Trial Court of the Osage Nation
FILED
SEP 19 2016
BY

IN THE TRIAL COURT OF THE OSAGE NATION
OSAGE NATION RESERVATION
PAWHUSKA, OK

IN RE:)
CONGRESSIONAL SUBPOENAS) Case No. CV-2016-01

COMPLAINT

COME NOW, Samuel Alexander, Scott Johnson, Casey Johnson and Mary Wildcat, (collectively, the "Plaintiffs") and allege and state:

1. This action, seeking to quash or modify subpoenas issued by the Osage Nation Congress (the "Subpoenas"), is brought pursuant to 15 ONC § 1-306 B.

2. The Plaintiffs received the Subpoenas issued by the Osage Nation Congress ("Congress") attached hereto as Exhibits "A", "B", "C", "D", and "E".

3. Three of those Subpoenas, Exhibits "A", "B" and "C", seek the production of documents which will identify by name and salary, the amount of salary of specific employees of the Osage Nation ("Nation"), along with information for which the name and salary of specific employees can be determined. (Scott Johnson September 8, 2016 Subpoena items 1 and 2; Scott Johnson September 9, 2016 Subpoena items 1 through 7; Samuel Alexander September 9, 2016 Subpoena items 1 through 6.)

4. The Osage Nation Supreme Court in *Standing Bear v. Whitehorn ("Standing Bear")*, Case No. SCO-2015-01, held that the freezing or setting of individual salaries of Executive Branch employees and the creation or abolishment of individual Executive Branch employment

positions by Congress violates the separation of powers and are unconstitutional. Exhibit "F", attached hereto.[1]

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[1] In *Standing Bear v. Whitehorn*, the Supreme Court stated in its Slip Opinion at page 8:

> The Principal Chief argues that establishing salaries is an executive function and Congress overstepped its legislative authority. (Pet. Br. at 7.) Congress contends that establishing salaries is part of its constitutional obligation to establish a merit-based employment system and the base Pay Adjustments section of the FY16 Appropriation Acts are lawful. (Resp. Br. at 8.) We hold such provisions in FY16 Appropriation Acts to be an unconstitutional act of Congress in violation of Article V, section 2.

The Supreme Court further stated in its Slip Opinion at page 9:

> By purporting to freeze the salaries of positions located exclusively within the Executive Branch, Congress usurped the role of the Human Resources Office (an Executive Branch department) as set forth in the Pay for Performance Act in violation of Article V, section 2. In addition, the base pay adjustment section in the FY16 Appropriation Acts targeted Executive Branch personnel compensation in violation of Art. VI, section 22 of the Constitution, which states that the merit principle governs the employment of persons by the Osage Nation. The merit system established in the Pay for Performance Act governs employee compensation, not Congress' appropriation responsibility. Congress cannot use this responsibility to circumvent the Constitution.

The Supreme Court additionally stated in its Slip Opinion at pages 17-18:

> The issue before us, then, is whether Congress can legislate job qualifications and job descriptions of an Executive Branch department without running afoul of Article V, section 2.
>
> * * * * *
>
> The Principal Chief also argues, in contrast to earlier governmental practice, under the Constitution each of the three branches of government must "control its own daily operations free from intrusion by the other branches." (Pet. Br. at 14.) In response, Congress argues, while the Constitution establishes a clear separation of powers between the branches, there must be a certain amount of "osmosis" between the Congress and Executive in order for the government to function effectively and that "mutually exclusive, water-tight compartments would render government unworkable." (Resp. Br. at 32.) While we agree that interaction and cooperation between branches is imperative to the function of any government, we are mindful of the historical prelude to our present Osage constitutional government. Osage

5. The identification of an employee's salary by name or by information from which the employee's name can be determined violates the fundamental public policy of the Nation and is beyond the constitutional authority of Congress as announced in *Standing Bear*.

6. Even though Congress cannot lawfully set or freeze employee salaries or create or abolish particular Executive Branch employment positions, the Executive Branch attempted to negotiate with Congress a production pursuant to the Subpoenas that would not identify employee's salaries by name of the employee or information from which the name of specific employees and their salaries could be determined. Exhibit "G", attached hereto.

7. Congress rejected the Executive Branch's proposal. Exhibit "H", attached hereto.

8. Three Subpoenas, Exhibits "C", "D" and "E", seek information that if produced would disclose the names and identify information of members, parents and children, in violation of the privacy rights of those members, parents and children, and identification of students (Samuel Alexander September 9, 2016 Subpoena item 13; Casey Johnson September 9, 2016 Subpoena items 4-6, 8-13 and 17; Mary Wildcat September 9, 2016 Subpoena items 4-6, 8-13, and 17.) An affidavit by Mary Wildcat confirms this violation. Exhibit I, attached hereto.

9. Four Subpoenas, Exhibits "B", "C", "D", and "E", also seek testimony but fail to identify the subject matter of that testimony.

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governance prior to adoption of the Constitution was often characterized by gridlock and inaction occasioned by power struggles between the executive and legislative branches. In view of this history, we must strive for clarity as to where the constitutional lines of authority lie. In pursuit of that objective, we must find sections 1(B)(1), 1(B)(2) and 1(B)(3) of ONCA 15-100, which establish job qualifications and job duties for positions within the Human Resources Department, unconstitutional.

10. The Subpoenas collectively seek such a volume of information that the information cannot be produced and reviewed by the Executive Branch and its counsel within the eleven (11) days allowed for production.

COUNT I: PROTECTION OF EMPLOYEE PRIVACY

11. Congress has no constitutionally authorized use of the salary by name of an Osage Nation Executive Branch employee.

12. The public policy of the Osage Nation protects from disclosure the salary by name of an Osage Nation employee.

13. The portions of the Subpoenas seeking the salary by name of an Osage Nation Executive Branch employee of information from which the identity of such employee can be determined should be quashed.

COUNT II: PROTECTION OF PARENTS AND CHILDREN'S PRIVACY

14. The public policy of the Nation protects from disclosure the existence of parent-child relationship identifying information of parents and their children, and the identification of students receiving benefits or participating in Osage Nation Programs.

15. The portions of the Subpoenas seeking the disclosure of the existence of parent-child relationships, identifying information of parents and their children, and identifying students receiving benefits or participating in programs should be quashed.

COUNT III: UNDUE BURDEN

16. The Osage Congressional Subpoena Act specifically protects recipients from burdensome congressional subpoenas. 15 ONC § 1-306 A provides:

> The Osage Nation Congress or its committees responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to subpoena.

That Act further provides that the recipient may contest the subpoena in the Trial Court of the Osage Nation if the subpoena subjects a person to undue burden or hardship.

17. The Subpoenas require production of substantial amounts of material covering 64 topics, which must be reviewed by counsel prior to production.

18. The Subpoenas allowed for only eleven (11) days for assembly, review and production of material by the Executive Branch.

19. Review and production cannot be made by the return date, as confirmed by the affidavits. Exhibits "I.1", "I.2", I.3", "I.4", and "I.5" attached hereto.

20. Because of the burdensome nature of the Subpoenas, the return date should be modified to allow time for the materials to be assembled, reviewed, and non-protected materials be produced.

COUNT IV: FAILURE TO SPECIFY THE SUBJECT OF TESTIMONY

21. 15 ONC § 1-305 (B)(4) provides in pertinent part:

> B. A subpoena shall identify the Osage Nation Congress as the legislative body issuing the subpoena and also identify the following, but only as they apply:
>
> 4. Specify with particularity the subject of the testimony or information sought.

22. The subpoenas require testimony for the recipients, but do not specify with particularity the subject of the testimony.

23. Because of their failure to comply with 15 ONC § 1-305 (B)(4), the Subpoenas' requirement to give testimony should be quashed.

WHEREFORE, the Plaintiffs request this Court to enter its order quashing and/or modifying the Subpoenas as requested herein, and award them their costs and all other relief to which they are entitled.

Respectfully submitted,

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-and-

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(918) 595-4800
dluthey@gablelaw.com

ATTORNEYS FOR PLAINTIFFS,
SAMUEL ALEXANDER, SCOTT JOHNSON,
CASEY JOHNSON AND MARY WILDCAT

OSAGE NATION CONGRESS

SUBPOENA DUCES TECUM

To Scott Johnson, Human Resources Director of the Osage Nation, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear and produce the following documents to the Clerk of the Congress in the Congressional office located at 813 Grandview, Pawhuska, Oklahoma, 74056, on or before the 19th day of September, 2016:

1. A copy of each table sent to each Executive Branch department showing the current individual employee positions and salaries for the respective Executive Branch departments; and
2. A copy of each table sent to each Executive Branch department showing calculated salaries according to the most recent merit/market survey for each individual employee position for the respective Executive Branch departments.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by authority vested in me by the Osage Nation, on this 8th day of September, 2016.

Archie L. Mason

Archie L. Mason, Speaker
Osage Nation Congress

EXHIBIT
A

RETURN OF SERVICE

This Subpoena Duces Tecum came into my hands this _____ day of _____,

2016, and I certify that I personally served the same upon the following person,

_____, named in the Subpoena, by delivering a copy of the

Subpoena to _____ at

_____.

Dated this _____ day of _____, 2016.

_____
Osage Nation Police Officer

AFFIDAVIT

I have read and signed the foregoing instrument and know it to be true and correct as stated.

_____
Osage Nation Police Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2016.

_____
Shana Walker
Clerk of the Osage Nation Congress

OSAGE NATION CONGRESS

SUBPOENA DUCES TECUM

To Scott Johnson, Director of the Human Resources Department, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear in the Congressional Chambers, located at 813 Grandview, Pawhuska, Oklahoma, at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 p.m. to give testimony and produce the following information and documents to the Clerk of the Osage Nation Congress:

1. Documents showing the September 30, 2016 salary for each position within the Education Division, current salary for that position, and proposed FY17 salary for each position.

2. Documents showing the number of positions in the Education Division, if any which received a base increase in FY2016.

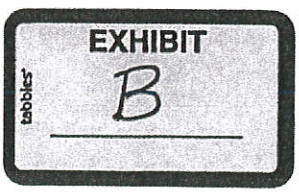
3. Documents showing the number of positions in the Education Division added in FY 2016 with position title.

4. Documents showing number of positions eliminated in the Education Division in FY 2016 with position title.

5. Documents showing number of positions in the Education Division proposed to be added in FY 2017 with position title.

6. Documents showing number of positions proposed to be eliminated in FY 2017 with position title.

7. Document showing the number of employees, by percentage, in the division that received merit bonus and the percentage received.



8. Documents showing the cost of administrative fees attributable to division employee medical and retirement payments.

9. Documents showing the cost for medical insurance for employees of the Education Division if the Congress elects not to appropriate additional funds for a different insurance plan or the Nation operates on a continuing appropriation which will not include additional funds for insurance.

10. Documents stating the reason the Principal Chief changed medical insurance providers and any document in your possession indicating the cost to the Nation versus the existing insurance plan.

