Unstable ground
Complex questions surround upcoming Cherokee impeachment process

By Holly Kays
Staff writer

More than a year of tension and fighting within the Eastern Band of Cherokee Indians government will come to a head this week, with a hearing for impeachment charges against Principal Chief Patrick Lambert slated for Thursday, April 20, and Lambert calling a Grand Council of all enrolled members for Tuesday, April 18, in an attempt to save his position.

But, while some big decisions about the future of the tribe could be made by this time next week, the political fallout will likely take much longer to resolve. Much is uncertain about the events ahead — impeachments are rare, Grand Councils even rarer, and many of the laws pertaining to how they are conducted and what power they have are unclear, at best.

After talking to a variety of attorneys, judges and tribal members familiar with Cherokee law — several of whom asked that they not be named, due either to prohibitions of their current position or an unwillingness to attach their names to the dispute — The Smoky Mountain News will attempt to answer some of the many questions raised by the current state of politics on the Qualla Boundary.

What is impeachment?

Though it’s a basic question, it’s also one without an answer in the Cherokee tribal code. Tribal law contains no definition for the word “impeach,” and the only mention of how to impeach an elected official is found in a single sentence of the tribe’s Charter and Governing Document: “Any officer of the Eastern Band of Cherokee Indians who violates his oath of office, or is guilty of any offense making him ineligible to hold said office, may be impeached by a two-thirds vote of council.”

“If you impeach somebody, what’s the next step? How do you remove him from office?” asked Rusty McLean, a Waynesville attorney who grew up on the Qualla Boundary and has studied Cherokee law throughout his 40-year career.

Lambert made the same point during the April 6 Tribal Council meeting, asserting that council has the authority to impeach, but not to remove.

Reading the Charter, it’s hard to say who’s right. The sentence does not explicitly say that Tribal Council can remove an elected official but does say that an impeachable offense is one that makes the official ineligible to hold office, perhaps implying removal.

According to Merriam Webster’s dictionary, “impeach” can mean “to charge a public official before a competent tribunal with misconduct in office” but can also mean “to remove from office especially for misconduct.” However, the dictionary at law.com defines “impeach” as “to charge a public official with a public crime for which the punishment is removal from office.”

So, when the Charter says “impeach,” does it mean it in the sense of charging someone with misconduct, or in the sense of removing someone due to misconduct?

The part of the Cherokee code that discusses removal of judges and justices is one of the few other places where impeachment is mentioned in tribal law. In this section, the law describes the power to “remove by impeachment,” in which impeachment is the mechanism and removal is the result.

However, others assert that the power to remove is assumed to be part of the power to impeach. If the body that is given the power to impeach has no power to follow through with any consequence for the crimes prompting impeachment, then why grant power to impeach in the first place?

“The EBCI Tribal Council has a precedent of removal of an elected official after an impeachment hearing,” said Tribal Council Chairman Dennis “Bill” Taylor in a statement to The Smoky Mountain News. “The process would entail the swearing in of a new Principal Chief or in this case the elevation of the Vice Chief to that post.”

During the 2003 impeachments of former Principal Chief Leon Jones and former Tribal Council Chairman Bob Blankenship, the law was indeed interpreted as giving Tribal Council the authority to remove elected officials from office. In the resolution setting up rules for the impeachment hearing, the 2001-2003 Tribal Council approved language stating that, if
articles of impeachment were approved by Tribal Council, impeachment hearings would follow “for a final decision on whether these officials should be removed from office.”

Even if Lambert argued that Tribal Council did not have the power to remove him and refused to leave his office, Tribal Council would have plenty of leverage. Council controls the tribe’s purse strings and could paralyze the chief’s office financially if it so chose. And regardless of the removal question, the tribal code is quite clear that any official who is impeached cannot run for office again.

What is Grand Council?

Grand Council, according to the Tribe’s Charter and Governing Document, is a gathering to which all enrolled members are invited and over which the principal chief presides.

But that’s where the consensus ends. According to Lambert, the Grand Council has the power to pass, uphold or overturn an action of the Tribal Council. However, others point out that those powers aren’t stated anywhere in tribal law, whereas the Tribal Council’s legislative authority is clearly outlined.

“Some Tribes use Grand Council to permit their members to vote. We do not,” said Councilmember Travis Smith, of Birdtown, in a post to his public Facebook page. In Cherokee, Grand Council is more a tool to get the opinion of the people, he added.

Those who say the Grand Council has authority to pass laws and even overturn decisions of Tribal Council point to both longstanding tribal tradition and to the Lloyd Welch Constitution, which members of the Eastern Band of Cherokee Indians passed in 1868.

