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L A W O F F I C E S

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## MEMORANDUM

DATE: September 12, 2005  
TO: Delaware Nation  
FROM: Steven D. Sandven, Esq.  
RE: **ARTICLE XI – REMOVAL**

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### *Purpose*

The numerous tribes undertaking constitutional revisions are hoping to create more effective and culturally-appropriate governments. However, successful processes of reform have been hindered by a variety of universal challenges - including political obstacles to changing the status quo and insufficient mechanisms for resolving conflict. A major area of concern in Constitutional reform includes avoidance of an overabundance of recall elections of council members. Problems associated with recall and removal provisions are not only disruptive of day-to-day government but personally destructive to those forced to defend themselves against frivolous claims. Hence, the ideal removal/recall provision allows elected officials leeway in the performance of their official duties without fear of removal but does not make it difficult to remove an inept official.

To meet the balance required for effective government, Tribes use a variety of procedures to maintain a check on their leadership. Many allow the Council itself to judge its members through removal procedures. Others allow the general membership to remove leaders pursuant to recall procedures. Further, each Tribe has developed their removal/recall procedures to reflect their traditions and local needs.

### *Currently Reads*

The executive committee shall enact an ordinance providing for the removal of members of that body. Included shall be procedures for the accused to confront his accusers and speak on his behalf in answer to a written statement of charges at a special executive committee meeting,

called for that purpose. The accused shall be provided with such written charges at least fifteen (15) days in advance of the removal meeting.

***Other Tribes (Examples of Removal by the Legislature)***

Miami Tribe of Oklahoma

The procedures set out in the ordinance shall be used in removal proceedings by each of the elected or appointive bodies. Included in the ordinance shall be procedures for the accused to confront his/her accusers and speak on his/her behalf in answer to a written statement of the charges at a Special meeting of the affected body called for that purpose. The accused shall be provided with a written statement of charges at least fifteen (15) days prior to the removal meeting. Such ordinance shall further provide that only one (1) person from any governmental body of the Tribe shall be considered for removal at any meeting called for that purpose. Should the process result in removal, no further removal shall be considered until the vacancy has been filled. Any Tribal member who has knowledge of wrongdoing by a Tribal official may file such charges with the appropriate body. In the event the accused or the accuser requests an investigation into the matter, it shall be the duty of the Grievance Committee to conduct such investigation and within twenty (20) days provide its findings to the affected body for its use in making a final determination. "Due Process of Law" will be followed and any violation shall be grounds for dismissal of all charges or accusations. The Miami Tribe will observe the "Indian Civil Rights Act" during the proceedings.

Otoe-Missouria Tribe

Any elected or appointed official found guilty in a court of competent jurisdiction, or by the Tribal Council, of behavior involving misconduct reflecting on the dignity and integrity of the tribal government, malfeasance in office, or gross neglect of duty, may be removed from office if at least four (4) members of the Tribal Council vote in favor of such removal. Voting must be by secret ballot and the Chairman is entitled to vote. If the accused is a Tribal Council member, he/she shall have the right to vote by secret ballot. Before, the vote for removal is taken, the accused tribal official shall be given a written statement of the charges at least ten (10) days before the Tribal Council meeting at which he or she is to appear, and shall be given an opportunity to answer any and all charges at such meeting. Any removed member of the Tribal Council or Election Board shall not be returned to office unless subsequently elected by the Tribe's qualified voters. No member of the Tribal Council shall call or preside over the meeting at which his or her removal is being considered. The decision of the Tribal Council shall be final.

Citizen Potawatomi

Any elective body of the Tribe, and the Supreme Court in the case of any judicial officers, shall remove any of its members from office for misconduct in office, as defined in the Recall and Removal Ordinance, or upon conviction of such member by any court of competent jurisdiction of a felony or other offense involving dishonesty or moral turpitude, or if such member becomes

ineligible to hold his office under this Constitution, by a unanimous vote of the remaining members of the body. Such removal action shall be taken only upon proof by clear and convincing evidence at a formal hearing during which a verbatim transcript and record of the proceeding is made, and at which the party complained of shall have the right to not less than thirty (30) days notice, the right to counsel at his own expense, the opportunity to cross examine witnesses, introduce any evidence in his favor, and to otherwise be accorded due process of law. A person removed in such a proceeding shall have the right to appeal the removal directly to the Supreme Court. During such appeal, which shall be expedited by the Court, the officer shall be deemed suspended but not removed from office until a final decision of the Court. For purposes of this Article, removal of an Executive Officer from the Business Committee shall also be deemed a removal from his Executive Office whether or not stated in the removal action.

