IN THE
HO-CHUNK NATION TRIAL COURT

Demetrio D. Abangan, **Tribal Enrollment No. 439A000001,** Plaintiff, v. **Ho-Chunk Nation Election Board in their official capacity,** Defendant.	Case No.: **CV 02-08**
-and- **Stewart J. Miller,** **Tribal Enrollment No. 439A002566, and** **Brenda Neff,** **Tribal Enrollment No. 439A002134,** Plaintiffs, v. **Ho-Chunk Nation Election Board,** Defendant.	Case No.: **CV 02-10**

ORDER
(Determination upon Remand)

INTRODUCTION

On March 25, 2002, the Supreme Court of the Ho-Chunk Nation [hereinafter HCN Supreme Court] reversed and remanded a decision of the Court rendered on consolidated election challenges. The Supreme Court instructed the Court to convene a rehearing in order to

determine if the plaintiffs had earlier met the proper evidentiary standard. The following discussion covers the relevant legal issues necessary to properly render a decision on remand.

PROCEDURAL HISTORY

The HCN Supreme Court remanded the instant case for proceedings consistent with the appellate decision. *Demetrio D. Abangan et al. v. HCN Election Bd.*, SU 02-02 (HCN S. Ct., Mar. 25, 2002) at 6. The Clerk of Court informed the parties of the date, time and location of the *Hearing on Remand*. The Court convened the *Hearing* on April 2, 2002 at 11:00 A.M. CST. The following parties appeared at the *Hearing on Remand*: Brenda Neff, plaintiff; Attorney James Ritland, plaintiffs' counsel; and Ho-Chunk Nation Department of Justice Attorney Wendi A. Huling, defendant's counsel. Plaintiffs Demetrio D. Abangan and Stewart J. Miller did not personally appear at the *Hearing*.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Preamble

We the People, pursuant to our inherent sovereignty, in order to form a more perfect government, secure our rights, advance the general welfare, safeguard our interests, sustain our culture, promote our traditions and perpetuate our existence, and secure the natural and self-evident right to govern ourselves, do ordain and establish the Constitution for the Ho-Chunk Nation.

Article III – Organization of the Government

Sec. 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by virtue of self-government and democracy.

Article V – Legislature

Sec. 3. Codes. The Legislature shall adopt Codes governing Membership, Open Meetings, Elections, Ethics including conflicts of interest, nepotism, and the conduct of all elected and appointed officials and employees, and other Codes as deemed necessary.

Sec. 4. Redistricting or Reapportionment. The Legislature shall have the power to redistrict or reapportion including changing, establishing, or discontinuing Districts. The Legislature shall maintain an accurate census for the purposes of redistricting or reapportionment. The Legislature shall redistrict and reapportion at least once every five (5) years beginning in 1995, in pursuit of one-person/one-vote representation. The Legislature shall exercise this power only by submitting a final proposal to the vote of the people by Special Election which shall be binding and which shall not be reversible by the General Council. Any redistricting or reapportionment shall be completed at least six (6) months prior to the next election, and notice shall be provided to the voters.

Article VII – Judiciary

Sec. 7. Powers of the Supreme Court.

(a) The Supreme Court shall have the power to interpret the Constitution and laws of the Ho-Chunk Nation and to make conclusions of law. The Supreme Court shall not have the power to make findings of fact except as provided by enactment of the Legislature.

(b) The Supreme Court shall have the power to establish written rules for the Judiciary, including qualifications to practice before the Ho-Chunk courts, provided such rules are consistent with the laws of the Ho-Chunk Nation.

Article VIII – Elections

Sec. 2. Special Elections. Special Elections shall be held when called for by the General Council, the Legislature, or by this Constitution or appropriate ordinances. In all Special Elections, notice shall be provided to the voters.

Sec. 5. Eligible Voters. Any member of the Ho-Chunk Nation who is at least eighteen (18) years old and who meets all other requirements established by the Ho-Chunk Nation shall be eligible to vote.

Sec. 7. Challenges of Election Results. Any member of the Ho-Chunk Nation may challenge the results of any election by filing suit in Tribal Court within ten (10) days after the Election Board certifies the election results. The Tribal Court shall hear and decide a challenge to any election within twenty (20) days after the challenge is filed in Tribal Court.

Art. X – Bill of Rights

Sec. 1. Bill of Rights.

(a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law;

HO-CHUNK NATION JUDICIARY ACT OF 1995

Sec. 3. Rules and Procedure.

Proceedings of the Judiciary shall be conducted in a public place suitable for the purpose. Decisions of the Judiciary shall be in writing and shall be submitted to the parties. The Judiciary shall keep a complete and permanent record of all proceedings and decisions. Absent protective orders granted for good cause or Legislative enactments to the contrary, these records shall be open to the public.

The Judiciary shall have the exclusive authority and responsibility to employ personnel and to establish written rules and procedures governing the use and operation of the courts.

All matters shall be tried in accordance with the Ho-Chunk Rules of Civil Procedure and the Ho-Chunk Rules of Evidence which shall be written by the Supreme Court, published, and available to the public.

