Supreme Court
of the Osage Nation
FILED AUG 11 2017
By

IN THE SUPREME COURT OF THE OSAGE NATION
OSAGE NATION RESERVATION
PAWHUSKA, OKLAHOMA

GEOFFREY M. STANDING BEAR, Principal Chief of the Osage Nation, Petitioner,	
v.	Case No. SCO-2016-01
ANGELA PRATT, Speaker of the Osage Nation Congress, Respondent.	**SLIP OPINION**

NOTICE: This opinion is subject to formal revision before official publication. Readers are requested to notify the Court Clerk, Osage Nation Supreme Court, at 1333 Grandview Ave., Pawhuska, OK 74056, or at courtinfo@osagenation-nsn.gov, of any typographical or other formal errors so that corrections may be made before the preliminary print is officially published.

Terry Mason Moore, MOORE LAW OFFICE, Fairfax, Oklahoma and Graydon Dean Luthey, Jr., GABLEGOTWALS, Tulsa, Oklahoma for Petitioner.

Mark D. Lyons, LYONS & CLARK, INC., Tulsa, Oklahoma, for Respondent.

PER CURIAM.[1]

A. INTRODUCTION AND SUMMARY

BEFORE THE COURT are several Executive Branch challenges to a number of laws adopted by the Congress: ONCA 16-84, 16-90, 16-93; 16-94 and 16-95; ONCA 13-67; and ONCA 14-47, as amended by ONCA 14-57; 15-27 and ONCA 16-65. The challenged laws

[1] Upon motion of Respondent, Associate Justice Lohah Homer recused from this matter and did not participate in the consideration or drafting of this opinion.

share some features common to one another and to similar laws we struck down as unconstitutional in *Standing Bear v. Whitehorn*, SCO-2015-01. Principal Chief Standing Bear ("Principal Chief" or "Petitioner"), on behalf of the Executive Branch, challenges the validity of all or portions of these laws as violative of Article V, section 2, separation of powers, Article VI, section 12, the single subject rule, and our opinion in *Whitehorn*, among other challenges. Speaker Pratt, on behalf of the Legislative Branch ("Congress" or "Respondent"), argues in response that the Executive's challenges to the disputed laws are either non-justiciable (not subject to judicial review), estopped (barred by reason of prior acts or practice) or, in the alternative, represent valid exercises of Congress's legislative authority. We exercise original jurisdiction under Article VIII, section 2 and 3 ONC 5-101 and 5-108.

In promulgating the Declaratory Judgment Act, 3 ONC § 5-108, Congress established a clear and logical framework for the efficient resolution of disputes between the Legislative and Executive branches over interpretation of the Constitution. Having done so, however, the Congress challenges the very framework it created through a series of affirmative defenses aimed at avoiding a declaratory judgment on the Principal Chief's specific constitutional challenges. We reject those challenges in greater detail below.

Petitioner asserts that the issues presented in this action were decided in *Whitehorn* and that decision is now controlling precedent. In response, Respondent essentially argues that *Whitehorn* does not control as to the issues presented or, alternatively, that *Whitehorn* was wrongly decided and should be modified or overturned. As will be discussed more fully below, we decline to modify or overturn *Whitehorn*.

Following the *Whitehorn* decision, the Principal Chief asked the Attorney General to review several provisions of prior legislation in light of that ruling and issue an opinion as to

their constitutionality. Specifically, the Principal Chief questioned the propriety of ONCA 13-67, styled the Budget Parameter and Limitation Act (BPLA); and ONCA 14-47, as amended by ONCA 14-57, 15-27 and ONCA 16-65. The Attorney General issued her opinion, which was filed of record March 24, 2016. In sum, she opined that, in light of *Whitehorn*, ONCA 13-67 violated the constitution in a number of ways. Relying on that opinion in part, the Petitioner filed this action seeking a formal ruling on the issues from this Court.

The Court finds section 5 of ONCA 16-84, 16-90, 16-93, 16-94 and 16-95 which purports to freeze Executive Branch salaries unconstitutional and void. We further find that creating the position of Paralegal within the Executive Branch in section 5 of ONCA 16-84 is also unconstitutional and void. Section 9(B) of ONCA 16-93, which limits the number of employees within the Education Division, is unconstitutional and void.

As to the challenged provisions of the BPLA, we hold the language in section 2 regarding "policies and procedures approved by the Osage Nation Congress" is unconstitutional and void; subsections 3(A)-(E) are unconstitutional and void, and sections 4 and 5 are also determined to be unconstitutional and void.

We further hold that section 6 of the BPLA is a valid exercise of Congress' appropriation power, as is section 8's requirements that budget requests be submitted in a form that complies with the BPLA and include support documentation.

Finally, we hold that ONCA 14-47, as amended by ONCA 14-57, ONCA 15-27, and ONCA 16-65 violates the Constitution and is unconstitutional and void.

B. FACTS AND PROCEDURAL HISTORY

In many respects, this case presents a reprise of constitutional questions we addressed in *Whitehorn*: separation of powers and the single subject limitation. For reasons that are not clear,

in its First Session, the Fifth Osage Nation Congress enacted a series of budget appropriation bills that contain essentially the same or similar provisions we struck down as unconstitutional in *Whitehorn*. The Principal Chief states that he signed the appropriation legislation into law to ensure funding to keep the government operating. He objected, however, to those provisions deemed unconstitutional and timely communicated those objections to the Congress. Congress took no action to amend the legislation to remove the challenged provisions and on November 28, 2016, the Principal Chief filed a Notice and Petition for Declaratory Judgment asking this Court to rule on several issues presented in the pleading. On December 20, 2016, we certified four multi-part constitutional questions. Petitioner filed his Opening Brief January 20, 2017 and Respondent filed her Response Brief March 3, 2017.

While the Court considered those pleadings, in a special election March 20, 2017, Osage voters approved a constitutional amendment to Article VI, section 24 of the Constitution. Because of that amendment, on April 5, 2017, Petitioner filed a Notice of Constitutional Amendment setting forth his argument regarding its effect. On April 28, 2017, Respondent filed a Supplemental Brief Regarding Passage of Amended Art. VI, § 23 of Osage Constitution. From all the above, we proceed today.

C. STANDARD OF REVIEW

We have already established the methodology used to resolve these types of disputes. As we have held in previous cases:

> In conducting our review, we first consider ϟΛ.ᏑƘΛ^, a unique Osage value that guides us as we attempt to balance the roles and responsibilities of each branch of government in a manner that respects the efforts of those who prepared this Constitution as well as the interests of Osage constituency to whom we are all accountable.

> The Osage Constitution was adopted to unite our Nation under the values of "Justice, Fairness, Compassion and Respect for the Protection of Child, Elder, All Fellow Beings and Self," creating three co-equal branches of government, with no single branch holding more power than the other and each branch accountable to the whole. OSAGE CONST. pmbl. & Art. V. Within this framework, we must evaluate constitutional provisions by reviewing the document as a whole, considering each provision as it relates to the others and giving each word its plain meaning when read in context to avoid absurd or inconsistent results.

