AN UNEXPECTED CHALLENGE: THE CONSEQUENCE OF A LIMITED TRIBAL APPELLATE CASELOAD

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I. A UNIQUE CONTEXT

An appellate court's decisions should derive from careful deliberation, involving an acute dissection of legal issues, an exhaustive performance of relevant research, and an integration—exacting in detail—of these two undertakings. This unexceptional proposition holds greater significance for recently emerging tribal judiciaries.[1] These appellate tribunals are engaged in constructing unique forms of jurisprudence that bear resemblance to Anglo-American tradition in varying degrees,[2] but exist to develop tribal law and envelop

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1. For example, eleven federally recognized Indian tribes are located within the geographical boundaries of the State of Wisconsin, "occupy[ing] about a thousand square miles." Oneida Tribe of Indians v. Village of Hobart, 732 F.3d 837, 841 (7th Cir. 2013). Each tribe maintains a court system, all of which came into existence since the mid-1970s. *See generally* WISCONSIN TRIBAL JUDGES ASSOCIATION, http://www.wtja.org (last visited Nov. 2, 2022) (representing eleven tribal judiciaries). The Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin established its judiciary on May 27, 1976, representing the earliest instance. 2 LCOTCL § TCT.2.2.010(j) (2019), https://www.lcotribalcourt.org/tribal-codes. The Ho-Chunk Nation established its judiciary most recently. *See infra* note 5.

2. *See, e.g.*, *In re* Lonetree, SU 96-16, at 3 (HCN S. Ct. Apr. 14, 1997) ("[T]he Ho-Chunk Nation Supreme Court is not under an obligation to apply the

distinct tribal customs, mores, and traditions. This expectation, already a daunting one, is usually confounded by the sheer lack of substantive appeals that a tribal judiciary routinely confronts. Tribal precedent, therefore, generally grows in fits and starts, and a misstep, even slight, can prove debilitating, especially since opportunities to correct course may not readily arise. The author attempts to illustrate this dilemma by resort to his experience as a tribal jurist for the Ho-Chunk Nation where he has served roughly equivalent trial and appellate level tenures over the past twenty-three years.

The Ho-Chunk Nation, formerly known as the Wisconsin Winnebago, is a federally recognized Indian tribe with its principal headquarters located in Black River Falls, Wisconsin.[3] The Nation simultaneously functions as a direct and representative democracy,[4] and

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holdings of other jurisdictions . . . ."); *cf.* Williams v. HCN Ins. Rev. Comm'n, SU 08-01, at 12–13 (HCN S. Ct. Oct. 29, 2008) ("This Court has used U.S. federal precedent as persuasive authority several times in the past when the laws of this Nation have provided incomplete guidance in resolving an issue."). The Ho-Chunk Nation Judiciary endeavors to post the full text of all substantive appellate opinions on the tribal website. *Supreme Court Decisions*, HO-CHUNK NATION, https://ho-chunknation.com/government/judicial-branch/supreme-court-case-summaries (last visited Nov. 2, 2022). Unfortunately, a network attack in September 2021 has compromised the Judiciary's ability to independently update its internet content. Marlon White Eagle, Letter, *Appreciation Goes Out to All Employees During IT Outage*, HOCĄK WORAK, Sept. 24, 2021, at 2 (archived issues of the tribal newsletter are available at http://www.hocakworak.com/archives.aspx (last visited Nov. 2, 2022)). Still, the Judiciary provides access to its trial and appellate level case law and corresponding files upon request. *See* HCN Judiciary Establishment & Org. Act, 1 HCC § 1.5b (2017) ("The Judiciary shall complete a 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 acronym "HCC" refers to the Ho-Chunk Code, which is accessible in current form on the tribal website. *Ho-Chunk Nation Laws*, HO-CHUNK NATION, https://ho-chunknation.com/government/legislative-branch/ho-chunk-nation-laws (last visited Nov. 2, 2022).

3. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636-02, 4638 (Jan. 28, 2022). The Nation maintains an enrollment of 7,730 members. HCN LEG. RES. 04-05-22 E, at 3.

4. The Ho-Chunk Nation General Council, consisting of the adult enrolled membership, imparted governmental authority to the executive and legislative branches while reserving certain overarching powers unto itself, which it

its judicial branch likewise derives from separate, but intertwined, traditions.[5] The Ho-Chunk Nation Judiciary may exercise "original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation."[6] Yet, the Ho-Chunk Nation Supreme Court entertains just a few appeals each year, averaging nine cases over twenty-six full years in existence (1996–2021). Parties filed seventeen appeals on two occasions, 1996 and 2000, representing the high mark during that timeframe. Conversely, in 2008 and 2010, the Court received merely four notices of appeal.[7]

As a result, significant constitutional and substantive legal questions do not frequently reach the Court, and recurring consideration of singular or related issues seldom occurs, thereby largely negating any gradual common law development. The absence of an intermediate court of appeals, although practically unwarranted in light of the demonstrated caseload, eliminates deliberate dissection of and elaboration upon

typically exercises at an annual General Council meeting. HCN CONST. art. IV, §§ 2–3, 4, https://ho-chunknation.com/wp-content/uploads/2019/10/Final-HCN-Constitution-July-2019-1.pdf.

5. The General Council conferred jurisdictive authority upon a judicial branch as set forth within the Constitution adopted on September 17, 1994, but this governmental branch technically emerged in 1995 with passage of enabling legislation. *Id.* § 2; *see also* HCN Judiciary Establishment & Org. Act, § 1 (2017) (instituting court system on March 22, 1995). The Judiciary primarily comprises separate trial and appellate level tribunals and a Traditional Court that includes recognized hocąk clan and Native American Church leaders. HCN CONST. art. VII, § 1; 1 HCC § 3(a)–(c); *cf.* Todd R. Matha, *Affirming a Pragmatic Development of Tribal Jurisprudential Principles*, 43 MITCHELL HAMLINE L. REV. 743, 752–58 (2017) (examining the manner in which the Ho-Chunk Nation Judiciary incorporates tribal tradition and custom within its case law). However, a party may only appeal a trial decision to the Supreme Court, constituting the sole appellate level of review. HCN CONST. art. VII, §§ 5(b), 14.