AMENDED AND RESTATED HO-CHUNK NATION ELECTION ORDINANCE

Article XIV – Challenges to the Election Results

Sec. 14.01. Challenges to the Election Results.

(b) The person challenging the election results shall prove by clear and convincing evidence that the Election Board violated the Election Ordinance or otherwise conducted an unfair election, and that the outcome of the election would have been different but for the violation. If the Court finds the challenge is frivolous or wholly without merit, the party challenging shall be assessed costs of the action in the amount equal to one hundred dollars ($100.00).

ELECTION CHALLENGE RULES (Adopted Jan. 19, 2002)

Rule 1. The Election Challenge Rules shall be followed by parties who are challenging an election. The Election Challenge Rules are the procedural rules for the election challenge cases. The HCN Rules of Civil Procedure and the HCN Rules of Appellate Procedure may be utilized to supplement procedural questions. "Days" in these rules means calendar days.

Rule 6. All documents, exhibits, answers to interrogatories and responses to requests for admission requested during discovery shall be provided to the requesting party within three (3) days unless otherwise ordered by the Court.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE (Adopted Feb. 22, 1997)

Chapter V – Discovery

Introduction. Discovery is the process used among parties to uncover evidence relevant to the action, including identity of persons having knowledge of facts. Discovery may take place before an action has been filed and may be used for the purpose of preserving testimony or other evidence which might otherwise be unavailable at the time of trial. Discovery may include written interrogatories, depositions, and requests for the production of documents and things. It is the policy of the Court to favor open discovery of relevant material as a way of fostering full knowledge of the facts relevant to a case by all parties. It is the intent of these rules that reasonable open discovery will encourage settlement, promote fairness and further justice. There is an ongoing obligation by any party subject to a discovery request, which continues up to and through trial, to supplement any response previously answered if new or freshly discovered material previously unavailable is discovered or revealed to them.

Rule 38. Non-Compliance.

If a party fails to appear or respond as requested under these rules, a party may request or the Court may issue an *Order* requiring a response and imposing costs, attorney's fees, and sanctions as justice requires in order to secure compliance.

Chapter VI – Trials

Rule 44. Presence of Parties and Witnesses.

(A) Subpoenas. *Subpoenas* may be used to cause a witness to appear and give testimony. If a party wishes to have a subpoena issued by the Court, he/she shall furnish a properly prepared subpoena including information necessary for service of process at least ten (10) calendar days before trial. Service will be completed at least three (3) calendar days prior to hearing or trial. When service of the subpoena will not be through the Court, the requesting party shall present the properly prepared subpoena to the Court for signature in time to ensure proper service before the hearing or trial and shall return proof of service to the Court prior to the trial. If a party does not timely request a subpoena, he/she shall not be entitled to a postponement because of the absence of the witness. If the subpoena has been timely issued, the Court may, in its discretion, postpone the hearing or trial. A person who fails to appear after being subpoenaed may be held in contempt of court.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE (Adopted Apr. 13, 2002)

Chapter VI – Judgments and Orders

Rule 61. Appeals.

Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate Procedure*.

HO-CHUNK NATION RULES OF JUDICIAL ETHICS

Article IV – Diligence and Impartiality

Sec. 4-1. Standards.

The judicial duties of a tribal judge or justice should take precedence over all other activities. The judicial duties of the judge or justice include all the duties of the office prescribed by tribal law, custom or tradition. In the performance of the duties, the following standards apply:

C. A tribal court judge or justice should give to every person who is legally interested in a proceeding or his or her representative, a full right to be heard according to tribal law and tradition. A judge or justice should avoid all out-of-court or other communications with tribal officials, agents, or others concerning a pending proceeding unless all parties to the proceedings are present, or represented. A judge or justice may however, obtain the advice of a disinterested expert on federal law, or tribal law, custom or tradition or on other sources of law applicable to a proceeding before the court if the request for advice is limited to points of law or tradition and does not involve the particular merits of the case. Ordinarily the parties should be given a reasonable opportunity to respond to the information provided by the expert.

D. A tribal court judge or justice should maintain order in the court. He or she should not interfere in proceedings except where necessary to protect the rights of the parties. A tribal court judge or justice should not take an advocate role. Similarly, a judge or justice should rely on only those procedures prescribed by the laws and customs of the Tribe.

DECISION

I.

The Court must attempt to answer two basic questions prior to addressing the facts at issue in the present case. First, what is a fundamental right? Second, what degree of protection should the Ho-Chunk Nation Judiciary afford fundamental rights?

Since the HCN Supreme Court has demonstrated a penchant for consulting BLACK'S LAW DICTIONARY, the Court will begin there. *See Abangan*, SU 02-02 at 3; *see also Chloris Lowe, Jr. et al. v. HCN Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Nov. 1, 2001) at 5 n.3. BLACK'S defines the term "fundamental rights" in the following manner:

> Those rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution, Price v. Cohen, C.A.Pa., 715 F.2d 87, 93, and state constitutions, Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763. *See e.g.*, Bill of rights.
>
> Challenged legislation that significantly burdens a "fundamental right" (examples include First Amendment rights, (privacy, and the right to travel interstate)) will be viewed under a stricter standard of review. A law will be held violative of the due process clause if it is not closely tailored to promote a compelling or overriding interest in government. A similar principle applies under Equal Protection law.

