Huron Potawatomi Tribal Court

The Nottawaseppi Huron Band of the Potawatomi

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Nathanial W. Spurr	**v.**	**Tribal Council; Plante Moran LLP; and Tribal Election Board**

OPINION OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

File Number: 12-005APP

Hon. John Wabaunsee, Chief Justice, Presiding

Hon. Matthew L.M. Fletcher, Associate Justice

Hon. Holly K. Thompson, Associate Justice

Appearances:

Plaintiff-Appellant, Nathanial W. Spurr, in pro per

Defendants-Appellees, William J. Brooks

Opinion by Fletcher, J.

Introduction

Article IX of the Constitution of the Nottawaseppi Huron Band of Potawatomi provides:

> This Constitution may be amended by a majority of the qualified voters of the Band at an election called for that purpose by the Tribal Council provided that at least thirty (30%) percent of those entitled to vote in said election unless a higher majority is required by terms of this Constitution, votes in said election. The Tribal Council shall call an election for the amendment of the Constitution upon presentation of a petition setting forth the proposed amendment and signed by two-thirds of the eligible voters of the Band. In the absence of a petition, the Tribal Council upon a majority vote of its members in favor may call for a membership vote on proposed amendments.

In this matter, we are called to interpret the boundaries of acceptable governmental conduct under this provision. This will be the first decision and opinion issued by the Supreme Court, and we do so with the greatest of humility and respect (Mno Bmadzewen) toward the People of the Nottawseppi Huron Band of Potawatomi and the parties.

Procedural History

This case reaches us on appeal from the trial court's Order Regarding Plaintiff Request for Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran LLP, and the Tribal Election Board, issued on December 29, 2011. The plaintiff and appellant in this matter is Nathanial W. Spurr, a tribal member, who is seeking to stop an election being held under the auspices of Article IX of the Constitution. We agreed to Mr. Spurr's request for an expedited briefing and argument schedule. *See* 9 NHBPCR § 5(D). We have jurisdiction over this appeal of the trial court's decision. *See* NHBP CONST. art. X, § 3(f); 9 NHBPCR § 3(A). After submission of the parties' briefs, we heard the arguments of the parties on January 12, 2012. Following the conclusion of oral argument, the Supreme Court Justices decided to affirm the order of the trial court.

We now provide the reasons for that decision.

Factual Background

After a two public meetings conducted by a consultant named James Mills under the apparent authority of the Constitutional Reform Committee in the summer of 2011, the Tribal Council approved Resolution Number 11-17-11-05 calling for an election on whether to approve amendments to the Constitution. At that time, Mr. Spurr was a sitting member of the Tribal Council (he voted against the resolution). The Tribal Council instructed the Election Board to administer the election. On November 23, 2011, the Election Board mailed to each tribal member eligible to vote a packet containing an absentee ballot, instructions for return of the ballot, a self-addressed envelope, a letter from James Mills on tribal letterhead, and contact information for the members of the Tribal Council and Mr. Mills. Mr. Spurr represented to the trial court that he received the ballot packet on November 25, 2011.

On December 15, 2011, nearly three weeks after he received the ballot package in the mail, Mr. Spurr sued to enjoin the election.

On December 20, 2011, the trial court, presided over by Chief Judge Melissa L. Pope, held an emergency hearing on Mr. Spurr's request. On December, 29, 2011, Chief Judge Pope issued an order denying Mr. Spurr's request.

Mr. Spurr appeals.

Discussion

I. The Tribal Government Must Ensure that Article IX Elections Comply with Potawatomi Standards of Fundamental Fairness.

We begin, as we must, with the Constitution. Article IX is the sole constitutional provision at issue here, and governs the process for amending the Constitution. Article IX provides little guidance on what, if any, minimum standards there are for conducting elections to amend the Constitution. It merely sets a minimum percentage of eligible voters (30 percent) that must vote in the election in order to make the election valid, and the requirements for when the Tribal Council must call an election. The Tribal Council must call an election after

being presented by a petition generated by tribal members or, "[i]n the absence of a petition, the Tribal Council upon a majority vote of its members in favor may call for a membership vote on proposed amendments."