Redcorn v. Red Eagle, SPC-2013-01 at 3-4 (2013).

Whitehorn was a case of first of impression. In that case, the Court was tasked with interpreting several laws passed by the Congress in light of relevant provisions of our Osage Constitution. The Court announced that in developing a uniquely Osage jurisprudence it would not consider Osage Constitutional disputes based upon the standards and values created by the federal or state governments.[2] SCO-2015-01 at 3.

We, therefore, reject outright Respondent's invitation to set the standard of review at "beyond a reasonable doubt." The Court reaffirms the standard of review established in *Whitehorn* and its predecessors.

D. BASIS FOR JURISDICTION

Jurisdiction is proper pursuant to 3 ONC 5-108, which states:

> The Supreme Court of the Osage Nation is granted original jurisdiction over actions for declaratory judgment between the Legislative and Executive Branches of the Osage Nation, filed by either party against the other, to resolve disputes over interpretation of the language or provisions contained in the Osage Constitution.

The matter before us falls squarely under this provision.

---

[2] Notwithstanding *Whitehorn's* clear directive regarding establishing a "uniquely Osage jurisprudence", Respondent cites thirty-seven Oklahoma state and federal cases and three Oklahoma statutes as "authorities" in defense of the challenged legislation. *Resp. Br.* at iv-vi.

E. ANALYSIS

1. Applicable Law

As a preliminary matter, we address Respondent's arguments regarding the applicability of certain Osage Nation laws, and whether those laws prohibit this matter from being heard by this Court. We find that 3 ONC 5-108 governs this matter and Respondent's arguments do not apply.

A. 3 ONC 1-101(C) is not applicable.

Respondent asserts that 3 ONC, section 1-101 applies to this action, which states in the absence of governing tribal law or federal law, "the law of the state in which the matter in dispute lies" must be applied. Respondent then proceeds to cite a litany of Oklahoma case law to support its arguments. The Court rejects Respondent's assertion.

First, "the matter in dispute" is the language of the Osage Nation Constitution. Unless the State of Oklahoma has adopted laws on how to interpret the Osage Nation Constitution, there is no "law of the state" to apply. To interpret this language in any other manner is to impose the policies and values of a foreign government into the Osage Nation.

Second, in *In re: Gray v. Mason*, we interpreted the phrase "the Court shall apply any laws of the United States that may be applicable" now codified within 3 ONC section 1-101. In that case, the parties argued that the procedural mandates of federal law included case law interpreting those laws. We held:

> In the interests of creating a framework to guide future decisions of the Nation's courts, and until such time when the laws, rules, or regulations of the Osage Nation provide otherwise, we find that the language of . . . the Civil Procedure Code requires the Osage Nation courts to apply United States statutes that impose specific obligations upon the Nation with respect to its activities. Case law interpreting those statutes shall be non-binding, persuasive authority. We find this will give the courts the

> necessary latitude to interpret laws in a manner consistent with the sovereign status of the Osage Nation.

In re: Gray v. Mason, SPC-08-01 at 4 (2009). We treat state law similarly, though it would be a rare occasion in which state law applies to the Nation's activities, and we would not be quick to recognize such law. In this case, there is no state law imposing specific obligations upon the Osage Nation regarding its Constitution. In the absence of such state law (without assuming such law would even be valid and enforceable against the Nation), there is no case law to even consider "non-binding" and/or "persuasive."

Third, Respondent's steadfast devotion to foreign constitutional jurisprudence is misplaced. The United States Constitution does not apply to Indian tribes. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Tribes both predate the United States Constitution and exist outside of its confines. As noted Indian law scholar Charles Wilkinson wrote:

> Indian tribes are part of the constitution structure of government. Tribal authority was not created by the Constitution—tribal sovereignty predated the formation of the United States—but the Constitution acknowledged the existence of tribes. Although many assumed that Indian tribal governments would simply wither away, the tribes have notdied out and the modern presidency, Congress, and the Supreme Court continue squarely to acknowledge this third source of sovereignty in the United States.

Charles Wilkinson, *Indian Tribes and the American Constitution*, in *Indians in American History: An Introduction*, 127 (Frederick Hoxie & Peter Iverson eds., 2014). Because the United States Constitution does not apply to tribes,[3] it stands to reason that the cases interpreting those provisions of the United States Constitution also would not apply.

Fourth, all courts—including tribal courts—have faced the task of interpreting and

[3] Those provisions of the United States Constitution that reference Indian tribes govern the acts of the federal government, not the acts of tribes.

applying its government's establishing document for the first time. By way of example only, the Mvskoke judiciary experienced this after its constitution took effect in 1878. In the article *Muscogee Constitutional Jurisprudence*, the authors wrote:

> The new [Mvskoke] Supreme Court encountered many of the same issues that arose in the early years of the United States, when inter-branch disputes threatened the constitutional structure. The major role of the Supreme Court in these disputes was to answer inquiries from the Principal Chief and/or the National Council on the constitutionality of existing or proposed legislation.

Sarah Deer & Cecelia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet under the Law)*, Tulsa L. Rev. 123, 151 (2013). We recognize a similar task here.

Another example lies in *Marbury v. Madison*, the landmark United States Supreme Court case regarding the power of judicial review, which was the result of Chief Justice John Marshall's review of the language of the United States Constitution itself. 5 U.S. 137 (1803). Not surprising, the technique is similar as the one we employ here. "It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." *Id.* at 174. What proceeds is an analysis of the U.S. Constitution's language, which culminated in the Court's holding that "the *particular phraseology of the constitution* of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument" (emphasis added). *Id.* at 180.

Finally, this Court opts to champion Osage autonomy rather than cede the Nation's power

to interpret its own laws to another government.[4] The Colville Court of Appeals recently remarked on the responsibility that rests on tribal judges: "[I]n our court system the cultural approach has been eroded and largely replaced by the non-Indian court system. Because of this, it is the trial judge's heightened responsibility to maintain the cultural milieu of the proceedings before it." *Sonnenberg v. Colville Tribal Court*, 26 Indian L. Rep. 6073, 6074 (Conf. Tribes of Colville Res. Ct. App. 1999). We agree and take this responsibility seriously.

According to a survey of tribal court opinions conducted by author Russel Barsh, "the frequency with which tribal courts rely on state law is troublesome, however, in the context of tribal courts' historical efforts to distinguish themselves from state courts, and justify their continued existence as separate judicial institutions." Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, Kan. J.L. & Pub. Pol'y, at 74, 80 (1999). Barsh observed, "more than one-fourth (28 percent) of the tribal rulings in the sample relied (at least in part) on state law" and "[t]here were very few instances in which tribal courts confronting a gap in tribal legislation expressly declined to adopt state law." *Id.* We do so here. The complexity and depth of the Osage Nation's history should be considered first before resorting to foreign law.[5]

---

[4] This is not new to any branch of the Osage Nation. The Osage Nation Congress, for example, asserted the Nation's sovereignty by establishing its own laws on employee eligibility for health benefits rather than adopt the applicable mandates of the Affordable Care Act. 19 ONC 3-105(C)(5). The Executive Branch—through the Nation's Self-Governance Program—assumed responsibility over the Real Estate Services and Natural Resources programs from the Bureau of Indian Affairs. *Nation makes historic switch from BIA land management to Osage land management*, https://www.osagenation-nsn.gov/news-events/news/nation-makes-historic-switch-bia-land-management-osage-land-management (last visited June 14, 2017).