“If you can go back through Cherokee history, even before the Lloyd Welch Constitution, anytime there was something important coming up or whatever, they would announce there would be a Grand Council and runners would be sent out to all the different villages, and they would say Grand Council is going to be held at such and such place, and the word would be spread,” said Mary Wachacha, a tribal member and member of the Qualla Boundary Historical Society who has spoken publicly on such affairs was at the center of the well-known case Santa Clara Pueblo vs. Martinez, decided in 1978, in which the petitioner Julia Martinez contended that a membership ordinance passed by the Santa Clara Pueblo tribe violated the right of equal protection guaranteed under the Indian Civil Rights Act. The case went all the way to the Supreme Court, which decided that, because Indian tribes are “Distinct, independent political communities” the court did not have authority to rule in the case.

Is there any opportunity to appeal Tribal Council’s decision at the impeachment hearing?

“This depends on who you ask,” McLean said, an assertion with which Wachacha agrees. In a video that Birdtown Tribal Council candidate Ashley Sessions posted on Facebook, Cherokee Beloved Man Jerry Wolfe supported this view.

“In the Grand Council session, whatever the people say, that’s the vote,” Sessions said in the video. “Tribal Council can’t overturn what the people vote.”

“Now, that’s the people,” Wolfe responded. “The people that make the law. We’re strong, we are.”

The opposing view, however, would be that, between Grand Council and Tribal Council, the Tribal Council’s powers are the only ones that are clearly defined in tribal law.

“The Grand Council carries no weight of authority in regards to tribal government operations,” Taylor said. “The full authority of matters concerning Tribal government operations including impeachment rests with the duly elected Eastern Band of Cherokee Tribal Council.”

So, while some may feel that a vote of tribal members gathered at Grand Council should prevail, this view says, that’s just a feeling. It’s not a law or a power granted in the tribe’s charter or code of ordinances. But Tribal Council’s authority is.

During the 2003 impeachments of former Principal Chief Leon Jones and former Tribal Council Chairman Bob Blankenship, the law was indeed interpreted as giving Tribal Council the authority to remove elected officials from office.

Others interviewed for this story agreed with that assessment, saying that impeachment is a function of the legislative body and it’s not within the court’s purview to rule on such a decision.

On the other hand, if Lambert believed that laws were broken in the course of conducting the investigation and then setting up the hearing, it’s possible that he could bring a suit contending that the process itself was illegal.

When Tribal Council first passed legislation directing that articles of impeachment be drafted, in February, the resolution gave Vice Chief Richie Sneed the power to ratify it, declaring that Lambert had “a conflict of interest.” However, tribal law gives the power of ratification to the chief, and Lambert wound up vetoing the resolution. While Tribal Council overturned the veto, in doing so it acknowledged Lambert’s right to veto.

However, the resolution introduced in April to approve articles of impeachment and set up a hearing once more gave Sneed the power to ratify, not Lambert. This time, Lambert did not assert his right to veto.

It is worth noting that, during the 2003 impeachment of Jones and Blankenship, Tribal Council took a similar action. The resolution approving rules for the impeachment hearing and the hire of a special impeachment prosecutor stated that because the Principal Chief has a conflict of interest in this matter, the Vice Chief is authorized to ratify this resolution,” similar language used in the 2017 resolutions pertaining to Lambert’s impeachment.

For McLean, “there is no question in my mind” that the impeachment issue will wind up in court.

“I just hope that the judge they select will devote the time to analyze the historical procedures of the tribe, the documents of the tribe, and work it forward to a point in time when you can rule on the actions that were taken by council against the chief in this instance,” McLean said. “I think that’s going to be the issue. Will the judge devote such time to it in order to ensure it’s a decision that can be affirmed with a good basis in the law to support its decision?”

Several members of the Cherokee Tribal Council are currently under investigation by the FBI. Could the results of that investigation, when concluded, have any retroactive effect on the impeachment decision?

The consensus seems to be no. The impeachment and FBI investigation are separate processes, performed by separate bodies, pertaining to separate allegations. The outcome of one won’t likely affect the outcome of the other.

While the two are separate, they have been linked in the public eye. Lambert has repeatedly called the impeachment effort a “witch-hunt” and said it’s retaliation for his attempts to expose wrongdoing in tribal govern- ment — attempts that included a foren- sic audit of various tribal dealings that were then handed over to the FBI and resulted in an investigation that has now been going on for more than six months. While the majori- ty of Tribal Council has expressed concern with the results of the Office of Internal Investigation that forms the basis for impeachment — the report lists contracts executed without proper approval and various violations of human resources policies — Lambert has said the allegations are trumped-up charges that shouldn’t rise to the level of impeachment.

However, the influence of the FBI investiga- tion on the impeachment process — if that is indeed what is going on — could be hard to prove.

“I don’t see that you can,” McLean said when asked if the impeachment could be reversed if the FBI results incriminated councilmembers. “I don’t think you can make it retroactive unless you can show some kind of intent on the part of those people.”
Cherokee chief receives massive support at Grand Council

Assembly votes to stop impeachment

By Holly Kays
Staff Writer

Big Cove Road in Cherokee slowed to a standstill last week as traffic backed up for more than a mile, en route to Cherokee Central School and the Grand Council meeting that Principal Chief Patrick Lambert had called for 1 p.m. Tuesday, April 18. The spacious parking lot at Cherokee Central School, where the event was to be held, quickly reached capacity. Some drivers pulled off to park on any patch of roadside grass or gravel available, while others pushed a little further to park at the old high school, where a shuttle would ferry them to the meeting.