How the election is conducted, and by whom, is not addressed by Article IX. Other provisions in the Constitution relating to elections appear to apply (for the most part) to elections for the office of the Tribal Council, either regular or special elections. *See* NHBP CONST. art. V, § 2 (regular elections for Tribal Council); Constitution art. IV, § 2 ("special election[s]" to fill vacancies in the Tribal Council). It is obvious that, despite Mr. Spurr's claims to the contrary, that the Election Code only applies to regular and special elections for tribal council. The repeated references to "candidates" throughout the Election Code, *e.g.*, §§ 2.2, 2.3, 4.1(A)(2)-(5), 4.2(A)(2)-(3), 5.1(A), 5.2, 6.1(A), 6.2(A)-(B)(1), 7.1, 8.1, 9.5, assure us of that finding. Section 10 of the Election Code is the only exception, and that section governs referendums; that is, an election to review an enacted ordinance or resolution of the Tribal Council. There is little in the way of standards for governing those elections either and, regardless, it is unlikely that any of those standards would apply to an Article IX election.

The question remains then – what standards, if any, govern Article IX elections? The People of the Nottawaseppi Huron Band of Potawatomi established and adopted the Constitution "to provide a means for ... the free expression of the community will...." NHBP CONST. preamble. The mechanism of elections – be they regular, special, referendum, or Article IX elections – appears to be a critical component of providing the "means for ... the free expression of the community will...." As such, Article IX elections should be conducive to allowing the community to communicate. Governmental conduct in calling and administering an Article IX election must be limited in a meaningful way to preserve the clear intent of the People in adopting the Constitution. What standards apply, then, is a matter of tribal common law, and we turn to principles of Potawatomi customary law for guidance.

At the beginning of this opinion we briefly invoked Mno Bmadzewen, and we return to this uniquely Anishinaabe (Ojibwe, Odawa, and Bodewadmi) concept. Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa

Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, recently stated:

> There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.

Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY at 39, 47-48 (Angela R. Riley, Matthew L.M. Fletcher, and Kristen A. Carpenter, eds. 2012) (quoting Eva Petoskey, Address, Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference (October 10-11, 2008)). The historical record of the Nottawaseppi Huron Band offers examples:

> [E]very time somebody was sick [in the 1930's], the women would all gather together and they'd send the word around and they'd go there [to the home of the ill member] and they'd clean that place out. They'd wash blankets, wash dishes, cook and just do everything. Take care of the baby and everything.

Anthropological Technical Report – Huron Potawatomi, Inc., at 6, *reprinted in* United States Dept. of Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, Proposed Finding – Huron Potawatomi, Inc., at 226 (May 10, 1995).

Mno Bmadzewen informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between Mno Bmadzewen and Anishinaabe legal principles:

> The four concentric circles in the sky – *Pagonekiishig* – show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put that is the meaning of a constitution.

Fred Kelly, *Anishinaabe Leadership*, at 3 (Dec. 14, 2005), *quoted in* Vanessa A. Watts, *Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin*, at 77, unpublished master's thesis, University of Victoria (2006).

Mno Bmadzewen is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, Mno Bmadzewen guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.

Many, if not the vast majority, of American Indian tribal courts have recognized as a matter of common law that the notion of "fundamental fairness" applies to tribal elections. For example, the three Michigan Odawa tribal courts

have all referred to fundamental fairness in various ways, but most especially in the context of tribal elections. *E.g.*, *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Court, May 8, 2009); *Bailey v. Grand Traverse Band Election Board*, No. 2008-1031-CV-CV, 2008 WL 6196206, at * 9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc); *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. C-006-0398, 1999 WL 35000425, at * 2 (Little Traverse Bay Bands of Odawa Indians Tribal Court, Sept. 30, 1999). We find the reasoning of these decisions persuasive in our review of the outer boundaries of acceptable governmental conduct in administering Article IX elections.

The oldest of the three decisions, *Deckrow*, issued by the Little Traverse Bay Bands tribal court, involved an individual tribal member's challenge to an election approving the Bands' "Judgment Fund Distribution Plan." *See Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. 98-A-0010998, 1998 WL 35301007, at * 1 (Little Traverse Bay Bands of Odawa Indians Tribal Appellate Court, Oct. 22, 1998). The Bands argued that no person could sue the tribal government due to the doctrine of tribal sovereign immunity. The *Deckrow* court held that the interim tribal constitution's guarantee of "the right to petition for action or the redress of grievances" effectively created a cause of action for tribal members to challenge election outcomes. 1999 WL 35000425, at * 3. Invoking to some extent tribal customary law, the court added: "After all, government is a human institution and the maxim 'to err is human' is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely, in everyone's book." *Id.* at * 2. We find the *Deckrow* court's invocation of fundamental fairness in the context of tribal customary and traditional law persuasive and compelling.