BLACK'S LAW DICTIONARY 674 (6th ed. 1990).

Consequently, the Court directs its attention to the cited federal opinion for further insight. The Court focuses upon the federal decision since the HCN Supreme Court earlier noted its agreement with a proposition articulated by the United States Supreme Court [hereinafter U.S. Supreme Court]. *Lowe, Jr.*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) at 8. Namely, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id*. (*quoting Reynolds v. Sims*, 377 U.S. 533, 566 (1964)). The U.S. Supreme Court

offered this succinct declaration of its judicial role in the context of guarding the fundamental right to vote. *See Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., May 4, 2001) [hereinafter *Constitutionality III*] at 8-9.

Unsurprisingly, BLACK'S LAW DICTIONARY refers its readers to a relatively cursory discussion reiterating the basic points set forth in its definition. *See Price v. Cohen*, 715 F.2d 87, 93 (3d Cir. 1983). This corresponds with the authors' intention to have the definition serve only as a "starting point" since a dictionary can neither capture the many nuances associated with a given legal term nor provide comprehensive case citation for research purposes. *See* BLACK'S LAW DICTIONARY iv (6th ed. 1990). In this regard, the Third Circuit, citing U.S. Supreme Court case law, posits that "[w]hen the classification employed by the state burdens the exercise of fundamental rights, strict judicial scrutiny is required." *Price*, 715 F.2d at 93 (*citing San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973)). The *Price* Court continues by stating: "As employed by the [U.S.] Supreme Court . . . the term fundamental rights . . . means those rights which have their source, explicitly or implicitly, in the Constitution." *Price*, 715 F.2d at 93 (*citing Plyer v. Doe*, 457 U.S. 202, 217 (1982)).

The Court previously examined the cited *Rodriguez* decision, discovering that "[t]he [U.S.] Supreme Court . . . designated the right to vote as a fundamental right by determining whether 'there is a right to [vote] explicitly or implicitly guaranteed by the Constitution.'" *Constitutionality III* at 9 (*quoting Rodriguez*, 411 U.S. at 33). Much analysis flows from this basic constitutional inquiry, and the Court has already provided the relevant overview as it concerns voting. *See Constitutionality III* at 8-13; *Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Mar. 30, 2001) [hereinafter *Implementation Order*] at 4-9. In essence, "[t]he inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental

principles of liberty and justice which lie at the base of all our civil and political institutions'' . . . ." *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (*quoting Hebert v. Louisiana*, 272 U.S. 312, 316 (1926))). In performing the inquiry "[t]he Court . . . does *not* 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Rodriguez*, 411 U.S. at 31 (*quoting Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (emphasis in original)).

As concerns this case, the HCN Supreme Court has recognized "an individuals [*sic*] fundamental right to vote." *Abangan*, SU 02-02 at 6. This recognition conforms with the long-standing characterization of this right by the Court. *See Joyce Warner et al. v. HCN Election Bd.*, CV 95-03-06, -09-10 (HCN Tr. Ct., July 3, 1995) at 16-17. In the first decisions rendered within the Ho-Chunk Nation Judiciary, the Court provided the following insight:

> the right to vote is a fundamental and vital right in any democratic society. Many years ago the Nation was not ruled by elected officials, however ever since the adoption of the IRA [Indian Reorganization Act] constitution in 1963, this Tribe has used an elective process to select its political leaders. The New Constitution of the Ho-Chunk Nation goes to great lengths to make elections more democratic. It lowers the voting age to 18 from 21. It allows the Judiciary to arbitrate election disputes, including the potential remedy of ordering new elections. It mandates redistricting. It mandates an Election Board to carry out elections in a fair and impartial manner. Its clear intent is to protect and insure that candidates are elected more fairly and impartially than in the past so that the democratic structure of the Nation will remain in tact.

Id. And, in delivering this assessment, the Court merely recognized established constitutional rights and procedural requisites.

The Ho-Chunk People adopted the CONSTITUTION OF THE HO-CHUNK NATION [hereinafter HCN CONST./CONSTITUTION] "in order to form a more perfect government, secure

our rights, advance the general welfare, safeguard our interests, sustain our culture, promote our traditions and perpetuate our existence, and secure the natural and self-evident right to govern ourselves . . . ." HCN CONST., pmbl. The People intended to construct a model democracy as an expression of continued sovereignty. *See id.*, ART. III, § 1. One essential element within this framework involved permitting "[a]ny member of the Ho-Chunk Nation who is at least eighteen (18) years old and who meets all other requirements established by the Ho-Chunk Nation [to] be eligible to vote." *Id.*, ART. VIII, § 5. The Court then needed to ascribe a value to this fundamental right, thereby leading into our second question.