#### Yavapai-Apache

The Tribal Council may suspend or remove a council member for the following reasons so long as the actions in question take place during the council members term of office: (1) Failure to attend three (3) regular or special meetings consecutively absent good cause as defined by ordinance including isions for leave for the following reasons: sickness, vacation, death in the immediate family, failure to receive adequate notice of the meeting. (2) Final conviction by any Tribal, Federal, or State Court of any of the following offenses: 1) felonies; 2) any sex related crimes; 3) drunk and disorderly conduct or its equivalent; 4) three misdemeanors while serving on the tribal council; 5) contempt of court. A Tribal Council member appealing a conviction shall be suspended pending the outcome of the final appeal.

#### ***Examples of delegation to the Judicial Branch***<sup>1</sup>

#### Chickasaw Nation

Any elected official shall be subject to impeachment for willful neglect of duty, corruption in office, habitual drunkenness, incompetency, becoming incapable of performing his duties or any offense involving moral turpitude while in office. Upon submission to the Judicial Department of a valid petition, stating the cause of action, and signed by not less than twenty-five percent (25%) of the registered voters residing within the district or area from which the official was elected, it shall be the duty of the Judicial Department to determine the validity of the charges and file formal impeachment charges. The accused shall be entitled to a hearing by the Tribal Legislature under rules and procedures prescribed by same. The accused shall be suspended from the exercise of duties of his office during the pendency of his impeachment proceedings. The Tribal Legislature shall appoint a prosecutor to present the charges before the Tribal Legislature. Such

<sup>1</sup>Tribal constitutions that delegate the removal authority to the judiciary are rare. Only five of the 150 constitutions reviewed for this memorandum allowed the judicial branch oversight of allegations of official misconduct. Of these five, two tribes allowed the judiciary to rule on the merits of the claims and the governing body made the final decision for removal.

prosecutor shall be a citizen of the Nation and shall not be employed or hold office in the Nation. The Tribal Legislature shall sit as a court in all cases of impeachment and its decision shall be final.

### *Examples of delegation to Committees*

#### Sac and Fox

There shall be a Grievance Committee which shall consist of three (3) members of the Governing Council who shall be elected by secret ballot. The Grievance Committee, under such procedures as shall be provided by the Governing Council, shall hear complaints of misconduct in office by members of the Business Committee and upon a showing of probable cause, shall call a special meeting of the Governing Council to act upon such complaints and shall undertake such other duties as may be assigned by tribal law. The Governing Council shall have power, by a two-thirds (2/3) majority vote by secret ballot taken after giving the accused a hearing, to remove him from office. The Chairman of the Grievance Committee shall preside at all meetings of the Governing Council for the purpose of considering the removal of a Business Committee member.

### *Example of IRA-influenced provision*<sup>2</sup>

#### Yup'ik People of Bill Moore's Slough, Alaska

Any Council Member shall be subject to recall by an 80% majority vote of all members of Bill Moore's Slough eligible to vote as set forth in Article XI Section C upon a finding that the Council Member has violated or ignored the articles or the intent of this constitution.

In summary, the preceding examples display that the majority of tribal constitutions do not reflect the needs of each community. Issues to be determined by tribal government include: 1) how much due process should the accused be afforded; 2) what offenses to include, i.e. gross neglect, official misconduct; 3) Will the accused be allowed to retain legal representation; 4) Should the accused be given the opportunity to appeal; and 5) if allowed an appeal, should the court or the general membership be the final judge.

## **RECALL PROCEDURES**

Unlike removal procedures, recall procedures are quite similar from tribe to tribe. The primary difference is the percentage of the general membership required to initiate the recall of the officer.

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<sup>2</sup>Many tribal constitutions still contain the IRA influenced language of the 1930's. Such provisions were adopted by federal officials who had little knowledge about the various cultures of the tribal communities. Hence, the provisions are generic and susceptible to interpretation leading to prolonged court battles.

