

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

PROPOSED LANGUAGE – DRAFT 24A	COMMENTS/ISSUES/IMPLICATIONS
<p style="text-align: center;"><u>Preamble</u></p> <p>The Constitution is adopted by the self-governing Hopi and Tewa Villages of the Hopi Tribe to provide a way of working together for peace and agreement between Villages and of preserving the good things of Hopi life including our culture, our land, and our economy.</p>	<p><u>Comments:</u> A Preamble serves the same function as a “purpose” section in an Ordinance, which can be referred to as a guideline for the interpretation of the terms and requirements of the constitution. This draft Preamble limits the purposes of the constitution, and focuses only on the tribe’s internal affairs. The proposed language does not address the tribe’s relationships with the external world. What about other purposes as establishing an effective governmental organization, to form a representative government, to preserve and protect self government, individual rights, liberties and Hopi customs, to promote the general welfare, to improve the tribe’s economic welfare, to preserve the tribe’s lands and cultural identity, promoting general welfare of the Hopi people, etc.?</p>
<p style="text-align: center;"><u>Article I – Territory and Jurisdiction</u></p> <p>Section 1. <u>Territory.</u> The Territory of the Tribe shall include all lands held by the Tribe or the People, or by the United States for the benefit of the Tribe or the People, and any additional lands acquired by the Tribe or by the United States for the benefit of the Tribe or the People. The Territory shall include all land, air, surface, subsurface, natural resources, and any interests therein, notwithstanding the issuance of any patent or right-of-way in fee or otherwise, by the government of the United States or the Tribe, existing or in the future.</p>	<p><u>Comment:</u> “Territory” refers to the geographic boundaries within which the Hopi Tribe exercises its jurisdiction. All Hopi land that falls within the definition of “Indian Country” is land that is subject to Hopi jurisdiction. It is not accurate to say Hopi jurisdiction stops at the boundaries of the tribe’s territory. The tribe may have certain jurisdictional prerogatives over its members even beyond the Hopi reservation. The “Territory” of the Tribe includes all lands held by the tribe. What lands do the People hold? Lands within the Hopi Reservation are held in trust by the federal government for the benefit of the Hopi Tribe. The People do not hold any lands separate from the tribe. The people have beneficial use rights in the tribe’s land. There is the potential that this could be confused with lands privately held outside of the tribe’s lands by tribal members.</p> <p><u>Comment:</u> The draft language separates and distinguishes the tribe’s territorial boundaries from its jurisdictional boundaries. In the first provision, the tribe’s lands are identified by describing territorial boundaries and then the tribe’s jurisdictional authority is identified under the next section.</p> <p><u>Comment:</u> The purpose for the jurisdictional provision in the constitution is to identify the tribe’s geographic territory. The tribe does not have geographic jurisdiction over lands held in fee (i.e. the tribe’s ranch lands). A tribe’s jurisdiction has always been territorial for the most part and when viewed as such, Section 2 can be eliminated as unnecessary, because the tribe’s jurisdictional</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

	<p>authorities will be identified in tribal ordinances. The constitution only serves to identify the tribe's territorial jurisdiction (i.e. the lands that are considered "Indian Country").</p> <p><u>Comment:</u> Concerning lands "acquired", does this include trust lands only or does this include all land regardless of its trust status? For example, is the land "held" in trust or in fee? There is a jurisdictional difference. "Any additional lands" language is not necessary when defining territory as "all lands held" is inclusive.</p>
<p>Section 2. <u>Jurisdiction.</u> The Tribe shall possess inherent Sovereignty. The jurisdiction of the Tribe shall extend to all persons, activities, and property based upon inherent territorial or popular Sovereignty. Every public highway or any other ingress into the Territory shall be accompanied by a public notice that entry is conditioned upon the acceptance of the Jurisdiction of the Tribe. Any person who enters the Territory shall, by entering, be deemed to have consented to the Jurisdiction of the Tribe. Every license or permit issued under the authority of the Tribe shall include a provision submitting all parties and their assigns to the Jurisdiction of the Tribe. Any employee of the Tribe shall, by accepting employment, be deemed to have submitted to the Jurisdiction of the Tribe. The Council shall have the power to assert the Sovereignty and Jurisdiction of the Tribe by law over all matters that affect the interests of the Tribe.</p>	<p><u>Comment:</u> The word "jurisdiction" refers to the power of a sovereign, such as the tribe, State, or the United States, to exercise its political authority over all persons and things within the sovereign's territory. There is no need in the constitution, to define "inherent sovereignty" as the basis for the tribe's jurisdiction over its lands. Inherent jurisdiction, by definition, can only be recognized, not conferred.</p> <p><u>Comment:</u> What does "the jurisdiction of the Tribe shall extend to all persons, activities, and property based upon <u>inherent territorial</u> or <u>popular sovereignty</u>" mean? This is introducing phrases that will trigger legal debate (in tribal courts).</p> <p><u>Comment:</u> Language pertaining to "public highway and any other ingress..." does not belong in a constitution. A constitution should set broad parameters and leave the working details to the legislature. This language more appropriately belongs in an ordinance or administrative rules. Delete language in reference to the "Council" as ambiguous. The tribe has inherent sovereignty and jurisdiction over its lands and this does not need to be conferred specifically in a tribal constitution.</p>

<p style="text-align: center;"><u>Article II - Membership</u></p> <p>Section 1. <u>Membership Requirements.</u> The following persons shall be enrolled members of the Hopi Tribe:</p> <p>(a) All persons whose names appear on the Census Roll of the Hopi Tribe as of December 31, 1937;</p> <p>(b) All persons of a one-fourth degree Hopi Indian blood or more, or one-fourth degree Tewa Indian blood or more, or one-fourth degree Hopi-Tewa Indian blood or more combined, born after December 31, 1937, who are not enrolled with any other Indian Tribe;</p> <p>(c) For the purpose of determining membership, Hopi Indian blood, Tewa Indian blood, and Hopi-Tewa Indian blood shall mean biological lineal descent from any Hopi or Tewa Indian person whose name appears on the Membership Roll of the Hopi Tribe as defined in Section 1(a).</p>	<p><u>Comment:</u> The intent of Membership Requirements is to declare who will be governed under the constitution and to whom the government must be responsive and responsible, i.e. who has basic rights and responsibilities of self-government? This provision should define the group of people who are entitled to receive the benefits of tribal membership. This provision should establish the requirements that a person must satisfy in order to have the rights and responsibilities of membership.</p> <p><u>Comment:</u> This language takes from individuals the choice to be or not to be enrolled in the Hopi Tribe. What about those who choose membership in another tribe or who choose not to be enrolled in any tribe? Does this draft eliminate the requirement for enrollment? The existing constitution draws a distinction between those who are deemed to be “enrolled” by virtue of their names appearing on the 1937 Base Roll and those who are subsequently born and become “eligible for enrolled membership,” i.e., entitled to have their names added to the Roll. Is this eliminating that distinction?</p> <p><u>Comment:</u> Are all Hopi/Tewa whose names appear on the 1937 Base Roll presumed to be 4/4 degree blood? There should be a savings clause for all those whose names currently appear on the Base Roll. Why eliminate the provision for village membership? What about an enrollment ordinance? Reinstating the last provision in the current constitution would mandate the tribe to implement and administer an enrollment ordinance pursuant to the Hopi constitution, as the supreme law of the (Hopi) land.</p> <p><u>Comment:</u> By omitting the last three sections from the current constitution the draft eliminates the clarity for those members who are currently enrolled but who are not on the 1937 Base Roll. It also eliminates the villages’ authority to determine their own village membership separate and apart from tribal membership. Elimination of the last section (the enrollment ordinance provision) from the current constitution eliminates the tribe’s mandate to implement and administer its tribal membership. This language is contrary to the basis for which a tribe’s membership is included in the constitution. Remember, membership defines who will be governed under the constitution and who the government must answer to.</p>
--	---

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p style="text-align: center;"><u>ARTICLE III – ORGANIZATION OF THE GOVERNMENT</u></p> <p>Section 1. <u>Sovereignty</u>. The People of the Tribe possess inherent sovereign powers of government by virtue of territorial integrity and democracy. The Constitution of the Tribe shall be the supreme law of the land.</p>	<p><u>Comment:</u> Articles III through VI of the proposed constitution is a major departure from the existing constitution and is designed to segregate powers into four separate and independent branches of government. This is referred to as “separation of powers”. It is designed to accomplish: 1) a division of responsibilities and creation of an expertise within each division; 2) avoidance of a concentration of power within the hands of a single branch; and 3) the creation of an impartial judiciary to gauge against the constitution the validity of legislative and executive action. It is intended to provide for “checks and balances”. Unfortunately, there is so much contradictory and conflicting language (e.g. powers of the president; powers of the legislative branch & powers of villages; etc.) throughout the remainder of the draft that it begs another careful review and revision. It is so important that new language be drafted to assure that each branch is identified with its appropriate powers.</p> <p><u>Comment:</u> Previous sections of the draft have the tribe (the government) holding inherent sovereignty but the language in Article III, Section 1 contradicts this language by stating “inherent sovereignty” vests with the People of the Tribe. A document as important as a constitution demands as much precision and internal clarity as is possible. What is the intent of this section? What does “<u>territorial integrity and democracy</u>” mean? Why insert statements that will no doubt trigger legal debate? Do we have to go to tribal court again to help them define what this means? This section is unnecessary. The Hopi Tribe is already recognized as a sovereign by its mere status and recognition (e.g. an Executive Order Tribe and is a federally recognized tribe).</p> <p><u>Comment:</u> The draft creates new commissions, executive boards and legislative committees without defining their purpose and functions. This is a costly proposition and there will be marked increases in levels of bureaucracy as additional layers of decision-making and review are added on. This draft also contains a lot of procedural language that does not belong in a tribal constitution. There is contradictory language throughout this section that this draft requires further study, analysis and clarification.</p>
<p>Section 2. <u>Branches of Government</u>. The government of the Tribe shall be comprised of four branches: Villages, Legislative, Executive and Judicial.</p>	<p><u>Comment:</u> The single most problematic provision is the proposal to bring the villages in as the <u>fourth branch of government</u>. This is a foreign concept not only to the Hopi Tribe and other tribes, but to the entire United States. It raises a number of legal questions. It has the potential to severely compromise the “inherent aboriginal sovereignty” of villages that villages have fought hard</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