[5] "[J]judges who begin invoking tribal norms will undoubtedly meet some initial resistance from litigants who have come to base their expectations on Western rules and values." Barsh at 89. We anticipated our approach would result in a thoughtful discourse between the branches rather than a scathing legislative reprimand and further intra-governmental conflict. Perhaps future opportunities will present themselves.

B. Clarification of *Standing Bear v. Whitehorn* re: application of historical Osage concepts

Given the ongoing nature of the dispute between the parties, the Court finds it necessary to clarify its ruling in *Whitehorn*, in which we discussed historical Osage governance to draw parallels between our cultural values and our governmental values.

Those references to historical Osage organization and governance in *Whitehorn* identified the Osage value of *separation of function based upon recognized and defined roles*. The *In-Lon-Schka*, for example, is a clear, relatable expression of this value. "We were told that a select group . . . created an extraordinary social device that transmitted a powerful spiritual foundation. It encompassed such force that today it is the basis for the perpetuation of all of our Osage values." S.E. Ruckman, *Drum ceremony unites Osages*, Tulsa World, June 19, 2005 at http://www.tulsaworld.com/archives/drum-ceremony-unites-osage/article_b4546067-e46b-5db4-871e-3d010e5f176a.html (last visited June 23, 2017) (quoting the late Fred Lookout). Why the *In-Lon-Schka* community (often comprised of the same people in the Nation's government) can function and the Legislative and Executive Branches fight each other to a standstill can be credited to this: in the *In-Lon-Schka* community, each person understands and accepts his/her role. *See* Jean Dennison, *Stitching Osage Governance into the Future*, American Indian Culture & Research Journal 37:2 115, 124 (2013) (relaying that we "needed to learn from the Osage *In-lon-shka* dances, when everything (especially political fighting) was put aside for those three weeks in June and everyone from the drumkeeper to the cooks focused on making the whole thing run smoothly. Each person had a set role and one didn't interfere with the roles of others."). In fact, the practice of individual role acceptance and requisite order flows through all Osage ceremonies and activities wherein every participant is expected to follow the traditional order when conducting or attending funerals, namings, Native American Church ceremonies, or

dinners.[6]

It appears our failure in *Standing Bear v. Whitehorn* was presuming that each party understood and accepted its role. We will try to clarify our reasoning here.

The Osage Congress is not the *non-hon-zhin-ga* or "Little Old Men." It is not the equivalent to the Little Old Men. It is a legislative body established by the Osage Nation vis-à-vis its Constitution. Respondent is correct that the Nation historically resolved disputes without a Supreme Court, or lawyers, or multimillion-dollar budgets, or a constitution. *Resp. Br.* at 1. As the first Chief Justice of the Supreme Court, Charles Lohah, wrote, "For thousands of years, the Osage have been a people of laws, first through the spoken word, then by resolution and now by written code." *Foreword*, Osage Nation Code Vol. 1 at IX (2017 ed.). We have consistently acknowledged our historical methods of governance when we examine the method of governance *in place today*. Our modern legislature has its role in the Osage governmental scheme, including:

(1) To enact laws prescribing rules and regulations governing membership;[7]
(2) To adopt uniform rules of procedure for conducting the business of Congress;[8]
(3) To establish procedure for enactment of bills into law;[9]
(4) To pass all laws necessary to carry into effect the provisions of the Osage Nation Constitution, including preserving hunting and fishing for the public good;[10] protecting and promoting the language, culture and traditional ways of the Osage people;[11] providing for the protection and advancement of a health care system for the Osage people;[12] establishing and promoting programs to contribute to Osage elders' economic, physical, and social well-being;[13] establishing and promoting

[6] Again, this is not an attempt to equate the role of one branch of government with a traditional role in any Osage custom and tradition. It is to identify those values in Osage custom and tradition that speak to the separation of functions, roles, and responsibilities.
[7] OSAGE CONST. Art III, sec. 4.
[8] *Id.* Art. VI, sec. 11.
[9] *Id.* at sec. 12.
[10] *Id.* Art. XV, sec. 5.
[11] *Id.* Art. XVI, sec. 1.
[12] *Id.* Art. XVII, sec. 1.
[13] *Id.* at sec. 2.

programs that contribute to protecting, nurturing and developing the minds, bodies, and spirits of Osage children; providing for and supporting a system of high quality early childhood learning programs for its children, advocating on behalf of Osage students for improvements in the public elementary and secondary school systems within the Osage Reservation through intergovernmental agreements, and developing effective tribal education programs that allow Osage students to obtain the skills and resources necessary for a post-secondary education;[14]

(5) To establish a merit based employment system;[15]

(6) To enact by law annual expenditure of funds which shall include an appropriation of operating funds for each branch of government;[16]

(7) To enact laws determining absence and disability of the Principal Chief;[17]

(8) To enact laws regarding the succession of office for the Principal Chief;[18]

(9) To enact laws regarding the salary and expense allowance for the Principal and Assistant Principal Chief;[19]

(10) To establish the Department of the Treasury;[20]

(11) To consent to Principal Chief appointees for Treasurer, Tribal Enterprise Boards, Supreme Court Justices and the Chief Judge;[21]

(12) To report the legislative priorities of Congress at the beginning of each legislative session and report actions taken by Congress at the end of a legislative session;[22]

(13) To establish inferior courts;[23]

(14) To enact provisions for violations of the Code of Ethics;[24]

(15) To conduct trials on removal of officers;[25]

(16) To enact an election code;[26]

(17) To provide for the utilization, development and conservation of all natural resources within the territory of the Osage Nation;[27]

(18) To waive the Nation's immunity from unconsented suit;[28] and

(19) To propose amendments to the Constitution.[29]

---

[14] *Id.* at sec. 3.
[15] *Id.* Art. VI, sec. 23.
[16] *Id.* at sec. 24.
[17] *Id.* Art. VII, sec. 9.
[18] *Id.*
[19] *Id.* at sec. 10.
[20] *Id.* at sec. 13.
[21] *Id.* Art. VII, secs. 13-14; Art. VIII, sec. 7.
[22] *Id.* Art. VII, sec. 21; the Speaker of Congress is required to carry out these tasks.
[23] *Id.* Art. VIII, sec. 1.
[24] *Id.* Art. X, sec. 10.
[25] *Id.* Art. XII, sec. 2.
[26] *Id.* Art. XIII, sec. 2.
[27] *Id.* Art. XV, sec. 1.
[28] *Id.* Art. XIX, sec. 1.

The Legislative branch of government is "separate and distinct and no person or collection of persons charged with official duties . . . shall exercise any power properly vested in either of the others except as expressly provided in the Constitution." *Id.* Art. V, sec. 2. When the Principal Chief takes executive action that interferes with Congress' constitutional powers, then such action may violate Article V, section 2 of the Osage Nation Constitution.