The next decision, *Bailey*, issued by the Grand Traverse Band's tribal court, involved the alleged tainting of an election for the Tribal Chairman's position due to a possible violation of the tribal election board's own rules. *See Bailey*, 2008 WL 6196206, at * 1-2. The election board there had publicly censored one of the candidates a single day before the election without ever providing notice to the candidate that a grievant had filed a complaint with the election board about the candidate's activities. *See id.* at * 1. The tribal court held that "the unique facts and circumstances of this case present Constitutional issues of due process of law and a lack of fundamental fairness that we cannot ignore or excuse." *Id.* at * 9. The tribal

court ordered a new election based on those "unique facts and circumstances." *See id.* at * 14-15. The *Bailey* court's decision to order a new election only where fundamental fairness lacks in extraordinary circumstances is persuasive to us for purposes of considering a standard of review for acceptable governmental conduct in administering Article IX elections. In fact, the third Odawa tribal court case, *Crampton*, borrowed the exact language the *Bailey* court used in analyzing election challenges. *See Crampton*, 8 Am. Tribal Law at 296. There, the court addressed allegations that candidates for the tribal election board members, who were prohibited from campaigning for office, improperly campaigned. *See* Complaint at 2, *Crampton v. Election Board*, 8 Am. Tribal Law 295 (Little River Band of Ottawa Indians Tribal Court 2009) (No. 09-084 EB).

We hold that Article IX elections, while not governed by any specific standards provided for in the Constitution or in the Tribal Code, must comport with a standard of fundamental fairness as a matter of Potawatomi custom and tradition. We are guided in determining whether the election is fundamentally fair by acknowledging the principles of Mno Bmadzewen and the intent of the Constitution "to provide a means for ... the free expression of the community will...." CONST. preamble.

II. The Election at Issue Complies with Potawatomi Standards of Fundamental Fairness.

Tribal election cases present legal issues of a particular complexity. Elections such as the Article IX election at issue here involve ultimate questions of tribal governance; namely, whether to amend the language of the Constitution. Elections are complicated endeavors, and involve many competing interests and questions of fairness and process sometimes implicating the responsibilities of the judicial branch of government. *See generally* NHBP CONST. art. X, § 3(b). As the Constitution's preamble states, elections also are inherently political affairs, and are a critical "means for [expressing] the community will...."

We as the Tribal Supreme Court tread carefully into the thicket of tribal elections. The remedy requested by Mr. Spurr – halting an election that is already underway – is extraordinary for at least two reasons. The first reason is that the

technical remedy, an injunction, is all but universally understood in tribal, state, and federal courts as "extraordinary." *E.g.*, *Bauer v. Mohegan Council of Elders*, 8 Am. Tribal Law 99, 102 (Mohegan Tribal Court 2009) ("However, a 'preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"); *Hopinkah v. Ho-Chunk Nation Election Board*, 1 Am. Tribal Law 256, 261 (Ho-Chunk Nation Trial Court 1998) ("Temporary restraining orders are extraordinary remedies."). The issuance of an injunction that orders governmental officials to cease their activity (in this case, the administration of an election) is the epitome of "judge-made law." JOHN F. DOBBYN, INJUNCTIONS IN A NUTSHELL 1 (1974). The second reason is that, as the government repeatedly argued before both the trial court and the Supreme Court, tribal elections are political affairs not usually implicating the judicial function. While challenges to election parameters and results are within the capacity of the judiciary to resolve, the policy preferences at the heart of the matter are not within our authority to review. We must defer to the Tribal Council on constitutional matters delegated to the Tribal Council, such as Article IX elections. *Cf. Delgado v. Oneida Business Committee*, No. 00-TC-0004, 2000 WL 35782584, at * 5 (Oneida Trial Court, Jun 7, 2000) (holding that issues "delegated to the political or legislative branch of the [tribal] government" are "not within the authority of the judicial branch to determine"); *Wabsis v. Little River Band of Ottawa Indians Enrollment Commission*, No. 04-185-EA, 2005 WL 6344603, at * 1 (Little River Band of Ottawa Indians Tribal Court, April 14, 2005) ("The court must also show the highest deference to a separation of powers for the Executive Branch of the tribe in their interpretation of Constitutional language and in enactment of ordinances....").