	<p>to preserve and protect. The United States Constitution does not bring in states as the fourth branch of government because states are sovereign entities – so are the Hopi and Tewa villages. As sovereigns they enjoy the privileges of self-governance. As the fourth branch of government, village rights and activities will be regulated by the tribe.</p> <p><u>Comment:</u> Villages are separate governments, exercising their local authority. Putting the villages in the constitutional structure of government puts them on the same level with the legislative, executive, and judicial branches. The current constitution and Hopi case law recognizes villages as distinct entities separate and apart from the tribal government with local controls (like the federal/state division). If the villages are included as a branch or “arm” of the tribal government, then they are no longer self-governing villages.</p> <p><u>Comment:</u> Bringing villages as a fourth branch will violate Article III, Section 2 of the current constitution where it provides each village the authority to “decide how it shall be governed”. The draft will force villages to be reorganized against their will. It also goes against the recent Hopi Appellate Court ruling in the Bacavi Village Certified Question where village powers were affirmed.</p> <p><u>Questions:</u> What is the purpose for creating a four branch of government? What will be the role of the villages within the Hopi tribal government? How will this affect the day-to-day functioning of the village governments as they now stand? What about those villages that currently do not participate in the central government? What about those villages who do not want to participate under this proposed structure? Will village powers be challenged by another branch of tribal government (i.e. land use and land assignment decisions, powers of self rule, power to tax, power to enter into economic development ventures, ability to file legal challenges in court, power to hire own attorneys)?</p>
<p>Section 3. <u>Separation of Functions.</u> No branch of government shall exercise the powers of functions delegated to another branch unless expressly authorized by this Constitution.</p>	<p><u>Comment:</u> This provision is the first example of how bringing villages in as a fourth branch will impair their ability to be autonomous and self-governing entities. This provision raises questions as to which branch truly has the authority to set laws (villages or tribal council). For example, villages currently have the power to make land use and assignment decisions, set local rules, e.g. by-laws and elections; have powers to tax, make investment decisions, make economic development decisions. If a village does not agree with a council action, will they be able to file action in tribal</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

	court (against another branch of government, i.e. tribal council)?
<p style="text-align: center;">ARTICLE IV - LEGISLATIVE BRANCH</p> <p>Section 1. <u>Composition</u>. The Legislative Branch shall be comprised of a Council. The Council shall consist of two Representatives from each Village. The Council shall select a Representative from among its Members to serve as Speaker of the Council.</p>	<p><u>Comment</u>: This eliminates the current system of population-based representation. This may increase the number of council representatives resulting in an increased budget. It will decrease the current representation of some villages from 4 representatives down to 2 representatives. Reducing the current number of representatives for some villages goes contrary to the assertion by proponents of Drat 24A that villages will have “more powers” under the new constitution.</p> <p><u>Comment</u>: Eliminates current officers of the tribal council such as the council secretary, treasurer, and sergeant at arms; and adds a speaker.</p> <p><u>Questions</u>: This provision raises many questions, such as: What is the job and authority of the speaker? How often is he selected; and how long is his term? Does the speaker replace the chairman (president) as presiding officer of council meetings? Does appointing a speaker from the ranks of the tribal council take away his power to vote? The draft provides for two council representatives from each village which will increase the current membership on the council. Is the intent to recognize each village separate and apart from the First Mesa Consolidated Villages? Are the president and vice president considered part of the tribal council, or officers thereof? What are the duties of the vice president?</p>
<p>Section 2. <u>Terms</u>. Each Representative shall serve a two year term or until a successor has been sworn into office. Representatives may serve any number of terms in succession or otherwise. Each Village shall have the power to remove its Representative prior to the expiration of the term, and each Village shall have the power to select a replacement Representative who shall serve for the remainder of the unexpired term.</p>	<p><u>Comment</u>: This language contradicts with powers of villages and, in fact, violates Article III, Section 2 of the current constitution, i.e. a village “shall decide how it shall be governed”. This provision voids the powers and rights of villages to determine qualifications and term limits of their council representatives.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Section 3. <u>Qualifications</u>. Each Representative shall be a member of the Village which he or she represents and a Member of the Tribe, at least twenty-five years old, a resident of the Territory for at least two years immediately prior to the Representative's election or appointment, able to speak and understand the Hopi language, and shall meet other criteria, if any, set by the Representative's Village.</p>	<p><u>Comment:</u> This is another example of internal inconsistencies throughout the document. The draft language places the accurateness of village enrollment on the tribe, rather than the villages. Instead, it should be a matter for a village itself to decide. How is village membership determined for purposes of this section? In the proposed Article VII it is presumed that the village would utilize the tribe's enrollment to determine village membership, this will lead to inadequacies in determining who is a village member, as the purpose of the tribe's enrollment function is to determine is who is eligible for tribal enrollment, not to determine village membership.</p> <p><u>Comment:</u> The draft constitution removes the reference to the Kikmongwi and still has the villages deciding their representation, so how would the council know who the villages have chosen? The draft constitution does not address this matter. If the village has not organized itself under a special election requirement as provided in the draft constitution, who certifies them? This matter goes at the heart of the problems that persisted for years. Proponents say Draft 24A will resolve village election and certification issues, but because Draft 24A does not address it, it will only make matters worse.</p> <p><u>Questions:</u> This provision raises many questions, such as: Does "Member of the Tribe" mean enrolled or eligible for enrollment? Is a certain degree of language proficiency (speaking and understanding) desired? "Other criteria" language is nebulous; it is not defined. Who enforces the "other criteria? How will elected/selected village council representatives be certified or presented to the tribal council? How do villages "certify" who has been elected/selected to serve on the tribal council?</p>
<p>Section 4. <u>Powers</u>. (a) Legislative power shall be vested in the Council. The Council shall have the power to make laws for the benefit of the Tribe. All Legislative actions shall be embodied in a written law enacted pursuant to the Legislative Process.</p>	<p><u>Comment:</u> The language "<u>shall have the power to make laws</u>" is extremely broad language and leaves the interpretation to the tribal council. This is very dangerous. Villages and tribal members may disagree with certain actions of the tribal council and may question the council's authority to "make laws". The only avenue available to villages and tribal members to challenge tribal council actions will be in the tribal courts. It is best to spell out the council's powers otherwise the tribal council will always assert that their actions are "implied powers". Another danger is that the tribal council or the president can enter into any number of attorney contracts for any purpose without restrictions which is already the case under this administration.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(b) The Council shall enact an annual budget which shall include appropriations for the Judicial Branch and the Executive Branch. The annual budget shall include all revenue and funds controlled by the Tribe, and all revenue and funds received by the Tribe from any and all sources. The Council may conduct one semi-annual budget assessment and shall have the authority to make appropriate modifications by law. The Tribe shall operate on a fiscal year of January 1st to December 31st. The Council shall have the power to raise revenues and appropriate funds for expenditure by law. No moneys shall be drawn from the Treasury except by a warrant signed by the President and except upon authorization and appropriation by law.</p>	<p><u>Comment:</u> Draft language removes existing Article VI – Powers of the Tribal Council in the current constitution and replaces it with the broad language of “shall have the power to make laws”. This is a significant deletion from the current constitution. It is important that such powers as the power to tax, to enter into leases, to enter into contracts with attorneys, etc., are spelled out in the constitution.</p> <p><u>Comment:</u> Draft 24A eliminates <u>Article XI – Taxation</u> in its entirety. Again, this is another significant deletion from the current constitution. If the tribe ever wants to enact a Tax Ordinance, it must first amend the constitution before it can have the power to enact taxes. If villages want to develop and adopt village taxation laws, they cannot do it because the tribe’s constitution no longer provides the power, unless villages want to reserve these powers to themselves and not delegate it to the tribal council. If a village is currently imposing taxes and fees, then it would be in violation of the constitution if Draft 24A passes.</p> <p><u>Comment:</u> The council is authorized to enact annual appropriations for the judicial branch and the executive branch only, but excludes the legislative branch and villages as the fourth branch. Another example of the consistencies in this draft. Language regarding fiscal year does not belong in a tribal constitution. It should be incorporated into the fiscal policies where it can be modified as necessary.</p> <p><u>Comment:</u> The requirement to limit draw downs from the treasury to the president’s discretion will eliminate the “checks and balances” inherent in any organization including tribal governments. It will violate adopted tribal management policies and procedures. This may create relational problems within the government (i.e. the council approving a budget but the president refusing to issue a warrant; or the president issuing a warrant for expenditures not approved by the council). Should one branch have the power to bring the government to a standstill by refusing to issue a warrant, or spend funds unabated? The draft constitution also eliminates the constitutional authority of the treasurer. This is very dangerous language as the current administration is seeking sole authority to make investment decisions.</p>
--	---

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

(c) The Legislative Process shall be public. Legislative proposals shall be formally introduced as written Bills, read into the Legislative Record, and published in a Legislative Calendar at least thirty days prior to a vote by the Council. All Bills shall be made the subject of Legislative Committee hearings prior to a Council vote on the Bill. A Bill shall remain on the Legislative Calendar for no more than one hundred eighty days. All votes of the Council shall be cast in public and shall be published in a tally with the name and vote of each Representative recorded. All Bills passed by the Council shall be presented to the President for signature or veto. Any action by the Council which does not follow the legislative process shall be deemed void. All Bills shall include a statement identifying the specific law, if any, to be superseded, repealed, or amended. All laws shall be compiled into one comprehensive Code which shall be published annually.

(d) The Council shall have the power to override a veto by the President by a two-thirds majority vote of the Council; provided, that the seats of Representatives from Villages which do not send Representatives to the Council shall not be

Comment: The intent of a defined legislative process may be good in that it would provide for transparency and a definitive legislative process, and one that would prevent abuse of the legislative process as is the current practice, but this kind of language is procedural language that belongs in an ordinance or tribal council meeting rules so that it may be modified easily to meet changing circumstances. This is an example that this draft contains extensive procedural language that does not belong in a tribal constitution. As with any public body, there is a need to balance the public interest in the openness of the legislative process with the legislature's need to quickly address situations requiring their immediate attention and action.

Questions: This lack of clarity raises several questions. What happens if a bill remains on the calendar for more than 180 days? Currently, the council acts not only through the creation of a resolution or written law, so is this meant to only refer to the bills but not the other ways in which the council can act? Does this restrict the council to acting only through bills? What about legislative actions that are lesser than "bills" such as contract and grant approval/acceptance? Concerning the requirement that all actions of the council meet the notice process, what about an emergency that requires the council's immediate action? So what will be the role of the legislative committees in this regard? Will they not be able to act on any "bills" coming before them; or will they proceed to enact laws (act on "bills") without the benefit of a full council quorum? What about open meeting laws?

Comment: The intent may good in that it allows for a "second level review and veto" of the council's actions by the president. The override can only be done with a number that equals two-thirds of the entire tribal council membership, as opposed to two-thirds of the council present at any meeting. Is that what was intended here? Notice that the draft constitution deletes the requirement that no council meeting takes place unless there is a "majority of the council" present. In other words, the draft eliminates tribal council "quorum" requirement. Another important

<p>counted for purposes of achieving a two-thirds majority vote.</p> <p>(e) The Council shall have the power to confirm or deny nominees selected by the President as Executive Officers within the Executive Branch. Representatives shall not be permitted to serve as Executive Directors within the Executive Branch.</p> <p>(f) The Council shall have the power to create Regulatory Commissions by law. Any Commission created by the Council shall be in the Executive Branch of government. No Member of the Council may also be a member of any Commission created by the Council. All Commissions shall be subject to the laws of the Tribe. Any Commission created by the Council shall have the authority to promulgate written regulations permitted by law and in accordance with legislative due process. Members of all Commissions shall be selected by the nomination of the President, subject to the confirmation by the Council.</p> <p>(g) The Council shall have the power to create Executive Boards by law. Any Board created by the Council shall be in the Executive Branch of government, shall be subject to the powers of the Executive</p>	<p>deletion from the current constitution. This is another example of not having clarity in the draft document. The draft language only creates uncertainties and raises questions.</p> <p><u>Comment:</u> This proposed legislative power will interfere with the power or functions of the executive branch to hire personnel. It will also mean an organizational change, subjecting the directors to political appointments rather than hiring directors based on their qualifications as is the practice with the current administration. What is the purpose? It will affect the stability of tribal programs if the directors serve at the pleasure of the president and will subject these offices to political appointments whenever there is a change in administration, thus affecting the institutional continuity of the programs. See the comments to Article V – Executive Branch.</p> <p><u>Comment:</u> The creation of regulatory commissions and executive boards by the council creates additional layers of government and creates additional financial burdens on the tribe. Is there really a need for additional layers of bureaucracy? What will be the purpose and role of the regulatory commission? What will they regulate? Will they be paid? With the regulatory commission placed in the executive branch will subject the commission to political influence.</p> <p><u>Comment:</u> Notice the draft constitution authorizes any commission the power to promulgate regulations. Does this circumvent the power of the tribal council to “make laws for the benefit of the tribe”? Regulations are like tribal ordinances and the tribal council is authorized by the current constitution to “make ordinances to protect the peace and welfare of the Tribe.”</p> <p><u>Comment:</u> The draft provides for creation of several bodies without identifying what the functions will be; how they will function in the overall scheme of things; and where the resources will come from to pay for the added layers of bureaucracy. It appears the draft language gives the president very broad powers.</p>
--	--