Likewise, the Principal Chief has a unique role and responsibility to "dutifully support the Constitution and laws of the Osage Nation" and to faithfully execute, administer, and enforce the Nation's laws. *Id.* Art. VII, sec. 1.[30] The Principal Chief's role is not to circumvent Osage law through subversive means, but to communicate when the law no longer meets the needs of the Nation. When a law proposed by Congress interferes with the Principal Chief's constitutional powers, it may violate Article V, section 2 of the Osage Nation Constitution.

In sum, the centralized tribal council model, created under the Act of June 28, 1906, 34 Stat. 539, in which all governmental power was vested in one body, was clearly rejected by the People in 2006 in favor of the three-branch government now embodied in the Osage Nation Constitution.

2. This dispute is properly before this Court.

A. 3 ONC 5-104 does not apply to actions for declaratory judgment between the Legislative and Executive Branches before the Supreme Court.

Respondent states the requirements for a declaratory judgment have not been satisfied because the Attorney General was not made a party to these proceedings and the record does not indicate the Attorney General was served with notice of these proceedings. Respondent cites to

---

[29] *Id.* Art. XX, sec. 1.

[30] The Principal Chief is also authorized to "veto bills by the Osage Nation Congress . . . , to appoint members" of boards, commissions, and other instrumentalities in the executive branch, and other officers identified in the Constitution, including a successor to serve as Assistant Principal Chief if the office becomes vacant. *Id.* at sec. 15; Art. VIII, sec. 7 (justices and judges); Art. VII, sec. 8 (Assistant Principal Chief vacancy).

3 ONC 5-104(B) to support this argument, which states the Attorney General "shall also be served with a copy of the proceeding and be entitled to be heard." Respondent also cites Oklahoma case law interpreting 12 OK Stat. 12-1653, the Oklahoma Declaratory Judgments Act, which mirrors the Nation's Declaratory Judgments Act.

If this were a matter filed before the Osage Trial Court, Respondent's argument would have significantly more weight. Here, however, this matter is brought under the Supreme Court's original jurisdiction pursuant to 3 ONC 5-108, which has no Oklahoma equivalent.[31] This provision grants this Court jurisdiction to consider disputes between the two branches of government regarding the constitutionality of Osage Nation law. It is this language that controls our review of proceedings of this nature.

When read in context within the Declaratory Judgments Act, 3 ONC 5-104 governs actions filed in the Osage Trial Court and not actions filed pursuant to this Court's original jurisdiction. The requirements in 3 ONC 5-104(B), which require the Osage Nation to be a party to the proceeding, indicate the action filed would not necessarily include the Osage Nation as a party. In actions brought under 3 ONC 5-108, the Osage Nation—by way of the Executive and Legislative Branches—is already a party. It would be an absurd conclusion to hold that the Osage Nation must be made a party to an action in which two branches are already parties.

Additionally, 3 ONC 5-104 is placed within several other provisions governing actions before the Trial Court. Section 5-102 sets forth the jurisdiction of the Osage Trial Court. Section 5-103 permits pleadings that seek a "determination of rights, status, or other legal relations" to be filed "alone or as incident to or part of a petition, counterclaim, or other pleading seeking other relief . . . ." 3 ONC 5-103. Such petitions, counterclaims, or other pleadings are

---

[31] Again, there is no Oklahoma law that addresses how this Court should interpret Osage law.

part of trial court actions.

Original actions filed in the Supreme Court are distinct actions under Osage law. The only relief permitted under original actions filed in the Supreme Court is the resolution of "disputes over interpretation of the language or provisions contained in the Osage Constitution." 3 ONC 5-108(A). Although either branch may file its action against the other in the Trial Court to obtain a determination of rights, status, or other legal relations, when declaratory relief "to resolve disputes over interpretation of the language or provisions contained in the Osage Constitution" is "incident to a petition or other claim in the Trial Court," the matter must be removed to the Supreme Court upon motion by either party. *Id.* at 5-108(D). Section 5-108, therefore, creates a unique process for actions filed between the Executive and Legislative Branches before the Supreme Court.

For these reasons, we hold the provisions of 3 ONC 5-104 to be inapplicable to actions filed with or removed to the Osage Supreme Court pursuant to 3 ONC 5-108.

B. Actions filed pursuant to 3 ONC 5-108 do not require material facts to be in dispute.

Section 5-108 creates a wholly unique cause of action before the Supreme Court that is only available to the Executive and Legislative Branches of government. No government agency or entity enjoys the direct access to this Court that section 5-108 offers the two branches. It is, by its very existence, designed to get to the heart of a dispute between the branches regarding the Osage Constitution by—in effect—bypassing the procedural and substantive measures taken at the trial court level and permitting the parties to plead their case directly to the Supreme Court. This direct route does not require a finding that material facts must be in dispute before we can consider an interpretation of the Constitution.

C. Standing is proper.

Section 5-108 is a legislative response to this Court's opinion in *In re: Gray v. Mason*, which rejected the Principal Chief's challenge to the Independent Press Act. SPC-2008-01 (2009). In that case, we held the Principal Chief had not satisfied the jurisdictional requirements of Article VII, section 5 of the Osage Constitution, which granted original jurisdiction in the trial court "over all cases and controversies arising under the Constitution, laws, and customs and traditions of the Osage Nation" when he filed his challenge in the trial court. OSAGE CONST. Art. VIII, sec. 5; *Gray* at 8-9.

Section 5-108 removed the procedural barriers discussed in *Gray* when a dispute involving an interpretation of the Osage Constitution between the Legislative and Executive Branches arises. Where other jurisdictions largely avoid constitutional disputes, the Nation has provided a clear mechanism to address them when they arise.

D. Consent does not render an unconstitutional act constitutional.

Respondent also argues that Petitioner waived any objections to the legislation at issue by signing them into law, stating that such "self-serving" acts are "unprecedented" and that once a law is signed the legislative process ends. *Resp. Br.* at 15-16. Respondent is correct that the Constitution governs the legislative process; once legislation passed by Congress is "approved, the Principal Chief shall sign it and notify the Congress of that fact." OSAGE CONST. Art. VII, sec. 14. Nothing in the Constitution states the Principal Chief's signature constitutes a finding that the legislation is constitutionally sound; as we held in *Gray*, "[I]t is the court's responsibility to determine the constitutionality of the Nation's laws." SPC-2008-01 at 10.

Contrary to Respondent's argument, Petitioner's requested relief is not a "do-over"—i.e., repeating an action to obtain a better result. Petitioner is accessing the vehicle set forth in Osage

law to determine whether the Constitution permits a particular action to take place.[32]

The Court agrees with Respondent that duress is not a defense that invalidates Petitioner's signing a bill into law because no defense is needed. The law does not require Petitioner to assert such a defense. We defer to the Principal Chief and to Congress to take the steps they determine are necessary to avoid disrupting government operations. The Constitution requires us to decide the legality—not the wisdom—of such acts.