One can most easily ascertain the value of a right by the degree of protection that a court deems necessary for its exercise. When dealing with fundamental rights, the protection should be considerable. Otherwise, a government could readily diminish or dilute one's fundamental rights in direct violation of constitutional guarantees to the contrary. *See id.*, ART. X, § 1(a)(8). If a court allowed an unchecked abridgement of a fundamental right, then the right would essentially cease to be fundamental because its inherent value would differ from person to person without a justifiable reason.

In light of the foregoing, the Court declared at its inception that because "[v]oting is a fundamental right[, a] restriction on the right to vote and exercise of the elective franchise will be examined under the strict scrutiny standard of review." *Joyce Warner v. HCN Election Bd.*, CV 95-03 (HCN Tr. Ct., July 5, 1995) at 3. This standard requires, in part, that "[i]f a burden is to be placed on a fundamental right such as the right to vote, it should be the least restrictive available." *Warner*, CV 95-03-06, -09-10 at 17. Since 1995, both the Court and the public expected that undue restrictions or limitations on the right to vote would need to survive a heightened degree of judicial scrutiny, but this presumption proves incorrect after the HCN

Supreme Court's decision in the first redistricting/reapportionment case. *See Lowe, Jr.*, SU 00-17 at 5-8.

In *Lowe*, the HCN Supreme Court regarded the Court's imposition of a heightened degree of judicial scrutiny as objectionable. The HCN Supreme Court chided the Court for imposing "a higher standard than that required by the Constitution's plain language[.]" *Id.* at 6; *see also* HCN CONST., ART. V, § 4 ("shall redistrict and reapportion . . . in pursuit of one-person/one-vote representation."). The Court was portrayed as having committed a grievous error, acting beyond the scope of its authority, by interpreting the constitutional provision by analogy to federal case law regarding the fundamental right to vote; equal protection; redistricting and reapportionment; and the resulting one person, one vote principle. The HCN Supreme Court deemed it "clear that [the Court] was attempting to provide a different standard for the proposals in pursuit of the one-person/one-vote representation than was required by the HCN Constitution." *Lowe, Jr.*, SU 00-17 at 7-8.

The HCN Supreme Court concluded its opinion by emphasizing its obligation to protect constitutional rights, but only after surrendering this judicial role to a majority of the electorate. *Id.* at 6, 8; *see also Constitutionality III* at 11-13. The electorate would determine the value of each individual's fundamental right to vote through the selection of a redistricting/ reapportionment proposal. This selection would follow the Ho-Chunk Nation Legislature's submission of "*any* plan" to the voters that satisfied the CONSTITUTION's plain language. *Lowe, Jr.*, SU 00-17 at 6 (emphasis in original). And, apparently, the CONSTITUTION only requires that the Legislature try really hard when constructing its plans. *Id.*

The HCN Supreme Court focused solely on the phrase "in pursuit of" when delivering its plain language interpretation. Despite this phrase having no relevant legal meaning, the Justices

seemingly could not understand how the Court overlooked a WEBSTER'S DICTIONARY definition adopted for usage in an obscure state employment law decision when performing its interpretive function. *See Implementation Order* at 13-14 n.10. But, does such an interpretive methodology afford proper protection of the fundamental right to vote? No.[1] The Court neither applies strict scrutiny nor rational basis review since "*any* plan" must survive the standard derived from the redistricting provision's plain language - the New Mexican gas station attendant standard of constitutional review. *Id*. In sum, the right to vote is fundamental in name only, not in substance.

II.

Against the preceding backdrop, the Court must now attempt to discern what the HCN Supreme Court believes is embodied in "the rights of individual of [*sic*] due process." *Abangan*, SU 02-02 at 5. In other words, what due process rights of the plaintiffs did the Court disregard during the election challenge timeframe, and were these procedural or substantive due process rights? Unfortunately, the HCN Supreme Court does not provide any insight into either of these questions. The HCN Supreme Court simply determined that the Court "made no attempt to balance the conflicting interests of the requirements of the HCN Constitution for quick resolutions of election challenges against the rights of individual of [*sic*] due process. The result is to deny individuals their due process rights as required by the Ho-Chunk Nation Constitution." *Id*.

---

[1] Ultimately, the HCN Supreme Court opinion has not greatly influenced the basic configuration of a redistricting/ reapportionment scenario *as of yet*. To be sure, a devaluing of the fundamental right to vote has occurred without any true justification. Yet, the most tangible difference: redistricting could have been accomplished in January 2001. *See Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Dec. 21, 2000) at 13.

In an effort to gather the understanding of the prevailing party, the Court entered into the following dialogue with the plaintiffs at the April 2, 2002 *Hearing on Remand*:

> Ct.: In that the [HCN] Supreme Court didn't set forth what due process right was actually being violated, can you articulate the due process right that was violated?
>
> Pls.' Att'y: Well, your right to a trial, I think, includes the right to adequate preparation and discovery, time to do research and prepare. And, it was our contention that the process limited our due process rights . . . because it was limited to twenty [20] days, and we didn't feel at the time of the trial that there was [*sic*] any grounds for extending that. If it had said in the [*Election Challenge*] *Rules*, for instance, that the timeline could be extended for good cause, we would have asked that it be extended. And, the process, rather than your decision or your scheduling, the *Rules* deprived us of due process . . . .
>
> Ct.: [Y]ou're stating that it's a procedural due process concern relating to a meaningful opportunity to be heard?
>
> Pls.' Att'y: Yes.

