/Commissions/ConstitutionConvention>.

<sup>2</sup> A 1996 U.S. Department of Justice Opinion stated "Congress may not dictate qualifications 'unattainable by a sufficient number to afford ample room for choice.'" 20 Op. O.I.C. 279, 280-281 (1996).

<sup>3</sup> The 1975 Constitution contained this same language, except the word "appointing" is used in place of the word "employing" which appears in the 1999 Constitution.

transcripts did not reveal any discussion on the term.<sup>4</sup> As such, the Canons of Construction indicate that when writing the Constitution, the framers intended to use ordinary English words in their ordinary senses. In examining the plain meaning of “administrative assistant” a myriad of definitions are available, covering a wide range of duties and responsibilities extending beyond clerical duties.<sup>5</sup> The common thread appearing throughout the various definitions is a subordinate who assists with the day to day operations of a business or department. For purposes of this Opinion, this Office shall interpret “administrative assistant” to mean:

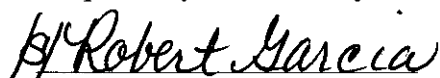
**An employee whose task is to assist the Principal Chief with the day-to-day affairs of running the Cherokee Nation.**

Accordingly, pursuant to this Section, the Principal Chief can employ individuals to assist with the day-to-day affairs of running the Cherokee Nation as deemed proper. As such, the Act, which imposes restrictions upon the Principal Chief’s ability to employ such administrative assistants as deemed proper, is in direct violation of this Section.

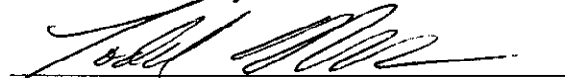
**IT IS, THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:**

- 1. ‘An Act to Require Certain Tribal Positions of Authority to be Enrolled Citizens of the Cherokee Nation’ violates Article V of the Constitution of the Cherokee Nation.**
- 2. ‘An Act to Require Certain Tribal Positions of Authority to be Enrolled Citizens of the Cherokee Nation’ violates Article VII, Section 11 of the Constitution of the Cherokee Nation.**

Respectfully submitted by:



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<sup>4</sup> The transcripts do contain significant discussion as to the makeup of the cabinet. Incidental to this discussion, Delegate Stopp clarified the intended purpose of cabinet-level positions when he stated: “When we looked at the cabinet level positions, the cabinet level position is an advisory position to the Principal Chief in the Nation. It is not a management position or a supervisory position. It has no role in operations. So it is truly someone who coordinates, advises, and counsels the Chief, much like the cabinet level positions for the President. It does not have operational responsibilities.”

<sup>5</sup> See, e.g., “Administrative Assistant”: an employee whose task is to assist a superior with the day-to-day affairs of running a business or department. Encarta World English Dictionary [North American Edition] (2009).