We must also remind the parties that the Principal Chief will not always be the petitioner in a dispute over the interpretation of the Constitution; the Legislative Branch may be a petitioner—as it has in the past[33]—and will expect, if not demand, that its issues be heard and decided. This process must be accessible by both parties.[34]

E. The issues are ripe for judicial determination.

The dispute before us is over whether the Constitution permits the legislation at issue, not whether the legislation is valid based upon the speculation that a series of future events may or may not happen.[35] As we held in *Redcorn v. Red Eagle*, "the allegation [that an action was unconstitutional] necessarily requires an interpretation" of the relevant language within the Constitution. SPC-2013-01 at 5 (2013.) In that case, we held the "Speaker [of Congress] created a de facto dispute over the applicable constitutional provisions by initiating this action." We find so here as well.

F. The Principal Chief's complaint has triggered the provisions of 3 ONC 5-108.

Respondent states Petitioner's remedy is non-justiciable because the parties are not

---

[32] A more apt example of a "do-over" is drafting legislation containing language that has already been determined to be invalid with the expectation that repetition and supercilious arguments will yield a more favorable result.

[33] *See Redcorn v. Red Eagle*, SPC-2013-01 (2013).

[34] Congress appears to have agreed by introducing legislation "to require the Supreme Court to be fair and treat the parties equally". *See* ONCA 17-67.

[35] *See Gray,* SPC-2008-01 at 11 ("We will not consider what matters may exist beyond this case.").

adverse to each other; "Congress is required to allocate funds to the Executive Branch and the Executive wants to receive funds." *Resp. Br.* at 19. The very purpose of 3 ONC 5-108 is to resolve "disputes over interpretation of the language or provisions contained in the Osage Constitution." 3 ONC 5-108(A). "In determining whether a dispute over a constitutional provision exists, we must only determine whether the [Petitioner's] Complaint sufficiently alleged facts that triggered the provisions of section 8(a) of the Declaratory Judgments Act."[36] *Redcorn v. Red Eagle*, SPC-2013-01 at 5.[37]

Here, Petitioner alleges that Respondent, in her capacity as Speaker of the Osage Nation Congress, passed bills that violated certain provisions of the Osage Nation Constitution. The facts, which the Court agrees are not in dispute, are that Congress passed a bill that became law whether by approval by the Principal Chief or by congressional override of the Principal Chief's veto. The Principal Chief challenges these laws on the grounds they violate the Constitution. There is no dispute that the laws have been enacted. The Principal Chief's complaint has triggered the provisions of 3 ONC 5-108.

G. The dispute regarding ONCA 16-100 Is Moot.

The Court agrees that the dispute regarding ONCA 16-100 is moot and the questions regarding ONCA 16-100 are withdrawn as they are no longer in controversy.

3. *Standing Bear v. Whitehorn* controls many of the issues presented.

We now look to a fundamental dispute in this case that we addressed squarely in *Whitehorn*: separation of powers. Both Petitioner and Respondent refer to our Constitution's separation of powers provision as a "doctrine". That framing fundamentally misconstrues the

---

[36] Now codified as 3 ONC 5-108(A).

[37] Respondent raises the same arguments raised by the Principal Chief (who was the respondent) and rejected by this Court in *Redcorn v. Red Eagle*.

separation of powers provision enshrined in the Osage Constitution.

As generally used in the common law, the term "doctrine" refers to theories and concepts that have become generally accepted principles by widely agreed upon usage over time. An example would be the "unclean hands" doctrine often applied in tort law. For our unique purposes, however, separation of powers is not a doctrine, but *an affirmative mandate* within our constitution. Article V, section 2 is unequivocal: "Separation of Powers: The Legislative, Executive and Judicial branches of government *shall be separate and distinct* and no person or collection of persons, charged with the official duties under one of those branches, shall exercise *any power* properly vested in either of the others except as expressly provided in the Osage Nation Constitution" (emphasis added).

In defending against Executive Branch separation of powers challenges both here and in *Whitehorn*, Congress urges that for our government to function effectively there must be a certain amount of "blending" of powers between the Legislative and Executive. *Resp. Br.* at 28-29. This Court rejected that very argument in *Whitehorn* when Congress urged that there should be a certain amount of "osmosis" in powers between the Legislative and Executive branches.

In both cases, this proposed "blending" of powers appears to flow in only one direction: outward from the Legislative Branch and into the operational functions of the Executive Branch. Respondent cites no examples of a similar blending of powers in which Executive Branch powers might properly be asserted within the operations of Congress. An example might be an executive order creating or abolishing a congressional committee. Nor does Respondent cite any provisions within the Constitution that expressly provide authority for the executive powers asserted by the Congress in the legislation at issue before us, such as freezing Executive Branch salaries or organizing the Executive Branch into divisions of Congress' own design.

Respondent takes this argument a step further in this case, suggesting that historically, the "Little Old Men" of Osage historical reference were arbiters of disputes and that body was traditionally more powerful than the Chiefs. *Resp. Br.* at 1. To the extent that notion may be intended to urge that Congress should carry the greater weight of power as between itself and the Executive Branch, we reject any such suggestion as plainly contrary to Article V, section 2.

In accordance with our interpretation of constitutional provisions, we note again that our Constitution contains some unique provisions. For example, Article VII describes the Chief as having "*Supreme* Executive Power" (emphasis added). Art. VII, section 1. In analyzing the respective limits of power within the branches of government, we consider the term "supreme" in describing the Chief's executive power to mean what it says: Article VII, section 1 vests the Principal Chief with control over the execution of Osage law, and Congress may not revoke or reduce the Chief's power to execute the law or the Chief's authority to control how subordinate officials execute the law. "Supreme," therefore, means that the Principal Chief's executive power rests with the office, and is the source from which all other executive officials derive their power to execute the law.

When read in conjunction with Article V, section 2 it becomes clear, in crafting their Constitution, the People intended that there be crystal clear lines of authority between the branches. For this reason, in the absence of citation to an expressed exception in support, we again reject Respondent's invitation to expand an interpretation of Article V separation of powers to include a "blending" of constitutional powers between the Legislative and Executive branches.

Before we delve into the specific issues presented, the Court notes that our Constitution is remarkable in its simplicity. While our Nation is ancient, our population is relatively small and

our new government even smaller. Indeed, our primary governmental positions, Principal and Assistant Principal Chief, members of Congress, Supreme Court justices, and Chief Judge of the Trial Court consist of a total of eighteen people. With that simplicity of size and structure in mind, a primary focus of the Court must be to resolve disputes in such a manner as to prevent the workings of our government from devolving into something overly complex and legalistic that fails in its primary function: to serve the Osage People according to their Constitution.

In that regard, we note that in *Respondent's Response to Petitioner's Opening Brief*, editorializing on the *Whitehorn* court's separation of powers ruling, Respondent stated, "While no section of the Constitution requires government efficiency nor prohibits gridlock and inaction, the Solomonistic ruling nonetheless emerged." *Resp. Br.* at 26. We reject that proposition in the strongest terms.