6. HCN CONST. art. VII, § 5(a).

7. One can derive appellate case statistics from two publicly available resources. *Judicial Bulletin Archive*, HO-CHUNK NATION, https://ho-chunknation.com/government/judicial-branch/judicial-bulletin-archive (last visited Nov. 2, 2022); *Supreme Court Decisions*, HO-CHUNK NATION, https://ho-chunknation.com/government/judicial-branch/supreme-court-case-summaries (last visited Nov. 2, 2022); *see also supra* note 2.

precedential authority. Instead, a solitary appellate opinion can definitively direct and instruct trial level practice and decision-making for decades. And, when errantly rendered,[8] the consequences are wide-ranging

8. Over the course of twenty-seven years, the Supreme Court has partially overruled fourteen opinions. Topping v. Martin, SU 14-03, at 2–3 (HCN S. Ct. Jan. 16, 2015); Topping v. HCN Grievance Rev. Bd., SU 09-08, at 4–5 (HCN S. Ct. July 1, 2010); Brinegar v. HCN Grievance Rev. Bd., SU 09-09, at 2 (HCN S. Ct. Apr. 12, 2010); Funmaker v. HCN Grievance Rev. Bd., SU 09-04, at 3 (HCN S. Ct. Mar. 29, 2010); Litscher v. HCN Grievance Rev. Bd., SU 09-03, at 2 (HCN S. Ct. Mar. 16, 2010); Williams v. HCN Ins. Rev. Comm'n, SU 08-01, at 7 (HCN S. Ct. Oct. 29, 2008), *overruled in part by* Ho-Chunk Nation v. Christopherson, SU 15-03, at 8–10 (HCN S. Ct. Sept. 10, 2015) (refusing to defer to a trial level review of an administrative decision). Warner v. Ho-Chunk Nation, SU 09-02, at 7–8 (HCN S. Ct. Mar. 1, 2010); Ostrowski v. Ho-Chunk Nation, SU 06-04, at 2 (HCN S. Ct. June 1, 2007); Brown v. Webster, SU 06-03, at 1–2 (HCN S. Ct. Feb. 9, 2007); Twin v. McDonald, SU 05-09, at 6 (HCN S. Ct. July 3, 2006); Smith v. Ho-Chunk Nation, SU 03-08, at 4 (HCN S. Ct. Dec. 8, 2003); Schmolke v. Ho-Chunk Casino, SU 01-08, at 3–4 (HCN S. Ct. Dec. 8, 2001); Funmaker v. Doornbos, SU 96-12, at 2 (HCN S. Ct. Mar. 25, 1997), *overruled in part by Christopherson*, SU 15-03, at 6–8 (refusing to subject trial level findings of fact to an abuse of discretion standard of review); *see also* Lightstorming v. HCN Off. of Tribal Enrollment, SU 02-07, at 5 (HCN S. Ct. Dec. 20, 2002) (Butterfield, J., concurring) (addressing the appropriateness of the clearly erroneous standard of review); Abangan v. HCN Election Bd., SU 02-02 (HCN S. Ct. Mar. 25, 2002), *overruled in part by* Funmaker-Romano v. HCN Election Bd., SU 05-08, at 9 (HCN S. Ct. Aug. 3, 2005) (regarding interpretation of Election Ordinance evidentiary standard).

Additionally, several subsequently issued opinions have effectively abrogated significant portions of thirteen judgments. *Topping*, SU 14-03, at 3; Funmaker v. Dep't of Treasury, SU 11-04, at 10–11 (HCN S. Ct. Aug. 9, 2012); Twin v. HCN Grievance Rev. Bd., SU 10-04, at 4–5, 7–8 (HCN S. Ct. July 10, 2012); *Brinegar*, SU 09-09, at 5; *Funmaker*, SU 09-04, at 5–6, 8; *Litscher*, SU 09-03, at 5; White v. Day, SU 08-02, at 4 (HCN S. Ct. Aug. 4, 2008), *abrogated sub silentio in part by* Kirby v. Gallagher, SU 18-04, at 4 n.7 (HCN S. Ct. Oct. 24, 2018) (disputing constitutionality of predecessor administrative grievance model and corresponding statutory judicial standard of review); *Abangan*, SU 02-02, at 4; Youngthunder v. Pettibone, SU 00-05, at 2 (HCN S. Ct. July 28, 2000); Jones v. HCN Election Bd., SU 95-05, at 3 (HCN S. Ct. Aug. 15, 1995), *abrogated in part by* Mudd v. HCN Legislature, SU 03-02, at 4 (HCN S. Ct. Apr. 8, 2003) (changing appellate standard of review for questions of law); *see also Smith*, SU 03-08, at 5 n.3 (commenting on sequence of modification). Knudson v. HCN Treasury Dep't, SU 98-01, at 8–9 (HCN S. Ct. Dec. 1, 1998), *abrogated in part by Smith*, SU 03-08, at 9–10 (withdrawing judicial deference from executive branch employment decisions that are not the result of administrative rulemaking); Porter v. Lowe, SU 96-05, at 2 (HCN S. Ct. Jan. 10, 1997), *abrogated in part by* HCN Legislature v. Cleveland, SU 19-06, at 6 n.8 (HCN S. Ct. Mar. 29, 2021) (rejecting the notion that administration of an executive department necessarily constitutes performance of delegated legislative authority and further explaining that the earlier decision errantly

within a relatively small tribal community.[9]

For these identified reasons, while the Judiciary has acknowledged principles of *stare decisis*,[10] it has not

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invoked lack of standing instead of failure to exhaust administrative remedies). Decorah v. Ho-Chunk Nation, PRC 93-40 (HCN S. Ct. Feb. 22, 1996), *abrogated in part by* HCN Legislature v. Greendeer, SU 17-02, at 1–2 (HCN S. Ct. Apr. 7, 2017) (explaining that the earlier decision mistakenly rested upon mootness when lack of redressability proved at issue).