<p>Branch of government, and shall carry out and execute the duties called for in the laws. All Boards shall be subject to the laws of the Tribe. No Member of the Council may also be a member of any Board created by the Council. Members of all Boards shall be selected by election as required by law, or by nomination by the President, subject to confirmation of the Council.</p> <p>(h) The Council shall have the power to establish its own policies and procedures, and appoint officials for the Council including the power to establish Legislative Committees comprised exclusively of Representatives. A Legislative Committee shall be entitled to meet in executive session upon a majority vote of the Members of the Committee. A decision made by a Legislative Committee to approve a Bill shall be presented to the full council for consideration and a vote in public during an official Session.</p>	<p><u>Questions:</u> What would be the role and function of the executive boards? Will these be recurring appointments? Will these boards be comprised of tribal members and/or non-members? Will this be time and resource efficient in light of the purposes for which the boards will be created? Does this mean that a new law will need to be enacted or amended by nomination by the President, subject to confirmation of the Council, e.g. election ordinance? Is this confirmation by the majority of Council or by the entire Council? Is it the Council who will determine if the Board will be elected or nominated? Will “election” of members to “all boards” be a public election? Who elects the board? Would the creation of an executive board and regulatory commission within the executive branch be part of the executive’s balance of powers? Is the authority here exclusive, and can the executive branch also create executive committees? What is the difference between a regulatory commission and an executive board?</p> <p><u>Comment:</u> The creation of a legislative committee creates another layer of government. Since membership on the legislative committee is limited to council representatives, why even bother having such a committee when the members are also members of the tribal council?</p> <p><u>Questions:</u> Is the creation of a legislative committee a replacement for the tribal council? What then happens to holding meetings in public? What is the function of the executive committee? What is the purpose of limiting the authority of the council to form committees only made up of representatives? What if a legislative committee is formed to consider legislation that would affect the villages? This provision would keep any interested and qualified tribal member from serving on legislative committees.</p>
<p>Section 5. <u>Legislative Sessions.</u> (a) The Council shall convene within the Territory for six Regular sessions of up to four consecutive days to begin on the first</p>	<p><u>Comment:</u> This provision has the potential to restrict legislative sessions to four days (and an additional 4 days if extended) and many needed legislative “bills” or action items will be delayed. But, the legislative committee (also composed of council representatives) may meet at any time – there are no restrictions or limitations.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Monday of the first full calendar week in the months of January, March, May, July, September, and November. The Council may extend a Regular Session for up to four consecutive calendar days after the fourth day of the first full calendar week in the months of January, March, May, July, September, and November. Legislative Committees may convene at anytime.</p> <p>(b) The President may call Special Sessions of the Council. All Special Sessions of the Council shall be held within the Territory. The purposes of the Special Session shall be stated in a notice published not less than ten days prior to the Special Session, and the Council shall not consider any other subject not within such purposes.</p>	<p><u>Questions:</u> Is the intent here to limit public notification requirement and to limit attendance and participation by tribal members? What about emergency meetings requested by council members or villages?</p> <p><u>Comment:</u> This leaves calling special council meetings to the exclusive discretion of the president. This is another example of how the president will be given broad powers and control over the council meetings. Requests by village council representatives, villages, tribal members for special council meetings would be subject to the complete discretion of the president. What about the role of the speaker? Can't the speaker call special council meetings? This goes back to the question of the role of the speaker and who presides over council meetings. This is another example of contradictory and conflicting language that exists throughout Draft 24A.</p>
<p>ARTICLE V – EXECUTIVE BRANCH</p> <p>Section 1. <u>Composition.</u> The Executive Branch shall be comprised of an elected President and Vice President and all Departments that the Council deems necessary by law for the effective operation of Government.</p> <p>(a) The Departments shall include at a minimum a Department of Treasury and a Department of Administration.</p> <p>(b) There shall be and Office of Records Management within the Department of</p>	<p><u>Comment:</u> This language does not belong in a tribal constitution. Requiring the establishment of an Office of Records Management does not belong in a tribal constitution much less mandating the departments of Treasury and Administration. This is normally done through a reorganization plan. Setting up departments and providing for the president to “hire and fire” executive directors subjects to the operation of programs and administrative functions to the political whims of the president.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Administration. The Office of Records Management shall secure and maintain at a minimum the following Records of the Tribe: constitution, codes, resolutions, laws, ordinances, court opinions, treaties, compacts, contracts, elections, executive orders, memos, letters and reports, budgets, salaries, travel records, grant proposals, grant awards, grant reports, maps, land records, newspapers, reports, studies, and any documents, audio, or written records. The Office of Records Management shall develop systems to index and access all Records maintained in the Office of Records Management or any other office. The public shall have the right to inspect any Record and shall have the rights to obtain copies of any Record for a reasonable fee as may be set by law; provided, that personal information maintained by the Tribe including but not limited to personnel files, medical records, enrollment records, and social service records, shall not be available for public inspection. The Office of Records Management shall maintain proper backup system for all records in its possession.</p>	<p><u>Comment:</u> This is another example of procedural and administrative language that does not belong in a tribal constitution. This requirement will create a mandate for the tribal council to appropriate annual funds necessary to maintain this office. Records are subject to the Privacy Act and it is not necessary to include this language in the constitution. It is a good practice for any government to have a records management system in place, but those requirements are administrative in nature and do not belong in a tribal law (constitution).</p> <p><u>Comment:</u> Bringing villages in as the fourth branch of government will then subject all records, including letters and memos of the villages to these requirements.</p>
<p>Section 2. <u>Terms.</u> The President and Vice President shall serve a four year term or until a successor has been sworn into office. The President and Vice President shall seek office as</p>	<p><u>Questions:</u> This provision obviously raises many questions. Why include “<u>or until a successor has been sworn into office</u>”? Does this contemplate the idea of allowing a holdover? What if the vice president or the president are both removed, is the removal not effective until the successor is sworn into office? Why include the reference to the single ticket? What if a person satisfies all</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>a single political ticket for the same term of office. The Vice President shall be subordinate to the President, shall serve at the pleasure of the President, and may be dismissed by the President for insubordination. The President and Vice President may serve any number of terms in succession or otherwise.</p>	<p>requirements and wishes to run for president but has no vice presidential partner; or if a person wishes to run for vice president but has no presidential partner? The vice president is also elected at large but the president has the exclusive power to remove the “choice of the people” for insubordination and will have the authority to replace the vice president with any person he chooses without the input and participation of tribal members. What constitutes “insubordination”? Why include the statement that the vice president is subordinate?</p> <p><u>Comment:</u> It is obvious from the nature of the offices that a vice president would be subordinate to the president. This section is better used to define and clarify the respective roles and responsibilities of both officers. Again, this is another example of Draft 24A giving the president exceptionally broad powers. It violates the “checks and balances” we are all seeking in our tribal government.</p>
<p>Section 3. <u>Qualifications.</u> The President and Vice President shall each be a Member of the Tribe, at least twenty-five years old, be able to speak and understand the Hopi language, and a resident of the Territory for at least two years immediately prior to the election.</p>	<p><u>Question:</u> Who will determine what level of fluency is required under the constitution? Will the tribal election board/commission determine the qualifications? Will the election board/commission truly be an independent body without tribal council or the presidential intervention? How will the election board/commission be selected?</p>
<p>Section 4. <u>Powers.</u></p> <p>(a) Executive power shall be vested in the President and the President shall have the power to execute, administer, and enforce the laws. The President shall enforce court orders.</p> <p>(b) The President shall have the power to veto a Bill passed by the Council with a written explanation of any objections, and if the President takes no action within twelve calendar days from the date the Bill is</p>	<p><u>Comment:</u> Enforcement of laws is generally a power given to the judicial branch. The tribal courts issue many court orders, some pertaining to the tribal council, some pertaining to tribal members, some to outside entities. Does this mean the president will enforce all court orders? This is an example of how Draft 24A is legally insufficient.</p> <p><u>Comment:</u> The veto power of the president may serve to provide a second level review of council actions but it may also disrupt the working conditions and relations between the president and the council and may, in effect, negatively impact the people. This assumes the speaker presides over tribal council meetings but the draft constitution does not identify the role of the speaker.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>presented to the President, then the Bill shall become law.</p> <p>(c) The President shall make projections of annual revenues and shall propose an annual budget to the Council no later than June 1st of each year. The annual budget shall include all revenues and funds controlled by the Tribe, and all revenue and funds received by the Tribe from any and all sources. The President may authorize the transfer and expenditure of monies which are included in a budget approved by the Council. No moneys shall be drawn from the Treasury except by a warrant signed by the President.</p> <p>(d) The President shall have the power to nominate an Executive Director for each Department subject to confirmation by the Council. Any nominee that is neither confirmed nor denied within sixty days of</p>	<p><u>Questions:</u> If the legislative branch has the authority to enact laws, and the executive branch carries out the laws, doesn't the president's veto power disrupt these functions? If the speaker does not preside over council meetings and the president does, does this mean the president veto his own council actions?</p> <p>Reminder, any action in tribal council where the chairman (president) and or vice chairman (vice president) presides over council meetings and legislative actions are taken, are legitimate actions and the president or vice president must sign the legislation (council resolution). The chairman/president or vice chairman/vice president cannot simply decide not to sign the council resolutions simply because they later find out that the council actions are controversial and may be harmful to the tribe or to themselves, e.g. CO2 Carbon Capture Sequestration resolution. In the current constitution, refusal to sign legally enacted council resolutions is "neglect of duty".</p> <p><u>Comment:</u> This language suggests that the president has the discretion to authorize the transfer and expenditure of money approved by council. This will violate the "internal controls" and will subject the expenditure of funds to the whims and discretion of the president. This provision will give the president an implied veto over the council-approved budget. It will also give the president exclusive power to make investment decisions as the current administration is attempting to do.</p> <p><u>Questions:</u> In the event that the president refuses to authorize an expenditure or transfer, what is the recourse for the entity that is requesting the transfer or expenditure, or for council? What is the purpose of implementing the added step of having the president sign a warrant? Once the tribal council approves the budget, is it necessary to have the president sign warrants?</p> <p><u>Comment:</u> This provision subjects hiring and firing of executive directors to the political whims of the president. Executive directors will now be political appointees and may be replaced every time there is a change in administration thus leading to the instability of the tribal government. These positions will be filled by political supporters regardless of their qualifications and the qualifications requirements of the positions.</p>
--	---