The scheduled 1 p.m. start time came and went as people continued to stream into the gymnasium’s stadium-style bleachers, pausing at the entrance to receive either a red or green dot to display on their clothing. Green dots went to people who had verified their status as enrolled tribal members, giving them the right to speak before the crowd and fill out a ballot — after turning in a ballot, the dot would be marked with an X. Red dots went to non-enrolled people, who were allowed to attend but not to vote or address the audience. Individual copies of the resolutions were not given out, but poster-size printouts were taped up on the wall inside.

Chief Lambert took the mic to apologize for the delay and promise to start just as soon as everyone had had a chance to park. It was nearly 1:30 p.m. by the time prayer, the presentation of colors and remarks by honored elders were underway to kick off the meeting.

“I just want to tell you how humbled I am to be here today,” Lambert addressed the crowd. “I want to welcome you to your Grand Council.”

Grand Council, which the Eastern Band of Cherokee Indians’ Charter and Governing Document gives the principal chief the right to call, is a gathering to which all enrolled members are invited. The exact function and authority of Grand Council, however, is currently the subject of a lawsuit in Cherokee Tribal Court (see story on page 14).

In his remarks to Grand Council, however, Lambert said that the body has authority to pass, uphold or overturn laws, and its decisions supersede those of Tribal Council.

“Typically those decisions happen within our government buildings and our government offices and down at the council cham-

ers,” Lambert said. “Yet every so often in our history we’re faced with situations that are more political and complicated. We’ve handed that power back to the people to make those decisions.”

He then ran through a list of his administration’s accomplishments over the past year-and-a-half, the promises he’d campaigned on and reiterated at his 2015 swearing-in, and the serious challenges still facing the tribe. Lambert also affirmed his contention that the effort to impeach him is based on retaliation for his work to expose corruption and demand transparency in tribal government. When he came into office, he admitted, he may have inadvertently made some procedural mistakes, but those mistakes were not violations of the law and not impeachable offenses.

“I will honor the results of this meeting today one way or the other,” Lambert said. “I want to say that whatever the outcome of the meeting today, the FBI’s not stopping. The FBI’s still coming.”

The rules for that day’s Grand Council, he told the crowd — which would eventually total 1,355 people — were developed from rules published in The Cherokee One Feather surrounding the series of Grand Council sessions former Principal Chief Joyce Dugan held in 1995 and 1996.

The rules included 25 different items. Stipulations included declaring a quorum to be the number of tribal members present at the time of the meeting; allowing any enrolled member to speak on any issue for 3 minutes; giving the chief the power to preside and decide when to cut off discussion; requiring members to be at least 18 years old to vote; and declaring that all decisions would become immediately upon ratification by the chief.

Widespread support

Energy in the room was high as the agenda got started. The first two of the four listed items dealt with issues unrelated to the impeachment controversy that initially spurred Lambert to call the Grand Council. Those items called for creation of a program to pay power bills for tribal elders and a resolution to designate the old high school for use as a tribal headquarters.

However, it was clear that most folks in the room were primarily interested in discussing the impeachment issue. Though 25 people spoke during the discussion on the power bill program, many of their comments had nothing to do with power bills.

“I believe that when we voted, we voted for change, and when the change comes that means cleaning house and that means you’re going to clean the dirty. You’re not going to keep it. We don’t want the clutter,” said Victoria Welch, one of the first speakers of the evening. “I just want to say, Chief Lambert, you’re doing an awesome job.”

“I really appreciate Patrick, what he’s doing for the elders,” added Edith Crowe, of Wolfetown. “I think these council members need to be put out, completely.”

Three hours in, the power bill resolution passed — by a show of hands, with that display backed up later in the evening by a count of paper ballots — and some people left. The ballots, printed on blue paper, could be dropped off at any point during the meeting at one of the provided boxes, which were staffed at all times.

The thinning crowd could be what prompted Lambert to move the impeachment-related resolutions up on the agenda and bump the second item — the one dealing with the old high school — to the end.

Stopping the impeachment

The impeachment resolutions sought to kill and prevent execution of the two resolutions that Tribal Council had passed in February and in April — first, to draft articles of impeachment against Lambert and hire an impeachment attorney, and second, to approve the articles and set an impeachment hearing date.

As with the first agenda item, the resolu-

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IMPEACHMENT, CONTINUED FROM 11

tions drew strong support from nearly all of the 22 people who spoke on them.

Secretary of State Terri Henry, who served as chairwoman of Tribal Council in the two years preceding Lambert’s election, was the first to take the mic.