Hearing on Remand (Log of Proceedings Electronically Recorded [hereinafter *LPER*] at 1, Apr. 2, 2002, 11:08:16 CST). The Court returned to this discussion slightly later in the proceeding:

> Ct.: It's the [HCN] CONSTITUTION that requires the Court to resolve the matter within twenty [20] days, and [the Court does not] believe that the [HCN] Supreme Court is saying that the [HCN] CONSTITUTION is unconstitutional. So, if all that is required in this Court concerning due process is minimal protections and a meaningful opportunity to be heard, what due process right is violated here? . . . Can you articulate to [the Court] why the HCN Supreme Court felt that it was arbitrary and unconscionable for discovery to end prior to the subpoena deadline?
>
> Pls.' Att'y: I think so, and that is that they feel that you can simply extend the time limit past the constitutional requirement of twenty [20] days by balancing the due process, which is also required by the [HCN] CONSTITUTION . . . , but [the Court is] not bound by the twenty [20] days that we all felt bound by in that *Trial*.

> Ct.: Attorney Huling, do you believe that the Court can choose to ignore the twenty [20] day timeline that is stated in the [HCN] CONSTITUTION?
>
> Def.'s Att'y: No, your Honor, we see the twenty [20] day timeline to render a decision is a constitutional mandate . . . .

Id. at 1-2, 11:10:59 CST.

Likewise, the Court felt obligated to render a final decision prior to the expiration of the twenty (20) day time limit. HCN CONST., ART. VIII, § 7. In doing so, the Court endeavored "to facilitate and ensure a just and fair proceeding within the condensed timeframe . . . ." *Dion W. Funmaker et al. v. Ho-Chunk Nation et al.*, CV 02-07-08, -10 (HCN Tr. Ct., Jan. 24, 2002) [hereinafter *Consolidation Order*] at 2. The Court strove to accommodate each legal and procedural requisite as it worked toward the constitutionally imposed deadline.

At the outset, the Ho-Chunk People have determined that the election challenge period of twenty (20) days represents an adequate amount of time for protection of their individual due process rights. The People established the HCN CONSTITUTION, in part, to "protect our rights," and, therefore, no argument exists for portraying certain constitutional requirements as somehow inconsistent with or subordinate to other constitutional requirements. HCN CONST., pmbl. In other words, the HCN CONSTITUTION cannot be unconstitutional.

Despite the foregoing, the Court could hypothetically deprive an individual of due process while conducting its review of an election challenge (*e.g.*, failure to notify parties of hearings). *Id.*, ART. X, § 1(a)(8). The U.S. Supreme Court has offered the following remarks concerning the application of the federal Due Process Clause in judicial proceedings:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Centr. Hanover Tr. Co., 339 U.S. 306, 313 (1950). The U.S. Supreme Court, however, deliberately refrained from elaborating upon this basic proposition. As stated as early as 1900, "[i]t is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States[2] does not control mere forms of procedure . . . or regulate practice . . . ." *Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900).

Prior to the instant case, the Court had every reason to believe that the tribal Due Process Clause also did not extend beyond its basic principles. And, while the Court agrees that "the Ho-Chunk Nation Supreme Court is not under an obligation to apply the holdings of other jurisdictions . . . ," specific rules enacted by the HCN Supreme Court seemed to demonstrate a degree of commonality. *In re: Diane LoneTree*, SU 96-16 (HCN S. Ct., Apr. 14, 1997) at 3. For instance, the *Ho-Chunk Nation Rules of Judicial Ethics* [hereinafter *HCN R. Jud. Eth.*] direct the Court to "give to every person who is legally interested in a proceeding or his or her representative, a full right to be heard according to tribal law and tradition." *HCN R. Jud. Eth.* § 4-1(C). Specifically, the Court "should rely on only those procedures prescribed by the laws and customs of the Tribe." *Id.*, § 4-1(D).

The Court will verify its adherence to both the *Election R. Civ. P.* and *HCN R. Civ. P.* below, but now directs its attention to *Hocąk* custom as previously articulated by the HCN Supreme Court. The HCN Supreme Court has recognized an inherent "responsibilit[y] to conduct a fair and impartial hearing on [an] election challenge." *JoAnn Jones v. HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The HCN Supreme Court later explained the traditional precepts underlying the requirement of judicial fairness, identifying the "Ho-

---

[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST.

Chunk values in allowing everyone an opportunity to be heard[.]" *In the Interest of the Minor Child: K.E.F.*, SU 97-03 (HCN S. Ct., Oct. 17, 1997) at 5. The HCN Supreme Court emphasized that "it is incumbent upon this system to provide Ho-Chunk members . . . with a forum where they will have, *at the minimum*, a court system where their voice [*sic*] will be allowed to be heard." *Id.* at 6 (emphasis added).