## *Examples of Recall Procedures*

### Passamaquoddy Tribe

Any member of the Pleasant Point Governor and Council shall be recalled from office by a majority vote of the eligible voters of the Pleasant Point Reservation voting in a special election. The Governor and Council shall call and hold a special election to recall any member of the Governor and Council upon a written petition from the eligible voters of Sipayik to the Tribal Clerk signed by at least fifty percent of the number of persons voting at the last Pleasant Point Gubernatorial Election. A separate petition for recall shall be drawn for each official to be considered for recall and shall contain a statement of the specific charges against that official. The Governor and Council shall select a date, time and place for a public hearing on the matters set forth in a petition or petitions and shall provide written notice to each official to be considered for recall. The notice shall contain a copy of the written petition naming that official, and shall be provided at least seven days prior to the time set for the public hearing. The Tribal Clerk shall carry out the provisions of this subsection if the Governor and Council fail to do so within ten days of the submission of a recall petition. Notwithstanding any other provision of this Constitution, any tribal official recalled from office shall be ineligible to be a candidate in any special election to fill the vacancy created by the recall, and in the next general election for the same office.

### Eastern Shawnee of Oklahoma

The eligible voters of the Eastern Shawnee Tribe shall have the right to recall any elected tribal official by submitting a petition with the Secretary of the Election Board, or his or her authorized representative, signed by at least thirty-percent (30%) of the total number of registered voters who cast ballots in the general election immediately preceding the submission of the recall petition, but thirty-percent (30%) shall be no less than one hundred (100) registered voters. Within five (5) days of the submission of the petition, the Secretary of the Election Board shall verify in writing that the petition is valid under the terms of the Election Ordinance and must then deliver said petition and written verification to the presiding chair of the Business Committee prior to the next regularly scheduled Business Committee meeting at which time it shall become a priority matter on the agenda for that meeting. Should the Secretary of the Election Board find that a recall petition is invalid he or she shall return the petition with a written explanation of its deficiencies and that it may be resubmitted once the deficiencies have been corrected. Upon receipt of the petition and written verification, it shall be the duty of the Business Committee to immediately issue a resolution directing the Election Board to hold a special election for recall. A copy of the petition for recall, the written verification and the resolution shall be served by the Secretary of the Business Committee, by return receipt mail, on the Chairperson of the Election Board within two (2) business days of the date of issuing said resolution and such service shall constitute notice on the Election Board for purposes of compelling the Election Board to set a special election for recall within no less than sixty (60) days but no more than ninety (90) days after receipt of said resolution. Thereafter, the Election Board shall conduct said special election following procedures set forth in the Election Ordinance regarding regular elections so as not to deny the right of all eligible voters of the Eastern Shawnee Tribe the right to vote. In addition, a written narrative of the issues by the originator of the petition for recall, along with a written rebuttal by the individual subject to recall, shall be mailed by the Election Board to all registered voters at least thirty (30) days prior

to the date of the special election for recall. Results of the special election shall be tabulated, certified and posted in accordance with those provisions of the Election Ordinance and such results shall be effective and binding as of the date they are certified and posted and shall be final upon the individual subject to said recall. If the recall of an elected tribal office is mandated by a voting majority, the position of said official so recalled shall be deemed vacant at the time the election results are certified and posted as aforesaid and such vacancy shall be filled according to article XII of this Constitution. The right of recall may only be exercised as to one (1) tribal official per recall. The right of recall cannot be exercised against an elected tribal official within six (6) months of the date of the expiration of their term. The right of recall shall only be exercised against an elected tribal official upon a showing that such official has either been derelict in their official duties, has abused the authority or power of their office, or has used the authority or power of their office for personal gain.