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>nomination shall be considered confirmed. The President shall have the power to remove an Executive Director of a Department.</p> <p>(e) The President shall have the power to represent the Tribe in all matters with any other government, entity, or individual. The President shall have the power to negotiate and sign a compact or treaty which has been previously and specifically authorized by the Council by law. No compact or treaty shall be valid which has not been previously authorized by the Council by law. Any compact or treaty signed by the President shall be subject to ratification by the Council.</p> <p>(f) The President shall have the power to negotiate and sign a contract, other than a compact or treaty, which has been previously authorized by Council. No contract shall be valid which has not been previously authorized by the Council by law.</p>	<p><u>Question:</u> Is the President the only person/entity who can remove an Executive Director? What about the employee rights of executive directors who become tribal employees upon appointment?</p> <p><u>Comment:</u> This language presumes the council has discussed and approved a contract before the president can negotiate and enter into a contract. What is a compact? What is a treaty? Remember that tribal council authorities are eliminated by the draft constitution (unless the tribal council will claim that these powers are “implied powers”). Another example of lack of clarity in Draft 24A.</p> <p><u>Comment:</u> It is presumed this includes contracts with attorneys, which by the current constitution, requires prior approval by the tribal council (and again council powers are excluded from Draft 24A). It is not practical to expect that the council to have knowledge of the specifics of what it is authorizing unless preliminary negotiations first define the scope.</p> <p><u>Questions:</u> Does this require council approval before the president may enter into discussions (negotiations) concerning a contract? And, how can the president represent the tribe in all matters, when that power is then restricted to only those negotiations that have been authorized by act of council?</p>
<p>Section 5. <u>Compensation.</u> The President and Vice President shall receive reasonable compensation as established by law. No increase or decrease in compensation for the</p>	<p><u>Comment:</u> This provision is not necessary in a tribal constitution. Another example that this draft contains procedural and administrative provisions that do not belong in a tribal constitution.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>understand the Hopi language, and shall possess a college degree, and at least one other Associate Justice of the Hopi Court of Appeals shall be a member of the Hopi Tribe and shall possess a college degree.</p> <p>(b) The Chief Judge of the Hopi Trial Court shall possess a law degree from an accredited law school. At least one Associate Judge of the Hopi Trial Court shall be a member of the Hopi Tribe and shall be able to speak and understand the Hopi language.</p>	<p>degree, i.e. B.A., A.A., etc.?</p>
<p>Section 4. <u>Appointment</u>. There shall be a Judicial Nominating Panel comprised of one person selected by each Village according to rules set by each Village. All Judges and Justices shall be appointed. The Judicial Nominating Panel shall nominate at least five qualified persons for a vacant Judge or Justice position and shall present the list of at least five persons to the President. The President shall select one person from the list presented by the Judicial Nominating Panel and shall submit the name of such person to the Council. If the President does not select a person from the list presented by the Judicial Nominating Panel within sixty days, then the Chief Justice of the Court of Appeals shall select one person from the list presented by the Judicial Nominating Panel and shall submit the name of such person to the Council. The nominee selected from the list presented by the Judicial Nominating Panel</p>	<p><u>Question:</u> If the intent of this provision is “separation of powers” (separating the judicial branch from the legislative branch and avoiding undue influence on the courts by the tribal council) then why require the nominees to be submitted to the president? Why not submit the names directly to the tribal council?</p> <p><u>Comment:</u> A more appropriate name of this new entity should be a “judicial commission” whose function would be to provide independent oversight over the courts. But Draft 24A is silent on the purpose of the panel and the qualifications requirements of the panel members. A judicial commission would serve to prevent such tribal council actions as the illegal removal of appellate court justices right when the court is hearing important cases. Draft 24A language is more procedural than law; and rightfully belongs in a tribal ordinance like Ordinance 21.</p> <p><u>Comment:</u> Article VII of Draft 24A proposes to give the judicial nominating panel the power the remove a sitting judge or justice; and will no doubt subject the panel to court action. Will the panel be “officers” of the tribe and have sovereign immunity protections? Will they be provided legal counsel by the tribe? What about the judges and justices – will they be provided legal counsel by the tribe as “officers of the tribe”? These questions can be addressed in an ordinance.</p> <p><u>Questions:</u> What happens if the person chosen by the president and/or the chief Judge is not confirmed by the council? Does it go back to the nominating committee? Do they start from</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>shall be subject to confirmation by the Council.</p>	<p>scratch? What happens if a panel cannot be established, or if there are no “at least five qualified persons” to choose from? What are the village rules? And what are qualifications for the judicial nominating panel? Would that be established by the respective villages? Will the judicial panel be compensated, and from what source?</p>
<p>Section 5. <u>Jurisdiction.</u> (a) The Hopi Trial Court shall 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 Hopi Tribe, including cases in which the Tribe or its officials and employees shall be a party. Any such case or controversy arising within the Jurisdiction of the Hopi Tribe shall be filed in the Trial Court before it is filed in any other court. This grant of jurisdiction shall not be construed to be a waiver of the Sovereign Immunity of the Hopi Tribe. (b) The Hopi Court of Appeals shall have appellate jurisdiction over any case on appeal from the Trial Court. The Court of Appeals shall have original and exclusive jurisdiction over all election disputes and over disputes between Villages and over any final determination by the Election Commission on a protest or challenge of the results of an election, and such jurisdiction shall include the power to make findings of fact and conclusions of law, and to issue all remedies in law and equity.</p>	<p><u>Comment:</u> This also seems unnecessary to state, as the tribe’s sovereign immunity cannot be waived unless the tribe expressly and explicitly states so.</p> <p><u>Questions:</u> If the court has original jurisdiction over all cases arising under the customs and traditions of the tribe, how does this interact with the authority of the villages to decide certain matters and have exclusive jurisdiction over such things as inheritance, guardianship, and family issues?</p> <p><u>Comment:</u> The language requiring the trial court to be the first place of filing is unnecessary and unlikely to be effective. This provision is more suited for inclusion in tribal ordinances (Ordinance 21). Further, inserting this provision also lends confusion to Article I were the tribe’s jurisdiction is first discussed.</p> <p><u>Comment:</u> This statement of jurisdiction is contrary to the Hopi trial court’s jurisdiction from the previous section which provides that the trial court with original jurisdiction to hear all cases and controversies. This states that all elections and village disputes will go to the Hopi appellate court first, not the Hopi trial court. It seems inappropriate that the tribe itself would leap over their own trial court for these two types of disputes, especially in light of Section 5(a) above.</p> <p><u>Questions:</u> If villages are now a fourth branch of tribal government, how does that impact their right and ability to file actions in tribal court against the tribal council, and officers of the tribal council? Does this also include all village election disputes where the draft constitution requires the establishment of election commissions?</p>

Section 6. Powers and Duties.

- (a) Judicial powers shall be vested in the Judicial Branch.
- (b) The Trial Court shall have the power to interpret the Constitution and laws of the Tribe and to make findings of fact and conclusions of law. The Trial Court shall have the power to issue all remedies in law and in equity.
- (c) The Courts shall have the power to declare the laws of the Tribe void if such laws are inconsistent with this Constitution.
- (d) The Court of Appeals shall have the power to interpret the Constitution and laws of the Tribe and to make conclusions of law. The Court of Appeals shall have the power to issue all remedies in law and in equity. Decisions of the Court of Appeals shall be final.
- (e) The Court of Appeals shall have the power to declare the laws of the Tribe void if such laws are not in agreement with this Constitution.
- (f) All orders, opinions, and decisions of the Court of Appeals shall be written and published.

Comment: Published where and how? What about the trial court's decisions, they are also established tribal case law?

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(g) The Courts shall render a final disposition in all cases properly filed or appealed.</p> <p>(h) The Judicial Branch shall have the power to administer funds appropriated by law for the Judicial Branch.</p>	
<p>Section 7. <u>Right to Appeal</u>. Any party to a civil action, or a defendant in a criminal action, who is dissatisfied with the judgment or verdict may appeal to the Court of Appeals. All appeals to the Court of Appeals shall be heard by the full court.</p>	<p><u>Comment:</u> If a person must only be “dissatisfied with their judgment” to file an appeal, this eliminates the requisite that their appeal be legally based; in essence, this opens the floodgate for unwarranted appeals, and stays at the trial court level.</p> <p><u>Question:</u> Does this mean the appellate court no longer has discretion to render decisions without holding oral arguments? This language is already in the Hopi Rules of Civil and Criminal Procedure. Is there a reason to include this in the constitution? Does this change the employment of the appellate court judges, who are currently in unpaid positions? If so, where will resources come from to pay the justices?</p>
<p style="text-align: center;">ARTICLE VII - VILLAGES</p> <p>Section 1. <u>Villages</u>. The recognized Villages of the Tribe are:</p> <ul style="list-style-type: none"> (a) Bacabi (b) Hotevilla (c) Kykotsmovi (d) Lower Moenkopi (e) Musanguvi (f) Oraivi (g) Sitsomovi (h) Songoopavi (i) Supawlavi (j) Tewa (k) Upper Moenkopi (l) Walpi 	<p><u>Questions:</u> See previous comments. What is the purpose of creating villages as a separate branch of government? What will their function be as a governmental branch? What about the other population centers, such as Keams Canyon, Polacca, Spider Mound, the Winslow property? What about any future areas created by act of government? Is it the intention to create a distinction between these later created areas and the “traditional” villages for the sake of the authorities granted here? What about for the benefits, such as funding and opportunity to participate in the political process? What happened to the language from Section 1 of Article III, “<u>The Hopi Tribe is a union of self-governing villages sharing common interests and working together for the common welfare of all</u>”? What about the First Mesa Consolidated Villages? Are they agreeable to be separate villages? And if each village is to have two council representatives, that will provide six council representatives to First Mesa.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Section 2. <u>Powers.</u></p> <p>(a) The following powers are reserved exclusively to the Villages:</p> <p>(1) To appoint guardians for children or incompetent persons who are Members of the Village or who are residing within the Village.</p> <p>(2) To adjust family disputes and regulate family relations of Members of the Villages or of persons residing within the Village subject to the criminal laws of the Tribe.</p> <p>(3) To determine Village Membership subject to Article VII, Section 3(b)(ii).</p>	<p><u>Comment:</u> Under the membership provision in Article II, reference to village membership has been eliminated, and under the proposed Article VII, Section 3(b), membership is limited and not clearly defined. This leaves out those children who are not tribally enrolled but who may qualify for enrollment; and extends authority over those who may be enrolled but whose village affiliation is from another village.</p> <p><u>Questions:</u> What about those children involved in ICWA cases that are not enrolled but whose parent(s) is from the village and who do not reside on the reservation? Are the Villages waiving jurisdiction over these children? And if they are, then who is responsible for the cases?</p> <p><u>Comment:</u> What does criminal jurisdiction have to do with the village’s authority to adjust and regulate family relations and disputes? These are enumerated powers are held by the villages under the current Constitution, and as a practical matter when the Hopi tribal court is faced with guardianship or incompetence issues it first refers the matter to the village to see if they wish to take on the responsibility and then, if the village does not or will not take the responsibility, the court handles the matter. This is not perfect, but it is a system that provides for a balance between the villages’ traditional interests in these matters and the importance of a quick, reliable process. The tribe established a significant administrative capability and capacity to deal with these situations, in regard to child welfare cases.</p> <p><u>Questions:</u> Does the reservation “exclusively” to the villages mean to overturn this process and force the villages to take on these matters? If so, how will an adoption be handled, since it is not a guardianship matter or a matter of incompetence? Would it be the regulations of family relations? What about “minor in need of care” cases, which are not criminal cases? What happens to the tribe’s administrative offices, programs, and funding? What about the practical problem of whether or not the villages are able to take on such responsibilities if Draft 24A passes? What about matters in which the families are members of more than one village or a member of the family is non-Hopi? Who would be authorized to intervene in state ICWA cases? Does this mean that the tribe would no longer be able to do this, and that the individual villages would have that responsibility?)</p> <p><u>Questions:</u> What does this mean? If the village determines its own membership, why would that determination be subject to its organizational structure, which is what Section 3(b) is about? Village</p>
---	--