11. Broker agreement with any broker currently administering employee benefits.

12. Copies of all proposals in response to any RFP soliciting health insurance brokers in the last fifteen (15) months.

13. Documents evidencing the change in plan year for health benefits to October 1, 2016 for employees.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by authority vested in me by the Osage Nation, on this 9th day of September, 2016.

Archie L. Mason

Archie L. Mason, Speaker
Osage Nation Congress

RETURN OF SERVICE

This Subpoena Duces Tecum came into my hands this _____ day of _____,

2016, and I certify that I personally served the same upon the following person,

_____, named in the Subpoena, by delivering a copy of the

Subpoena to _____ at

_____.

Dated this _____ day of _____, 2016.

_____
Osage Nation Police Officer

AFFIDAVIT

I have read and signed the foregoing instrument and know it to be true and correct as stated.

_____
Osage Nation Police Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2016.

_____
Shana Walker
Clerk of the Osage Nation Congress

OSAGE NATION CONGRESS

SUBPOENA DUCES TECUM

To Samuel Alexander, Treasurer of the Osage Nation, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear in the Congressional Chambers, located at 813 Grandview, Pawhuska, Oklahoma, at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 p.m. to give testimony and produce the following information and documents to the Clerk of the Osage Nation Congress:

1. Documents showing the September 30, 2016 salary for each position within the Education Division, current salary for that position, and proposed FY17 salary for each position.

2. Documents showing the number of positions in the Education Division, if any which received a base increase in FY2016.

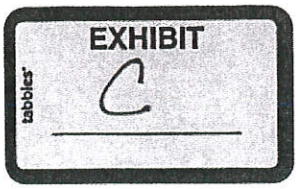
3. Documents showing the number of positions in the Education Division added in FY 2016 with position title.

4. Documents showing the number of positions eliminated in the Education Division in FY 2016 with position title.

5. Documents showing the number of positions proposed to be added in the Education Division in FY 2017 with position title.

6. Documents showing number of positions proposed to be eliminated in FY 2017 in the Education Division with position title.

7. Documents showing the cost of administrative fees attributable to the Education Division employee medical and retirement payments.



8. Documents showing the cost of medical insurance if the Congress elects not to appropriate additional funds for a different insurance plan.

9. Documents showing the deficit in funding under the new insurance plan for the Education Division, if any, should the Nation operate on a continuing appropriation which will not include additional funds for medical insurance.

10. Broker agreement with any broker currently administering employee benefits.

11. Documents identifying the Accounting Program Number (#), line and amount of all funds utilized to operate the Pawhuska WYA from October 1, 2015 to date.

12. Monthly financials for the following:

    A. College Entrance Testing Assistance $15,000
    B. Nationwide Sylvan Learning Center Voucher $125,000
    C. Osage County Certified Tutor Voucher Program $125,000
    D. Youth Council Leadership Program (UNITY) $10,000
    E. Summer Youth Osage Nation Employment $50,000
    F. Stole and Commendation Awards $1000.00
    G. Career Technology Financial Assistance $130,000

13. Documentation of any kind relating to the Skiatook WELA facility, including any contract, lease, emails, letters sent to clients of the daycare, interoffice correspondence, and or written directives to shift funds from wages in the WELA Account Number (#) to lease/purchase a building in Skiatook.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by authority vested in me by the Osage Nation, on this 9th day of September, 2016.

Archie L. Mason

Archie L. Mason, Speaker
Osage Nation Congress

RETURN OF SERVICE

This Subpoena Duces Tecum came into my hands this _____ day of _____, 2016, and I certify that I personally served the same upon the following person, _____, named in the Subpoena, by delivering a copy of the Subpoena to _____ at _____.

Dated this _____ day of _____, 2016.

_____
Osage Nation Police Officer

AFFIDAVIT

I have read and signed the foregoing instrument and know it to be true and correct as stated.

_____
Osage Nation Police Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2016.

_____
Shana Walker
Clerk of the Osage Nation Congress

OSAGE NATION CONGRESS

SUBPOENA DUCES TECUM

To Casey Johnson, Director of Operations, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear in the Congressional Chambers, located at 813 Grandview, Pawhuska, Oklahoma, at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 p.m. to give testimony and produce the following information and documents to the Clerk of the Osage Nation Congress:

1. Performance of the Education Division in meeting the goals set out in the FY 2016 Division Plan filed August 2016 and any subsequent plans.

2. Most current Scholarship America Contract.

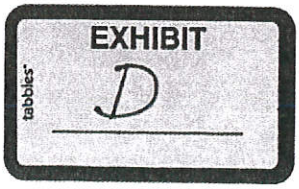
3. Documents showing the reason Scholarship payments for Fall 2016 have been delayed past the start of the school year.

4. Any new reporting requirements made of Scholarship America and Students since Summer 2015.

5. Documents showing the number of students on academic probation as of September 1, 2016.

6. Documents showing the number of scholarships and dollar amounts billed out for Fall 2015 and Spring and Summer 2016 together with totals for the calendar school year.

7. Documents showing written criteria and process if any, for awarding scholarships outside the Osage Nation Higher Education General Scholarship.



8. Documents showing the number of Student Interns for 2016 Calendar School Year by field of study.

9. Documents showing amounts paid out for Field of Study Internship.

10. Documents showing number of students enrolled in Sylvan tutoring program.

11. Documents showing amount paid to Sylvan FY 2015 year-to-date.

12. Documents showing number of students enrolled in reservation tutoring program.

13. Documents showing amount paid for on reservation tutor vouchers FY 2015 year-to-date.

14. Any and all documents referencing in any way line item shifting within the Education Division in FY 2016.

15. Documents identifying the Accounting Program Number (#), line and amount of all funds utilized to operate the Pawhuska WYA from October 1, 2015 to date.

16. Monthly financials of FY 2016 for the following:

    A. College Entrance Testing Assistance $15,000
    B. Nationwide Sylvan Learning Center Voucher $125,000
    C. Osage County Certified Tutor Voucher Program $125,000
    D. Youth Council Leadership Program (UNITY) $10,000
    E. Summer Youth Osage Nation Employment $50,000
    F. Stole and Commendation Awards $1000.00
    G. Career Technology Financial Assistance $130,000

17. Documentation of any kind relating to the Skiatook WELA facility, including any contract, lease, emails, letters sent to clients of the daycare, interoffice correspondence, and or written directives to shift funds from wages in the WELA Account Number (#) to lease/purchase a building in Skiatook.

18. Current Education Division organization chart list showing all positions in the division.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by authority vested in me by the Osage Nation, on this 9th day of September, 2016.

Archie L. Mason, Speaker
Osage Nation Congress

RETURN OF SERVICE

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2016, and I certify that I personally served the same upon the following person,

_____, named in the Subpoena, by delivering a copy of the

Subpoena to _____ at

_____.

Dated this _____ day of _____, 2016.

_____
Osage Nation Police Officer

AFFIDAVIT

I have read and signed the foregoing instrument and know it to be true and correct as stated.

_____
Osage Nation Police Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2016.

_____
Shana Walker
Clerk of the Osage Nation Congress

OSAGE NATION CONGRESS

SUBPOENA DUCES TECUM

To Mary Wildcat, Education Division, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear in the Congressional Chambers, located at 813 Grandview, Pawhuska, Oklahoma, at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 p.m. to give testimony and produce the following information and documents to the Clerk of the Osage Nation Congress:

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2. Most current Scholarship America Contract.

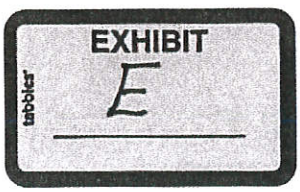
3. Documents showing the reason Scholarship payments for Fall 2016 have been delayed past the start of the school year.

4. Any new reporting requirements made of Scholarship America and Students since Summer 2015.

5. Documents showing the number of students on academic probation as of September 1, 2016.

6. Documents showing the number of scholarships and dollar amounts billed out for Fall 2015 and Spring and Summer 2016 together with totals for the calendar school year.

7. Documents showing written criteria and process if any, for awarding scholarships outside the Osage Nation Higher Education General Scholarship.



8. Documents showing the number of Student Interns for 2016 Calendar School Year by field of study.

9. Documents showing amounts paid out for Field of Study Internship.

10. Documents showing number of students enrolled in Sylvan tutoring program.

11. Documents showing amount paid to Sylvan FY 2015 year-to-date.

12. Documents showing number of students enrolled in reservation tutoring program.

13. Documents showing amount paid for on reservation tutor vouchers FY 2015 year-to-date.

14. Any and all documents referencing in any way line item shifting within the Education Division in FY 2016.

15. Documents identifying the Accounting Program Number (#), line and amount of all funds utilized to operate the Pawhuska WYA from October 1, 2015 to date.

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    B. Nationwide Sylvan Learning Center Voucher $125,000
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    D. Youth Council Leadership Program (UNITY) $10,000
    E. Summer Youth Osage Nation Employment $50,000
    F. Stole and Commendation Awards $1000.00
    G. Career Technology Financial Assistance $130,000

17. Documentation of any kind relating to the Skiatook WELA facility, including any contract, lease, emails, letters sent to clients of the daycare, interoffice correspondence, and or written directives to shift funds from wages in the WELA Account Number (#) to lease/purchase a building in Skiatook.

18. Current Education Division organization chart list showing all positions in the division.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

Given under my hand, by authority vested in me by the Osage Nation, on this 9th day of September, 2016.

Archie L. Mason

Archie L. Mason, Speaker
Osage Nation Congress

RETURN OF SERVICE

This Subpoena Duces Tecum came into my hands this _____ day of _____, 2016, and I certify that I personally served the same upon the following person, _____, named in the Subpoena, by delivering a copy of the Subpoena to _____ at _____.

Dated this _____ day of _____, 2016.

_____
Osage Nation Police Officer

AFFIDAVIT

I have read and signed the foregoing instrument and know it to be true and correct as stated.

_____
Osage Nation Police Officer

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2016.

_____
Shana Walker
Clerk of the Osage Nation Congress

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

Supreme Court
of the Osage Nation
FILED MAR 08 2016
By

GEOFFREY M. STANDING BEAR,
Principal Chief of the Osage Nation,
Petitioner,

v.

MARIA WHITEHORN,
Speaker of the Osage Nation Congress,
Respondent.

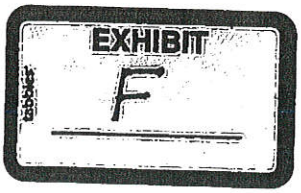
CASE NO. SCO-2015-01

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@osagetribe.org, of any typographical or other formal errors so that corrections may be made before the preliminary print is officially published.