Finally, numerous other opinions contain legal interpretations or applications of law that remain in apparent conflict. *Compare* Krause v. HCN Election Bd., SU 21-03 (HCN S. Ct. Feb. 18, 2021) (declining to recuse despite existing collegial (fellow justice) and familial (first cousin) relationship with an interested party), *with* Funmaker v. HCN Election Bd., SU 05-06 (HCN S. Ct. May 27, 2005) (recusing due to existing collegial (fellow justice) relationship with a party); *see also* HCN JUDICIAL R. OF ETHICS § 4-2(D) cmt. ("[A] . . . justice should look to case law . . . in determining whether recusal is warranted."). *Compare* White Wing v. HCN Election Bd., SU 07-09, at 6 (HCN S. Ct. June 4, 2007) ("[T]he person seeking removal must allege that the official sought to be removed committed an act which arguably constitutes malfeasance."), *with* Lewis v. HCN Election Bd., SU 06-07, at 6 (HCN S. Ct. Mar. 12, 2007) ("By recognizing the General Council has the authority to decide what constitutes malfeasance in the first instance[,] the Court respects the authority of the General Council decision as a binding political question . . . ."). *Compare Lewis*, SU 06-07, at 3 (performing a *de novo* review of the trial court's issuance of a preliminary injunction), *with* Coalition for a Fair Gov't II v. Lowe, SU 96-02, at 7 (HCN S. Ct. July 1, 1996) (scrutinizing the grant of a preliminary injunction for an abuse of discretion since "this is not a review of the merits of any of the parties[']claims, since they have not had the opportunity to be fully presented to the trial court"). *Compare* Littlejohn v. HCN Election Bd., SU 03-07, at 3 (HCN S. Ct. July 11, 2003) ("[T]he current HCN Election Ordinance does not distinguish between general and special elections for purposes of holding a primary election."), *with* Greengrass v. HCN Election Bd., SU 99-03, at 2 (HCN S. Ct. June 30, 1999) (holding that the Legislature cannot modify the date of the General Election regardless of the number of candidates vying for an office). *Compare* Lowe v. HCN Legis. Members, SU 01-05, at 2 n.1 (HCN S. Ct. May 4, 2001) ("Parties should aver that the preservation of the appeal of the prior order is based upon [HCN R. Civ. P.] 58(B) so that this Court may rule accordingly."), *with* Smith v. Ho-Chunk Nation, SU 00-07 (HCN S. Ct. May 26, 2000) (denying appeal as untimely despite automatic extension of appellate timeframe due to filing of a post-judgment motion), *recons. denied*, SU 00-07 (HCN S. Ct. July 14, 2000).

9. Although anecdotal, the author has served as a jurist (at times in a *pro tempore* capacity) or in-house counsel for thirteen tribes over the course of a twenty-five-year legal career and, in general, these other tribes had either an equivalent or reduced appellate case load.

10. "*Stare decisis* is the policy of courts to stand by prior established precedent." HCN Election Bd. v. Mudd, SU 97-05, at 2 (HCN S. Ct. Oct. 28, 1997); *see also* Abangan v. HCN Dep't of Bus., CV 01-08, at 17 (HCN Tr. Ct. Mar. 25, 2003) (opining that the Supreme Court would reject a previous constitutional interpretation "only when confronted with an extraordinary change in

rigidly adhered to such strictures in practice.[11] The Supreme Court declines to perpetuate the impact of poorly reasoned and legally dubious case precedent even without an intervening profound change of circumstances. However, the Court must await an appropriate opportunity to act. A party must present a particular issue, which remains a justiciable concern,[12] for resolution or the Court must antecedently address an issue that impedes a full and necessary consideration of

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circumstances," i.e., "'some special reason over and above the belief that a prior case was wrongly decided'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992))); *cf. Sallaway v. HCN Election Bd.*, CV 07-47, at 11–12 (HCN Tr. Ct. June 27, 2007) ("The common law principle of *res judicata*, or claim preclusion, provides that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980))), *aff'd without comment*, SU 07-11 (HCN S. Ct. June 29, 2007); *Abangan*, CV 01-08, at 18–19 (discussing collateral estoppel, or issue preclusion).

11. Despite conceivable alternative argument, the Supreme Court will decline to relitigate issues that it has unambiguously and unerringly determined. *See* Josellis v. Field, SU 15-06, at 2 (HCN S. Ct. Apr. 1, 2015) (denying appeal since trial court correctly dismissed administrative action given the *stare decisis* effect of *Ho-Chunk Nation v. Christopherson*, SU 13-05 (HCN S. Ct. Nov. 21, 2013)); *infra* app. B, note 8.

12. As recently reaffirmed:

> The General Council has authorized the Trial and Supreme Courts to perform their principle constitutional function—interpretation and application of the law—in the context of justiciable disputes. Const. art. IV, § 2; *see also Henry Greencrow v. Ho-Chunk Nation et al.*, SU 12-04 (HCN S. Ct., Dec. 18, 2012) at 3–4 (linking the doctrine of justiciability with the constitutional case and controversy clause); *Loa L. Porter v. Chloris Lowe Jr.*, SU 96-05 (HCN S. Ct., Jan. 10, 1997) at 6 (acknowledging constraints imposed by justiciability doctrine). A justiciable dispute concerns a case or controversy "'appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.'" *Schottel v. Young*, 687 F.3d 370, 374 (8th Cir. 2012) (citation omitted). The Judiciary must refrain from attempting to resolve matters that do not constitute actual "cases and controversies . . . arising under the Constitution, laws, customs, and traditions of the Ho-Chunk Nation." Const. art VII, § 5(a).