<p>(b) The following powers are reserved exclusively to the Villages or Clans:</p> <p>(1) To regulate the inheritance of property within the control of a Village or Clan.</p> <p>(2) To assign all Village Lands or Clan Lands.</p> <p>(c) Except as provided in Article VII, Section 4, any disputes involving powers reserved to the Villages or Clans shall be decided by the Village or Clan unless the Village or Clan waives its jurisdiction to the Judicial Branch, and any such decision by the Judicial Branch shall be final.</p>	<p>membership as defined here does not account for those members who are not tribally enrolled and those who are enrolled but whose village affiliation is different. Do the Village’s want to limit membership in this way?</p> <p><u>Comment:</u> If a village does not want to exercise this power should/will/can the village or clans consider giving such powers to the Hopi tribal courts or the council? Why would a village or clan even consider giving this authority to the tribal council?</p> <p><u>Questions:</u> How and who will determine whether the village or clan has control of property? Leaving out “of a member of the Village” may create problems, what if the property physically is within the village, but the owner of the property is from another village? Or what if the property physically is not within the village, but the owner is a member of the village?</p> <p><u>Questions:</u> Why are the powers here separated from the previous section? If the Tribal Government is based on four branches, including the villages, what does it mean to now include the clans? Also, the above questions regarding the issue of the use of “exclusively” also apply here. What about a situation in which the general welfare of the tribe is at stake (an authority granted to the tribal council) but which also involves village and clan lands? Who is the decision-maker?</p> <p><u>Questions:</u> What about the situation where there is a controversy involving the village/clan authority and the authority of another branch of government, does this dispute need the village/clan’s permission to go to court? What about the concerns of the other branches? Also, does the requirement for village/clan permission to go to court mean that if they file claim against another branch of government, then the immunity of that branch is waived?</p>
<p>Section 3. <u>Village Organization.</u></p> <p>(a) Each Village shall decide for itself how it shall be organized and how it may select its Council Representatives subject to Section 3 (b)(vi) below. Each form of Village organization shall be consistent with the Constitution.</p>	<p><u>Comment:</u> The proposal to bring villages into the tribal government as the fourth branch contradicts with this language.</p>

<p>(b) A Village may reorganize as follows:</p> <p>(i) A Village may call a Special Election to decide how it will be organized by written petition signed by at least twenty percent of the Members of the Village.</p> <p>(ii) A Member of the Village age eighteen or older shall be entitled to sign a petition in their respective Village based on their Village affiliation number. For purposes of this Section 3 (b), the Tribe shall maintain Village affiliation numbers in accordance with a process established by the Tribe.</p> <p>(iii) Each Village shall have separate Village affiliation numbers. A Member of the Tribe shall have no more than one Village affiliation number and only Members of the Tribe shall be entitled to possess a Village affiliation number.</p>	<p><u>Comment:</u> This goes contrary to the previous statements that villages shall decide how they shall be governed.</p> <p><u>Questions:</u> Villages may determine their own percentage rules. How are (a) and (b) meant to work together? Is (b) meant to be the only way a village may organize? If so, then how can the village have the authority to decide for itself under (a)? Or is this meant to carry over the distinction from the current constitution regarding “traditional” and other organizations? What if a village decides to organize elections different than (b)? What about the adoption of a constitution, such as done by Upper Moenkopi?</p> <p><u>Comment:</u> The tribe’s membership roll is based on information provided by the applicant, and is maintained for the purpose of Hopi tribal membership, not village membership. The villages will be relying on information held by the tribe rather than creating their own membership requirements. Also, tribal members may and have changed their village affiliation numbers (i.e. their enrollment numbers) based upon residency (i.e. someone marries into a family from another village and moves to that spouse’s village).</p> <p><u>Questions:</u> If the tribe will keep membership records under this constitution, should it be publishing the names and addresses of those members? Currently, the information kept by the enrollment office is confidential except for those things corollary to the enrollment process, such as checks by other enrollment offices to see if a person is enrolled at all.</p> <p><u>Questions:</u> What is a village affiliation number? Is this a requirement that the village now track and provide to the tribe, through a number system, its membership? Or, is it the responsibility of the tribe to determine this membership/affiliation? If so, how does this work with the previous section that states that the villages decide their own membership? Is village affiliation different from village membership?</p> <p><u>Comment:</u> Village affiliation numbers goes against our traditional customs and will create dissention among villages and village members. It may lead to the council later using village affiliation number counts to set annual village appropriations. Affiliation numbers will also cause</p>
---	---

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(iv) The Election Commission shall prepare and issue a petition form to a Petitioner along with the names and addresses of Members of such Village and the minimum number of signatures required for a valid petition. A Petitioner shall have ninety days to collect the requisite number of signatures on the petition. A Petitioner shall submit a completed petition to the Election Commission.</p> <p>(v) The Election Commission shall verify the signatures on a petition within thirty days of receipt of the petition. Upon receipt of a valid petition, the Election Commission shall call and hold a Special Election within sixty days.</p> <p>(vi) Members of the Village age eighteen or older shall be entitled to vote in the Special Election. A Special Election shall be decided by majority vote of the eligible voters in the Special Election. The Village organization form decided by the voters in a Special Election shall serve as the official organization of the Village, and shall be recognized by the Council unless modified in a</p>	<p>other adverse impacts in such areas as land assignments, property ownership, ability to represent villages on the tribal council, and being able to participate in village ceremonies, etc.</p> <p><u>Comment:</u> This language to prescribe village election processes, establish election commissions, etc. goes against the language that acknowledges villages as autonomous villages, how villages shall decide how to be governed, etc.</p> <p><u>Comment:</u> Why include these provisions in the constitution? They are procedural in nature and are more easily and more properly included in other legislation, like village election rules. This is another example of how Draft 24A contains numerous procedural language that do not belong in a tribal constitution.</p> <p><u>Comment:</u> Section 3(b)(vi) eliminates those individuals who are not enrolled tribal members and who do not have enrollment numbers affiliated with the village that is selecting council reps.</p> <p><u>Questions:</u> Given that the population requirement has been removed from Draft 24A, how is the fifty percent of eligible voters to be determined? If the Village is free to decide for itself how to organize, does having the tribe's executive or legislative branch keep track of this village affiliation information interfere with that right?</p>
---	---