We first address the standard that the trial court must use in determining whether to issue an injunction, and the standard the appellate court must use in reviewing the trial court's decision. The trial court applied the four-part test required in federal and state courts: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, at 8 (NHBP Tribal Court, Dec. 29, 2011) (quoting *Winter v. Natural Resources Defense*

Council, 555 U.S. 7, 20 (2008)). This four-part test is standard in other Anishinaabe tribal courts as well. *E.g.*, *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Court 2009); *DeVerney v. Election Board*, 9 Am. Tribal Law 290, 291 (Little River Band of Ottawa Indians Tribal Court 2009). We agree with the trial court on the proper test to apply in analyzing requests for injunctive relief.

As we noted earlier, the issuance of an injunction is an extraordinary matter. The issuance of an injunction against government officials doing the work of the tribal government, which enjoys tribal sovereign immunity, is even more extraordinary. And the issuance of an injunction to stop an election to determine the "will of the community" is still more extraordinary. We will not stop an election that, on its face, meets the relatively simple requirements of Article IX unless the plaintiff makes a clear showing that "the unique facts and circumstances of this case present Constitutional issues of due process of law and a lack of fundamental fairness that we cannot ignore or excuse." *Bailey v. Grand Traverse Band Election Board*, No. 2008-1031-CV-CV, 2008 WL 6196206, at * 9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc). A high burden of proof is essential because "undoing an election is an extraordinary act and must be avoided as much as possible. It is therefore only appropriate that the challenger in an election dispute prove a violation by a higher standard than by preponderance of the evidence." *Visintin v. Ho-Chunk Nation Election Board*, 7 Am. Tribal Law 280, 289 (Ho-Chunk Nation Trial Court 2008). Other tribal courts have required election challengers to prove by clear and convincing evidence that the election violated the law. *See*, *e.g.*, *Barrientoz v. GTB Election Board*, No. 2006–316–CV–CV, 2006 WL 6285478, at * 4 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, May 12, 2006) (en banc); *Shomin v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 2010-001738-CV-CV, slip op. at 18 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Feb. 28, 2011); *Woods v. Grand Traverse Band Election Board*, No. 2010-001630-CV-CV, slip op. at 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, April 23, 2010) (en banc). Following the persuasive guidance of other tribal courts, we apply the clear and convincing evidence standard to Mr. Spurr's allegations here.

We start our analysis with Mr. Spurr's allegations. They involve the method by which the electorate will vote – via a mailing – and the import of a letter included in the election mailing packet drafted by a consultant hired by the Tribal Council to advise on the election. As a preliminary matter, Mr. Spurr alleges that "[t]he election procedure used for this proposed constitution ... was entirely novel." Appellants' Brief at 11. He alleges "there was no voting at the polls on the reservation [and] the requirement to request an absentee ballot was eliminated...." *Id.* at 12.

We assess these preliminary allegations by looking at the requirements of Article IX. Article IX expressly delegates the authority to call an election to amend the Constitution. Twice the provision grants the authority to the Tribal Council: "This Constitution may be amended by a majority of the qualified voters of the Band *at an election called for that purpose by the Tribal Council*...." (emphasis added). Later, the provision states, "In the absence of a petition, the *Tribal Council upon a majority vote of its members in favor may call for a membership vote* on proposed amendments." (emphasis added) It appears that the Tribal Council has complied with its minimal requirements to call for an Article IX election. The Tribal Council called for the election in Resolution 11-17-11-05 by a majority vote of three to two. That is all that Article IX requires. Nothing in Article IX prohibits the actions taken by the government as alleged by Mr. Spurr.