“One of the things that I’ve seen, chief, you do is strive for accountability, and today this whole conversation and everything that’s led to us being here today is all about accomplishing government accountability,” she said. That wasn’t the case during the previous administration, she said, when laws and procedures were routinely flouted.

“These articles (of impeachment) are in essence trying to go to the letter of the law,” Henry said. “Where were they (Tribal Council) in 2014? Where were they?”

“Since Chief Lambert has come in and taken over operations, the accountability has increased,” added Polly Castorena, of Wolfe town, who has worked for the tribe since 2008. “I see it day to day.”

Many speakers expressed anger with their Tribal Council representatives — for not attending Grand Council, or for not representing them as they felt they should be represented, or both.

“This is Grand Council,” said Patricia Garcia, of Birdtown. “I think they (councilmembers) should be here because they’re supposed to be the people who speak for us. Supposed to be.”

Of the 12 councilmembers, only Richard French, of Big Cove, and Tommye Saunooke, of Paintown, attended. Teresa McCoy, of Big Cove, sent her regards but was out of town at the time. The other nine — the same nine who have consistently voted for impeachment — simply didn’t attend.

CONCERNS AND OPPOSITION

The meeting was more than just a forum for Lambert’s supporters to express solidarity or air grievances about the legislative branch, however. The session also involved several back-and-forth discussions about the wording of the resolutions and about the legitimacy of the process itself.

Perhaps the most explosive resulted from a series of comments by Joey Owle, a Wolftown community member who is running for a school board seat.

“Only one group in the room was allowed to submit resolutions,” Owle said, referring to the fact that all four resolutions on the agenda were submitted by a group called the Committee For Putting Cherokee Families First. “Why wasn’t anybody else given the opportunity to do so? This Grand Council is about the chief. This is about his agenda.”

Owle called Lambert’s management style “dictatorial” and “micro-managing,” referring to the Grand Council as a “pep rally” and saying that tribal employees who aren’t Lambert supporters didn’t show up for fear of repercussions.

“Having supported Chief Lambert twice in the previous two elections, I wouldn’t support him again based on how he conducts himself,” Owle said.

Owle’s comments were met with boos and yells from the audience, though some other audience members responded by yelling that Owle should be allowed to speak, even if he wasn’t expressing the viewpoint held by the majority in attendance.

Others questioned the voting method. Many people marked their ballots and turned them in before the discussion was complete.

“What I’ve already voted on is different than what we’ve amended,” said Lavita Hill, of Big Cove. “The resolution, we’ve since changed them, so what if I want to change my vote based on the changes?”

“Well the resolution wasn’t included on your ballot,” Lambert said. “It was just a description.”

Ashley Sessions, a Birdtown candidate for Tribal Council, said that the resolutions should include provisions to keep Tribal Council from simply passing duplicates of the impeachment resolutions if Grand Council voted to repeal them.

“We know how sneaky they are,” Sessions said. “We know they would just create a new one.”

This resulted in an amendment stating, “Tribal Council shall not take any action that contradicts the express intent of these resolutions.” However, Susan Toineeta, a former Tribal Council member from Wolftown, later took the mic to say that the resolution was too broad in its prohibition against future impeachment efforts. Elsewhere in the ordinance, it’s stated, “any ordinance pertaining to the impeachment is hereby invalid and unacceptable.”

Toineeta moved to strike that phrase about any impeachment ordinance being invalid, saying it would hamstring Tribal Council should any impeachable offense arise in the future. However, Grand Council voted to kill that move.

VOTE OPPOSES IMPEACHMENT

Both anti-impeachment resolutions passed handily, with the room becoming largely empty by the time Grand Council made it to the last item on the agenda, which sought to authorize turning the old high school into a centralized tribal headquarters building. This passed as well, though the discussion spurred a move from the floor to resolve that solid plans be made to expand the Cherokee-language New Kituwah Academy to serve students all the way through 12th grade. The issues were related in many people’s minds, as Tribal Council had some time ago discussed using the old high school for the academy.

By the time the discussion was over, the votes counted and the meeting dismissed, it was 8 p.m. But Lambert indicated that, while it had been more than 20 years since a Grand Council was held, it might not be quite that long before another session convened. He recessed the meeting rather than actually adjourning it, meaning that Grand Council could be resumed at any time.

“Great job today,” Lambert said before recessing the meeting. “We’re going to do this more often. I think it’s a great day for the Cherokee people and returning some power back to our people. Don’t let them tell you that your votes don’t count. This is real.”
Disagreement over Grand Council’s authority spurs lawsuit

BY HOLLY KAYS

It’s safe to say that the Cherokee Tribal Council is not scurrying to incorporate the decisions of Grand Council into its future actions. Tribal Council held a special-called meeting Wednesday, April 19 — the day after Grand Council was held — in which it set a new impeachment hearing date to comply with a recent order from the Cherokee Supreme Court and shot down an amendment Councilmember Tommye Saunooke, of Painttown, had introduced aimed at recognizing the authority of Grand Council.