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>subsequent Special Election by the voters of the Village.</p>	
<p>Section 4. <u>Disputes Between Villages</u>. All disputes between Villages shall be subject to arbitration by a neutral third party agreed upon by the respective Villages, or if the Villages cannot agree on an arbitrator then the Judicial Nominating Panel shall select a neutral third party as the arbitrator. The final result of the arbitration may be appealed to the Court of Appeals. Decisions by the Court of Appeals shall be final.</p>	<p><u>Questions:</u> What if there is no judicial nominating committee in place? The result of the arbitration may be appealed to the court of appeals. So this provision will expand the role and authority of the judicial nominating panel? Is this the proper venue for settling disputes? Will members of the judicial nominating panel be willing to get in between disputing villages? Why is the appeal first to the appellate court instead of to the trial court?</p> <p><u>Comment:</u> See previous comments on the problems of the jurisdiction statements above. This is another example that Draft 24A lacks clarity and lacks legal sufficiency.</p>
<p>ARTICLE VIII - REMOVAL AND VACANCIES Section 1. <u>Removal of the President or Vice President</u>. The Council shall have the sole power to remove the President or Vice President for gross misconduct by a two-thirds majority vote of the Council; provided, that Villages that do not send Representatives to the Council shall not be counted for purposes of achieving a two-thirds majority vote. The Council shall provide the President or Vice President with notice of the charges and an opportunity to address the Council in a public hearing. A President or Vice President who is removed from office under this Section must wait at least two full terms of a President or Vice President before becoming eligible to run for any elective office.</p>	<p><u>Comment:</u> This provision will continue the misuse of power by the tribal council to remove an elected officer without the participation of the voters who vote, at large and by secret ballot, for the chairman and vice chairman (president and vice president). Without a definition of “gross misconduct” it leaves the discretion and interpretation entirely to the tribal council.</p> <p><u>Questions:</u> Is the “sole” power of the council meant to exclude other ways in which a public officer may be removed, e.g. recall election, or is “sole” meant to refer to the only grounds for which the council may remove? Why the specific inclusion of the reference to the villages that do not send Representatives? How is “gross misconduct” defined? What is the criteria?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Section 2. <u>Removal of Council Representatives.</u> Each Village shall have the power to remove its Representative according to the criteria and procedures established by the Village.</p>	<p><u>Comment:</u> This is not a new provision or a new power that villages don't already have. The appellate court's final answer to Bacavi Village's certified question affirmed the villages' authority to remove their council representatives. And village council representatives have previously been removed by the Kikmongwi.</p> <p><u>Questions:</u> Can the council remove the representatives if the villages refuse to act on charges other than gross misconduct? What are the grounds that the village may use to establish its removal? Any at all?</p>
<p>Section 3. <u>Removal of Judges and Justices.</u> The Judicial Nominating Panel shall have the sole power to remove a Judge or Justice for gross misconduct by a two-thirds majority vote of the Judicial Nominating Panel, provided, that Villages that do not send representatives to the Panel shall not be counted for purposes of achieving a two-thirds majority vote. The Judicial Nominating Panel shall provide the Judge or Justice with notice of the charges and an opportunity to address the Judicial Nominating Panel in a public hearing.</p>	<p><u>Comment:</u> This means that no other entity can remove the judges and justices. The authority of the judicial nominating panel here is confusing. Here the judicial nominating panel has authority to remove, but its appointing authority is tempered by presidential and council approval. Therefore, the judicial nominating committee can effectively veto a decision of the council to approve by removing for gross misconduct. Removal of the judges and justices will, no doubt, subject the judicial nominating panel to grievance processes and law suits in tribal court. This will require that the judicial nominating panel should be compensated for all that is expected of them, including removing judges, going through potential grievance processes and being sued in court</p> <p><u>Questions:</u> Does the tribe want to limit the removal of judges so narrowly? And how and who will define what gross misconduct is? Does this mean the judicial nominating committee can be sued in tribal court? What about appeals to the courts? Who provides legal counsel to the judicial nominating panel? Will the panel have sovereign immunity protection? What if they act outside the "scope" of their authority? Will they, can they, be sued in their individual capacities?</p>
<p>Section 4. <u>Automatic Removal.</u> A President, Vice President, Representative, Judge, Justice, Executive Director, or a Legislative Branch official or Legislative Branch employee who is finally convicted in any court of a felony, or any crime involving embezzlement, dishonesty, or fraud shall be automatically removed from office or employment; provided, that a person</p>	<p><u>Questions:</u> This provision, like other provisions, raises a number of questions. What does "finally convicted" mean and how is it different than "convicted"? If the villages are the fourth government branch, does this mean a conviction also bans the person from such village jobs? What is a legislative branch official or employee? Does this include those that are appointed by the council but in the executive branch under the "executive boards"? If a person is suspended pending the outcome of the appeal, and the term of their office expires, can they then be reelected to their office?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>who is appealing a conviction shall be suspended without pay pending the outcome of the final appeal. Any person who is removed under this Section shall not thereafter be eligible to run for office, serve as an elected official, or serve as an employee of the Tribe.</p>	<p><u>Comment:</u> Draft 24A speaks to removal of officials from the legislative branch, executive branch, and the judicial branch but is silent on villages as a fourth branch. Does this language imply that the same provisions will apply to villages?</p> <p><u>Comment:</u> Removal can be addressed in employee contracts for those who are not elected. Because of the consequences of this section, all convictions are likely to be appealed.</p>
<p>Section 5. <u>Vacancy in the Office of the President.</u> A vacancy in the Office of President shall be filled by the Vice President who shall serve as President for the remainder of the unexpired term, and who shall appoint a new Vice President for the remainder of the unexpired term.</p>	<p><u>Comment:</u> This provision takes away the right of tribal member voters to elect a president and vice president (chairman and vice chairman) in popular elections provided for in the current constitution at Article V, Section 3.</p> <p><u>Comment:</u> This provision will give the tribal council exclusive power to remove the president in favor of the vice president; and again will take away the rights of tribal members to vote for the president and vice president of their choice in popular elections. This gives the vice-president wide discretion on who he/she wants to appoint to fill his/her position. If all vice presidents are to be chosen in a general election under the constitution, is this a conflict with popular election rules?</p>
<p>Section 6. <u>Vacancy in the Office of the Vice President.</u> A vacancy in the Office of the Vice President shall be filled by the President, who shall appoint a qualified person to serve as Vice President for the remainder of the unexpired term.</p>	<p><u>Comment:</u> See above comments on authority and the vote of the people. This provision takes away the right of tribal members to vote in a secret ballot to replace the vice president and provides the president exclusive power to select the vice president of his choosing.</p>
<p>Section 7. <u>Vacancy in the Office of the President and Vice President.</u> A vacancy in both the Office of the President and the Office of the Vice President shall be filled as follows: (a) If less than one year remains in the term, then the Speaker of the Council shall serve as President for the remainder of the unexpired term and at the end of the term,</p>	<p><u>Comment:</u> Again, this provision takes away the right of tribal members to elect replacements in the offices of the president and vice president. The previous provisions state that if the president vacates, then the vice president serves out his term and appoints a new vice president. If the vice president vacates then the president selects a new one. Therefore, in order for this section to apply, both president and vice president would have to leave office simultaneously or before another appointment to fill a vacancy can be made.</p> <p><u>Question:</u> What if the speaker does not wish to serve as president for the rest of the term? What</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>the Speaker of the Council shall resume his seat on the Council;</p> <p>(b) If more than one year remains in the term, then a Special Election shall be held within ninety days of the vacancy to fill the vacant seats for the remainder of the unexpired term.</p>	<p>about the rights of the village where the speaker is elected? Does that village then hold another election to fill the vacated village representative position?</p> <p><u>Comment:</u> Who will enforce this provision? Past tribal councils have violated the existing provision in Article V, Section 3, by deciding among themselves to not hold special elections despite the calls by tribal members to hold the elections.</p>
<p>Section 8. <u>Vacancy in the Council.</u> A vacancy in a Representative seat may be filled by the respective Village for the remainder of the unexpired term.</p>	<p><u>Comment:</u> Is this necessary? The villages already have the authority to choose their representatives, and presumably this means when to pull or remove them, and whether to fill a vacant seat. Representatives do not necessarily serve a set term of office as that is supposedly left to the village, but note the contradictory language in Article IV, Section 2. The use of the word “shall” here infers that the village must fill vacancies. This interferes with the villages’ authority to decide its own organization and its choice of representatives.</p>
<p>Section 9. <u>Vacancy in the Judicial Branch.</u> A vacancy in an Office of Judge or Justice shall be filled upon nomination of the Judicial Nominating Panel, approval by the President, and confirmation by the Council for the remainder of the unexpired term.</p>	<p><u>Comment:</u> If the filling of the vacancy in the judicial branch is no different than the appointment authority, why include this section? This is another example of how Draft 24A is legally insufficient.</p>
<p style="text-align: center;">ARTICLE IX – BILL OF RIGHTS</p> <p>Section 1. <u>Bill of Rights.</u> The government of the Hopi Tribe shall not:</p>	<p><u>Comment:</u> Some language used in the following sections differs slightly from comparable language used in the U.S. Constitution and the Indian Civil Rights Acts. The language which is “standard”, used and recognized and interpreted through years of trials and case law. Care must be exercised when changing this language so that the underlying rights of citizens are not adversely affected. For instance, there is a prohibition against prosecuting someone for the “same offense arising out of the same incident” (double jeopardy) rather than saying that no person, “shall be subject for the same offence to be twice put in jeopardy”, these words could be interpreted to change the underlying right. While it is not necessarily unacceptable to change or clarify those rights that we</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(a) infringe upon religious beliefs or prohibit the free exercise thereof;</p>	<p>recognize under other documents in the tribal constitution, if the language is changed and is meant to change the rights thereunder, the reasons for either adding to or diminishing those rights should be clear and considered.</p> <p><u>Question:</u> Are these rights guaranteed to the people by their government?</p>
<p>(b) abridge the freedom of speech, press, expression, conscience, association, or the right of the People peaceably to assemble, and to petition the government;</p>	<p><u>Comment:</u> The use of the broad language “<u>infringe upon religious beliefs</u>” is problematic for use by an Indian tribe, which necessarily has certain religious and cultural tenants unique and specific to that tribe. Section 1302 of the Indian Civil Rights Act modified the language from the U.S. Constitution regarding the prohibition against the “establishment of religion” due to this inherent part of tribal governments. A balance must be struck between the rights of the people to choose their religious practices and the fact that certain aspects of the tribal government are linked to the tribe’s traditional cultural and religious practices. For example, the reference to clan leadership and their authority under the constitution is based both on Hopi traditional and religious practices. By specifically recognizing this in the constitution, the Hopi Tribe is “establishing” a religion, which could be interpreted to conflict with the prohibition against infringing on religious beliefs in section (a) above. The Hopi tribal government is not religion-neutral, and any language involved in a Bill of Rights should take into consideration that religion.</p> <p><u>Questions:</u> Is there a difference between the freedom of speech and the freedom of expression? What is the freedom of conscience? Is there any difference between the freedom of association or the right to assemble? Is the right to petition the government meant to include any more or less rights than the right to petition for the redress of grievances? For example, what if someone were to petition the tribe to reverse an employment decision. Is that provision under this section? Or are they simply grieved and seeking an audience?</p>
<p>(c) violate the right of the People to be secure in the privacy of their persons, houses, papers, vehicles, and effects against unreasonable searches and seizures, nor</p>	<p><u>Questions:</u> Is there supposed to be an “and” in between “supported by oath or affirmation” and “signed by a Judge”? Is the description of the “object and scope” of a search not the same as the “person or thing to be seized”? Is the right to have “these” rights explained limited to this part?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>issue warrants but upon probable cause, supported by oath or affirmation signed by a Judge, and particularly describing the place, person, house, papers, vehicle, or effects to be searched, the object and scope of such search, and the person or thing to be seized, and any search or seizure taken in violation of this provisions shall be excluded;</p> <p>(d) subject any person to be prosecuted twice for the same offense arising out of the same incident;</p> <p>(e) compel any person under oath in any case to self-incrimination;</p> <p>(f) search or arrest any person without informing them of their right to remain silent, to have access to an attorney, to be informed that anything they say can be held against them in a court of law, to have these rights explained at the time of the search or arrest, and to ask them if they understand these rights;</p> <p>(g) take any private property or possessory interest in private property for public use, without due process and just compensation;</p>	<p><u>Question:</u> Why is this right limited to those persons under oath?</p> <p><u>Comment:</u> This language is unnecessary as it states requirements for reasonable searches and seizures.</p> <p><u>Questions:</u> This provision explicitly gives the tribe the right to take property by eminent domain. Will this affect village and clan holdings? What is meant by the “possessory interest in private property”? These requirements seem to refer to some U.S. Constitutional case law involving the ability of the government to take privately held lands through regulation rather than outright condemnation and the ability of the government to take a lesser interest than the full fee. Is that what the possessory interest language is meant to refer to?</p>
---	--

<p>(h) deny to any person in a criminal or civil proceeding the right to a speedy and public trial which shall be initiated no more than six months from the filing of criminal charges or a civil complaint and which shall be decided by the Courts within one year, and in a criminal proceeding to be informed of the nature and cause of the accusation, to be presumed innocent until proven guilty, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, and to have the assistance of counsel for his or her defense including the right to have counsel provided subject to income guidelines; nor deprive any person of liberty or property without due process of law;</p>	<p><u>Comment:</u> The protection of the public from this right of the government does not particularly apply to Hopi as the tribe holds its lands in common and no one person owns a particular piece of the reservation, but instead those persons have use rights according to custom and practice. Since the lands within the Hopi government’s jurisdiction (and therefore the lands over which the tribe could possibly exercise the right of eminent domain) are not privately owned, the idea of a taking of private property does not apply. In addition, since the lands of the Hopi reservation are not severable by the tribe or any of its members and are instead held in common trust, those lands have no real ‘market value’. So, how could you measure the loss of any value through regulation or the ‘just compensation’ due for any taking?</p> <p><u>Questions:</u> Does the tribe have the resources to pay for the assistance of legal counsel (attorneys) for all those who exercise this right? If so, will the assistance of counsel cover all Hopi criminal offenses and all defendants? The common interpretation of the requirement for a speedy criminal trial is that the trial initiate one year from the date of the complaint. Is there a reason this section reduces that requirement to 6 months? This section also makes the guarantee for a speedy trial apply not only to criminal actions (actions instigated by the tribe against a person involving criminal charges) but also for civil actions.</p> <p><u>Comment:</u> This is adding an additional right: the right to a speedy civil action. There are several reasons to provide a guarantee of a speedy criminal trial, reasons which do not necessarily apply to civil actions. A criminal trial necessarily implicates more serious rights than a civil, the possibility of the loss of liberty rather than merely the loss of money. In addition, this guarantee would only apply to those civil actions initiated by the tribe and not those initiated against the tribe. The practical reality of civil litigation is that it is not always possible to get into court within 6 months, and sometimes it is not advisable given the strategy of that litigation. The complexities and facts of each civil case dictate its timing and how long it takes to make it to court. In addition, the requirement for 6 months for both civil and criminal will create an additional economic burden to the tribe, which will have to spend more money on lawyers and judges to ensure that the Courts are able to function in accordance with these restrictions.</p> <p><u>Comment:</u> The inclusion of the civil trial in the requirement for a “speedy and public” trials means</p>
--	--

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(i) require excessive bail, impose excessive fines, or inflict cruel and unusual methods of interrogation or punishment;</p> <p>(j) deny to any person within its jurisdiction the equal protection, application, or opportunity of the laws;</p> <p>(k) pass any bill of attainder or a law;</p> <p>(l) deny to any person accused of an offense punishable by imprisonment of the right,</p>	<p>that all civil trials must also be public. This is a conflict with the standard practice of cases involving minors, which are not always public, and/or other sensitive family cases that may now be closed for good cause and whose records may be closed from the public.</p> <p><u>Comment:</u> The requirement that a criminal defendant have assistance of counsel is also an additional right that will be considerably costly to the tribe. If the tribe must provide attorneys to defendants at no cost, the tribe will then have to hire and pay for those attorneys.</p> <p><u>Questions:</u> This section should be separated for the sake of clarity. Is the requirement for compulsory process for criminal defendants meant as a waiver of the tribe’s immunity? In other words, does that compulsory process allow the court, at the request of a private individual, to subpoena tribal officers and employees and require that they appear in court? The tribe may, of course, waive its immunity for this purpose, but due consideration should be given to the possible ways in which the waiver will be used. Will it apply to the president and the council? Does this include the ability to subpoena tribal documents (and villages if they are a fourth branch of government)?</p> <p><u>Question:</u> How does this, or will this provision apply to villages as a fourth branch of government?</p> <p><u>Question:</u> What is considered excessive?</p> <p><u>Questions:</u> What does the “application or opportunity of the laws” mean? In addition, under this draft the protections of this section are now specifically applicable against the actions of the village government. Does the traditional village system provide any conflict with these protections?</p> <p><u>Comment:</u> By definition, a bill of attainder is a law passed to punish conduct after the fact or retroactively.</p>
---	--