Cleveland, SU 19-06, at 3 (footnote omitted); *see also* Decorah v. HCN Exec. & Legis. Branches, SU 20-01, at 5 n.3 (HCN S. Ct. Sept. 14, 2020) ("The trial court . . . need[s] to deduce facts substantiating the alleged harm; determine whether the harm [i]s actual or imminent and—if demonstrably present—ongoing; confirm that the plaintiff designated the proper party defendant(s); and assess whether it c[an] grant an adequate form of relief.").

an appeal.[13] Once properly before it, the Court will not typically refrain from attempting to rectify past errors because these possibilities do not happen with any regularity.

That being said, as reflected above, the Court has received ample opportunity to refine its jurisprudence on the margins, relating mostly to evidentiary burdens and standards of review.[14] The Court largely performed this task within election and employment disputes, which generally proceed to a determination on the merits absent timeliness concerns, e.g., running afoul of applicable statutes of limitation.[15] These cases usually advance through the Judiciary without much difficulty due to the presence of clear constitutional or statutory waivers of sovereign immunity.[16] Consequently, corresponding appeals do not characteristically afford the Court an ability to confront questions relating to constitutional or inherent authority, including jurisdictional issues and justiciability concerns. On occasion, however, ancillary questions to a central dispute will eclipse the principal disposition but, due to the nature of the predominant appellate caseload, do not—as already stated—readily reemerge on appeal.

In 2021, the Court received a rare chance to revisit two 1997 opinions, *In re Lonetree* and *Lowe*,[17] that had guided trial level practice throughout all stages from

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13. *Kirby*, SU 18-04, at 5 ("The Court previously avoided the constitutional issue it confronts in this opinion. . . . Neither appellants nor appellee raised the constitutional issue the Court addresses now, but . . . the Court could not exercise its authority without preemptively doing so in this case." (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

14. *See supra* note 8.

15. Statute of Limitations & Commencement of Claims Act, 2 HCC § 14.4(e)–(g) (2017).

16. *See* HCN CONST. art. VIII, § 7 (conferring constitutional standing upon any member to challenge election results within ten days after certification); Employment Relations Act of 2004, 6 HCC § 5.38(e) (2022) (permitting an employee to seek judicial review of certain administrative determinations affecting employment).

17. Lowe v. Ho-Chunk Nation, SU 97-01 (HCN S. Ct. June 13, 1997); *In re* Lonetree, SU 96-16 (HCN S. Ct. Apr. 14, 1997).

initial pleading to enforcement of a final judgment. Each of these earlier opinions pertained to disputes regarding elective office, but only tangentially so. The constitutionally significant issues addressed within each did not reappear and garner judicial attention despite an intervening two decades of appellate consideration of alleged election irregularity, challenged employee discipline, and various other causes of action.

Quite fortuitously, these two seminal opinions figured prominently in successive appeals arising out of a 2020 intragovernmental conflict between the executive and legislative branches.[18] Part II recounts the history of the 1997 precedent opinions. Part III provides the legal and practical backdrop of the 2020 dispute. Part IV offers some commentary upon tribal jurisprudential development as exemplified here. The author's concurring opinion in *Thundercloud v. Ho-Chunk Nation Executive Branch*,[19] where he discusses the extension of the defense of sovereign immunity from suit to official capacity actions, and the decisional component rendered by the author in *Ho-Chunk Nation Legislative Branch v. Ho-Chunk Nation Trial Court*,[20] where he assesses the vitality of a civil contempt fine following resolution of an underlying suit, follow the article.

II. THE MISSTEP—1997 CASES

The *Lonetree* opinion emanated from a suite of cases, which still serve as the doctrinal foundation of the court

18. *See generally* Complaint, HCN Exec. Branch v. HCN Legis. Branch, CV 20-05 (Aug. 27, 2020).

19. Thundercloud v. HCN Exec. Branch, SU 20-05, at 15–23 (HCN S. Ct. Dec. 15, 2021) (Matha, C.J., concurring). The opinion appears in its entirety in Appendix A, *infra*. The author has modified the citation format for purpose of publication.

20. HCN Legis. Branch v. HCN Trial Ct., SU 20-04, at 4–15 (HCN S. Ct. Apr. 27, 2022). The opinion appears in its entirety in Appendix B, *infra*. The author has modified the citation format for purpose of publication.

system.[21] Following adoption of a new election code,[22] the Nation conducted its initial election under the successor constitution on June 6, 1995,[23] and litigation quickly ensued.[24] One of the cases involved allegations of campaign impropriety as legislative candidate Gail L. Funmaker accused fellow candidate Diane S. Lonetree of improperly using governmental property for personal advantage.[25] Ms. Funmaker sought to compel her opponent's testimony, along with a production of documents, at an evidentiary hearing, securing a subpoena for such purpose.[26] Ms. Lonetree, however, did not comply with the subpoena in any respect, and the trial court consequently proceeded against her for contempt of court.[27] Statutory law acknowledged the court's possession of contempt authority,[28] but no procedural guidance yet existed for the fledgling court.[29] Ultimately, the Supreme Court overturned the trial level

21. *Lonetree*, SU 96-16.

22. HCN CONST. art. VIII, § 3 (requiring codification of election procedures at least 120 days prior to first election); *see also* Election Code, 2 HCC § 6 (2022) (adopting original version on February 10, 1995).

23. *See supra* note 5.