“So we got nine people that’s going to overrule the Grand Council and the vote of the people. Is that what I just saw happen?” said Principal Chief Patrick Lambert.

Lambert went on to say that this gathering of Tribal Council couldn’t even be considered a valid meeting, as the tribe’s Charter and Governing Document states that only the chief can call a special session of Tribal Council. He repeated the claim two days later, when Tribal Council met for its second special session of the week. That time, the purpose was to add five articles to the existing seven articles of impeachment.

COURTROOM DEBATE

As a result of Tribal Council’s refusal to recognize the legitimacy of Grand Council, Lambert added a new complaint to an existing lawsuit in Cherokee Tribal Court which now alleges 12 counts of law breaking on the part of Tribal Council. Temporary Associate Judge Sharon Tracey Barrett heard arguments Monday, April 24, on Lambert’s motion pushing for a preliminary injunction on Tribal Council’s impeachment efforts. After three-and-a-half hours of arguments, Barrett said she would take the issue under advisement and come up with a ruling at a later date.

“We have shown the court a substantial likelihood of success on the merits (of the case),” Lambert’s attorney Scott Jones told Barrett, adding that granting a preliminary injunction would “prevent irreparable harm” to the tribe.

If granted, the injunction would stop Tribal Council from moving forward with impeachment until the court could conduct a full hearing to determine who should have the final say — Grand Council, or Tribal Council. A variety of other issues are at play in the lawsuit as well.

Tribal law is a bit hazy on the definition and function of Grand Council. It’s not mentioned anywhere in tribal code but appears only as a single sentence in the tribe’s Charter and Governing Document: “The Principal Chief shall have the right to call a Grand Council of all enrolled members to attend and he shall preside over such meeting.”

Jones based his case for the authority of Grand Council in tribal custom and tradition. In Tribal Court, judges must look to customs, traditions and precedents alongside the laws themselves.

“The Grand Council historically has the ultimate power of the tribe,” Jones said. “It is the power of the people.”

In recent history, he said, Grand Council has been called three times. Once, in 1972, Grand Council met and voted to accept a $1.86 million settlement from the U.S. government for obstructing tribal heritage sites with the building of the Tellico Dam. A few years later, Principal Chief John Crowe called one in 1979 to draft a constitution. And most recently, Principal Chief Joyce Dugan called a series of Grand Council meetings in 1995 and 1996.

Jones argued that the decisions of these Grand Councils were recognized as carrying the full authority of the tribe. When Grand Council voted to accept the settlement in 1972, that decision was accepted by the U.S. government, he said. And before the 1979 Grand Council concluded, the tribe voted to submit the draft constitution it had compiled in those sessions to the Bureau of Indian Affairs, which would conduct an election for tribal members to decide whether to adopt the constitution. In accordance with the vote, the constitution was submitted, though it did not pass the election and was never adopted.

While Jones averred that Grand Council’s authority has been observed in the past, upon questioning from Barrett he allowed that Tribal Court had never before been asked to weigh in as to whether Tribal Council or Grand Council is more powerful.

However, he argued, Grand Council’s authority is well grounded in tribal tradition, and the meeting held April 18 sent a clear message to Tribal Council.

“It’s unquestionably the will of the people that the impeachment proceedings cease,” he told Barrett.

Tribal Council’s view

However, Chris Siewers — the attorney representing Tribal Council — argued that there was no historical precedent for Grand Council overriding an action of Tribal Council and said that, even if there was, the April 18 Grand Council meeting was not conducted in accordance with procedures used in the past.

“What happened here can’t be called Grand Council in any historic sense of the word, but I don’t think the court has to get to that to decide the issue at hand,” he said.

“I think from what we’ve presented this morning it’s clear there’s not this idea of a Grand Council that can convene and tell other elected officials what to do. I think that what this history shows is it’s more a consultation session.”

To support that argument, he pointed to a 1994 resolution that had been submitted to the Tribal Council by the clerk of Grand Council, asking that a Grand Council be held that October. Tribal Council killed the request.

It is the principal chief — not the clerk of Grand Council — to whom the Charter gives the authority to call...
If granted, the injunction would stop Tribal Council from moving forward with impeachment until the court could conduct a full hearing to determine who should have the final say — Grand Council, or Tribal Council.

Grand Council. However, Siewers argued, “if the Grand Council was all-powerful, why do you have the clerk of that Grand Council going to Tribal Council to ask for something?”

Siewers also cast doubt on how Lambert conducted the April 18 session. Proper notice was not given, he said, as previous Grand Councils had been advertised in The Cherokee One Feather weeks beforehand and Lambert announced this one just one week before it happened. Lambert first announced the meeting on his Facebook page and mailed flyers to every mailbox owner on the reservation, but he did not advertise it in the newspaper and, Siewers said, there was no evidence he’d sent mailers to tribal members who don’t live on tribal land.