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>upon request, to a trial by a jury of their peers of not less than six persons;</p> <p>(m) deny to any person the right to own and use firearms subject to regulation by the Tribe;</p> <p>(n) deny to any person the access to his or her own personal information maintained by the Tribe, or to public information which shall include but not be limited to financial records maintained by the Tribe.</p>	<p><u>Comment:</u> This is a significant addition, not only to the tribal constitution, but to any right conferred or recognized under federal or state law. Does the tribe have firearms regulations in place?</p> <p><u>Comments/Questions:</u> What is the purpose for this section? One’s personal information is generally available to that person, and the tribe’s financial records should not be public information unless the tribe itself determines that disclosure of such will not harm the tribe (Sunshine laws). This appears to be an attempt to regulate a person’s access to personal information and tribal public documents. This is not something that does not belong in a tribal constitution. What is meant by “public information”? In addition, the right to access to the “financial records” of the tribe is very broad language and does not consider the practical need for some documents to be held confidentially by the tribe. Putting such guarantees into legislation rather than the constitution would allow the tribe to more specifically define the types of records subject to public access as well as create a process so that everyone knows how to gain such access.</p> <p><u>Comment:</u> These proposed provisions in this section are examples of how Draft 24A is legally insufficient. Instead of providing clarity, it raises numerous legal and practical questions.</p>
<p style="text-align: center;">ARTICLE X - REFERENDUM</p> <p>Section 1. <u>Referendum Requirements.</u> The enrolled Members of the Tribe may reverse any action of the Council by Referendum. Enrolled Members of the Tribe shall be required to obtain the signatures of at least twenty five percent of the eligible voters of the Tribe on a Referendum petition. The Election Commission shall prepare and issue a petition form to a Petitioner along with the names and addresses of Members of the Tribe age eighteen and older</p>	<p><u>Question:</u> How does the new provision placing villages as the fourth branch of government affect their right to “reverse any action” of the tribal council by referendum? The ability of the people to overrule any decision of the council creates an effective fifth branch to the government.</p> <p><u>Questions:</u> There is also the practical effect to the effective functioning of the government. Under Draft 24A, the court has the power to overturn council decisions, the president can veto them, and the public can overturn them. How is the council to be effective if every decision they make is subject to second guesses? Also, how can the subject of a referendum to overturn the council action be based on a bill which has been introduced on the calendar but to which no action has yet been taken?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>and the minimum number of signatures required for a valid Referendum petition. Members of the Tribe shall have ninety days to collect the requisite number of signatures on the Referendum petition. A Referendum petition shall address one subject or item that the Tribal Council has formally adopted or rejected and which has been fully exhausted. Members of the Tribe shall submit a Referendum petition to the Election Commission which shall have thirty calendar days to rule on the validity of the signatures on the petition, and if valid, the Election Commission shall submit the matter to a popular Referendum in a Special Election held within forty-five days. The decision by a majority vote of the voters in the Special Election shall determine the success or failure of the Referendum, and if successful, the decision shall be binding upon the Tribe until amended or revoked by a subsequent Referendum vote in a Special Election.</p>	<p><u>Question:</u> If the concern is to ensure the public’s ability to participate in the legislative process, why not include something in the section on the legislature’s sessions like what is contained in the current constitution (and left out of this draft) which guarantees the right of the public to attend meetings and/or speak to an issue either with leave of the council or according to a pre-scheduled request.</p> <p><u>Question:</u> If the decision on the referendum is binding absent another referendum, then does this remove that issue from the functioning of the government and place it in the hands of the public, possibly permanently? For instance if a referendum overturns legislation on zoning, does this mean the council can never again address zoning, even in a different way, unless it does so by calling a referendum vote?</p> <p><u>Comment:</u> Consider potential costs (to the public funds) of the referendums – and having the public’s funds being spent on referendums called by less than the majority of the public. The referendum power is for “any” action of the council. Should this be limited to certain actions, i.e. ordinances, resolutions, budgets, etc.?</p>
<p>Section 2. <u>Council Referendum.</u> The Council shall have the power to call a Referendum under this Article by a two-thirds majority vote.</p>	<p><u>Comment:</u> See above comment on requirement for vote of 2/3 of entire Council as opposed to here requiring 2/3 majority vote.</p> <p><u>Questions:</u> Are these two requirements meant to be different? Why would the council call a referendum over a matter they have decided? Or does this refer to a referendum on amending the tribal constitution?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