A. INTRODUCTION & SUMMARY

Before us is the Executive Branch's challenge to several laws adopted by the Legislative Branch pursuant to its authority under Article VI, section 12 of the Osage Nation Constitution ("Constitution"): ONCA 15-82 through 15-87 appropriate funds to the Executive Branch and establish other conditions for the 2016 fiscal year (collectively "FY16 Appropriation Acts"). ONCA 15-91 amends the Osage Nation Gaming Reform Act, and ONCA 15-100 amends the Pay for Performance Act. Principal Chief Standing Bear ("Principal Chief") on behalf of the Executive Branch challenges the validity of these laws, stating that such laws are inconsistent with the Constitution's separation of powers requirement, among other challenges. The Osage Nation Congress on behalf of the Legislative Branch ("Congress") argues that the laws are valid exercises of its constitutional authority and are within the Constitution's boundaries. We



exercise our original jurisdiction pursuant to Article VIII section 2, ONCA 12-103 section 8(A) and ONCA 12-103 section 8(C).

As we summarize here and explain below, we find the provisions of the Fiscal Year 2016 Appropriation Acts that limit the base pay adjustment and direct the Treasurer to reduce the appropriation based upon a recalculation of the frozen salaries and wages line item unconstitutional and void. We also find that those provisions of ONCA 15-100 that set forth qualifications, duties, and responsibilities violate Article V, section 2 of the Constitution and are unconstitutional. We similarly invalidate as unconstitutional those provisions of ONCA 15-91 that make the Annual Plan of Operation legally binding upon the Osage Nation Gaming Enterprise Board. Finally, we find that ONCA 15-91, section 12-105(A)(2) is a valid exercise of Congress' legislative authority.

B. FACTS AND PROCEDURAL HISTORY

In its Third Session in late September and early October, 2015, the Fourth Osage Nation Congress enacted a series of bills making appropriations for the 2016 Fiscal Year budget and for other purposes. Among those bills, each of which will be discussed in detail below, were certain provisions to which the Principal Chief objected. He timely exercised his right of veto pursuant to Article VII, section 11 and returned the bills to Congress stating his objections under authority of Article VI, section 14. Congress timely overrode each of the Principal Chief's vetoes pursuant to Article VI, section 13 and the acts became law.

The Principal Chief then filed this action on November 30, 2015 seeking a declaratory judgment as to the constitutionality of the challenged provisions. The Principal Chief timely filed his *Petitioner's Memorandum of Points and Authorities* ("Petitioner's Brief") on December 29, 2015 and the Congress filed its *Respondent's Memorandum of Points and Authorities*

("Respondent's Brief") on January 11, 2016. We heard Oral Arguments in open court January 29, 2016, and from all of the above we proceed today.

C. STANDARD OF REVIEW

Developing a uniquely Osage jurisprudence is no small task; we have been asked to consider this dispute in light of the standards and values created by the Federal and State governments in developing their constitutional jurisprudence, and we decline to do so, looking instead to glean from historic and scholarly sources such relevant factors as may be applied to the questions at hand.[1]

As always, our starting point is the Osage value ϟΛ.ᘐᛕΛ^ "to do one's best," which "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."[2] Above all things, we strive for reconciliation under the values of: "Justice, Fairness, Compassion and Respect for the Protection of Child, Elder, All Fellow Beings and Self."[3]

Within this framework, we 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. We tread lightly on the use

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1 We are inspired and guided by other Indian Tribes faced with a similar task. *See, e.g., Village of Mishongnovi v. Humeyestewa, et al.*, No. 96AP000008 (Hopi 03/20/1998), 1998.NAHT.0000017 <http://www.versuslaw.com> (finding that a trial court had "inappropriately applie[d] foreign law without analyzing that law to determine whether it is consistent with Hopi custom and tradition."); *Colville Confederated Tribes v. Meusy*, 5 CTCR 39, 10 CCAR 62 (Colville Confederated 09/15/2011), 2011.NACC.0000014 <http://www.versuslaw.com> ("We believe that incorporating our customs into our written law is very important" and the doctrine of separation of powers had "cultural support in our governmental system"); *Tuba City Judicial Dist. of the Navajo Nation v. Sloan*, No. SC-CV-57-97 (Navajo 09/07/2001), 2001.NANN.0000012 <http://www.versuslaw.com> ("Separation of functions is a concept that is so deeply rooted in Navajo culture that it is accepted without question. It is essential to maintaining balance and harmony.")

2 *Red Corn v. Red Eagle*, SPC-2013-01 at 4 (2013).

3 OSAGE CONST. pmbl.

of "inherent" or "implied" authority, as both have a high potential for abuse, but may find such authority exists within the context of the Constitution.

We dispense with the arguments that Congress possesses "plenary" power, the Executive has "supreme" power, or other qualifying adjectives that give the illusion that one branch has more "power" than the other. The Constitution does not treat the Principal Chief as an autocrat, or Congress as an oligarchy. No entity within the Osage Nation has "plenary" authority. The Constitution distributes its power, establishing roles and responsibilities and separation of functions throughout the government. If any one branch fails by act or omission to exercise its responsibility, then the Nation as a whole is affected.

This constitutional concept is not new to us as a Nation. The Osage Constitutions of 1861, 1881, and 1994 all reflect our efforts to self-govern and avoid the forced implementation of federally-created government structures by organizing under a document similar to the United States Constitution.[4] "A lack of trust, histories of exploitation, mistrust of governments, limited faith in one's own capacities, and disenfranchisement from full governing authority" were all brought on by a history of external interference.[5] Understanding these changes in the context of Osage history should be the first place we start.

"While change is a fundamental part of all groups, oral and written history has positioned 'moving to a new country' as a fundamental component of Osage society."[6] We have accepted new forms of language, technology, prayer, and ceremonies, while maintaining the core principles of our own unique worldview, which includes transforming our environs into

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4 *See* Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation*, 20-21 (2012).

5 *Id.* at 29.

6 *Id.* at 93. Garrick Bailey described "Moving to a new country" as "a term expressive of a slow movement that preceded a change in the government of the tribe." Frances La Flesche, *The Osage and the Invisible World: From the Works of Francis La Flesche*, 65 (Garrick Bailey ed., 1995)

something that ensures our future survival.[7] This can be directly observed today in our *In-Lon-Schka*, in our families, how we grieve, how we pray, and how we govern.

Viewing the Constitution in this context raises new questions. "Part of the answer lies not with the cultural practices the Osages were learning outside their culture, but with the continuation of traditions they had developed over the course of centuries."[8] The Constitution reflects our continuing values of respect, compassion, preservation, cultural stewardship, resource management, home, land, and family.

Historically, some of our earliest known structures identified roles and responsibilities for our clans. Although "basic knowledge was shared by the twenty-four clan priesthoods, each clan also had exclusive control over parts of this knowledge."[9] This is an early example of a "separation of powers" concept—the assigning of roles and responsibilities—as well as separation of functions, which we discuss in our Count III analysis.

Our historical family relationships also had a role/responsibility structure. Clan membership was based on the father's clan. After marriage, the man would move in with the woman's family and "assume the position of the head of the household."[10] As we know, these practices have been adapted to accommodate the myriad of family units in existence today, carrying forward the same tradition in a new manner.

It is the tradition of "roles and responsibilities" that we consider as we examine the issues before us, particularly as to Article V, section 2 "Separation of powers." The concept refers to

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7 Osages have proven adept at applying the tools in our changing world. "[W]riting in English is a technology that our best and brightest traditional leaders, at a portentous moment in history, embraced as a means toward the future." Robert Warrior, *The People and the Word: Reading Native Nonfiction* at 90 (examining the importance and legacy of the 1881 Osage Constitution) (2005).

8 *Id.* at 74.

9 Frances La Flesche, *The Osage and the Invisible World: From the Works of Francis La Flesche*, 74 (Garrick Bailey ed., 1995).

10 *See* Garrick Bailey, *Changes in Osage Social Organization*, 1673-1906 at 13, 16 (1973).

the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another and to prevent the concentration of power in any one branch. Its core philosophy states, to most effectively promote liberty, the executive, legislative, and judicial powers must be separate and act independently.[11]

"Liberty" as it is understood today, however, describes the relationship between the law and an individual rather than the law and a group, which competes with the Osage value of community.[12] Our Constitution is laden with this value: Article IV, *Declaration of Rights*: "All government of right originates with the Osage People, is founded upon their will only, and *is instituted solely for the good of the whole*." (emphasis added). Article X, section 1 also states, "elected or appointed tribal officials and employees of the Osage Nation, putting aside their personal or private interest, shall strive *for the common good of the Osage People . . .*" Each official has taken the Constitution's Oath of Office, which states, "I further swear (or affirm) always to place *the interest of all Osages* above any special or personal interests . . . ."[13] For this language to have any meaning, we must construe the Constitution not in terms of individualism, but in terms of community.

Congress' legislative responsibility must serve the Constitution's purposes.[14] In many cases, Congress and the Principal Chief have satisfied their roles much to the Nation's benefit. We do not doubt that both branches are unequivocally dedicated to this Nation's success.

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11 *See* National Conference of State Legislatures, *at* http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx (last visited February 14, 2016).

12 "The Osages emphasized the long-term survival of the group and not the survival of individuals in their own right." *La Flesche*, at 34.

13 OSAGE CONST. Art. IX. (emphasis added).

14 *See* OSAGE CONST. Article VI, section 15 ("The Osage Nation *shall pass* all laws necessary to carry into effect the provisions of the Osage Nation Constitution.") (emphasis added); Article III, section 4 (Membership), Article VI, sections 5 (Disqualification of Congressional candidates), 7 (Compensation), 11 (Rules of Procedure), 22 (Merit-based Employment System), and 23 (Annual Budget); Article X (Code of Ethics); Article XIII (Elections); Article XV, sections 1 (Natural Resources Management), and 5 (Hunting and Fishing); Article XVI, section 1 (Language and Culture); Article XVII, sections 1 (Health Care Services and Programs), 2 (Elders Services and

The Constitution enumerates the exceptions from the "separation of powers" mandate, none of which we observe in the dispute before us. For example, removal under Article XII is Congress' alone. If the Principal Chief and Assistant Principal Chief are unable to serve, the Speaker of Congress acts as Principal Chief.[15] The Principal Chief can convene a session of Congress.[16] The Chief Justice of the Supreme Court is responsible for the Judicial Branch's budget and administration (an executive function).[17]

The Constitution also places responsibilities on the Executive Branch, the most important of which is to "dutifully support the Constitution and laws of the Osage Nation and [ ] see that the laws are faithfully executed, administered, and enforced."[18] The Principal Chief is our political leader who maintains organizational cohesiveness, develops strategic and policy direction, and represents the Nation. These responsibilities are similarly bounded by the Constitution, particularly when Congress enacts laws to carry out the Constitution's provisions.

Thus, "separation of powers" in this context means that each branch has a role and a responsibility entrusted to it by the People. We previously held that one branch cannot refuse to perform its constitutional duties on the basis that the enabling legislation [or executive action] is unconstitutional.[19] If a dispute exists, it must be addressed in the proper forum when the parties have exhausted efforts to resolve the dispute outside of the judicial process.

With these findings in place, we turn to the dispute before us.