In addition, he said, the voting procedures were suspect. The EBCI Board of Elections was not involved, and with tribal members being given their ballots upon entrance to the seven-hour meeting rather than at the ballot box, there was not enough ballot security to ensure that each person had only one vote.

“This is not a vote with real structure in place that is authorized by the election board to carry out,” Siewers said. “We cannot put any stock into those numbers.”

The votes were double confirmed, Jones pointed out, with those in attendance asked to raise their hands in a yay or nay in addition to turning in a paper ballot. Barrett expressed interest in seeing a video of the hand vote.

While much information was presented over the course of the day, quite a few questions remained unanswered. But this will not be the last time this case is heard in court. The Cherokee Supreme Court will hear the case in its entirety during a May 9 hearing — Barrett will not be the final arbiter.

“Tribal Council members have sovereign immunity from lawsuits when acting in their official capacities, and that sovereign immunity does not come into play if, as the tribe’s Charter and the Cherokee Supreme Court stated, the Cherokee One Feather weeks beforehand and the Cherokee Supreme Court scheduled a court hearing for 10 a.m. Tuesday, May 2.”
Cherokee court ruling declines to uphold Grand Council votes; Supreme Court to review decision

BY Holly Kays
Staff writer

A recent ruling from the Cherokee Tribal Court has called the authority of Grand Council into question. Temporary Associate Judge Sharon Tracey Barrett denied a request for a court order stopping Tribal Council from pursuing impeachment against Principal Chief Patrick Lambert, though 84 percent of enrolled members who cast ballots during an April 18 Grand Council session voted to repeal the impeachment legislation.

“At this time,” reads Barrett’s April 26 decision, “Plaintiffs have not shown that Cherokee custom, tradition or precedent give the enactments of a Grand Council the force of law, especially in the absence of subsequent action thereon by the Tribal Council.”

However, the ruling does not amount to a legal green light for Tribal Council’s efforts to remove Lambert from office. The ruling responded to Lambert’s request for a preliminary injunction, a relatively rare action in which the court concludes that, even before holding a full trial, it’s evident that the defendants will likely lose and that irreparable harm will result if the action in question isn’t halted. Barrett decided that Lambert’s case — represented by Asheville-based attorney Scott Jones — had not met that high standard.

However, the Cherokee Supreme Court has granted a request from Attorney General Danny Davis — who has intervened in the case — to review that decision. A hearing is scheduled for May 10, the day after the May 9 hearing during which the Supreme Court will hear arguments on a variety of other impeachment-related complaints.

Grand Council’s legitimacy questioned

Barrett upheld her earlier decision that Tribal Council has no authority to suspend Lambert from office, as it attempted to do in an April 6 resolution. But she did not conclude that Grand Council’s decisions have historically held the force of law, or that the Grand Council held April 18 was conducted in accordance with tribal traditions.

In some historical examples, Barrett wrote, there is evidence that action from Tribal Council was needed to validate decisions of the Grand Council. For example, rules governing the 1979 Grand Council stated that passed resolutions should go before Tribal Council during a special session, and that Tribal Council would carry out those resolutions in ordinance form. Similar language appeared in the rules published for the Grand Council called in February 1986. However, no such stipulation was included in the rules governing the April 18 Grand Council.

“These rules (for April 18) plainly vary from the rules of prior Grand Councils in numerous significant ways ... Among other things, these rules provide no role whatsoever for the Tribal Council in the process of adopting the resolutions of Grand Council as ordinances,” Barrett wrote.

Barrett also questioned whether the April 18 Grand Council could be considered a council representing all enrolled members, pointing out issues with the way the meeting was noticed and the vote taken. In previous Grand Councils, she wrote, notices, rules and agendas had appeared in The Cherokee One Feather well ahead of time, while this Grand Council was first announced on Lambert’s public Facebook page, six days beforehand. Notices were sent in the mail, but evidence had not been offered to show that those notices went to all enrolled members. The meeting was not advertised in The One Feather.

In addition, Barrett wrote, the Eastern Band of Cherokee Indians Board of Elections was not involved in the voting, and many people cast their votes before discussion was complete and voice votes taken.

Amendments were added to some items from the floor, but there was no opportunity for people who had already turned in a ballot to change their votes if they so desired.

“The court does not find that the Grand Council held on April 18, 2017 was conducted in accordance with the laws, customs, traditions or precedents of the Eastern Band of Cherokee Indians,” Barrett wrote. “Instead, the Grand Council represented a display of public support by numerous enrolled members of the Plaintiff...
Tribe, including many friends and supporters of Plaintiff Chief, for him and for the measures that were considered.”

The Grand Council drew 1,355 people, with 1,242 turning in a ballot and 1,140 voting on the impeachment issue. Of those, 84 percent voted to rescind the resolutions Tribal Council had passed to start impeachment proceedings against Lambert. Attendance was less than 10 percent of the tribe’s membership, but the number of voters was 31 percent of the number who voted in the chief’s race in 2015.