Mr. Spurr makes additional allegations about the voting method, arguing that the "mail-in-vote was actually a change made at the eleventh hour ...[,] six days before the ballots were mailed...." Appellants' Brief at 12. According to Mr. Spurr, the Tribal Council "decided to make this last-minute change in the election procedure because they believed it was quite unlikely the proposed Constitution would be approved in a normal, conventional election of the kind that has been used by the Tribe for the last 32 years." *Id.* The government did not dispute these claims, possibly because, standing alone, these allegations have no legal import. The government at oral argument suggests that the intent to increase voter participation is justified by the increase in tribal membership made possible by a recent change to blood quantum, and a resulting increase in the geographic disposition of tribal member domiciles around the State and elsewhere. The change, given these assertions, seems eminently reasonable as a means of increasing voter participation. Mr. Spurr insists that there is some malevolent intent

behind the change to a mail-only ballot system for this election, but offers no evidence whatsoever that such an intent exists. More importantly, there appears to be no substantive impact on whether the increased voter participation will somehow create illegitimate outcomes, despite Mr. Spurr's repeated allegations at oral argument that few Nottawaseppi Huron Band tribal members are competent to vote on these proposed amendments.[1] Efforts by the tribal government to increase voter participation are not disfavored by the Constitution, and Mr. Spurr has not alleged (nor did he prove) any kind of reason why increased voter participation is an unconstitutional outcome. Mr. Spurr's first allegation fails the first prong of the four-part test for the issuance of an injunction – likelihood of success on the merits.

Mr. Spurr's second major allegation gives us pause, however, though not enough to reverse the trial court. Mr. Spurr focuses heavily on a letter on tribal letterhead from James Mills, a consultant retained by the Tribal Council to advise on the amendment process. Appellants' Brief at 9-11. The letter was in the election packet mailed to the tribal membership, and included his contact information for tribal members seeking additional information about the election. *Id.* The so-called "Mills Letter," according to Mr. Spurr, "purported to summarize the important changes made by the proposed constitution to the current Constitution and those made in response to input from Tribal members, is highly selective in terms of the changes from the current constitution that it describes." *Id.* at 10. Mr. Spurr especially objected to the phrase, repeated twice, that one crucial amendment was the product of "fair compromise," suggesting that the drafter of the letter used that phrase as "a thinly veiled endorsement of the constitution." *Id.* Mr. Spurr also argued that the portion of the Mills Letter that offered a contact number to reach Mr. Mills and Tribal Council members further tainted the process. *See id.* at 11.

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[1] *See also* Hearing on Motion for Temporary Restraining Order, *Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, No. 11-251 TRO (Dec. 20, 2011), Transcript at 7:

> Specifically, I'm bringing this to your Honor's attention because at the time I believe we had 785 registered voters; so that would mean that we would have upwards of 60 percent of our tribal members—our eligible voting members who are of age—would be receiving ballots in this election who, otherwise, wouldn't have, you know, gone to the polls on election day nor would they have requested absentee ballots. Now all of them have received ballots.
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> And then the—The problematic thing about that, in the opinion of all the plaintiffs who signed on to this case, is these are people who know very little about the constitution or possibly the tribe. In many cases, they're new members. In many cases, they might not read the newsletter or might not, you know, go through this—this document, which is, you know, almost—almost 19 full pages long single-spaced.

Mr. Spurr offered no evidence that the Mills Letter influenced any tribal member one way or the other.

The trial court dismissed the import of these allegations as "pure speculation." *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, at 8 (NHBP Tribal Court, Dec. 29, 2011). It is the institutional obligation of the trial court to hear testimony and make findings of fact, and so we defer to the trial court's findings rather than rehear all of the same testimony. In other words, the trial court's findings of fact will not be overturned if they are supported by the evidence or if the appellate court finds that the great weight of the evidence leads to a contrary finding. *See Rasmussen v. Oneida Police Dept.*, No. 99-EP-0030, 2000 WL 35780308, at * 3 (Oneida Tribal Appellate Court, Jan. 24, 2000).

"Pure speculation" – that is, a complete lack of evidence that the government's actions in conducting this election were unacceptable – is an insufficient factual basis *in this matter* to reverse the trial court and order the government to end the election. We do take note of Mr. Spurr's argument that it is difficult to prove that the government's actions are unacceptable. Mr. Spurr would have us hold that any election "disturbance" is justification to shut down the election, even without evidentiary support. Appellants' Brief at 23 (quoting *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1221 (11th Cir. 2009)). The government counters with reasoning from the Ninth Circuit that "[i]nterference with impending elections is extraordinary ..., and interference with an election after voting has begun is unprecedented." Appellees' Brief at 13 (quoting *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)); *see also id.* at 13-14 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). We find the government has the better of the argument. The Tribal Council's authority to call and conduct Article IX elections forces the judiciary to extend great deference to that branch of government. Mr. Spurr has not met his burden of proof.