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Programs), 3 (Child Development Programs and Services), and 4 (Early Learning Systems, Elementary and High School Advocacy, Post-Secondary Programs).

15 OSAGE CONST. Art. VII, § 9.

16 *Id.* Art. VII, § 12.

17 *Id.* Art. VIII, § 11.

18 OSAGE CONST. Art. VII, § 1.

19 *See In re Gray*, SPC-2008-01 at 10 (2009).

D. ANALYSIS

1. Count I

The Principal Chief first challenges the validity of certain sections of ONCA 15-82 through 15-87, all of which appropriated funds to various Executive Branch departments. We certified four questions under this count and take each one in turn, holding that the challenged provisions are unconstitutional exercises of Congress' legislative authority.

Question 1

> **Whether those provisions of ONCA 15-82, 15-83, 15-84, 15-85, 15-86 and 15-87 (Collectively "FY16 Appropriation Acts") that prohibit increases in base pay for employees located within the Executive Branch violate Article V, section 2 of the Osage Nation Constitution by exercising a power properly vested in the Executive Branch.**

The Principal Chief argues that establishing salaries is an executive function and Congress overstepped its legislative authority. (Pet. Br. at 7.) Congress contends that establishing salaries is part of its constitutional obligation to establish a merit-based employment system and the Base Pay Adjustments section of the FY16 Appropriation Acts are lawful. (Resp. Br. at 8.) We hold such provisions in FY16 Appropriation Acts to be an unconstitutional act of Congress in violation of Article V, section 2.

> **a. The Pay for Performance Act (codified at 19 ONC subchapter 3) adopted pursuant to Article VI, section 22 exclusively governs employee compensation and cannot be modified or bypassed by way of appropriation.**

Article VI, section 22 of the Constitution requires Congress to establish a "system under which the merit principle will govern the employment of persons by the Osage Nation . . ." The Osage Constitution does not define what the "merit principle" means. The Pay for Performance Act does not necessarily identify "principles" but does refer to "fairness, accountability, and high

quality government services," and removes politics from the "process of evaluating and rewarding employee performance."[20]

When the Constitution mandates that Osage law implement its provisions and Congress enacts such a law, then that law controls.[21] In this instance, the Pay for Performance Act governs employment and states "Annual base pay adjustments shall be funded based on the recommendation of the Office of Human Resources to the appropriate branch of government."[22]

By purporting to freeze the salaries of positions located exclusively within the Executive Branch, Congress usurped the role of the Human Resources Office (an Executive Branch department) as set forth in the Pay for Performance Act in violation of Article V, section 2. In addition, the base pay adjustment section in the FY16 Appropriation Acts targeted Executive Branch personnel compensation in violation of Art. VI, section 22 of the Constitution, which states that the merit principle governs the employment of persons by the Osage Nation. The merit system established in the Pay for Performance Act governs employee compensation, not Congress' appropriation responsibility. Congress cannot use this responsibility to circumvent the Constitution.

For these reasons, we find the following in violation of Article V, section 2 and Article VI, section 22 of the Osage Nation Constitution: ONCA 15-82, section 10; ONCA 15-83, section 11; ONCA 15-84, section 9, ONCA 15-85, section 10; ONCA 15-86, section 9; and ONCA 15-87, section 10.

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20 19 ONC § 3-102(F).

21 *See Red Corn v. Red Eagle*, SPC-2013-01 at 10 (holding when the Constitution directs Congress to legislate remedies, those remedies are exclusive).

22 19 ONC § 3-106(B)(2).

Question 2

Whether laws ONCA 15-82, 15-83, 15-84, 15-85, 15-86, and 15-87, which appropriate funds to divisions located within the Executive Branch, prohibit increases in base pay for employees located within the Executive Branch, and direct the Treasurer to return excess tribal revenue in the salaries and wages line items to the general fund in the Treasury within 30 days from each law's effective date, violate the provision within Article VI, section 12 of the Osage Nation Constitution that requires legislation to "embrace but one subject."

Next, the Principal Chief argues that Congress violated the single subject rule by including non-appropriation provisions in the FY16 Appropriation Acts. (Pet. Br. at 12.) Congress states that each provision within the legislation is permissible because it is related, relevant, and a necessary exercise of Congress' appropriation authority. (Resp. Br. at 21.)

b. Congressional appropriations must be enacted by legislation without conditioning appropriation on a subsequent action that violates the Constitution.

We start by examining the scope and nature of Congress' appropriation responsibility, which is found in Article VI, section 23: "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 year. The annual budget shall not exceed projected revenues." Congress must take a finite amount of funds and distribute them throughout the Nation without compromising anyone's constitutional obligations, which include preserving Osage language and culture, developing services to improve health in children and elders, establishing an early learning program for Osage children, and preserving natural resources. The Constitution does not expressly authorize Congress to condition its appropriation on certain actions taking place.

It is clear that no monies can be spent without a Congressional appropriation, but Congress' appropriation responsibility does not cast as wide a net as Congress claims. The

Constitution limits this authority in several ways, including requiring appropriations to be enacted by law, prohibiting Congress from usurping another branch's responsibilities via legislation in violation of Article V, section 2, prohibiting the Osage Nation from violating the rights set forth in Article IV, and violating the Code of Ethics in Article X. Congress cannot, for example, refuse to adopt an annual budget, or refuse to fund a constitutionally-mandated program, service, function or activity (such as elections and compensation).

The Constitution also tells us that Congress is obligated to appropriate funds for each branch's operating costs.[23] This responsibility is not as unbounded and arbitrary and Congress would argue. Appropriated funds must be sufficient for each branch to operate to avoid (a) disabling a constitutionally required program, service, function or activity, and (b) disrupting government operations to the detriment of the Osage citizenry.[24] No provision in the Constitution should be interpreted to allow one branch to bring governance and/or constitutionally required programs to a screeching halt. Any branch's failure to perform its constitutional obligations could be construed as a hindrance or obstruction of "the proper administration of the Osage Nation government."[25]

We similarly reject the argument that Congress possesses the inherent authority to impose conditions, restrictions, or limitations in its appropriation laws when such conditions violate the Constitution. That does not mean that Congress lacks the authority to ensure that a program is operating in accordance with Osage law; Congress' legislative authority is fairly broad when considered in context of the Constitution. In this case, however, we do not interpret Article VI,

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[23] *See* OSAGE CONST. Art. VI, § 23 ("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 government for each fiscal year.") (emphasis added).

[24] We completely reject Congress' argument that it "is not required to appropriate in sums certain." An appropriation law that does not specify a sum certain places all funded entities in the untenable position of not knowing whether they have the funds necessary to function.

[25] OSAGE CONST. Art. X, § 3.

section 23 to allow Congress to include in an appropriation bill the conditions set forth in the FY16 Appropriation Acts.

c. Congressional appropriation laws must adhere to the Constitution's single subject mandate.

This is our first opportunity to address this constitutional mandate; we acknowledge the concept of "single subject" legislation is widely practiced in other jurisdictions. According to the National Conference of State Legislatures, 41 states have constitutions restricting legislation to one subject.[26] Generally, the single subject doctrine has been liberally construed to allow related topics under the "single subject" umbrella. Nonetheless, we examine this issue in the context of our own Constitution.

The Constitution enumerates those acts of Congress that may cover related topics under one subject. Congress can establish a different effective date for legislation under Article VI, section 13. Article VI, section 22 directs Congress to adopt a merit-based employment system *and* include employee grievance procedures. Congress is also directed to adopt laws that define *and* limit nepotism in the Nation's government *and* Tribal Enterprise Board employment. Article XIII directs Congress to establish a comprehensive election process covering multiple facets of the election process from administration to how disputes are processed. Article VI, section 23 does not authorize a multi-faceted appropriation law such as what Congress purported to exercise in the disputed legislation before us.

The Principal Chief's line item veto authority in Article VI, section 13 provides some additional context. "If a bill presented to the Principal Chief contains several items of appropriation of money, he may veto *one or more of the items* while approving the bill." In the

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[26] *See* National Conference of State Legislatures, *at* http://www.ncsl.org/research/ elections-and-campaigns/single-subject-rules.aspx (last visited February 14, 2016).

appropriations context, "item" or "line item" is commonly defined as an entry that appears on a separate line in a fiscal budget.[27] It does not reference *any* provision within legislation, which means that the Principal Chief's line item veto authority is limited to appropriation items. If Congress' argument were accepted, it would mean that the Principal Chief would be forced to veto the entire bill even if he (or she) approved the appropriation itself. This could be construed as a political manipulation of the appropriation responsibility and is inconsistent with Article VI, section 23. For the line item veto authorization to have any meaning, appropriation laws must only include appropriations.

We therefore hold that the Constitution's mandate that legislation address "one subject," means that legislation cannot take the form of an omnibus bill (one bill that addresses multiple subjects), proposed legislation cannot be amended to include other subjects ("riders" in legislative parlance), and legislation designed to satisfy one constitutional obligation cannot address a separate obligation except as authorized by the Constitution. This allows open, considered deliberation and debate and is consistent with the Constitution's mandate that Osage governance occur in the public eye.[28]

The FY16 Appropriation Acts purport to do more than appropriate funds; they modify employee pay and include a retroactive amendment.[29] These provisions are substantive provisions governed by other parts of the Constitution.[30] The appropriation authority cannot be used to legislate such substantive provisions. For these reasons, we find that ONCA 15-82,

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[27] *See* Merriam-Webster.com, *http://www.merriam-webster.com/dictionary/line item* (last visited February 19, 2016).

[28] *See, e.g.*, OSAGE CONST. Art. VI, § 18 (Public Proceedings), Art. VI, § 20 (Legislative Accountability), Art. VII, § 12 (Communicate with legislature; convene legislature), Art. VII, § 17 (Offices and records of executive officers), Art. VIII, § 2 (decisions of the Supreme Court shall be published and indexed).

[29] Congress argues that this provision is a "remittitur" rather than an amendment. We note, however, that "remittitur" is a judicial act regarding the amount of damages awarded in a legal action. BLACK'S LAW DICTIONARY 1409 (9th ed. 2009). We decline the opportunity to expand the definition to include legislative acts.

[30] *See* 19 ONC ch. 3 (Pay for Performance Act); OSAGE CONST. Art. VI, § 12 (Enactment of Laws).

ONCA 15-83, ONCA 15-84, ONCA 15-85, ONCA 15-86, and ONCA 15-87 violate the single subject requirement by including salary limitations and retroactive amendment instructions.

Question 3

Whether those provisions of ONCA 15-82, 15-83, 15-84, 15-85, 15-86, and 15-87 that direct the Treasurer to return the excess tribal revenue in the salaries and wages line item to the general fund in the Treasury within 30 days from each law's effective date violate Article V, section 2 of the Osage Nation Constitution by authorizing an Executive Branch officer to exercise a power vested in the Legislative Branch.