SUPREME COURT HEARING COMING

There is potential for the court to reverse its decision. The Cherokee Supreme Court granted Davis’ request that the higher court review Barrett’s ruling, and a hearing is scheduled for 9 a.m. Wednesday, May 10. Afterward, the court can either grant the preliminary injunction — meaning that impeachment proceedings would cease — or it could deny the request, meaning the proceedings could continue.

But even if the request were denied, the lawsuit would continue. True to its name, a preliminary injunction is a preliminary action — one taken before the full case can be entered and argued. A hearing on all the facts and legal issues at play will likely be scheduled for some later date. However, if the Supreme Court denies the preliminary injunction, Tribal Council will be free to pursue impeachment while the lawsuit plays out.

If an impeachment hearing is held and Tribal Council votes to remove Lambert, a new lawsuit could result. In her ruling, Barrett allowed that a vote to remove him would raise “significant questions” about what the law says.

For example, it’s unclear whether the Charter gives Tribal Council the power to actually remove an elected official from office, or merely the power to accuse that official of wrongdoing. The tribe’s Charter says only that elected officials who violate their oath of office “may be impeached by a two-thirds vote of council.” It does not explicitly say that council can remove impeached officials, and tribal law doesn’t clarify the issue any further.

“Further, a question might, in the future, be presented in this case if the Tribal Council enacts a two-thirds final vote upon impeachment, because the governmental body that issues articles of impeachment do not customarily hear impeachment trials,” Barrett wrote. “It appears that such an approach would be a contravention of the practices in most, if not all, legislatures in other jurisdictions.”

In both the state and federal government, the House of Representatives has the power to draft articles of impeachment, but the Senate conducts the hearing and holds the final vote on whether the official should be removed from office. But the tribe does not have a bicameral legislature, and tribal law contains no mention of these powers being divided.

No impeachment hearing will be held until the Supreme Court comes back with a ruling following the May 9-10 court hearings.
Cherokee court allows impeachment to continue

Chief will likely return to court after May 22 impeachment hearing

BY HOLLY KAYS
STAFF WRITER

The Cherokee Supreme Court issued a pair of rulings last week that paved the way for impeachment efforts against Principal Chief Patrick Lambert to continue. However, the order left several key points of contention unanswered, meaning the issue will likely continue to appear on the court schedule.

Though Lambert’s attorney Scott Jones said he was “disappointed with the court’s ruling,” he found elements of it encouraging.

The Supreme Court upheld the lower court’s ruling that, because Tribal Council has not yet voted to remove Lambert from office, he doesn’t have any basis to sue — at least, not yet. Presumably, Lambert could return to court if Tribal Council did vote to remove him. At that time, the court could rule on still-unanswered questions, such as whether Lambert has a right to due process and whether that right has been violated, or his claim that Tribal Council ignored tribal laws when moving the impeachment forward.

“We were pleased to see that the court did have jurisdiction to answer these questions, and that the court’s ruling on the Chief’s claims was, essentially, that he had come to court too early,” Jones said. “There will now be an impeachment trial, and we will likely be back in court after that.”

An impeachment hearing has been scheduled for 10 a.m. Monday, May 22, and Lambert fully expects that it will end with a vote to remove him from office. If that happens, his legal team will likely make a beeline to court.

Meanwhile, Council’s attorney Rob Saunooke sees the rulings as a clear victory for his client. Siding with Saunooke’s arguments, the court found that Council has the authority to both impeach and remove any elected official and that Grand Council decisions don’t carry the force of law unless they’re backed up by an action of Tribal Council. The decision also upheld the lower court’s denial of Jones’ request for an order halting impeachment proceedings until the court could schedule a hearing on the full case.

“I’m not surprised. The law is very clear,” Saunooke said. “The Attorney General’s arguments about the inability of the tribe to impeach and remove were beyond disingenuous.”

Impeachment-related litigation has been circulating through the Cherokee Tribal Court since a series of actions Tribal Council took April 6 to adopt articles of impeachment against Lambert, set an April 20 hearing date on the matter and suspend him from office until the hearing concluded.

Lambert immediately filed suit, saying that council did not have the authority to suspend him — Temporary Associate Judge Sharon Tracey Barrett agreed, issuing a preliminary injunction to stop the suspension — and also arguing that Tribal Council did not have the authority to remove him from office through impeachment. The suit was later amended to reflect a variety of other complaints. Lambert alleges that Tribal Council broke the law by not publishing the impeachment resolutions before bringing them to the floor, by conducting secret meetings and by depriving him of his due process rights. The suit also argued, among other points, that some Tribal Council members have “an irredeemable conflict of interest” in the impeachment hearing and that the impeachment is retaliation for Lambert’s own investigations into wrongdoing in tribal government.