The Osage Constitution does, in fact, require government efficiency and prohibits gridlock and inaction. Article X, section 3, Code of Ethics, states "Tribal officials and employees *shall not hinder or obstruct the proper administration of the Osage Nation government* in the administration of their duties" (emphasis added). Respondent has not identified—and we have not found—language that exempts any one branch from this requirement.

Even taken as a whole the Constitution is designed precisely to promote government efficiency and prevent gridlock and inaction. The Preamble itself is illuminating; it states that the Constitution's purpose is, among other things, to form "[a] government that is accountable to the citizens of the Osage Nation", and further, "[W]e, the Osage People, based on centuries of being a People, now strengthen our government in order to preserve and perpetuate a full and abundant Osage way of life that benefits all Osages, living and as yet unborn." Governmental

inefficiency, gridlock and inaction would violate both the spirit and letter of that foundational principal of our Constitution.

With all the above in mind, we turn to the certified questions.

F. CERTIFIED QUESTIONS

COUNT I

Whether ONCA 16-84, 16-90, 16-93, 16-94 and 16-95 violate Article V, Article VI, Article VII of the Osage Constitution and/or *Standing Bear v. Whitehorn*, to wit:

> **A. Whether freezing employee salaries for executive branch entities as of the effective date of the Act is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. Section 5 of each of the challenged acts, styled "Congressional Authorization" states: "The Osage Nation Congress authorizes the expenditure of salaries/wages and benefits to pay *current compensation* of all *existing* employees as of the effective date of this Act" (emphasis added). Rather than defend its salary-and-workforce-freezing provisions as a permissible legislative exercise, Respondent argues that section 5 does not, in fact, freeze salaries and workforce structure, stating: "This law does not freeze employee wages or salaries. This law has appropriate limiting language in it that the Executive Branch can only spend the wages and salaries that Congress appropriates. That's it!" *Resp. Br.* at 15. The plain language of section 5 admits of no such interpretation.

At the outset, the Constitution does not permit the Executive Branch to spend *more* in wages and salaries than Congress appropriates. The proviso that only "current compensation" is authorized under the appropriation can only be reasonably interpreted to mean that only the compensation levels "authorized" in the bill—no more and no less—are allowed. (In contrast, Article VII, section 10 expressly authorizes Congress to establish the salaries of Principal Chief

and Assistant Principal Chief and prohibits their increase or decrease during their terms of office.) Likewise, "all existing employees" can only be reasonably interpreted to mean that the appropriation permits compensation only for those employees in existence as of the effective date of the Act.

In *Whitehorn*, in addressing a nearly identical Article V, section 2 challenge, we stated "The Constitution does not expressly authorize Congress to condition its appropriation on certain actions taking place." SCO-2015-01 at 10. By the same reasoning, the Constitution does not authorize Congress to condition its appropriation on certain things *not* taking place, such as salary adjustments or workforce restructuring, both of which are clearly within the scope of the Constitution's Article VII executive functions.[38] Section 5 of ONCA 16-84, 16-90, 16-93, 16-94 and 16-95 purports to do exactly that and is, therefore, unconstitutional and void as violative of Article V, section 2.

B. Whether including more than one subject within the challenged pieces of legislation is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING: No. In *Whitehorn*, we stated "Appropriation laws must only include appropriations." SCO-2015-01 at 13. Section 5's proviso that purports to manage and control the Executive Branch's use of appropriated funds throughout the fiscal year after the appropriation has been made is a subject apart from the appropriation itself. We again decline Respondent's invitation to expand the definition of "single subject" to include ancillary provisions within an appropriation law on the theory that they are "germane and related to the

[38] Employee compensation is within the purview of the merit-based employment system, which safeguards the way compensation and bonuses are determined. According to the Society for Human Resource Management, "Pay increases based on performance are representative of an employee's ongoing and potential contributions. [B]ase pay increases must be earned, based on demonstrated individual achievement." SHRM, *Introduction to the Human Resources Discipline of Compensation*, May 5, 2017.

appropriation." *Resp. Br.* at 24. To find otherwise would strip Article VI, section 12 of its meaning and purpose.

As additional clarification for its mandate, Article VI, section 12 also provides that the subject of each law "shall be expressed in its title." The ongoing constraints on the Executive Branch's use of appropriated funds contemplated in section 5 of each of the challenged laws is clearly not expressed in the act's titles, which are referred to as "Appropriation Acts". For these reasons section 5 of ONCA 16-84, 16-90, 16-93, 16-94 and 16-95 is unconstitutional and void as violative of Article VI, section 12.

C. Whether creating a new position within the Executive Branch, specifically that of "Paralegal", and establishing the salary range for that position is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING: No. Section 5 in ONCA 16-84 states that Congress "authorizes a new position titled "Paralegal" within the salary range set out in the position description filed with the Human Resources Department." We find this language is an improper attempt to commandeer the Executive Branch's hiring decisions in violation of Article V, section 2. Under Article VI, section 23, Congress is charged with establishing "a system under which the merit principle will govern the employment of persons by the Osage Nation." Congress is not charged with making individual employment decisions; it is responsible for establishing a *system* by which employees are hired, promoted, compensated, disciplined, trained, and rewarded. The language in section 5 is unconstitutional and void as an improper interference with the Executive Branch's powers.

D. Whether prohibiting the Executive from creating positions within the Education Division beyond those authorized in section 9(B) of ONCA 16-93 is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING: No. The challenged language states, "The current positions in this Division are authorized for fiscal year 2017. No new positions were presented to the Osage Nation Congress for fiscal year 2017, and therefore are not authorized." For reasons already set forth in the above discussion, this language improperly interferes with the Executive Branch's hiring decisions. Section 9(B) of ONCA 16-93 is unconstitutional and void.

COUNT II

1. **Whether one or more provisions set forth in ONCA 13-67, the Budget Parameter and Limitation Act (BPLA), as set forth more specifically below, violate Articles V, section 2 and Article VII of the Constitution of the Osage Nation and/or *Standing Bear v. Whitehorn* by permitting an unconstitutional intrusion by the Osage Congress upon the powers and authorities reserved to the Executive Branch, to wit:**

    A. **Whether section 2 of the BPLA requiring Congressional approval of the policies and procedures of the Human Resources Department and Executive Branch Departments is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. Section 2 of the BPLA states "Salary and wage increases shall be made solely according to the provisions of a merit based system established in Osage law and policies and procedures approved by the Osage Nation Congress except as otherwise provided by the Osage Constitution." ONCA 13-67; *codified at* 15 ONC 1A-103. The phrase "and policies and procedures approved by the Osage Nation Congress" constitutes an improper interference with the Executive's constitutional powers. Respondent cites no constitutional provision that would permit Congress to exercise the power to approve or disapprove the policies and procedures of any Executive Branch department. Once Congress adopts the law establishing the merit principle system, its role ends.

B. Whether sections 3(A)-(E)[39] of the BPLA prohibiting line item shifting and imposing salary restrictions is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING 1: As to subsections 3(A), (B), and (C): Yes, as to the line item shifting provisions, which we find is a permissible exercise of Congress' powers, but with some qualifications. No, as to the restriction of new positions without Congressional approval, which we find is outside of Congress' authority.