Article VII, section 13 establishes the Department of the Treasury under the Executive Branch, creates the Treasurer position (appointed by the Principal Chief and confirmed by Congress) and directs Congress to prescribe the Treasurer's powers and duties. Congress enacted ONCA 06-02 (codified at 15 ONC subchapter 3) in satisfaction of its obligation. The FY16 Appropriation Acts, however, direct the Treasurer to recalculate the "salaries and wages" line item, modify the appropriation amount and return any excess to the general fund. Congress argues that this is not a delegation of its appropriation power, but a directive to the Treasurer to execute the law in a certain manner. We hold otherwise.

d. Congressional appropriation laws cannot delegate to Congress a power exercised by another branch and cannot delegate a congressional power to another branch.

Here, Congress directed the Treasurer to take two specific actions: first, the Treasurer must recalculate the "salaries and wages" line items based upon the salary restriction set by Congress, and second, the Treasurer must calculate the difference between the line item values and return the difference to the general fund. This goes beyond mere execution because it requires the Treasurer to modify an appropriation (a figure determined by Congress) after recalculating the "salaries and wages" line item.

The appropriation amount is established by Congress by law. As we explain below, any change to that amount requires legislative action. Congress cannot direct an Executive Branch employee to effect a legislative change by administrative act in this manner. For this reason, we hold the following is a violation of Article V, section 2: ONCA 15-82 § 10(B); 15-83 § 11(B); 15-84 § 9(B); 15-85 § 10(B); 15-86 § 9(B); and 15-87 § 10(B).

Question 4

Whether laws ONCA 15-82, 15-83, 15-84, 15-85, 15-86, and 15-87, which appropriate operating funds to divisions located within the Executive Branch, violate Article VI, section 23 of the Osage Nation Constitution by returning an unspecified amount of funds the Treasurer determines is "excess revenue" in the salaries and wages line items to the general fund in the Treasury within 30 days from each law's effective date without amending legislation.

For the same reasons set forth above, we find that the FY16 Appropriation Acts violate Article VI, sections 12 and 23, adding that amendments to an appropriation require a legislative act, not an administrative adjustment.

e. Congressional appropriation laws can only be amended by legislation and not by executive action.

The Constitution requires annual budgets to be adopted by law, laws to be adopted by statute, and statutes to be enacted by bill.[31] Appropriations are only enacted by law, meaning any changes to that law would require another act of Congress.

Congress adopted the Budget Parameter and Limitations Act (ONCA 13-67) to govern the manner in which appropriated funds are expended within a budget. Assuming the law is a valid exercise of Congress' authority, appropriated funds cannot be shifted within a budget except as authorized by this law.[32] The law itself does not purport to increase or decrease an

31 OSAGE CONST. Art. VI §§ 12 & 23.
32 ONCA 13-67 §§ 3-4 (October 28, 2013).

appropriation amount. When an appropriation amount changed (or needed to be changed), Congress enacted a new law to modify the appropriation amount.[33]

By authorizing a change in an appropriation amount without legislation, Congress has violated Article VI, section 12. To modify an appropriation, the Constitution requires Congress do so by legislation. Accordingly, we hold the following a violation of Article VI, sections 12 & 23: ONCA 15-82 § 10(B); 15-83 § 11(B); 15-84 § 9(B); 15-85, § 10(B); 15-86, § 9(B); and 15-87, § 10(B).

2. **Count II**

We certified the following question as to Count II of the Principal Chief's *Petition*:

Whether ONCA 15-100, which sets forth job descriptions for positions within the Human Resources Department, violates Article V, sections 1 and 2 (separation of powers), Article VII, sections 1 and 5 (powers reserved in the Executive Branch) of the Osage Constitution.

The Principal Chief alleges that those portions of ONCA 15-100 that set forth specific duties and responsibilities of persons holding certain positions within the Human Resources Department—Director, Benefits Analyst and Compensation Analyst—violate Article V, sections 1 and 2, and Article VII, sections 1 and 5 of the Osage Constitution by creating job descriptions for positions within the Executive Branch. (Pet. Br. at 14.) In response, the Congress argues that such specifications are within its power to establish those agency positions and "establish reasonable duties and minimum qualifications" for persons holding those positions. (Resp. Br. at 27.) The issue, thus presented, is whether Congress' establishment of such qualifications, duties and responsibilities encroaches into the Executive's constitutionally designated powers to

[33] *See, e.g.*, ONCA 14-02 (An Act to provide an appropriation modification to the Legislative Branch in the amount of one hundred dollars ($100)); ONCA 13-99 (To reduce the appropriation to the Osage War Memorial Fund by three hundred fifty thousand dollars ($350,000)); ONCA 14-05 (To provide a supplemental appropriation to the Division of Administrative Services in the amount of one hundred thirty four thousand one hundred sixty seven dollars ($134,167))

designate the daily operational duties of persons in its employ in the Human Resources Department. We find it does.

There is no dispute that the positions at issue in ONCA 15-100, while created by Congress pursuant to Article VI, section 22 as part of the merit-based employment system, once created, fall within the purview of the Executive Branch. Therefore, Article V and Article VII are applicable.

The Constitution directed Congress to establish a system that governs employment by the Osage Nation. Such a system necessarily requires the creation of positions to implement the system. The issue before us, then, is whether Congress can legislate job qualifications and job descriptions of an Executive Branch department without running afoul of Article V, section 2.

For reasons set forth more fully in our Count IV analysis below, we uphold Congress' authority to define "qualified professional" for Article VII, section 14 appointments, based upon the "advice and consent" language within section 14 itself. No such provision exists here. Similar to our Count I analysis, Congress cannot usurp another branch's constitutional obligation by legislation.

ONCA 15-100 creates positions within the merit-based employment system but also contains provisions that set forth both job qualifications *and* job descriptions. Legislating job qualifications and job descriptions goes beyond establishing an employment system. While Congress has the constitutional authority to establish minimum qualifications for appointed positions under section 14, we find no textual authority in section 22 that would allow Congress to establish what it describes as "reasonable duties" or "minimum qualifications" for persons who apply for those positions. The Constitution is clear when such authority exists: Article VI, section 5 authorizes Congress to "prescribe further disqualifications" for serving on Congress;

Article VII, section 13 directs Congress to prescribe the Treasurer's "powers and duties" (and includes an "advice and consent" provision); Article VII, section 14 directs the Principal Chief to appoint "qualified professionals" to Enterprise Boards subject to Congress' "advice and consent"; and, Article XIII, section 3 directs Congress to create an Election Board. These provisions are examples of when the Constitution dictates the depth of Congress' involvement. No such language exists within Article VI, section 22.

The Principal Chief also argues, in contrast to earlier governmental practice, under the Constitution each of the three branches of government must "control its own daily operations free from intrusion by the other branches." (Pet. Br. at 14.) In response, Congress argues, while the Constitution establishes a clear separation of powers between the branches, there must be a certain amount of "osmosis" between the Congress and Executive in order for the government to function effectively and that "mutually exclusive, water-tight compartments would render government unworkable." (Resp. Br. at 32.) While we agree that interaction and cooperation between branches is imperative to the function of any government, we are mindful of the historical prelude to our present Osage constitutional government. Osage governance prior to adoption of the Constitution was often characterized by gridlock and inaction occasioned by power struggles between the executive and legislative branches.[34] In view of this history, we must strive for clarity as to where the constitutional lines of authority lie. In pursuit of that objective, we must find sections 1(B)(1), 1(B)(2) and 1(B)(3) of ONCA 15-100, which establish job qualifications and job duties for positions within the Human Resources Department, unconstitutional.

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[34] *See Dennison*, at 28.

3. Count III

Whether that portion of ONCA 15-91(§ 12-105(C)(3)), which reads in part: "The Annual Plan, once approved by the Osage Nation Congress, is *legally binding* on the Board and executive management" (italics added), violated Article V, section 1 (Separation of Powers), Article VII, sections 1 and 5 (powers reserved in the Executive Branch) and Article VII section 14 of the Osage Nation Constitution.

We turn now to the question certified under Count III as recited in the above heading of this section of the Court's opinion. This case represents a challenge by the Principal Chief of the Osage Nation on behalf of the Nation's Executive Branch (Executive) to an amendment adopted by the Osage Nation Congress (Congress) to the Osage Nation Gaming Reform Act ("ONGRA").[35] The ONGRA, now codified at 14 ONC § 12-105, was first adopted in 2007 as a means of providing a statutory basis for the operation of the Osage Nation Gaming Enterprise ("ONGE") under an enterprise Board responsible for overseeing operations.[36]

The amendment at issue here, as well as the amendment pertaining to Board member eligibility addressed separately in this opinion, was adopted by the Congress on October 1, 2015, in ONCA 15-91 and vetoed by the Principal Chief on October 5, 2015, pursuant to an Executive Veto Message enumerating objections and challenging the constitutionality of the amendments now before the Court. The Executive veto was overridden by a super majority of the Congress and became law on October 7, 2015.[37]

The issue addressed here concerns the constitutionality of the Congress' decision to amend section 12-105(C)(3), making the Annual Plan of Operation "legally binding" on the

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35 The original enactment was identified as ONCA 07-30, subsequently codified as 14 ONC § 12-105.

36 The ONGRA was first adopted by the Congress in 2007, to replace and supersede the prior law governing the operational aspects of the Nation's gaming activities, predating the ratification of the Constitution in 2006. Under the now defunct prior law, the gaming activities were operated under a tribal development authority format.

37 The vote to adopt the amendment was virtually unanimous with 11 of 12 votes for and one absence. The vote to override the Executive override was adopted with 10 yes votes, 1 no vote, and one absence.

[ONGE] Board and management. Though the challenge comes within the Separation of Powers provision set forth in Article V, section 1, at the core is the question of the application of the "Separation of Powers" doctrine imbedded in the Constitution in relation to Article VII, section 14, which pertains to the establishment of Tribal Enterprise Boards in the Executive Branch.

> Article VII, section 14 provides as follows:
>
> Tribal Enterprise Boards: There shall be established, by Osage law, a Tribal Enterprise Board(s) in the Executive Branch, and the Principal Chief shall appoint qualified professionals to oversee operations of the Osage Nation business enterprises, by and with the consent of the Osage Nation Congress. The Osage Nation Congress shall reserve the right to review any action taken by the Board, and may approve the Annual Plan of Operation for the coming year. No Osage Nation elected official may be appointed to such Board.

We begin this discussion by noting that the question presented is one of first impression under the Osage Nation Constitution. We further note that there is little useful precedent from which to borrow in interpreting section 14 from any other jurisdiction to aid the Court's deliberation: tribal, state or federal. We suspect that this is because such provision is largely unique to the Osage Constitution. Neither party offered nor did the Court's independent research effort yield an example of an organic instrument of any American jurisdiction, containing a provision pertaining to "enterprise boards" or a reference to an "annual plan of operation."