Lambert asked that Barrett issue a preliminary injunction in the case, which would prevent Tribal Council from making any more impeachment-related decisions until after the court had heard and decided on the full case. In hearings April 17 and April 24, Barrett heard arguments for and against the preliminary injunction, eventually issuing a decision denying the request. Lambert appealed the decision to the Cherokee Supreme Court, which held hearings May 9 and 10.

In addition to Lambert and Tribal Council, the case contained a third party — Attorney General Danny Davis, who intervened on behalf of enrolled tribal members.

“I wasn’t sure these two feuding branches were going to protect this government, and the processes that are important and the legal questions that need to be answered,” Davis told the court May 9.

The hearing included a great deal of back-and-forth between Presiding Chief Justice Brenda Toineeta Pipestem and the three parties as to whether the law actually gave Davis the authority to intervene of his own accord. However, the ruling did not include any statement on the matter.

The Cherokee Supreme Court consisted of a three-justice panel, including Pipestem, Associate Justice Robert Hunter and Associate Justice Jerry Waddell. The one-page orders were not attached to any written decision, but the documents promised that a decision explaining the rulings would follow.

May 9: Does Tribal Council have the right to remove Lambert?

Order: Impeachment can proceed; Tribal Council has power to impeach and remove; preliminary injunction denied

From the legality of Tribal Council’s own actions while pursuing impeachment to Council’s authority to remove an elected official from office, the May 9 hearing covered a wide range of topics.

“We are here because Tribal Council claims absolute and all-encompassing power unrivaled by the rule of law,” Jones told the court. “I want to argue to you instead that even the lawmakers must follow the law.”

Jones argued that the impeachment was plainly retaliation for Lambert’s efforts to expose corruption in tribal government, pointing out that the impeachment process was initiated during a spontaneous motion from the floor made at the same time that the FBI was busy raiding files at the Qualla Housing Authority, on whose board six Tribal Council members sit.

Since then, Jones said, Tribal Council has broken laws requiring that proposed resolutions be provided to all councilmembers at least five business days before council meetings, as well as laws stating that only the principal chief can call a special session of council. Multiple other impeachment-related resolutions — including articles of impeachment and proposed hearing dates — were voted on with no prior publication or public notice, and this spring Tribal Council held at least two sessions outside of its normal meeting schedule that Lambert did not authorize.

In addition, Jones said, Tribal Council shouldn’t even be allowed to preside over the impeachment hearing, as many of its members have conflicts of interest and preconceived notions about what the outcome should be.

“Tribal Council was involved in the investigation, brought the charges, has amended the charges, has members who are witnesses of the charges and some who are subjects of the federal investigation,” Jones said. “Some Tribal Council members have already decided the outcome before having heard the evidence.”

Davis made arguments along the same lines. Because Cherokee doesn’t have a bicameral legislature, it can’t handle impeachments like the U.S. federal government and most U.S. states do, with one house bringing charges and another voting on them. However, Davis said, “they could have isolated themselves a little better from this than they have,” perhaps hiring a special prosecutor to investigate so councilmembers could be shielded from the evidence until the hearing. Because councilmembers have been so involved in the investigation, Davis said, they’re not qualified to make a fair decision.

Further, Davis said, Cherokee law doesn’t give Tribal Council the authority to remove impeached leaders. Since the 1986 charter was enacted, he said, no elected leader has been removed by impeachment — those who left due to impeachment charges resigned of their own accord. Tribal Council did not remove them.

“My argument would be that the people have the right to remove, not the Tribal Council,” Davis said.

Even if Tribal Council did have the power to remove, Davis argued, this Tribal Council should not be allowed to do that because it’s not properly constitut-
For a decision of Grand Council to carry the force of law, the court decided, it must be backed up with a resolution from Tribal Council.

argument, quite frankly,” Saunooke said. As to Davis’ argument that impeachment should be halted until a census could be completed, Saunooke said that there’s no proof that the weighted votes are inaccurate. Instead, there’s merely a possibility that they could be. “They haven’t demonstrated that the way we are currently voting in our council is incorrect,” Saunooke said.

The court came down on Saunooke’s side. A ruling issued May 10 upheld Barrett’s decision to deny the request for a preliminary injunction. Furthermore, it said that Tribal Council does indeed have the authority to both impeach and remove. It also lifted the stay over impeachment proceedings that had been in place since April 17.

May 10: Can Grand Council supersed Tribal Council?

Order: Grand Council decisions do not carry force of law if not backed up by Tribal Council; Tribal Council has power to impeach and remove.

The second day of hearings focused on the role of Grand Council — in particular, the question of whether the Grand Council of enrolled members that Lambert held April 18 had the power to overturn Tribal Council’s decision to pursue impeachment.

When it comes to Grand Council, all tribal law says is that the principal chief has the right to call one. According to Jones, that means that the court should look to Cherokee traditions and customs to fill in the gaps. And he believes that those traditions and customs describe a gathering that holds authority higher than that of Tribal Council.

In his argument, Jones referenced the transcript of a meeting that former Principal