The HCN Supreme Court previously found an absence of judicial procedural due process in a contempt proceeding wherein the alleged contemnor received neither notice nor a hearing prior to the imposition of contempt penalties. *In re Rick McArthur*, SU 97-07 (HCN S. Ct., Feb. 27, 1998) at 5-7. Significantly, the HCN Supreme Court did not set forth procedural hearing requirements, focusing rather upon the sufficiency of the notice. *Id.* at 7. An individual's right to due process of law simply does not entitle him or her to any particular form or manner of judicial procedure.

Under the HCN CONSTITUTION, the HCN Supreme Court is authorized "to establish written rules for the Judiciary . . . , provided such rules are consistent with the laws of the Ho-Chunk Nation." HCN CONST., ART. VII, § 7(b); *see also* HO-CHUNK NATION JUDICIARY ACT OF 1995, § 3. Therefore, the HCN Supreme Court must insure that the *Election R. Civ. P.* and *HCN R. Civ. P.* comport with due process in the first instance. Consequently, the Court could only deprive the plaintiffs of due process if it failed to follow the rules, or if the HCN Supreme Court drafted and adopted unconstitutional rules.

As indicated above, the plaintiffs firmly believe that they won their appeal on the grounds of the latter proposition. *See supra* at 13. This, however, conflicts with the HCN Supreme Court ruling that the Court "arbitrarily set out a [discovery] deadline without any allowance for

---

amend. XIV, § 1.

additional time for the Appellants to locate other parties." *Abangan*, SU 02-02 at 5. So, despite the plaintiffs contention that "[i]t wasn't our argument that [the Court] abused [its] discretion or that [the Court] did anything wrong[,]" the HCN Supreme Court felt otherwise. *Hearing on Remand* (*LPER* at 3, Apr. 2, 2002, 11:27:38 CST).

The HCN Supreme Court characterized the Court's scheduling of the election challenge in the following manner: "[t]he Court in haste to facilitate the current litigation, within the timeline of twenty (20) days, set strict deadlines in which the parties must submit [*sic*] their discovery. The Appellants [*sic*] due process rights were lessened when the time constraints were so narrow." *Abangan*, SU 02-02 at 6. Again, the HCN Supreme Court does not indicate which due process rights were violated, presuming instead that the parties could fill in the gaps of the legal discussion. On this score, neither party could offer an explanation for the appellate ruling. The defendant's counsel remarked, "I find it hard to interpret the intentions of the [HCN] Supreme Court at this time[.]" *Hearing on Remand* (*LPER* at 3, Apr. 2, 2002, 11:25:25 CST). The plaintiffs' counsel could only state that "[i]t's not a question of whether we were denied due process - that's a ruling. So, I think that that is a finding, and we don't need to discuss whether or not we were denied due process." *Id.* at 3, 11:23:09 CST.

The Court agrees that it must follow the rulings of the HCN Supreme Court, but no requirement exists for blind and unquestioning obedience to an appellate decision without any seeming foundation in either fact or law. The Court should reasonably expect that the appellees have a rough idea as to why they prevailed on appeal. A court should strive to provide clarity as opposed to confusion. This is the function of the Judiciary and the reason for the existence of law. "[A] decision without principled justification [is] no judicial act at all." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

So, what principled justification exists for the HCN Supreme Court's ruling concerning due process? As noted earlier, the plaintiffs argue that either the HCN CONSTITUTION or the rules deprived them of due process, but the HCN Supreme Court placed the blame squarely upon the Court's purported uncompromising and unfair scheduling of the election challenge. An examination of the scheduling deadlines will show that this depiction has absolutely no merit. The following timeline must be viewed against the clear directions of the HCN Supreme Court. Specifically, "[t]he Election Challenge Rules *shall be followed* by parties who are challenging an election. The Election Challenge Rules are the procedural rules for the election challenge cases. The HCN Rules of Civil Procedure . . . *may* be utilized to supplement procedural questions." *Election R. Civ. P.* 1 (emphasis added).

Relevant Event	Date	Justification
Special Redistricting Election	01/12/02	*Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Nov. 19, 2001) at 7
Certification of Election Results	01/13/02	HCN CONST., ART. VIII, § 6
Election Challenge, CV 02-07[3]	01/22/02	HCN CONST., ART. VIII, § 7
Election Challenges, CV 02-08, -10	01/23/02	HCN CONST., ART. VIII, § 7
Formal Discovery Period Begins	01/24/02	*Consolidation Order* at 3
Discovery Request Deadline	01/29/02	*Election R. Civ. P.* 6
Discovery Period Concludes	02/01/02	
Subpoena Service Deadline	02/04/02	*HCN R. Civ. P.* 44(A)
Trial Dates	02/07-08/02	*Funmaker*, CV 02-07-08, -10 (HCN Tr. Ct., Feb. 4, 2002) at 10
Challenge Decision Deadline	02/12/02	HCN CONST., ART. VIII, § 7