The dearth of useful precedent on point or by analogy, in case law or otherwise, is no doubt attributable to the uniqueness of the Osage Constitution and the inclusion within it of a provision specific to the operation of the Nation's business enterprises. Accordingly, this Court applies the standard of constitutional construction announced by it in the *Red Corn v. Red Eagle* decision to the question presented.[38] Accordingly, we will proceed to evaluate the question presented by reviewing the document as a whole, considering each provision as it relates to the

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38 *Red Corn v. Red Eagle*, SPC-2013-01 (2013).

others and giving each word its plain meaning when read in context to avoid absurd or inconsistent results and to glean from historic and scholarly sources such relevant factors as may be applied to the question at hand.[39]

Without question, the Nation's Constitution contains many unique features. Of these is Article VII, section 14, which reflects a clear choice by the Osage People to include within the Constitution a provision specific to the establishment of tribal enterprise boards. The People, however, did not stop with simply referencing enterprise boards, they included within section 14 several additional concepts in relation to the Nation's business enterprises. Among these is the concept that enterprise board positions must be occupied by "qualified professionals" appointed by the Principal Chief subject to the advice and consent of the Congress and that each enterprise must have an "Annual Plan of Operation." Section 14, however, extends to the Congress a right to review any action taken by boards and discretion and authority to approve the Annual Plan of Operation for Osage Nation business enterprises. Section 14 further provides for an absolute prohibition on the appointment of Osage Nation elected officials to enterprise boards.

The dispute before us today goes to the extent of Congress' section 14 authority to amend the ONGRA to make the ONGE's Annual Plan of Operation "legally binding" on the Board and management. The Principal Chief, in his resoundingly rebuffed veto message, raised numerous practical objections to the amendment based on his interpretation of this language and its operational effect, though he stopped short of expressly challenging its constitutionality, it is clearly implied in the message's closing, which states that, "For the Osage Congress to try to control the activities of the casinos by restricting the business discretion of the Gaming Board would be clear interference of operational autonomy of the gaming operations."[40]

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39 *Id.*

40 *See* Executive Veto Message.

In his brief, however, his constitutional objection is stated unequivocally. He asserts that section 14 gives the Enterprise Board, and no one else, the oversight of the Nation's business and that the "plain meaning of [the People's] Constitutional words confirm, that the Board is not subject to Congressional control." The brief states that the amendment to section 12-105(C)(3), unconstitutionally alters the constitutional framework, effectively removing the enterprise from the Executive Branch.

In contrast, at argument and in its brief, Congress asserts that once approved, the Gaming Enterprise's Annual Plan of Operation "will necessarily have the force of law and be legally binding on the Gaming Enterprise Board and its executive management." It further asserts that once adopted the Annual Plan of Operation becomes law and can only be changed by enactment of a statute by Congress just like any other law of the Osage Nation. The Congress' brief also alludes anecdotally to a situation in which the Enterprise was believed to have acted beyond the scope of activities set forth in its Annual Plan, which ostensibly represents the harm the Congress intended to address through its amendment making the Annual Plan "legally binding."

In considering the arguments posited by each party, the Court first looks to the words set forth in the provisions in the context of the Constitution as a whole. In reviewing the actual words of section 14, the Court is first struck by just how uncommon it is to find within an organic document of governance provisions pertaining to business enterprises or business practices, such as business plans. While some, such as the Constitution of the Muscogee (Creek) Nation,[41] authorizing the [Creek Nation's] National Council "to create authorities with attendant powers to achieve objectives allowed within the scope of this Constitution," most government

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41 *See* MUSCOGEE (CREEK) CONST., Article VII.

owned and operated business entities are creatures of statute, not constitutions. Moreover, our effort, though admittedly not exhaustive, revealed no constitutional reference: tribal, state, or federal, that specifically provides for anything resembling an "Annual Plan of Operation." This feature, thus, appears to be unique to the Osage Constitution and, therefore, requires our considered attention because it was important enough to the Osage People to be included within the supreme law of the Osage Nation.

a. The Osage People made a conscious decision to establish a separation of function between the Nation's political bodies and its business enterprises.

Section 14 refers specifically to "***the***" Annual Plan of Operation" not "an annual plan of operation" nor any other type of document, so it is clear that the Osage People had something very definite and specific in mind intended to serve one or more specific purposes. The resolution of this dispute requires us to ascertain this purpose in order to understand the contours of Congress' authority in relation to the Annual Plan of Operation.

In November of 2005, some months in advance of the March 11, 2006 Constitutional referendum, the Osage Government Reform Commission ("Commission") conducted a referendum as a means of securing the input of the Osage People in order to finalize the text of the Constitution.[42] This measure was taken by the Commission to ensure adequate citizen engagement on key constitutional issues identified over the course of the Osage government reform initiative.[43] Particularly relevant to the issue here is Question 16 of the referendum which reads as follows:

> Tribally owned enterprises shall be managed by boards in which the members are qualified professionals appointed by the Osage Nation legislature. In order to

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42 For an excellent and detailed treatment of the Osage Government Reform Initiative, see Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First Century Osage Nation* (2012).

43 *Id.* at app. 6 at 195.

> insulate tribal enterprises from politics, no elected official shall be appointed to a tribal enterprise board. The legislature shall maintain general oversight and approve the Annual Plan of Operation.[44]

Nearly 93% of the voters in the referendum voted in favor of this provision.[45] As Priscilla Iba, a member of the Commission noted in a presentation at an academic seminar in 2008, "Our primary charge was to listen to the will of the Osage people and bring into existence the governmental choice of that majority."[46] In her remarks, she noted that the [Government Reform] [C]ommission meetings were held weekly and always included a time for attending citizens to give opinions and held more than 40 town meetings to hear what the Osage people wanted in a new government.[47] From its government reform initiative, the Osage Nation embarked upon a new path under a new constitution with features unique to the interests and vision of the Osage people.

Although the language ultimately included in the Constitution is not completely identical to the language of Question 16 of the referendum, the words in Question 16 offer strong clues as to the People's intent in relation to Article VII, section 14. Similarly instructive is that which was included in section 14 as well as what was not included and what was changed.

The basic concept from Question 16 ultimately embedded in the Constitution is that the Nation's enterprises are to be managed by boards comprised of qualified, appointed professionals. We note that the language of Question 16 extending Congress the power to appoint Board members did not make it into the Constitution. Instead, section 14 delegates the power to appoint members of the Board to the Principal Chief. Question 16 also provided that

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44 *Id.*

45 *Id.*

46 *See* Remarks of Priscilla Iba, Native Nations Institute for Leadership, Management, and Policy, University of Arizona – Tucson, March 26, 2008 *available at* https://nnidatabase.org/video/priscilla-iba-osage-government-reform.

47 *Id.*

the legislature shall maintain general oversight and approve the Annual Plan of Operation. Although the language pertaining to Congress' authority to approve the Annual Plan of Operation survived into section 14, the language in Question 16 expressly delegating "general oversight authority" to the Congress was omitted from section 14.[48] The second sentence of Question 16 provides immense insight as to the intent underlying the inclusion of section 14 in the Constitution and its absolute prohibition on the appointment of elected officials to the Nation's enterprise boards: to "insulate tribal enterprises from politics."

The concept of insulating tribal enterprises from tribal politics is not unique to the Osage Nation. There are mountains of books, articles, and other works of scholarship advocating for a functional separation between the political and business functions of tribal government. In a paper published by the Harvard Project on American Indian Economic Development, one author writes that tribal political interference in enterprise operations is a major impediment to the success of such enterprise.[49] The article states that where the structure of tribal governments allows elected officials access to the daily operations of tribally owned business enterprises, business decisions are subject to political considerations, making business planning difficult, creating instability in business management, and placing extraordinary burdens on enterprise management.[50] The article further states that the close association of tribal politics and tribal

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[48] We view it significant that the reference to "general oversight authority" was not included in the final language of the Constitution. Had the term been included, it would have suggested a broader delegation than is actually contained in the Constitution. Essentially, the Constitution provides for a more limited oversight function, providing Congress a look backward as to actions already taken by the ONGE (right of review) and a look forward through the Annual Plan of Operation approval process. The Constitution does not assign Congress any role in the on-going day-to-day affairs of the enterprise.

[49] Michael Cameron, *A Prototypical Economic Development Corporation for Native American Tribes*, (1990) *available at* http://hpaied.org/publications/prototypical-economic-development-corporation-native-american-tribes?keys=&field_tribe_tid=All&field_topic_tid=All&field_year_value=&field_pub_type_value=Article+and+Chapter+Reprints enterprise management.

[50] *Id.*

business impedes the development of business relationships outside the tribe as a consequence of the increased risk to the enterprise.

It is evident from Question 16, that this concept of a separation of function between the political and economic arms was thoughtfully considered during the Osage Government Reform Process and resoundingly embraced by Osage voters. The clues we derive from the evolution of Question 16 into the language of section 14 of Article VII, lodging the Nation's enterprise boards in the Executive Branch, reveal that section 14 is designed to achieve a "*Separation of Function*" between the political and business arms of the Nation. We find that the placement of section 14 within the umbrella of the Executive Branch was a purposeful decision intended to use the Separation of Powers principle set forth in Article V, section 2 to create a boundary between the delegated functions of the Congress and those of the Nation's enterprise boards. Our conclusion in this regard is further supported by the inclusion of section 8 in Article X, the Code of Ethics, the heading of which is "Independence of Boards and Commissions, a further indication of the People's intent to separate political considerations from operational decision-making.[51]

Bearing in mind this *Separation of Function* principle, we turn back to the arguments of the parties on the question of the constitutionality of the amendment making the annual plan "legally binding." In essence, the Executive posits that the effect of the amendment is to provide Congress the means to assert operational control over the enterprise in derogation of the Constitution, amounting *de facto* to the removal of the enterprise from the Executive Branch. In contrast, the Congress asserts that the amendment is well within the bounds of its oversight

[51] Article X § 8 of the Constitution provides that "Tribal officials and employees shall refrain from using tribal positions to improperly influence the deliberations, administrations, or decisions of established board or commission proceedings."

authority in relation to the ONGE. That its section 14 authority to review actions of the Board and approve the Annual Plan of Operation is sufficient to allow it to make the Annual Plan "legally binding" as a matter of statute. The Congress further asserts that the Constitution plainly grants Congress the power to review any board action and that such review is mandatory.

It is the Court's view that Congress' authority in relation to the Nation's business enterprises is neither as broad as the Congress asserts nor as constrained as the Executive asserts. While section 14 obviously assigns Congress an oversight role in the relation to the gaming enterprise, it does not mandate any such review of Board action by the Congress, rather, by its plain terms, its reserves to the Congress the right to review any action taken by the Board. It is within the discretion of the Congress to determine whether to exercise such right of review. With that decided, we turn to the question of the amendment pertaining to the Annual Plan of Operation.