24. The trial court received six separate timely election challenges. *See, e.g.*, Jones v. HCN Election Bd., SU 95-05 (HCN S. Ct. Aug. 15, 1995) (concerning application of new majority vote requirement); Funmaker v. HCN Election Bd., CV 95-10 (HCN Tr. Ct. July 7, 1995) (presenting equivalent concern and also alleging misuse of governmental property by another candidate, who eventually won legislative office). The Judiciary has since entertained election challenges in nearly every election cycle. *See, e.g.*, Krause v. HCN Election Bd., SU 21-03 (HCN S. Ct. Mar. 2, 2021) (declining to overturn candidacy certification decision in most recent general election).

25. *Lonetree*, SU 96-16, at 1–2 (citing *Funmaker*, CV 95-10).

26. *In re* Lonetree, CV 95-24, at 1 (HCN Tr. Ct. Dec. 18, 1996).

27. *Id.* at 1, 4.

28. HCN Judiciary Establishment & Org. Act, 1 HCC § 1.7 (2017) ("The failure to comply with a subpoena shall subject the person not complying to the contempt power of the Court.").

29. *See, e.g.*, HCN R. CIV. P. (adopting civil rules on May 11, 1996, after appellate court empaneled in 1995 election). Judicial rules are accessible in current form on the tribal website at https://ho-chunknation.com/government/judicial-branch/judicial-rules/ (last visited Nov. 2, 2022); *see also* HCN CONST. art. VII, § 7(b) (conferring power upon the Supreme Court "to establish written rules for the Judiciary").

contempt finding, opting to incorporate federal case law, which proved determinative.[30]

Prior to fully resolving each dispute arising from the 1995 election, the membership chose to jettison the election's most high-profile victor. On January 11, 1997, the General Council removed President Chloris A. Lowe Jr. from office,[31] resulting in the organization of a *pro tempore* administration and preparation for an early presidential election that would align with an already scheduled general election.[32] The second influential appellate opinion at issue in this article resulted from President Lowe's attempt to enjoin these occurrences by bringing suit against the Nation and two governmental sub-entities.[33] The Supreme Court upheld the trial court's denial of a preliminary injunction given the retained sovereign immunity of the defendants,[34] but, in *dicta*, opined upon the manner in which to properly file suit against a governmental official,[35] including conjecture, in a footnote,[36] about the type of immunity implicated in such an action.

In each decision, the Court somewhat reflexively analogized to foreign case law to aid in its initial interpretation of certain tribal constitutional and statutory provisions. The absence of any directly correlative Ho-Chunk tradition or custom served to justify adopting another sovereign's doctrinal approach

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30. *Lonetree*, SU 96-16, at 3 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)). The Court has subsequently rejected this assessment. HCN Legis. Branch v. HCN Trial Ct., SU 20-04, at 7–11 (HCN S. Ct. Apr. 27, 2022).

31. President Lowe had served less than half of his elected term of office, which began on September 13, 1995, following resolution of only the third appeal filed in the Supreme Court. Jones v. HCN Election Bd., SU 95-05 (HCN S. Ct. Aug. 15, 1995); *see also* HCN CONST. art. VI, § 5 (designating a four-year presidential term); *supra* note 4.

32. HCN CONST. art. IX, §§ 2, 9 (describing manner of presidential succession after removal for malfeasance).

33. Lowe v. Ho-Chunk Nation, SU 97-01, at 1–2 (HCN S. Ct. June 13, 1997).

34. *Id.* at 2–4 (citing HCN CONST. art. XII, § 1); *see infra* note 53.

35. *Lowe*, SU 97-01, at 4 (citing HCN CONST. art. XII, § 2); *see infra* note 53.

36. *Lowe*, SU 97-01, at 4 n.2; *see infra* app. A, note 12 and accompanying text. This author has since attempted to address the proper manner of approaching these issues. *See also supra* note 19.

to governmental immunities and judicial contempt. In doing so, the Court did not apparently perform a deliberate and exhaustive examination of the borrowed authority, thereby failing to adequately appreciate the development of the relevant jurisprudential principles. Without a firm command of pertinent doctrinal evolution, the inherent risks associated with incorporating and synthesizing external legal concepts dramatically increase. The Court misapplied or misconstrued such concepts in 1997 due to its seeming reluctance to perform this essential inquiry.

III. A REAPPEARANCE—2020 CASES

The President of the Ho-Chunk Nation possesses authority "to propose . . . an annual budget to the Legislature,"[37] and the legislative branch maintains the power "[t]o authorize expenditures by law and appropriate funds to the various Departments in an annual budget."[38] Typically, the budgetary process extends from at least January 15 until June 25, culminating in passage of an annual budget prior to the beginning of the fiscal year on July 1.[39] However, 2020 was not a typical year.

In early March 2020, the tribal newsletter reported that "[a]t this time there are no suspected or confirmed cases of COVID-19 in our jurisdiction,"[40] but by the next publication the front-page story advised, in part, as follows:

> President Marlon White Eagle declared a state of emergency . . . on March 13 . . . , includ[ing] limitations on employment related travel . . . and other . . . social interaction. . . . On March 17,

37. HCN CONST. art. VI, § 2(c).

38. *Id.* art. V, § 2(d). "The Legislature shall enact an annual budget." *Id.* art. V, § 13.