ARTICLE XI - ELECTIONS	
<p>Section 1. <u>Primary Election</u>. A Primary Election for President and Vice President shall be held on the first Wednesday in October. Notice of a Primary Election shall be provided to the voters.</p>	<p><u>Question/Comment</u>: Is the passage of election laws and/or regulations of the elections within the authority of the tribal council? This language belongs in an ordinance not in a tribal constitution.</p>
<p>Section 2. <u>General Election</u>. A General Election for President and Vice President shall be held on the third Wednesday in November. Notice of a General Election shall be provided to the voters.</p>	<p><u>Comment</u>: See comment above.</p>
<p>Section 3. <u>Special Election</u>. A Special Election shall be held when called for by the Council or by the Constitution. Notice of a Special Election shall be provided to the voters.</p>	<p><u>Comment</u>: What are special elections for? Remember the draft constitution provides that a vacancy in the office of the president is filled by the vice president; and the vice president selects a new vice president; and further that the speaker may fill the vacancy in the office of the president.</p>
<p>Section 4. <u>Election Commission</u>. There shall be an Election Commission to conduct all elections in accordance with the election laws and this Constitution. The Election Commission shall provide notice of all elections.</p> <p>(a) The Election Commission shall be comprised of twelve persons with one member selected by each Village according to the rules of each Village.</p> <p>(b) Each Election Commission Member shall serve four years or until a successor is sworn into office. Election Commission Members may serve any number of terms in succession or otherwise.</p>	<p><u>Comment</u>: This is an example of contradictory language inherent throughout Draft 24A. This language is better placed in a tribal ordinance (election ordinance). Too much procedural language that does not belong in a tribal constitution.</p> <p><u>Questions</u>: What if a village does not select a member and twelve commission members cannot be achieved? Is the establishment of this commission and the judicial nominating panel a responsibility of the villages, or another branch of government? What recourse does the tribe have if the villages do not select individuals for the commission or panel?</p> <p><u>Comment</u>: Is the intent here to set up an election commission separate from the legislative or the executive branches (including the regulatory commissions and the executive boards)?</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Section 5. <u>Nominations</u>. Each candidate for President and Vice President shall file a petition with the Election Commission. Each petition shall contain at least ten signatures of Members of the Tribe who are qualified to vote.</p>	<p><u>Questions</u>: What is the timing requirement before the election for the filing of a petition? The approval of a petition, i.e. verification that a petitioner meets the requirements for a candidate? Again, this language belongs in an election ordinance, not in a tribal constitution.</p>
<p>Section 6. <u>Voters</u>. Members of the Tribe ages eighteen or older shall be eligible to vote in an election other than a Village election. Eligibility to vote in a Village election shall be determined by the Village. When a Village decides to reorganize, eligibility to vote in a Village Election shall be determined pursuant to Article VII, Section (3)(b).</p>	<p><u>Questions</u>: Does the limitation of the eligibility determination for voting in village elections to the villages include the village elections for council representatives? If so, how does that work with the tribe’s responsibility to track village affiliation? Or does this mean that when villages become a fourth branch of government, that these rules will regulate village elections as well?</p>
<p>Section 7. <u>Ballots</u>. All elections shall be conducted using secret written ballots.</p>	<p><u>Questions</u>: Is there a reason for the inclusion of the word “written” here? What about punch-out ballots? Again, this language does not belong in a tribal constitution.</p>
<p>Section 8. <u>Absentee Ballots</u>. Voting by Absentee Ballot shall be permitted in all elections.</p>	<p><u>Comment</u>: This limits the tribe’s ability to permit absentee ballots in the future, and limits the number of tribal members who can vote. It seems more restrictive and harmful to include this provision, especially when it is not necessary; by leaving it out does not mean the tribe is not required to institute absentee voting. It is more appropriate to include this in the election procedures, rather than a tribal constitution.</p>
<p>Section 9. <u>Polling Places</u>. A polling place shall be located in each Village. The Council may establish additional polling places.</p>	<p><u>Comment</u>: This is better stated in an election ordinance and would be established by the election commission. It is important to keep the separation of powers in mind.</p>
<p>Section 10 <u>Certification of Election Results</u>. The Election Commission shall tally the votes at each election and certify the results of the election within three days.</p>	<p><u>Comment</u>: Again this requirement should be in an election ordinance, not in a tribal constitution.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Section 11. <u>Challenges to Election Results</u>. Any challenges to the election results shall be filed with the Court of Appeals within three days of certification of the results by the Election Commission. The Court of Appeals shall hear and decide all election challenges within thirty days. The decision of the Court of Appeals shall be final.</p>	<p><u>Questions:</u> Why not the trial court? The draft constitution places additional responsibilities on the appellate court that heretofore the court did not do. This will require additional resources to keep the appellate court active as needs arise. Does the tribe not have confidence in its trial court? This provision will violate Ordinance 21.</p> <p><u>Comment:</u> The provisions of the above sections starting with Section 5 and including the notice requirement are set out in the election ordinance. Other than the basic information on voting eligibility, candidate requirements and election dates, the rest of the information here is more suited to legislation and regulation than the constitution. These are procedural requirements that do not belong in a tribal constitution.</p>
<p>Section 12. <u>Oath of Office</u>. A Judge or Justice shall administer the Oath of Office to newly elected or appointed Representatives on the first day of the first Regular Session in January. A Judge or Justice shall administer the Oath of Office to a newly elected President and Vice President on the first day of the first Regular Session in January. A Judge or Justice shall administer the Oath of Office to a President, Vice President, or Representative who has been elected or appointed to fill a vacancy. All Representatives, Judges, Justices, the President, and the Vice President shall swear an oath and allegiance to preserve, protect, and defend Constitution of the Hopi Tribe.</p>	<p><u>Comment:</u> Oath of office for representatives is better placed in the section on the legislative branch and the one for the president and vice president to the executive branch. The requirements a publicly elected official to swear an oath of allegiance may, depending on their specific requirements, interfere with the rights to speech and religion recognized in the Constitution's bill of rights. Any such oath must be crafted carefully.</p>
<p>ARTICLE XII - LANDS AND PROPERTY Section 1. <u>Village Lands</u>. The Villages of Kykotsmovi, Bacavi, Oraivi, Hotevilla, Upper Moenkopi, and Lower Moenkopi shall have the</p>	<p><u>Comment:</u> Villages have not been consulted about the division here between Section 1 and Section 2; i.e why each village was included in these sections and what the implications are. Since the villages decide for themselves how they are organized, what about a village in Section 2 that later organizes under Article VII, Section 3 of this Constitution? This provision presumes that the named</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>power to exclusively govern their Village Lands for purposes of the assignment, and use, and alienation subject to the power of the Tribe to prohibit certain uses of Village Lands to protect the health or safety of the Tribe or its Members, the Bill of Rights. At the request of the Village, the Council shall have the power by law to issue patents to property interests in Village Lands only to Members of the Tribe.</p>	<p>villages do not have traditional assignments of lands within and around the villages.</p> <p><u>Comment:</u> A patent is a legal document by which a government grants or conveys to an individual land (generally public land) and secures to this person exclusive right to make, use, and sell the property (generally for a given time period). Tribes only have possessory interest in trust lands, not ownership. A tribal member cannot sell tribal land. Most of the lands on the Hopi reservation are federal lands held in trust for the Hopi tribe by the federal government. Any conveyance of trust lands must be approved by the federal government, the tribe's trustee. Second, the villages have the right to assign the land, under the current and this proposed constitution, any additional recognition by tribal council would be unnecessary.</p> <p><u>Comment:</u> The villages cannot alienate Hopi lands, only the tribe can with the approval of the Secretary of the Interior. This language appears to categorize villages under the presumption that some villages do not have clan lands.</p>
<p>Section 2. <u>Clan Lands.</u> Traditional Clan Land holdings of the Villages of Tewa, Walpi, Musangnuvi, Supawlavi, Sungoopavi, and Sitsomovi shall be exclusively governed by their respective Clans for the purposes of the assignment, and use subject to the power of the Tribe to prohibit certain uses of Clan Lands by law to protect the health or safety of the Tribe or its Members, and subject to the Bill of Rights. At the request of the Clan, the Council shall have the power by law to issue patents to property interests in Clan Lands only to Members of the Tribe.</p>	<p><u>Comment:</u> Language in Sections 1 and 2 refer to the alienation of lands within the village. The lands within the Hopi reservation are held in common in trust and cannot be sold or alienated absent consent of the tribe and the federal government.</p> <p><u>Questions:</u> The inclusion of the term "exclusively" creates several questions. Is the intent of these provisions to place with the villages the authority to uses of the village lands other than traditional uses (such as housing, agriculture, etc? If the individual villages are granted this authority, what is the mechanism for oversight or monitoring of such grants? Why the restriction to the granting of village land interests to members of the tribe only? What about a right of way to APS for power? What about a right of way to BIA for roads? What about a lease to any enterprise? Is the exclusive authority to govern and the restriction on the council's general welfare authority meant to mean that the villages also have the authority to regulate land use, such as zoning or construction permitting?</p>
<p>Section 3. <u>Other Lands.</u> Lands other than Village Lands or Clan Lands shall be governed by the Council. The Council shall have the power</p>	<p><u>Questions:</u> Does this mean that the council governs the lands in areas within the reservation that are not mentioned, like Polacca, Keams Canyon and the new lands? Is there a reason the term "exclusively" was used to modify "governed" in the previous sections but not in this one? See</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>by to issue patents to property interests in Other Lands only to Members of the Tribe.</p>	<p>above comments on the limitation of the issuance of property rights to tribal members.</p>
<p>Section 4. <u>Transfer of Interests in Real Property</u>. Notwithstanding any other provision of the Constitution, interests in real property within the Territory excluding leases shall not be conveyed or otherwise transferred, by sale, gift, devise, descent, forfeiture, or otherwise, to any person who is not a Member, and any such conveyance or transfer shall be deemed void and any action to execute such a conveyance or transfer, if intentional, shall constitute a crime as determined by law for persons who are subject to the jurisdiction of the Tribe, and any property subjected to such conveyance or transfer determined to be criminal shall escheat to the Tribe.</p>	<p><u>Comment</u>: This provision will require drafting a law to be included in the tribe’s criminal offenses. Real trust property cannot be totally conveyed without the consent of the tribe and approval by the federal government. Only use interests (possessory rights) in the land are assigned to members and can be conveyed. This provision also creates conflicts with the villages’ rights to regulate the inheritance of property. This provision may also create some conflict for those members who leave a will. What about allotted lands?</p>
<p>Section 5. <u>Land Disputes</u>. Notwithstanding Article VI, Section 5, and except as provided in Article VII, Section 4, the Judicial Branch shall not have jurisdiction over disputes regarding Village Lands or Clan Lands unless the Village(s) or Clan(s) involved in the dispute submit such dispute to the Judicial Branch, and the decision of the Judicial Branch shall be final.</p>	<p><u>Question</u>: What if the land dispute is between village members?</p>
<p>ARTICLE XIII - SOVEREIGN IMMUNITY Section 1. <u>Sovereign Immunity</u>. The Tribe shall possess inherent Sovereign Immunity. The Legislative Branch shall have the power to</p>	<p><u>Questions</u>: Does this provision not violate the separation of powers that this constitution seeks to achieve? The draft claims that the legislative branch is authorized to waive the sovereign immunity of the executive branch and judicial branch. How about villages as the fourth branch? Does waiver of sovereign immunity by the tribe (legislative branch) mean the villages’ sovereign immunity is also</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>waive by law the Sovereign Immunity of executive officials, employees, or departments in accordance with the Constitution. The Legislative Branch and the Judicial Branch shall be immune from suit in any jurisdiction and such Sovereign Immunity shall not be waived.</p>	<p>waived? Do villages, as a fourth branch of government also have protections of sovereign immunity? Draft 24A only mentions the legislative and judicial branches.</p> <p><u>Comment:</u> Ordinance 21 currently provides that the tribal court has jurisdiction over officers of the court, which include certain judicial staff and executive staff.</p>
<p>Section 2. <u>Immunity from Suit by Foreign Parties.</u> The government of the Tribe, its subdivisions, and officials and employees acting within the scope of their duties shall be immune from suit brought by any foreign entity, government, or person, except to the extent that the Council expressly waives Sovereign Immunity. Nothing in this Constitution shall be deemed to waive Sovereign Immunity from foreign suit.</p>	<p><u>Question/Comment:</u> What does foreign suit mean? Any judicial forum outside the Hopi Reservation? If so, the tribe cannot be brought into such forums without its consent or congressional abrogation. By stating the tribe is immune in the constitution does not make it immune, and its immunity is dependent on the “foreign entity” bringing suit, the forum, etc. Tribe, its officials, officers, employees are only immune from suit if they act within the scope of their authorities.</p>
<p>Section 3. <u>Immunity from Suit by Domestic Parties.</u> The government of the Tribe shall be immune from suit brought by any public or private entity or individual within the Territory or subject to the Jurisdiction of the Tribe except to the extent that the Council expressly waives such Sovereign Immunity. Executive Branch officials and employees acting within the scope of their duties shall be immune from suit, except to the extent that the Council expressly waives such Sovereign Immunity, or to the extent necessary to enforce in equity exclusively in the Judicial Branch the rights and responsibilities arising under this Constitution.</p>	<p><u>Comment/Question:</u> This is ambiguous language. Are the executive branch officials, etc., immune except by tribal council waiver, or if it is necessary to enforce rights and responsibilities? This language appears to permit the tribal court to waive the tribe’s sovereign immunity if it deems necessary, even if the council has not waived immunity. This is contrary to law and dangerous language. Another example that Draft 24A is legally insufficient.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>Persons exercising any power reserved to the Villages who are acting within the scope of such power shall be immune from suit except to the extent necessary to enforce in equity exclusively in the Judicial Branch the rights and responsibilities arising under this Constitution.</p>	
<p>ARTICLE XIV - EXISTING LAWS AND TERMS OF OFFICE</p> <p>Section 1. <u>Existing Laws</u>. All actions of the Tribe taken prior to the effective date of this Constitution shall remain in full force and effect to the extent these actions were lawful and are consistent with this Constitution.</p>	<p><u>Comment</u>: What happens if existing laws are inconsistent with Draft 24A? Draft 24A sets forth various new procedures and provisions that require planning to implement, additional resources, and enactments of law.</p> <p><u>Questions</u>: How does the current council and administration intend on implementing this constitution? It is obvious there various actions that are not be consistent with the proposed constitution, as this is nearly a complete renovation of the current constitution.</p>
<p>Section 2. <u>Existing Terms of Office</u>. Upon adoption of this Constitution, the official results of the most recent election for Chairman and Vice Chairman shall remain valid and this Constitution shall not require a new election for such provisions until such terms have expired; provided, that such Chairman and Vice Chairman shall be considered the President and Vice President and shall be subject to all other applicable provisions of this Constitution. Upon the adoption of this Constitution, all incumbent Tribal Council Representatives who were elected to office by their respective Villages shall remain in the office to complete their two year terms of office notwithstanding any other provision of this Constitution, any other</p>	<p><u>Comment</u>: This language does not belong in a tribal constitution.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>constitution, or any law establishing a term of office or the number of Representatives. Upon adoption of this Constitution, the incumbent Judges of the Judicial Branch shall remain in office with the full judicial authority to act in accordance with this Constitution until such time as replaced or reappointed in accordance with this Constitution.</p>	
<p>ARTICLE XV - EAGLE GATHERING AND SHRINES Section 1. <u>Eagle Gathering</u>. The customary and religious rights of the Tribe and its Members to gather eagles in its traditional territories shall be respected and upheld. The President shall negotiate with other governments and interested parties to secure and uphold the right of the Tribe and its Members to gather eagles in its traditional territories and to have access and use of its outlying established shrines, and any such agreement negotiated by the President shall be subject to ratification by the Council.</p>	<p><u>Comment</u>: This will not extend to those who are not subject to the tribal constitution.</p> <p><u>Question</u>: Does this limit the ability to negotiate only with the President?</p>
<p>ARTICLE XVI - AMENDMENTS Section 1. <u>Request for an Election</u>. (a) The Council may initiate the process to amend the Constitution by calling a Special Election by law. The Election Commission shall call and hold a Special Election to amend the Constitution within ninety days of the enactment of such law.</p>	<p><u>Comment</u>: Unless Draft 24A is intended to eliminate the involvement of the Secretary of Interior, the tribal election commission does not have the authority to hold a Special Election to amend the tribal constitution. Until and when the tribe's constitution is amended deleting the Secretary of the Interior's authority, the Secretarial Election to revise or amend the tribal constitution is conducted by the Secretary of the Interior.</p>

Analysis of Draft Hopi Tribal Constitution Version 24A

December 17, 2010

[Subject to Revision/Update]

<p>(b)The voters shall have the right to request a Special Election to amend the Constitution by submitting a petition to the Election Commission signed by at least thirty percent of the Members of the Tribe age eighteen or older. The Election Commission shall call and hold a Special Election to amend the Constitution within ninety days of receipt of a valid petition.</p>	<p><u>Comment:</u> The voters will request for a Special Election of the tribal council who then will authorize the Secretary of the Interior to conduct the Secretarial Election. Again, the tribal election commission does not have the authority to hold a special election to amend the tribal constitution, until and when the tribal constitution is amended deleting the Secretary’s authority.</p>
<p>Section 2. <u>Requirements.</u> The Constitution may be amended by a majority vote of the voters who vote in the Special Election, provided, that at least thirty percent of the voters cast a vote in the Special Election. Amendments approved by the voters shall become effective immediately unless otherwise indicated in the amendment.</p>	<p><u>Comment:</u> Again, the Secretary of the Interior currently has the authority to conduct a Secretarial Election to amend the tribe’s constitution; and the rules are prescribed in the applicable parts of 25 CFR.</p> <p><u>Question:</u> Who will certify that indeed 30% of tribal member voters voted in favor of a change to the tribal constitution? Currently it is the Secretary of Interior (BIA) not the tribal council.</p>