#### Wampanoag Tribe of Gay Head

A member of the tribal council shall be recalled in the following manner: A petition stating the grounds for recall shall be submitted to the secretary of the tribe. The statement of reasons supporting the recall shall appear at the top of each page of the recall petition. Specific reasons for recall shall be: 1). felonies; 2). documented misappropriation of funds; or 3) absence from 3 regularly scheduled Council meetings in a 3 month period (excluding verifiable sickness, death in immediate family or out of town on tribal business.) Within seven consecutive working days the secretary shall determine whether or not the requisite number of signatures appears on the recall petition. In the event the secretary is being recalled, the Chairperson shall validate the signatures. Any member who meets the voting requirements set forth in Article V, Section 5 shall be eligible to sign a recall petition. Each signature must be accompanied by the printed name, box number, street, town, state, zip code, tribal roll number and telephone number of the signing tribal member. Should the secretary find that an insufficient number of signatures appears on the recall petition, the secretary shall return the petition with a statement indicating why each unaccepted signature was rejected. The sponsors of the recall petition shall have ten consecutive working days from the date they receive the returned petition to cure the defects. If they fail to cure the defects the petition is invalid and no new petition may be circulated against the same office holder for 180 (one hundred eighty) consecutive calendar days. Within thirty (30) consecutive calendar days of the validation of the recall petition a recall election shall be held. 30% of the eligible voting membership shall vote to constitute a valid recall election. At least ten (10) consecutive working days prior to the recall election the Secretary shall cause a notice to be sent to the membership. The notice shall state the date of the recall election and the hours of polling. In addition, the Secretary shall publish the same notice in a newspaper of general local circulation on Martha's Vineyard at least ten (10) consecutive working days prior to the recall election. The recall election shall be conducted by the same provisions which apply to a general election. In the event that a recall vote is unsuccessful, the subject of the recall election shall not be subject to another recall election which is based Upon the same or similar grounds for at least one year from the date of the recall election. In the event that sufficient votes are cast to require recall, the Chairperson shall declare the position vacant and shall fill the position pursuant to Article V, Sections 10 and 11 of this constitution. The person recalled may not be named to fill the vacant position.

## Yavapai-Apache Nation

Any member of the Yavapai-Apache Tribe of voting age shall have the power to initiate recall proceedings against a Tribal Council member by filing with the Election Board a written statement in one-hundred (100) words or less giving specific reasons why the Tribal Council member in question should be recalled. All recall proceedings subsequent to the filing of a recall petition shall be administered by the Election Board. The Tribal Council shall not have jurisdiction over recall proceedings and it shall not exercise its authority to remove members of the Election Board in such a way as to impede a recall proceeding. The Election Board shall issue official petition forms to the petitioners who shall have sixty (60) days to collect the signatures from thirty-five (35) percent of the eligible voters of the Tribe. Each eligible voter of the Tribe shall have the right, exercisable freely and without constraint or coercion of any kind, to participate in proceedings for the recall of any elected tribal official. Individual petitions shall be circulated for each Tribal Council member who is subject to recall. The Election Board shall verify the signatures on a recall petition within ten (10) days of receipt of a recall petition. The person subject to recall may file a written response to the charges alleged in the petition in accordance with the applicable provisions of the recall ordinance. The written response must be mailed to the voters along with the notices of the recall election but only when such notices are required to be mailed to the voters. A recall meeting shall be held in accordance with the provisions of the recall ordinance. A recall meeting shall be considered a special election and shall be conducted in accordance with all applicable provisions of this constitution and appropriate ordinances. The ballots used at the recall meeting shall state the reasons for the recall and any response by the person subject to recall. A majority vote of the eligible voters attending the recall meeting shall determine the success or failure of the recall petition(s); Provided, That at least thirty-five (35) percent of the eligible voters vote at the recall meeting. The Election Board shall certify the election results. The results of the recall election shall be final. The Tribal Court shall have exclusive jurisdiction to hear any challenge to the recall election or to hear any complaint against the Election Board or its members based upon its conduct of the recall proceeding. Any challenge or complaint shall be filed in a timely manner as established by ordinance. The Tribal Court shall hear and decide the challenge to the recall election within thirty (30) days of the date the complaint is filed. A Tribal Council member who is successfully recalled must wait one (1) year to be eligible to run for office or to be appointed to fill a vacancy.

### Lumbee Tribe of North Carolina

The power to recall any elected official of the Lumbee Tribe of North Carolina who is in the second calendar year or later in his or her term is specifically reserved for the general membership of the Tribe. A recall election shall be held when a petition bearing the signatures, names, addresses, and enrollment numbers of at least ten (10) percent of eligible voters who voted in the election from the district electing a tribal official or ten (10) percent of eligible voters who voted in the election for the tribal chairperson, alleging in one hundred (100) words or less that the tribal official is guilty of malfeasance in office, gross disregard for tribal law or custom, or open abuse of authority, and designating three signatories as a Petitioner's Committee, is filed with the Tribal Elections Board. Upon certification of the signatures and grounds stated in the petition and within no more than five (5) days of its receipt, the Election Board shall:

1. Serve a copy of the petition upon the named tribal official, who shall have fifteen (15) days from the date of said notice to respond to the reasons stated in the petition in one hundred (100) words or less;
1. Immediately upon receipt of any response, serve all members of the Petitioner's Committee with a copy of the same.
2. Allow the Petitioner's Committee forty-five (45) days from the date of receipt of the response to collect additional signatures upon their petition;
3. Conduct a recall election within ten (10) days of the resubmission of the petition, provided that the petition is signed by twenty (20) percent of the voters who voted in the election for the recalled tribal official;
4. If at least thirty (30) percent of the voters who voted in the election for the recalled official vote and a majority of those voting vote in favor of recall, the Election Board shall declare the office vacant and the vacancy shall be filled in accordance with the appropriate provisions of this constitution, except that the recalled tribal official shall not be qualified to run for office in that special election.
6. If a recall election fails to obtain a majority of those voting, the Election Board shall not certify any recall petition against that tribal official for a minimum of one year thereafter.

### Miami Tribe of Oklahoma

Any voting member of the Miami Tribe may prefer charges by a valid petition supported by the signature of no less than seventy-five (75) members of the General Council, stating any of the causes for removal set forth in Section 1 of this Article against any member of the Business Committee. The petition must be submitted to the Grievance Committee. The Grievance Committee, within fifteen (15) days after receipt of the notice of petition, shall in writing notify the accused of the charges brought against him/her and set a date for a hearing before the General Council. If the General Council deems the accused has failed to answer charges to its satisfaction or fails to appear at the appointed time, the General Council may schedule a recall election which shall be held within thirty (30) days after the date set for the hearing. The outcome of the recall election shall be final.

### Citizen Potawatomi

The Business Committee shall enact a Recall and Removal Ordinance establishing the procedures to be followed in recall actions. Said Recall and Removal Ordinance shall contain the definitions of misconduct in office which shall subject a tribal officer to a recall election. Thereafter, this Ordinance may be amended or repealed only by the Council at an election conducted pursuant to Articles 10 or 13 of this Constitution. Such Ordinance shall provide that not more than two recall proceedings may be pending in the Court at any time. A recall proceeding shall not include more than one official, unless the Court consolidates two or more actions for a good cause shown. A Grievance Committee, consisting of three members of the Citizen Potawatomi Nation Indian Council, shall act as a fact finding body and present the facts to the Tribal Courts in the event the Grievance Committee determines that there is probable cause of misconduct in office had occurred. The Grievance Committee, pursuant to such procedures as shall be provided in the Recall and Removal Ordinance, shall hear complaints of misconduct in office by members of the Business Committee or Judicial Officers of the Tribe. Upon showing of probable cause that misconduct in office has occurred, the Grievance Committee shall file and prosecute a civil action in the Tribal Court and shall undertake other such duties as it may be assigned by tribal law. In any recall action initiated by the Grievance Committee, the Court, pursuant to the rules of civil procedure, shall have the power to hear evidence and determine whether the act or acts of misconduct in office have been shown by clear and convincing evidence so that a recall election should be held. If the Court determines that a recall election should be held, a two-thirds (2/3) majority of those voting in a special election held pursuant to Article 12, Section 6, shall be necessary to recall the officer. Any appeal of the Trial Court's judgment ordering a recall election shall be expedited by the Supreme Court. If the Grievance Committee refuses to bring the action in the Court after a complaint is brought before them, the complaining party may proceed individually pursuant to subparagraph (b) of this Article if he or she so desires. In the alternative, a complaining party, in his discretion, may bring an immediate court action pursuant to subparagraph (b) without previous action by the Grievance Committee. The Court, pursuant to the rules of civil procedure, shall hear complaints brought by a person alleging misconduct in office by members of the Business Committee or Judicial Officers of the Tribe. The Court shall require, prior to hearing any such action, that the complaining party post a bond in such amount as the Court shall deem proper to guarantee the costs, damages, and attorney fees of the person complained of in the event that the recall action was filed without probable cause to believe misconduct in office had occurred or that the recall action was otherwise filed in bad faith. In any such recall action, the Court shall have power to hear the evidence of the complaining party or parties and to determine whether the act or acts of misconduct in office have been shown by clear and convincing evidence so that a recall election should be held. If the Court determines that a recall election should be held, a two-thirds (2/3) majority of those voting in an election held pursuant to Article 12, Section 6, shall be necessary to recall the officer from his office. Any appeal taken of the Trial Court's judgment ordering a recall election shall be expedited by the Supreme Court.

Please contact me if there are any questions.