The language at issue states:

> A. Except for non-tribal funds, no line item shifting shall be allowed into or out of the categories of "Salaries and Wages" and "Employee Benefits." Line item shifting shall not be utilized to establish new positions *without the specific approval of the Osage Nation Congress.*
>
> B. Except for non-tribal funds, no line item shifting shall be allowed between any Administrative Expense category and any Non-Administrative Expense category.
>
> C. Except for non-tribal funds, no line item shifting shall be allowed out of the category of Direct Assistance.

ONCA 13-67 §§ 3(A)-(C); codified at 15 ONC 1A-104(A)-(C) (emphasis added).

As to the restriction on new positions, in section 3(A), Congress reserves for itself approval of new positions within another branch, which is wholly outside its constitutional authority. This language is unconstitutional and void.

As to the line item shifting issue, the Constitution is silent and the practice has been part of the Nation's internal budget management since the Constitution was enacted. The practice addresses the changing needs of a branch throughout the fiscal year, but raises the issue of whether an expenditure is consistent with the annual appropriation approved by Congress. The

[39] Originally, the question posed addressed subsections 3(B) through (E); we include 3(A) in our decision.

parties dispute whether Congress has the authority to legislate the practice of line item shifting. We find it does, but with some caveats, for the reasons set forth below.

First, Congress is vested with the appropriation power under Article VI, section 24. Congress adopts legislation containing a total appropriation, which is allocated into several categories defined by Osage law.

Second, Congress is vested with prescribing the "powers and duties of the Treasurer of the Osage Nation" under Article VII, section 13 (Establish Department of the Treasury). The Treasurer is responsible for managing tribal funds. "The Treasurer shall accept, receipt for, keep and safeguard all tribal funds as directed by the Congress and shall maintain and provide an accurate record of such tribal funds." OSAGE CONST. Art. VII, § 13. Congress later enacted 15 ONC 2-311, which describes the Treasurer's duties, including the management of appropriations.

Third, Congress must "pass all laws necessary to carry into effect the provisions of the Osage Nation Constitution." *Id.* Art. VI, § 16 (Necessary Laws). This includes the provisions of Article VI, section 24 and Article VII, section 13.

Fourth, members of Congress are officials, and are prohibited by Article X, section 3 from hindering or obstructing "the proper administration of the Osage Nation government in the administration of their duties." In other words, Congress cannot, in the discharge of its legislative obligations, adopt laws that hinder or obstruct the government's administration.

Finally, we held in *Whitehorn* that Congress cannot authorize the Treasurer to reduce an appropriation once enacted into law. "The Constitution requires annual budgets to be adopted by law, laws to be adopted by statute, and statutes to be enacted by bill. Appropriations are only enacted by law, meaning any changes to that law would require another act of Congress." SCO-

2015-01 at 15. Specifically, we held that Congress could not authorize a change in *appropriation* without enacting a change in the law.[40] *Id.*

Taking all this into account, we hold that line item shifting does not constitute a change in the appropriation amount and line item shifting laws are a proper exercise of Congress' constitutional powers; *provided*, those laws vest the Treasurer with the authority to manage a budget within an appropriation and such laws do not hinder or obstruct the proper administration of the Osage Nation government.[41] Congress cannot, however, adopt legislation directing the Treasurer to reduce or increase an *appropriation* without a further act of Congress.

For these reasons, the provisions of Section 3 of the BPLA regarding line item shifting are a valid exercise of Congress' authority, except for the language: "Line item shifting shall not be utilized to establish new positions without the specific approval of the Osage Nation Congress", which we find is unconstitutional and void.

HOLDING 2: As to subsections 3(D) and (E): No. These subsections state:

> D. Salaries shall not be advanced, nor paid out, at a level in excess of 1/26th of the *approved annual salary* as evidenced by the salary assigned to the position by the Osage Nation Human Resources Department, and recited in the support documentation of a given entity for the fiscal year.
>
> E. [T]his Act shall be deemed to authorize additional expenditure of [] non-tribal funds as they are received in all categories set out in that entity's appropriation or in any new category allowed by the funding source, *subject to the 1/26th salary restriction referenced in paragraph (D)* of this Section . . . .

ONCA 13-67(D)-(E), codified at 15 ONC 1A-104(D)-(E) (emphasis added). In subsection D, Congress reserves approval over annual salaries, which is outside its constitutional authority. In

[40] The "appropriation amount" is the total sum of funds appropriated to a branch.

[41] A law may be construed to "hinder or obstruct the proper administration of the Osage Nation government" when it is intended to interrupt or actually disrupts Osage Nation programs, services, functions or activities, or to prevent or actually prevents an official or employee from performing his/her lawful duties.

subsection (E), Congress restates its authority to approval an annual salary. For these reasons, the language in subsection D and E referencing "approved annual salary" is unconstitutional and void.

C. Whether section 4's prohibition on line item shifting into a line item(s) not contained within an appropriation bill at the time of its enactment is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING: No. The language at issue states: "Except for non-tribal funds authorized by the funding source, no line item shifting shall be allowed into line items not within an appropriation bill at the time of the enactment." ONCA 13-67 § 4; codified at 15 ONC 1A-105. The restriction appears to prohibit an entity from using the Nation's funds on unlisted expenditures without Congress' approval.

We have already held that Congress can limit the Treasurer's line item shifting authority through legislation; the issue is whether Congress can require the funded entity (in this case, the Principal Chief) to seek an amendment for an expense using tribal funds that is not listed in the original appropriation act. We hold that it cannot *when it results in Congress managing a funded entity's budget*, which is the Treasurer's responsibility under the Constitution.

Here, the law states that line item shifting is permitted—*regardless of the presence or absence of expenditure lines*—for non-tribal funds, but not permitted when tribal funds are being used. The issue is not whether a line item exists in an appropriation; if Congress was concerned about a "bait-and-switch" budget request, then this restriction would have been universally applied. Instead, Congress steps into the Treasurer's role by deciding whether an expenditure is

a legitimate use of the Nation's resources. This distinction results in Congress reserving for itself the management of another branch's budget in violation of Article V, section 2.[42]

D. Whether section 5's requirement that approved budgets shall be organized by divisions is a constitutionally permissible exercise of the Congress' legislative authority.

HOLDING: No. The challenged language states "Approved budgets shall be organized by Divisions as *established by law* or Executive Order." ONCA 13-67 § 5, codified at 15 ONC 1A-106. Congress reserved to itself the authority to organize the Executive Branch (regardless of whether the Principal Chief had already organized the branch by Executive Order), which we find improperly interferes with the Executive's authority to organize its branch.

In addition, Article VI, section 24 provides: "The Osage Nation Congress shall enact, by law, an annual expenditure of funds which shall include an appropriation of operating funds *for each branch of the government* for each fiscal yea[r]" (emphasis added). We again decline to read into the Constitution provisions that are not set forth in its text. Appropriating operating funds for each "branch" of the government is a very different mandate than appropriating funds for each "division" within each branch. Congress' role is to appropriate operating funds to the branches. Organizational decisions within the Executive branch not specified by the Constitution are the Executive's prerogative and outside Congress' constitutional authority.