We pause, however, to note that we share, to some extent, Mr. Spurr's concern about the Mills Letter. *See Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, slip op. at 8 (NHBP Tribal Court, Dec. 29, 2011) ("[T]he Court agrees with Plaintiff that the letter from Mr. Mills

should not have been included in the mailing with the ballot...."). We have located one other tribal court decision that threw out an election to amend a tribal court due to concerns about ballot materials. *See In re Anoatubby*, 4 Okla. Trib. 137 (Chickasaw Nation Tribal Court 1994). We now turn to that opinion for persuasive guidance.

In *Anoatubby*, the tribal council called an election to decide whether to amend the Chickasaw constitution to include a provision mirroring the Fifth Amendment to the United States Constitution. *See id.* at 141. The ballot at issue did not contain the actual amendment language, but instead included a summary of the proposed amendment that differed from the actual language. *See id.* The Chicksaw constitution, much like the NHBP Constitution, delegated authority to conduct constitutional amendment elections without much guidance on the procedures to be used. *See id.* at 142 (quoting CHICKASAW CONST. art. XVIII, § 2). The court decided that, even though the actual amendment had been printed in the *Chickasaw Times* just prior to the election, there was no guarantee that tribal members would have the opportunity to read the language before the election. *See id.* at 144. The court enjoined the election.

Anoatubby is distinguishable from this case. Here, the amendment language is included in the ballot, along with the other materials to which Mr. Spurr objects. All voting members will have an opportunity to read the specific amendment language.

Anoatubby also does not offer guidance on the content of a ballot summary. However, in this case, the government's representations about the purposes of including the Mills Letter, the content of the letter, and the inclusion of the contact information firmly rebut the implications Mr. Spurr asks us to make. First, according to the government, the Mills Letter "does nothing more than point out (and highlight for the voters) the portions of the Ballot Draft being presented to voters for possible ratification, which were changed in response to Membership input/comment from the draft Amended and Restated Constitution members were send in July 2011." Appellees' Brief at 18. The government further argues that the Mills letter "encourages a more informed electorate by focusing voter attention on the language that was the subject of the most dispute during the public comment period." *Id.* at 19. While concerned with the possible electioneering in the Mills

Letter, the trial court nonetheless agreed with the government's position that any government error in conducting the election was harmless:

> While sending an analysis with a ballot may be questionable, it was sent on or about November 23, 2011. With ballots needing to be posted by 5:00 p.m. on January 27, 2012 and counted on January 28, 2012, Tribal Members will have had over sixty (60) days to engage in the political process to determine how they want to vote or if they want to vote.
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> ***
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> [Tribal Members] can communicate their concerns about the proposed Amended and Restated Constitution, encourage discussion and encourage Tribal Members to have their voice heard by voting in the election. ... [A]ll Tribal Members, regardless of whether they support or opposed the proposed Amended and Restated Constitution are fully explored before the vote takes place.

Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council, No. 11-251 TRO, slip op. at 8 (NHBP Tribal Court, Dec. 29, 2011). The trial court's analysis is very persuasive, taken with the government's position that the Mills Letter is intended to encourage, rather than stifle, political participation. In fact, as the government points out, the ballot materials include this sentence: "Make sure you have taken the time to read and understand the proposed Amended and Restated Constitution before you cast your vote." Appellees' Brief at 20. Much, if not all, of the harm from the alleged electioneering in the Mills Letter is obviated by the clear governmental intent to increase political participation.

Nonetheless, while it is apparent that the government did not violate Article IX or any other provision of the Constitution or the Election Code as it currently reads, we can imagine circumstances where a document included in an election packet mailing constitutes a form of electioneering that we could consider a violation of the Tribal Council's mandate to call and conduct Article IX elections. We hearken back to our consideration of Mno Bmadzewen, and we find that the government's boundaries of acceptable conduct in administering an Article IX election are broad, but not unlimited. Like the *Bailey* court, there may come a day

that the government engages in conduct that is inconsistent with the Constitution and laws. However, so long as the government's conduct respects, as we believe it does here, elections as expressions of the community's will, we will not intervene.

Signed:

2/21/2012 — John Wabaunsee

Dated — Hon. John Wabaunsee, Chief Justice

2/21/2012 — Matthew Fletcher

Dated — Hon. Matthew L.M. Fletcher, Associate Justice

2/21/2012 — Holly K. Thompson

Dated — Hon. Holly K. Thompson, Associate Justice