39. Appropriations & Budget Process Act, 2 HCC § 4.4h, 4.5b(1)(b), 4.5h (2022).

40. HCN Health Dep't, *Monitoring the Novel Coronavirus*, HOCĄK WORAK, Mar. 13, 2020, at 5.

> President White Eagle signed orders for all Ho-Chunk Gaming sites to transition to critical functions . . . no later than March 20 at midnight . . . , clos[ing] all gaming facilities to the public. . . . On March 19, President White Eagle released a memo to tribal members . . . , announc[ing] that the Nation is working on suspending government operations with the following measures taken: layoff plans developed to reduce payroll expenses; services being transitioned to critical only; a task force designed to address any possible federal or state aid; all contracting and purchasing . . . suspended for non-emergency services or goods; and an immediate hiring freeze.[41]

The Nation's casino enterprises did not begin to gradually reopen until May 27, 2020.[42]

Against this backdrop, the legislative branch adopted continuing budget resolutions, subsequently explaining to the membership that such measures derived from "closing the casinos for three months and working through th[e] pandemic."[43] The executive branch took exception to this practice and requested a preliminary injunction from the trial court to forestall passage of the second successive resolution.[44] The trial court granted an *ex parte* temporary restraining order

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41. Ardith Van Riper, *COVID-19 Causes Ho-Chunk Nation Policy and Procedure Adaptations*, HOCĄK WORAK, Mar. 27, 2020, at 1.

42. Ardith Van Riper, *Madison Casino Reopens in Phases*, HOCĄK WORAK, June 12, 2020, at 1. Ho-Chunk Gaming—Nekoosa followed on June 16, *id.*, and the remaining facilities opened for business on June 29, 2020. Ardith Van Riper, *Three Ho-Chunk Gaming Facilities Reopen June 29*, HOCĄK WORAK, June 26, 2020, at 1. The Nation operates three primary gaming facilities and several ancillary sites. Wisconsin Winnebago Tribe and State of Wisconsin Gaming Compact of 1992 § XXVII(B), https://doa.wi.gov/Gaming/HCN_Compact.pdf (last visited Nov. 2, 2022); Notice of Approved Tribal-State Compact, 57 Fed. Reg. 34,654-01 (Aug. 5, 1992).

43. Karena Thundercloud, *The Vice President's Statement on the Recent Budget Controversy*, HOCĄK WORAK, Sept. 25, 2020, at 2.

44. The plaintiffs named the legislative branch and each of its elected representatives, in their "individual and official capacity," as defendants. Complaint at 1, HCN Exec. Branch v. HCN Legis. Branch, CV 20-05 (Aug. 27, 2020).

the day after the request.[45] Yet, less than twenty-four hours later, the Legislature adopted a sixty-three-day continuing budget resolution at a special meeting called by Vice President Thundercloud, prompting the trial court to proceed against her for contempt of court.[46] The opinion appearing in Appendix B represents the Supreme Court's resolution of a challenge to the issuance of a civil contempt fine against this elected representative.[47]

The trial court issued its final substantive judgment on the constitutional issues on October 29, 2020,[48] and an appeal followed on December 28, 2020.[49] Notably, the trial court opted to remove the Legislature from the action since it possessed sovereign immunity from suit, which it had not waived.[50] The Supreme Court later criticized this omission because the trial court should have formally dismissed the institutional party.[51] Furthermore, despite the omission, the trial court proceeded only to adjudicate actions taken by the Legislature without independently finding that its representatives acted outside the scope of their respective authorities.[52] The Chief Justice's attempt to clarify the Judiciary's approach to sovereign immunity,[53]

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45. HCN Exec. Branch v. HCN Legis. Branch (*TRO*), CV 20-05 (HCN Tr. Ct. Aug. 28, 2020). An interlocutory appeal followed, but the Supreme Court refused to accept. HCN Legis. Branch v. HCN Exec. Branch, SU 20-03 (HCN S. Ct. Sept. 15, 2020).

46. HCN Exec. Branch v. HCN Legis. Branch (*Contempt Order*), CV 20-05 (HCN Tr. Ct. Sept. 28, 2020).

47. HCN Legis. Branch v. HCN Trial Ct., SU 20-04, at 4–15 (HCN S. Ct. Apr. 27, 2022).

48. HCN Exec. Branch v. Thundercloud (*Final Judgment*), CV 20-05 (HCN Tr. Ct. Oct. 29, 2020).

49. Notice of Appeal, Thundercloud v. HCN Exec. Branch, SU 20-05 (Dec. 28, 2020).

50. *Final Judgment*, CV 20-05 at 1 n.1 (citing HCN CONST. art. XII, § 1).

51. Thundercloud v. HCN Exec. Branch, SU 20-05, at 5–7 (HCN S. Ct. Dec. 15, 2021) (citing HCN R. CIV. P. 56(B) (concerning involuntary dismissal)).

52. *Id.* at 7–9 (citing HCN CONST. art. XII, § 2).

53. The constitutional sovereign immunity article provides, in relevant part, as follows:

> Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly

including its differentiation from official immunity, appears in Appendix A.

IV. THE ATTEMPT AT CORRECTION

A multitude of reasons could exist to explain the presence of any notable aberration in tribal appellate precedent. Speculation upon such causes would remain just that, speculation, and likely not improve one's grasp of a particular given instance.[54] Nonetheless, a tribal court's adoption and application of foreign legal concepts, doctrines, and principles within its case law would expectedly yield many attendant complications. If a perceived compulsion to do so exists, it probably results from the presence of tribal constitutional and statutory provisions improbably, although understandably, derived from a separate legal tradition.[55] A tribal appellate court's attempt, no matter how conscientious, to coalesce different—and, at times, conflicting—common law strands will likely produce errant outcomes. The cases addressed in this article seemingly support this proposition.

> waives its sovereign immunity, and officials and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit. . . .
>
> Section 2. Suit Against Officials and Employees. Officials and employees of the Ho-Chunk Nation who act beyond the scope of their duties and authority shall be subject to suit in equity only for declaratory and nonmonetary injunctive relief in Tribal Court by persons subject to its jurisdiction for purposes of enforcing rights and duties established by this constitution or other applicable laws.

HCN CONST. art. XII, §§ 1–2.

54. *See* Matha, *supra* note 5, at 755–56 (articulating the unique difficulties encountered by a fledgling tribal judiciary).

55. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985) (describing level of uniformity in constitutional provisions adopted by tribes shortly following passage of the Wheeler–Howard Act as "the Bureau of Indian Affairs . . . assist[ed in] the drafting of tribal constitutions" (citing Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (codified as amended at 25 U.S.C. § 5123(a)–(b), (e) (2018)))); *see also* Matha, *supra* note 5, at 751–52 (identifying propensity of "tribal constitutional drafters, legislators, and voters [to] either choose or sanction the inclusion of foreign concepts within the written law").

When a significant and substantive error occurs, a tribal appellate court is chiefly, if not solely, responsible for discovering and then remaining cognizant of the mistake. At Ho-Chunk, justices serving on successive compositions of the appellate panel have diligently and frequently reviewed case precedent, which the Supreme Court has regrettably maintained in less than optimal archival systems. Despite the existence of only a quarter-century of compiled case law, this has become an increasingly arduous task.[56] Moreover, the Court cannot rely upon the surrounding legal community for insightful analysis or commentary, which distinguishes its experience from that of federal and state counterparts.[57] Even within recent, relevant appellate filings, tribal counselors made no deliberate argument to depart from the faulty guidance presented in the 1997 decisions.[58]

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56. *See supra* notes 2, 7 and accompanying text.

57. During the entire history of the Supreme Court, neither law school located within close geographical proximity to the Nation, University of Wisconsin Law School and Marquette University Law School, has published a single law review article offering a critical examination of Ho-Chunk case law. The Wisconsin Lawyer, the official publication of the State Bar of Wisconsin, has not done so either. Currently, thirty-four licensed attorneys compose the tribal bar, excepting fifteen tribal counselors, but the tribal bar has never conducted or facilitated a continuing legal education seminar or periodic symposium. Mary F. Thunder, Clerk of Court, Ho-Chunk Nation Tribal Court Bar Association: 2022-2023 Updated Bar Membership List (Nov. 1, 2022). The Judiciary has instead conducted recurrent CLE events. *See, e.g.*, *Ho-Chunk Nation Judiciary Hosts 17th Annual Law Day*, HO-CHUNK NATION COURT BULLETIN, Sept./Oct. 2012, at 1. The author makes these observations only to emphasize the relative isolation of the Court in the performance of its function.

58. Concerning immunity, Legislative Counsel criticized the trial court for failing to assess whether individual legislators acted outside the scope of their authority, but did not initially ascribe a particular type of immunity to these officials. Notice of Appeal, Thundercloud v. HCN Exec. Branch, SU 20-05, at 6–7 (Dec. 28, 2020). The appellants later noted that absent such a finding, "the Legislators [we]re cloaked in the Nation's sovereign immunity and not subject to suit." Initial Brief, SU 20-05, at 16 (Feb. 11, 2021) (citing HCN Legislature v. HCN Gen. Council, CV 01-11, at 16 (HCN Tr. Ct. June 22, 2001)). However, the cited trial level decision does not represent persuasive authority for this declaration. In 2001, the trial court alternatively held that the Legislature could not obtain redress against former General Council officials who maintained no ongoing constitutional responsibilities, resulting in a lack of justiciability. *HCN Legislature*, CV 01-11 at 16; *see also* HCN CONST. art. IV, § 7 (describing selection of officers to conduct a particular meeting, record minutes, and subsequently transmit a record). Appellees' counsel, in contrast, identified the

In *Lonetree*, the Court overturned a finding of contempt against a successful legislative candidate who failed to comply with a trial court subpoena in a 1995 election dispute. The trial court had required the contemnor to complete a modest amount of community service primarily intended to educate the contemnor and the electorate. The contempt sanction, therefore, resembled a civil, remedial measure, although the Judiciary had not yet erected clear distinctions between civil and criminal contempt procedure or associated substantive outcomes.[59]

The *Lonetree* Court grounded its opinion upon resort to and incorporation of U.S. Supreme Court precedential authority. Regrettably, the analogized decision shared little in common with the factual record before the Court. In *Gompers v. Bucks Stove & Range Company*, the U.S. Supreme Court held that a predominantly punitive contempt penalty (incarceration) could not result from a civil process that did not afford the contemnor mandatory constitutional protections.[60] The U.S. Supreme Court then conjectured that even had a civil penalty resulted, a hypothetical remedial fine could not have survived an earlier mutual settlement of claims that neither preserved nor referenced the penalty.[61]

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immunity possessed by individual legislators as "official immunity." Response Brief, SU 20-05, at 16–17 (Mar. 15, 2021) (quoting Cleveland v. Garvin, CV 08-36, at 18 (HCN Tr. Ct. Feb. 2, 2009)).

Regarding the contempt power, Legislative Counsel argued for an extension of the errant decision. Initial Brief, SU 20-04, at 6–7 (Jan. 18, 2022) ("[T]he contempt action against the Vice President is mooted by virtue of the Supreme Court's 1997 [d]ecision . . . , which held that a civil contempt proceeding in the Nation's Court becomes moot upon termination of the underlying action." (citing *In re* Lonetree, SU 96-16, at 3 (HCN S. Ct. Apr. 14, 1997))). The Attorney General countered by first conceding that "*In re Diane Lonetree* was correctly decided and determined in 1996 [sic] . . . ." Response Brief, SU 20-04, at 6 (Feb. 17, 2022). He then separately contended that subsequent passage of a contempt ordinance effectively overturned the decision. *Id.* at 6–7.

59. *Lonetree*, SU 96-16, at 2–3; *see infra* app. B, notes 14, 30 and accompanying text.

60. 221 U.S. 418, 444–49 (1911); *see infra* app. B, notes 18–23 and accompanying text.

61. *Gompers*, 221 U.S. at 451–52; *see infra* app. B, note 25 and accompanying text.