By its use of the term "legally binding," Congress has used legal terminology not typically associated with business planning instruments, but rather one associated with statutes, regulations, and contracts. The Executive has interpreted this language to mean Congress' amendment effectively transforms that which is a plan for future operations into a binding statute. The Congress does not specifically refute this theory, but rather asserts that making the Annual Plan of Operation "legally binding" is within its section 14 authority. The Court, thus, is left to consider the contours of Congress' role in relation to the Annual Plan of Operation and the nature of its status under the Constitution.

Generally speaking, a planning document, such as an Annual Plan of Operation, is a basic tool used by businesses to map out courses of action, identify business goals and objectives, and identify the resources needed to achieve them over a relatively short timeframe, typically the

upcoming business year.[52] Necessarily, a business plan is based on projections derived through financial forecasting models, present knowledge, and available data sets. Unlike statutes, regulations, and contracts, business plans cannot be set in stone and their utility would be sorely undermined if they were. Rather a business plan is best thought of as an operational roadmap with a starting point and an endpoint, but along the way conditions may arise requiring a detour.

Market forces, the overall economy, labor issues, forces of nature, and numerous other factors can undermine even the most scrupulously thought out business plan based on the most sophisticated economic model. Conversely, unexpected opportunities may arise, prompting the need for a change in course. The inflexibility characteristic of a statute or contract is incompatible in relation to a business plan because a business must have the flexibility to adapt to changed or unforeseen circumstances if it is to be successful.

On the other hand, an Osage Nation enterprise's Annual Plan of Operation cannot be characterized as just an ordinary business plan because it is of constitutional import and status. Accordingly, we must evaluate its function and purpose within the overall framework of the Constitution. One thing that does not appear to be in dispute and with which we agree, is that section 14 mandates all Osage Nation business enterprises to operate within the framework of its Annual Plan of Operation subject to Congress' approval. That the Osage People intended the Nation's business enterprises to be operationally autonomous entities has already been decided by this Court.[53] What remains at issue is whether the constitutional status of the Annual Plan of Operation in light of the Separation of Function principle, as juxtaposed against Congress' Article VI authority to enact law and its Article VII, section 14 oversight authority is sufficient to permit the amendment to withstand scrutiny.

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52 *Cameron*, at n. 14

53 *Red Corn v. Red Eagle*, SPC 2013-01 at 6-7 (2013).

The Annual Plan of Operation serves several important objectives in addition to being an important business tool. The mere act of committing a business plan to paper helps to ensure that adequate thought and consideration has been given to all aspects of the operation and its potential, which is no doubt precisely why the Osage People elevated a business planning process to one of constitutional stature. This intent is further reflected by the dictates of section 14, including the command that enterprise Boards be created comprised of "Qualified Professionals" and the care taken to limit the role of the Nation's political arms in the operation of the enterprises. In section 14, the Osage People made a conscious effort to allow the enterprises to operate on a business basis as autonomous operations, but which are subject to a process designed to effect accountability. The requirement for an Annual Plan of Operation, thus, advances four important objectives: 1) to ensure that the enterprise may operate on a business basis based on business, not political considerations, in order to be stable and profitable; 2) to keep the Nation informed about the activities, goals, and objectives of the gaming enterprise; 3) to harmonize the Nation's goals and objectives with those of the Enterprise; and 4) to provide a check on the enterprise's accountability.

It is our understanding that in practice, this process has been in place for several years. In some cases the Congress, by resolution, has approved the ONGE's Annual Plans of Operation in whole and, in some cases, Congress has disapproved it, at least in part. While this practice may not have proven wholly satisfactory to all concerned -- doubtlessly there have been bumps along the way -- the gaming enterprise has flourished and achieved a remarkable level of success, producing critical revenue the Nation relies upon to fund its now extensive operation and enabling it to provide a wide variety of programs, benefits, and services to the Osage People.

We gather from its brief and reference by counsel at Oral Argument that the Congress is dissatisfied with the ONGE Board and management's adherence to the Annual Plan. While we are not apprised of the details, we gather that the ONGE Board's actions were sufficiently offensive to the Congress to prompt it to enact the amendment notwithstanding the Executive Veto. The trouble is not so much with Congress' desire to hold the Board and management accountable, rather it is with Congress' solution. To amend the ONGRA to make its Annual Plan of Operation "legally binding" is problematic. The language creates ambiguities that cannot be readily reconciled within the contours of Congress' section 14 more limited oversight delegation or the separation of function principle reflected in the Constitution.

We note that the concerns presented in both the Veto Message and the Executive's brief have merit. Application of the term "legally binding" is legal terminology that as applied in its ordinary use would seem to render the content of the Annual Plan legally enforceable to the finest detail. Moreover, the term implicitly suggests a cognizable legal cause of action with all attendant penalties, fines, and sanctions. As such, the amendment is subject to abusive application that foreseeably could well have a destabilizing effect on the ONGE and permit Congressional encroachment into the operation of the ONGE beyond that authorized in section 14. Moreover, the potential threat of civil action for even minor deviations from the Annual Plan would likely have a chilling effect on the willingness of potential candidates to seek or accept appointment to Osage enterprise boards, making it significantly more difficult for the Nation to be able to attract qualified professionals to serve.

If it is Congress' intent to use the threat of a civil suit to control or direct the affairs of the Board and management, then it has strayed from the balance intended by the People and encroached too far into the affairs of the Nation's gaming enterprise. If this is not Congress'

intent, then we are without a prudential basis to discern precisely what Congress intends to be the operative effect of the amendment. This leaves us with two possible constructions of the amendment. On the one hand, the amendment would be unconstitutionally overbroad and on the other it would be unconstitutionally vague. Either way, the amendment fails to withstand constitutional scrutiny. However, our analysis does not end here.

To be clear, we do not accept the notion the Congress' authority to approve the Annual Plan is meaningless or that the enterprise may disregard a congressionally approved Annual Plan of Operation by proceeding with a course of action not contemplated in the Annual Plan or proceeding with an action disapproved by the Congress in relation to it. It is the Constitution, not the Congress, which commands Annual Plans of Operation and it is the Constitution that provides Congress the authority to approve them. Without any check on the power of the Nation's enterprises to conduct business, the enterprises created to produce revenue to fund the operations of government and fuel the Nation's economy, could well pursue a course wholly at odds with the Nation's overall goals, interests, and objectives. Congress' constitutionally delegated authority to approve (or disapprove) the Annual Plan serves as that check.

The creation of a civil cause of action against Board members and managers, however, is not the appropriate remedy if an Enterprise Board ignores the parameters set forth in a congressionally approved Annual Plan of Operation. As a matter of constitutional law, Board members are appointed officials of the Nation. As such, they have a constitutional duty to oversee operations of the enterprise, which must operate under an Annual Plan of Operation as approved (or disapproved) by the Congress. While this duty does not require the Board's strict adherence to every detail or projection set forth in the Annual Plan of Operation as though it were a statute or contract, it does mean that each Board member has a duty to ensure that the

enterprise is operated within the basic parameters of its Annual Plan of Operation, which, after all, are established by the Board in the first place. This duty entails operating within the limits of its approved budget, refraining from pursuing projects not approved by the Congress, and proceeding with projects and activities proposed and approved in its Annual Plan of Operation to the maximum extent practicable.

Neither do we suggest that there is no remedy for a Board member's breach of his or her constitutional duties. As appointed officials of the Nation, Board members are subject to removal under Article XII and may be removed, among other causes, for the "willful neglect" of their constitutional duties.[54] This is the sole remedy contained in the Constitution for the breach of a constitutional duty by an elected or appointed Osage official and it preempts all others, including any statutory cause of action or remedy.

4. **Count IV**

We certified the following question as to Count IV of the Petition:

> **Whether that portion of OCNA 15-91, (Sec. 12-105(A)(2)), which reads "Board Eligibility. Any Board candidate who is at least thirty (30) years old who shall not have been convicted of a felony, *and who can demonstrate the credentials of a qualified professional*, is eligible to serve as a member of the board" (italics added), violates Article V, sections 1 and 2 (separation of powers), Article VII, sections 1 and 5 (powers reserved in the Executive Branch) and Article VII, section 14 (qualification for appointment to board) of the Osage Constitution.**

In his *Petition*, the Principal Chief challenges only a portion of ONCA 15-91, section 12-105(A)(2) as amended, which establishes certain requirements for qualification for appointment to Tribal Enterprise Boards. He urges that subsection (A)(2)'s requirement that Enterprise Board

[54] *See* OSAGE CONST., Art. XII § 1.

candidates must "demonstrate the credentials of a qualified professional" works an unconstitutional violation. We disagree.

Article VII, section 14 states that Congress has authority to establish Tribal Enterprise Boards and states that persons appointed to Enterprise Board positions must be "qualified professionals." We do not find that establishing criteria from which Congress can make a reasonable determination of whether a candidate is indeed a "qualified professional" works any constitutional violation. On the contrary, without the requirement that a candidate is able to produce some generally accepted professional credentials, such as a resume showing education, special training, professional associations, work history and experience, etc., Congress would be without a rational basis upon which to carry out its duty of advice and consent through an informed assessment of candidates.

While a challenge to subsection (A)(2)'s provision of a minimum age requirement of thirty years is not specifically pled in the Principal Chief's Petition, the parties did brief the issue and we find that it is a matter subject to reoccurring challenge and address it accordingly.

In support of his challenge to subsection (A)(2)'s provision of an age restriction, the Principal Chief urges that since the Constitution establishes an age restriction for the position of Principal Chief in Article VII, section 3, its silence as to such a requirement in section 14 precludes Congress from establishing an age restriction for appointment to a Tribal Enterprise Board. Again, we disagree. Article VII, section 14 makes clear that persons charged with overseeing the Nation's business enterprises shall be "qualified professionals." As stated above, we find that it is within Congress's legitimate authority to set measurable standards by which to make a determination as to whether a candidate is indeed a "qualified professional." If in

Congress' view a minimum age of thirty years is a necessary prerequisite to the determination of a "qualified professional," we find it is within its constitutional purview to do so.

In the absence of specific criteria for what is required to establish a candidate for appointment to a Tribal Enterprise Board as a "qualified professional," Congress' duty of advice and consent would be reduced to an ad hoc, standard-less evaluation that would be both unfair to the Executive, the nominee, and inconsistent with the mandates of section 14. For Congress' responsibility under section 14 to have any meaning, Congress must have the appropriate discretion to establish qualifications for board members, provided such qualifications are consistent with the Constitution. In the matter before us, we find that Congress has not exceeded its authority or violated the Constitution by establishing a minimum age requirement.

Accordingly, we find ONCA 15-91 (Section 12-105(A)(2)) constitutional.