E. Whether the restriction on the introduction of general appropriation legislation set forth in sections 6 and 8 of the BPLA contingent upon Congressional approval of a motion to adopt an Annual Projected

---

[42] There are numerous provisions in place to protect the Nation's assets, such as the Code of Ethics listed in Article X and the removal provisions in Article XII. Federal law also criminalizes embezzlement and theft from tribes, punishing anyone who "embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian [tribe] or intrusted to the custody or care of any officer, employee, or agent of an Indian [tribe]." 18 USC § 1163.

Revenue Report for the same fiscal year violates Articles V and VI, section 23.

HOLDING 1: No, as to section 6. Section 6 of the BPLA requires the adoption of an Annual Projected Revenue Report prior to the introduction of appropriation legislation. Petitioner states the prerequisite is not authorized by the Constitution and prevents Congress from carrying out its obligation to appropriate operating funds to the branches. Respondent argues the mandate that "the annual budget shall not exceed projected revenues" requires Congress to determine the Nation's projected revenues first.

Respondent is correct; the Nation's projected revenues must be determined before an appropriation can be made; the Constitution's language regarding "projected revenues" would be meaningless if there was no provision for Congress to determine projected revenues first.

HOLDING 2: No, as to section 8 of the BPLA, with one proviso. Section 8 states: "All Osage Nation governmental branches and independent entities and instrumentalities seeking funding for operations through general appropriation must submit in a form which complies with this act to the Osage Nation Congress by July 15th of each year: [] An approved annual budget; and [] Support documentation." ONCA 13-67 § 8, codified at 15 ONC 1A-109. Petitioner's objection states the language requires the "submission of budgets complying with the unconstitutional Executive Branch divisions form." *Pet. Br.* at 19. Respondent argues the requirement is part of "Congress' duty to appropriate only that amount of money the Nation expects to receive in revenue," and the "comprehensive employment, wage and salary information [requested] from the Executive Branch" is a valid exercise of Congress' appropriation power. *Resp. Br.* at 21.

Petitioner's objection is based on the Congress-created Executive branch divisions we have now struck down. Notwithstanding the unconstitutional language, we find that Congress'

appropriation power includes the ability to legislate the form that appropriation requests should take. It would be both impractical and absurd for Congress to consider appropriations without assigning some form to the manner in which appropriations are presented and adopted. That portion of section 8 regarding the form of an appropriation request is consistent with Congress' appropriation authority.

For the same reason, the requirement in section 8(2) that an appropriation request include "support documentation", as defined by Osage law, is within the scope of Congress' appropriation power because each requesting entity is responsible for providing Congress with a complete, relevant, and accurate picture of its appropriation request.

2. **Whether a severability provision may be implied in relation to Congressional legislation to preserve a particular legislative enactment notwithstanding the enactment's inclusion of one or more unconstitutional provisions.**

HOLDING: Moot. The BPLA contains a severability clause. Whether a severability provision may be applied to some future legislation is not properly before the Court.

3. **Whether for purposes of the Declaratory Judgments Act, a justiciable issue may be presented to the Court where the challenged legislation was signed by the Principal Chief.**

HOLDING: Yes, as discussed above, the Principal Chief's signature on a bill passed by Congress does not automatically cure any unconstitutional provisions within the particular act.

COUNT IV[43]

Whether ONCA 14-47, as amended by ONCA 14-57, ONCA 15-27, and ONCA 16-65 violates Article VII, section 3 of the Constitution and/or *Standing Bear v. Whitehorn*, to wit:

[43] Count III of *Petitioner's Notice and Petition for Declaratory Judgment* challenged the constitutionality of ONCA 16-100, which was repealed in its entirety shortly after the filing of this action.

A. **Whether organizing the Executive Branch into divisions beyond those set forth in Article VII of the Constitution is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. See Article V, section 2 discussion and rulings, above, and the Court's ruling in *Whitehorn*.

B. **Whether requiring that each Executive Branch "entry" be assigned to certain divisions is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. See Article V, section 2 discussion and rulings, above, and the Court's ruling in *Whitehorn*.

C. **Whether preventing line item shifting by prohibiting the Executive Branch from paying salaries, benefits and travel expenses for a division employee except to those employees originating within that division is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. See Article V, section 2 discussion and rulings, above, and the Court's ruling in *Whitehorn*.

D. **Whether prohibiting hiring for a position within an Executive Branch division until Congress appropriates funds to the division "for compensation" is a constitutionally permissible exercise of the Congress' legislative authority.**

HOLDING: No. See Article V, section 2 discussion and rulings, above, and the Court's ruling in *Whitehorn*.

CONSTITUTIONAL AMENDMENT OF MARCH 20, 2017

In a Referendum held by special election March 20, 2017, Osage voters approved an amendment to Article VI, section 24 of the Osage Constitution. In response, Petitioner filed a "Notice of Constitutional Amendment" on April 5, 2017 and Respondent filed a "Supplemental Brief Regarding Passage of Amended Art. VI, sec. 23 of Osage Constitution" on April 28, 2017.

Petitioner argues that the amendment is essentially "aspirational" and does not change existing law or bear on the separation of powers questions at issue in this action. Respondent, on the other hand, argues that the amendment is significant as it bears on the Executive Branch's challenge to Congress' right to demand department and/or job specific payroll information for purposes of Congress appropriating a budget. We agree with Petitioner.

The amendment states: "The annual budget of the Osage Nation shall be governed by the principals of transparency and accountability, and the budgetary process encompassing those principals shall be set forth in Osage law." No reasonable argument could be made that the annual budgeting process should *not* be governed by transparency and accountability. Indeed, we would hope that those qualities have been polestars of the budgeting process all along. The amendment's second clause, however, merely establishes that some future legislation may be required that creates a "budgetary process encompassing those principals." No such legislation is presently before the Court and therefore the Court is without jurisdiction to make any findings regarding the clause's potential future effects.

G. CONCLUSION

The small size of our government and the straight-forward simplicity of our Constitution present both opportunities and challenges. An abiding objective of this Court in interpreting our Constitution is to focus on that economy of size and not be drawn into an overly complex, legalistic approach to dispute resolution that obscures the common-sense principles and provisions the People adopted in their Constitution.

Our government is essentially in its infancy. In relative terms, our level of constitutional legal development could be compared to that of the United States federal government in 1799 or 1800. For that reason, a certain amount of uncertainty in its application and enforcement is

natural. We are troubled, however, by the fact that the legislative acts at issue here, all but one of which were enacted *after* our decision in *Standing Bear v. Whitehorn*, appear to either challenge the validity of the Court's rulings in that case or disregard them altogether. Constitutional governments are only as effective as the people elected to serve in them. Every member of each branch of government must carry out his or her duties in accordance with the plain meaning of Constitution. Anything less is a disservice to the People.

SO ORDERED on this 11th day of August, 2017.

/s/
Meredith D. Drent
Chief Justice

/s/
Drew Pierce
Associate Justice