As one can see, the Court needed to function under strict time constraints as mandated by the HCN CONSTITUTION and the applicable rules. Concerning discovery, the Court announced the formal commencement of the discovery period one (1) day after the deadline for filing

[3] The Court originally anticipated that it would need to render the election challenge decision on or before February 11, 2002, since Mr. Funmaker filed his challenge one (1) day prior to the challenge deadline. *See Consolidation Order* at 4.

election challenges, which fell on January 23, 2002 at 4:30 P.M. CST. The Court could not have entered this opinion any sooner. Moreover, "[d]iscovery may take place before an action has been filed . . . ," providing the plaintiffs a period of time extending from January 13, 2002 to February 1, 2002, within which to locate witnesses for *Trial*. *HCN R. Civ. P.*, Ch. 5, Intro.

The Court established the discovery deadline of Friday, February 1, 2002, to accommodate the issuance of potential subpoenas. A party must serve a subpoena "at least three (3) calendar days prior to . . . trial" in order to be effective, and, therefore, the issuing deadline fell on Monday, February 4, 2002. *HCN R. Civ. P.* 44(A); *see also Funmaker*, CV 02-07-08, -10 (HCN Tr. Ct., Feb. 4, 2002) at 9-10. Obviously, in order to request a subpoena, a party must have knowledge of those individuals possessing relevant information to a case. A party gains this knowledge through discovery, and because of that fact, discovery must conclude prior to the subpoena deadline. In the instant case, the discovery period ended one (1) business day before the final day upon which the Court could issue subpoenas. Given these facts, the Court cannot conceive how the HCN Supreme Court described this scheduling determination as arbitrary, not to mention a deprivation of due process of law, especially in light of a very important overlooked detail.

To reiterate, the HCN Supreme Court criticized the Court for "arbitrarily set[ting] out a deadline without any additional time for the Appellants to locate parties." *Abangan*, SU 02-02 at 5. Essentially, "the time constraints were [too] narrow." *Id.* at 6. However, the plaintiffs utilized every single day of the election challenge timeframe up to the <u>second day</u> of *Trial*. The following telling discussion occurred at the *Hearing on Remand*:

> Ct.: Now, when was the last point in time at which the plaintiffs ceased attempting to find individuals who could testify?

Pls.' Att'y: Prior to the *Trial*?

Ct.: Yes.

Pls.' Att'y: Thursday evening, well, you know, Friday morning, Friday noon rather.

Hearing on Remand (*LPER* at 2, Apr. 2, 2002, 11:20:13 CST).

At *Trial*, the Court and the defendant recognized the continuing effort of the plaintiffs to produce witnesses and acquiesced to this endeavor. This attempt to afford the plaintiffs every reasonable opportunity to present their case undoubtedly informs the plaintiffs' opinion that the Court did not err in its supervision of the case. *See supra* at 17. Regardless, the HCN Supreme Court, without principled justification or provocation, apparently found that the Court violated the plaintiffs' procedural due process right to a meaningful opportunity to be heard.[4] The Court strongly, but respectfully, objects to the appellate ruling on this issue.

III.

Ultimately, the HCN Supreme Court requires the Court to do one thing: "determine if the plaintiffs met the requirements of a clear and convincing standard." *Abangan*, SU 02-02 at 6. The HCN Supreme Court held that the Court improperly required the plaintiffs to establish the elements of their case by beyond a reasonable doubt. *Id.* at 4-5. Such an action stands in direct

---

[4] The Court remains unsure what liberty or property right entitled the plaintiffs to minimum procedural due process right protections in the first instance. The U.S. Supreme Court has characterized the right to vote "as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). In that respect, the right to vote would encompass an individual's liberty and property interests. But, also in that respect, a denial or diminution of the right to vote should be met with heightened judicial scrutiny. The hopelessly muddled state of the law summarized in Part I kept the Court from further engaging in this line of inquiry. Otherwise, the Court would have seriously considered setting aside the January 12, 2002 Special Redistricting/Reapportionment Election based solely upon the failure to provide adequate notice to the voters. *See* HCN CONST., ART. V, § 4, ART. VIII, § 2. A denial of the right to vote in this manner could hypothetically constitute a violation of substantive due process. *See e.g.*, *Bonas v. Town of North Smithfield*, 265 F.3d 69 (1st Cir. 2001); *Duncan v. Polythress*, 657 F.2d 691 (5th Cir. 1981).

contradiction of the applicable statutory provision, which directs challengers to "prove by clear and convincing evidence that the Election Board violated the Election Ordinance or otherwise conducted an unfair election, and that the outcome of the election would have been different but for the violation." AMENDED & RESTATED HO-CHUNK NATION ELECTION ORDINANCE [hereinafter ELECTION ORDINANCE], § 14.01(b).