While numerous distinctions (none particularly susceptible to a characterization as nuanced) separated the federal and tribal cases, including a brokered settlement versus a trial adjudication, a general, misguided principle restricting the civil contempt process to the duration of any underlying matter persisted for decades at Ho-Chunk. In this regard, the resulting rule practically eliminated the possibility of exercising an inherent power within relatively short-lived cases, such as election disputes.[62] The Court, therefore, did not subsequently perceive any obligation to follow tribal precedent,[63] and it did not hesitate in 2022 to severely diminish *In re Lonetree* despite each party acknowledging its legitimacy.[64]

The Court offered a second confused interpretation of a foreign doctrine in 1997's *Lowe* decision. The Court easily dispensed with the appeal, upholding the trial court's denial of a requested preliminary injunction due to the existence of defendants' sovereign immunity from suit.[65] The Court unfortunately proceeded to comment on the nature of the tribe's constitutional immunity provisions, asserting that official—rather than sovereign—immunity afforded protection to officials and employees against suits for prospective, non-monetary injunctive relief.[66] A corresponding discussion regarding the need to formally name individual defendants,[67] coupled with a general understanding that official immunity offers protection in individual capacity

62. *See supra* note 16.

63. HCN Legis. Branch v. HCN Trial Ct., SU 20-04, at 11 (HCN S. Ct. Apr. 27, 2022); *see infra* app. B, note 33 and accompanying text.

64. *See supra* note 58.

65. Lowe v. Ho-Chunk Nation, SU 97-01, at 3–4 (HCN S. Ct. June 13, 1997).

66. *Id.* at 4 n.2 (citing HCN CONST. art. XII); *see also supra* note 53.

67. *Lowe*, SU 97-01 at 4.

actions,[68] has since confounded trial and appellate level practice.[69]

In 2021, this author attempted to untangle the intervening precedent within a concurring opinion.[70] The issues proved tangential to the central holding, and, therefore, the full appellate panel has not sanctioned the new, albeit long overdue, approach, i.e., correction.[71] Consequently, the confusion engendered by a single 1997 footnote, constituting mere *dicta*, remains.[72]

As the preceding overview demonstrates, an appellate court declaration, whether a holding or passing comment, can either frustrate or proliferate jurisprudential development. When these declarations amount to errant statements of law, the impact can be profound. A tribal appellate court must remain vigilant in its effort to discern past deficiencies and not avoid opportunities to self-correct. A relative scarcity of such chances within many tribal settings confirms the continual and crucial significance of this undertaking.

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68. Thundercloud v. HCN Exec. Branch, SU 20-05, at 20–21 (HCN S. Ct. Dec. 15, 2021) (Matha, C.J., concurring); *infra* app. A, notes 27–29 and accompanying text.

69. *See, e.g.*, *supra* note 58 (citing contrary trial level positions on the application of immunities).

70. *Thundercloud*, SU 20-05, at 15–23 (Matha, C.J., concurring); *infra* app. A.

71. *Thundercloud*, SU 20-05, at 10 ("The majority opinion does not need to resolve this matter because whether the individually-named legislators acted beyond the scope of his or her [sic] duties or authority will be dispositive for purposes of this appeal.").

72. Notice of Appeal, HCN Att'y Gen. Seifert v. HCN Legis. Branch, SU 22-04, at 4 (Sept. 29, 2022) ("The [t]rial [c]ourt's decision errantly addressed sovereign immunity, which indicated that it followed SU 20-05. However, the Appellants contend that the SU 20-05 concurrence is apt."). The Attorney General insisted that his office presented a cognizable cause of action by alleging an unconstitutional action of a tribal official. *Id.* (citing *Thundercloud*, SU 20-05, at 21–22 (Matha, C.J., concurring)); *infra* app. A, notes 30–33 and accompanying text. *But see* HCN Att'y Gen. Seifert v. HCN Legis. Branch, CV 22-11, at 12–15 (HCN Tr. Ct. July 29, 2022) (containing trial court's assessment of the constitutional immunity provisions in the wake of the *Thundercloud* opinion). The Supreme Court ultimately rejected the appeal since untimely filed, thereby preserving these issues for a later date, perhaps much later. *Siefert*, SU 22-04 (HCN S. Ct. Oct. 12, 2022).

V. CONCLUSION

The above-referenced and scrutinized opinions demonstrate the critical importance of carefully and skillfully considering each issue (many expectedly of first impression) presented for appellate review,[73] particularly when deciding to incorporate "analogous" foreign authority that will not perfectly align with tribal constitutional, statutory, or traditional law. As discussed, legal imprecision has served to complicate and impede practice in the Ho-Chunk Nation Judiciary for nearly its entire existence. Out of necessity, litigants adopted a scattershot approach to pleading matters involving the government and its agents, and the trial court was left to perform various machinations while attempting to comply with a doctrinal pronouncement appearing in a single confounding footnote.[74] Similarly, in regard to contempt, inexpert and undue reliance upon a seminal federal opinion confused the exercise of an inherent judicial authority.[75] The Judiciary partially resolved these matters after twenty-five years, and, going forward, its legal footing will hopefully remain a little more firm. From this experience, a somewhat counterintuitive instruction emerges: a tribal judiciary cannot hastily bypass precedential review opportunities, regardless of prudential limitations to the contrary,[76] because chances to improve may prove few and far between.

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73. "Tribal law often demands more than a primary, secondary, or even tertiary analysis." Matha, *supra* note 5, at 760.

74. *See supra* app. A, notes 12, 14 and accompanying text.

75. Following *Lonetree*, the trial court lacked assurance that a contempt sanction arising in a given case could extend beyond entry of any parallel final judgment. *See supra* app. B, note 16 and accompanying text.

76. *See supra* note 10.