In the January 12, 2002 Special Redistricting/Reapportionment Election, Scenario E passed by a margin of ninety-three (93) votes. *See Abangan*, CV 02-08, -10 (HCN Tr. Ct., Feb. 12, 2002) at 10. Consequently, the Court required the plaintiffs to produce ninety-three (93) enrolled tribal members who would have voted against Scenario E but for the absence of proper notice. *Id.* at 14-15. The plaintiffs, however, could only secure the testimony of thirty-one (31) members by the close of *Trial* on Friday, February 8, 2002. *Id.* at 8-9. Therefore, the Court determined that the plaintiffs had failed to establish by clear and convincing proof "that the outcome of the election would have been different but for the violation." ELECTION ORDINANCE, § 14.01(b); *Abangan*, CV 02-08, -10 at 14-15.

Again, the HCN Supreme Court characterized the Court as requiring the presence of proof beyond a reasonable doubt, but in order to make this characterization the HCN Supreme Court must presume a fact not in existence. The HCN Supreme Court must presume that only roughly ninety-three (93) more members would have voted in the Special Election with receipt of proper notice. However, such a presumption has no basis in reality. Even more, the HCN Supreme Court has no constitutional authority for either explicitly or implicitly establishing findings of fact. *See* HCN CONST., ART. VII, § 7(a); *see also Clifford Riddle v. Ho-Chunk Nation et al.*, SU 95-03 (HCN S. Ct., Nov. 1, 1995).

The HCN Supreme Court has recognized the Court's ability to assess probabilities from existing facts. *See Abangan*, SU 02-02 at 5. Fact one: no one challenged the appropriateness of the notice in the October 14, 2000 Special Redistricting/Reapportionment Election. Fact two: 746 enrolled tribal members exercised their right to vote in the October 14, 2000 Special Election. *Abangan*, CV 02-08, -10 at 10. Fact three: 437 members exercised their right to vote in the January 12, 2002 Special Election, signifying a reduction in voter participation in the amount of 309 individuals. *Id*. Conclusion: no reasonable likelihood exists that only roughly ninety-three (93) more members would have participated in the January 12, 2002 Special Election with receipt of proper notice.

The options appearing on the October 14, 2000 and January 12, 2002 Special Election ballots differ dramatically in form and substance, and, therefore, no one can reasonably predict the extent of increased voter turnout in the latter election. However, the Court can safely assume that, if not 300, perhaps approximately 200 more members would have either made their way to the polls or submitted absentee ballots. The plaintiffs dispute this assumption, emphasizing that "[r]edistricting . . . became gradually a bigger and bigger issue . . . , and finally in January 2002 when it comes out, turnout . . . should have been higher than the 746 in October of 2000." *Hearing on Remand* (*LPER* at 4, Apr. 2, 2002, 11:43:12 CST).

So, if the plaintiffs essentially concur with the Court on this issue, then what accounts for the HCN Supreme Court's alternative factual rendition and analysis? Regrettably, the parties could not shed any light on this matter at the *Hearing on Remand*. Instead, the plaintiffs' counsel surprisingly remarked, "[w]e didn't argue that reasonable doubt standard, and if I'm correct, I never used that in a brief or in any statement I made before the [HCN] Supreme Court, and so I can't say what there reasoning was . . . ." *Id.* at 5, 11:45:07 CST.

By way of explanation, the Court required the plaintiffs to produce ninety-three (93) credible witnesses because any attempt by the defendant to produce its own witnesses to sway the balance back into its favor would have proven untenable in a case where the defendant argued that notice was proper. *See Defendants' Answer*, CV 02-07-08, -10 (Jan. 28, 2002) at 9. In actuality, by requiring such a showing, the Court declined to rigidly enforce the prevailing evidentiary standard. In other words, in light of the preceding discussion, the plaintiffs would not have necessarily presented clear and convincing evidence of a different election outcome even if they had secured ninety-three (93) more votes.

In accordance with the appellate ruling, the Court must now determine whether the production of an additional thirty-one (31) votes at *Trial* proved by clear and convincing evidence that the outcome of the January 12, 2002 Special Election would have differed. The Court will utilize a conservative estimate of an increased voter turnout of 200 individuals for purposes of making this determination. A tally of thirty-one (31) more votes does not satisfy a beyond the reasonable doubt standard, a clear and convincing evidence standard, or a mere preponderance of the evidence standard. Therefore, the Court's holding in the February 12, 2002 *Order (Denial of Election Challenge)* shall remain unchanged.

"Any *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court."[5] *Ho-Chunk Nation Rules of Civil Procedure*, Rule 61.

---

[5] The Supreme Court earlier emphasized that it "is not bound by the federal or state laws as to standards of review." *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard "to determine if an error of law was made by the lower court." *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov't II v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and *JoAnn Jones v. HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted the following definition of abuse of discretion: "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted." *Youngthunder, Sr.*, SU 00-05 at 2 *quoting* BLACK'S LAW DICTIONARY 11 (6th ed. 1990). Regarding findings of fact, the Supreme Court has required an appellant to "demonstrate[ ] clear error with respect to the factual findings of the trial court." *Coalition II*, SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., Mar. 25, 1997) at 1-2.

IT IS SO ORDERED this 21st day of June, 2002 by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

_____

Honorable Todd R. Matha
Associate Trial Court Judge