CONCLUSION

We are a young government yet an old Nation that has survived by adapting, unifying, and embracing the values of roles, responsibilities, and balance. The Osage People made a deliberate—and repeated—decision to distribute the burden of governance so no one person or entity bears it alone. If longevity is our continued goal, then we must treat the Constitution as a unifying document with roles and responsibilities designed to benefit the People as a whole. Like those who came before us, "To meet and successfully overcome the enemies that beset life's pathway there must be a complete unity of purpose and of action . . . and all the people must share alike in the fortunes and misfortunes of the common defense."[55]

We do not question the good faith of either party on the points of contention addressed in this section. Both have raised important points and both have evidenced a strong desire to

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[55] *La Flesche*, at 34-35.

faithfully adhere to the Constitution. Not only is the Osage Constitution new, it is truly distinct from all others, and so we as a Nation are challenged to strike that correct balance envisioned by the Osage People and reflected in their Constitution.

We close by noting that above all, the Osage People historically and culturally have strived to achieve balance in all aspects of life in order to produce stability and order. It is, therefore, incumbent that we not only respect the roles, functions, and prerogatives of each Branch of our Nation's government, but those of the Nation's Boards and Commissions as well.

For the foregoing reasons, we find ONCA 15-82, section 10; ONCA 15-83, section 11; ONCA 15-84, section 9, ONCA 15-85, section 10; ONCA 15-86, section 9 and ONCA 15-87, section 10 unconstitutional and void; subsections 1(B)(1), 1(B)(2) and 1(B)(3) of ONCA 15-100 unconstitutional and void; section 12-105(C)(3) of ONCA 15-91 unconstitutional and void; and section 12-105(A)(2) of ONCA 15-91 constitutional.

SO ORDERED on this 8th day of March, 2016.

/s/ Meredith D. Drent
Meredith D. Drent
Chief Justice

/s/ Elizabeth L. Homer
Elizabeth L. Homer
Associate Justice

/s/ Drew Pierce
Drew Pierce
Associate Justice

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Geoffrey M. Standing Bear
Principal Chief

Osage Nation

Office of the Principal Chief

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Raymond Red Corn
Assistant Principal Chief

September 9, 2016

Archie Mason, Speaker
Osage Nation Congress
813 Grandview Avenue
Pawhuska, OK 74056

Re: Subpoena Duces Tecum to Employee of Executive Branch

Dear Speaker Mason:

I extend an offer of settlement for release of Executive Branch position salaries. A settlement is preferable than going to court. By settling a matter there will be no admission or claim as to who is right or wrong, legal or illegal, within the Constitution or out of bounds.

Your letter to Executive Branch employee Scott Johnson as Human Resource Director mentions the Osage Congress reliance on an Attorney General Opinion dated March 25, 2013, three years before the landmark Supreme Court Decision of *Standing Bear vs Whitehorn* which effectively changes everything we do and makes reliance on past practices constitutionally suspect. I respectfully request that the Members of this 5th Osage Congress take actions consistent with our Supreme Court decision. The Osage Supreme Court tells us:

> "By purporting to freeze the salaries of positions located exclusively within the Executive Branch, Congress usurped the role of the Human Resources Office (an Executive Branch department) as set forth in the Pay for Performance Act in violation of Article V, section 2. In addition, the base pay adjustment section in the FY16 Appropriation Acts targeted Executive Branch personnel compensation in violation of Art. VI, section 22 of the Constitution . . . . The merit system established in the Pay for Performance Act

EXHIBIT G

> governs employee compensation, not Congress' appropriation responsibility. Congress cannot use this responsibility to circumvent the Constitution."

Standing Bear v. Whitehorn.

Further, I am concerned that some Members of Congress are refusing to accept the doctrine of separation of powers by attempting to "end-run" the Supreme Court Decision. The purpose of the subpoena cannot be rationally explained. The Supreme Court also pronounces the following:

> "The Constitution also tells us that Congress is obligated to appropriate funds for each branch's operating costs. This responsibility is not as unbounded and arbitrary and Congress would argue. Appropriated funds must be sufficient for each branch to operate to avoid (a) disabling a constitutionally required program, service, function or activity, and (b) disrupting government operations to the detriment of the Osage citizenry. No provision in the Constitution should be interpreted to allow one branch to bring governance and/or constitutionally required programs to a screeching halt. Any branch's failure to perform its constitutional obligations could be construed as a hindrance or obstruction of "the proper administration of the Osage Nation government."

Standing Bear v. Whitehorn.

Here is our offer of settlement:

I propose that in addition to the salary and hourly wage ranges for every job position already provided the Congress, that we further provide the Congress the exact amount of salary or hourly wage paid now, but without the names of the individual employees. We also will provide the exact proposed salary or hourly wage for the next fiscal year (as recommended by the Market Study) without the names of the individual employees. Please remember, what we submitted as our proposed budgets do not reach the proposed amount of the Market Study because of the availability of funds. Also, we cannot determine with any certainty what these proposed salaries will actually be until we know the amount of the

appropriation from the Congress. Any job which is unique, such a Director, will have to be handled in a way which does not allow the individual to be identified. Each employee may on their own tell anyone what they receive as salary or hourly wage but others should not disclose this information.

A sample of a "table" with the names and points of the individual redacted is attached as an example. Human Resource Director Scott Johnson would work with the Congress to assist in any way to explain any aspect of what the Market Survey accomplishes and how it is fair to all.

Very truly yours.

Geoffrey M. Standing Bear

GMS/sld

cc: Raymond Red Corn, Assistant Principal Chief
Holli Wells, Attorney General
Samuel Alexander, Treasurer

LANGUAGE

FY 17 MARKET STUDY

JOB WORTH		LEVEL	EMPLOYEE	NEW PAY		EMPLOYEE		
Hourly	ANNUAL	POINTS	NAME	Hourly	ANNUAL	PREMIUM/DISCOUNT	MOVEMENT	THIRD
$ 16.48	$ 34,281.00	[redacted]		$ 17.31	$ 10,798.52	5%	$ 1,714.05	N/A
$ 16.48	$ 34,281.00			$ 17.31	$ 3,599.51	5%	$ 1,714.05	N/A
$ 32.03	$ 66,621.00			$ 36.83	$ 76,614.15	15%	$ 9,993.15	MIDDLE
$ 20.52	$ 42,681.00			$ 22.57	$ 46,949.10	10%	$ 4,268.10	LOWER
$ 25.18	$ 52,370.00			$ 27.70	$ 57,607.00	10%	$ 5,237.00	LOWER
$ 20.59	$ 42,831.00			$ 26.77	$ 55,680.30	30%	$ 12,849.30	MIDDLE
$ 20.52	$ 42,681.00			$ 22.57	$ 46,949.10	10%	$ 4,268.10	LOWER
$ 23.41	$ 48,683.00			$ 25.75	$ 53,551.30	10%	$ 4,868.30	LOWER
$ 24.88	$ 51,751.00			$ 26.12	$ 54,338.55	5%	$ 2,587.55	LOWER
$ 16.48	$ 34,281.00			$ 17.31	$ 7,614.34	5%	$ 1,714.05	N/A
$ 25.40	$ 52,841.00			$ 27.94	$ 58,125.10	10%	$ 5,284.10	LOWER
$ 21.53	$ 44,781.00			$ 23.68	$ 49,259.10	10%	$ 4,478.10	LOWER
$ 16.48	$ 34,281.00			$ 17.31	$ 10,798.52	5%	$ 1,714.05	N/A
$ 16.48	$ 34,281.00			$ 17.31	$ 22,496.91	5%	$ 1,714.05	N/A
$ 16.49	$ 34,302.00			$ 17.32	$ 21,610.26	5%	$ 1,715.10	N/A
$ -	$ -			$ -	$ -		$ -	
$ -	$ -			$ -	$ -		$ -	
$ -	$ -			$ -	$ -		$ -	
$ -	$ -			$ -	$ -		$ -	
$ -	$ -			$ -	$ -		$ -	
	$ 650,947.00				$ 575,991.74		$ 64,119.05	

Above numbers include all anticipated certification and degree increases for FY 17

[redacted]	

OSAGE NATION CONGRESS

Archie L. Mason, Speaker
Osage Nation Congress
P.O. Box 1449
Pawhuska, OK 74056

Phone: 918 287 5543
Fax: 918 287 5571
E-mail: amason@osagecongress.nsn.gov

September 12, 2016

Principal Chief Geoffrey M. Standing Bear
Osage Nation
627 Grandview
Pawhuska, OK 74056

Dear Principal Chief Standing Bear:

I am in receipt of your offer to settle on the subpoena for salary and merit/market information by individual position. On behalf of the Osage Nation Congress, I decline your offer since it is not the information in full that we requested by subpoena. For example, the table you provided does not have the position titles listed.

My colleagues and I, as the elected representatives of the Osage People, feel strongly that we have a responsibility to oversee the Osage People's money and to know how it is being spent by each branch of the government.

Respectfully,

Archie L Mason

Archie L. Mason, Speaker
Osage Nation Congress

EXHIBIT
H

AFFIDAVIT

I, Mary Wildcat, Hereby Swear and Affirm,

1. I am the Director of the Education Department of the Osage Nation.

2. On September 9, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 to give testimony and produce information and documents listed in 18 separate paragraphs.

3. I have previously signed an Affidavit on this matter and this Affidavit does not change anything in that one.

4. Once I began to review all the documents requested by the Subpoena Duces Tecum it became very clear to me that to comply I had to disclose confidential student and parent information including social security numbers, private financial information, and other identifying information. I am also concerned that the Subpoena Duces Tecum requires me to provide information from minor children and about them.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Mary Wildcat

Subscribed and sworn to before me this 19th day of September, 2016.

My Commission Expires:

MRS SHERYL DECKER
NOTARY PUBLIC – STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded Through RLI Insurance Company

Notary Public

EXHIBIT
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AFFIDAVIT

I, Scott Johnson, Hereby Swear and Affirm,

1. I am the Director of the Human Resource Department of the Osage Nation.

2. On September 9, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 to give testimony and produce information and documents listed in 13 separate paragraphs.

3. Since receiving the Subpoena Duces Tecum I have been working with my staff and the Office of the Chiefs to prepare a complete response.

4. Even though we have tried to copy all documents to respond to the Subpoena Duces Tecum we do not have enough time to have everything copied in time to bring to the meeting.

5. I believe an additional week is needed beyond Tuesday, September 20, 2016 to find the material subpoenaed and make copies.

6. Additionally, after consultation with attorneys, there are legal questions on what documents are privileged and confidential and which documents are not. I do not know what the difference might be so I need to have all the documents I am gathering reviewed by the attorneys and I do not know how long that will take.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Scott Johnson

Subscribed and sworn to before me this 14th day of September, 2016.

My Commission Expires:
NOTARY PUBLIC - STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded through RLI Insurance Company

Notary Public

EXHIBIT
tabbies
I.1

AFFIDAVIT

I, Mary Wildcat, Hereby Swear and Affirm,

1. I am the Director of the Education Department of the Osage Nation.

2. On September 9, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 to give testimony and produce information and documents listed in 18 separate paragraphs.

3. Since receiving the Subpoena Duces Tecum I have been working with my staff and the Office of the Chiefs to prepare a complete response.

4. Even though we have tried to copy all documents to respond to the Subpoena Duces Tecum we do not have enough time to have everything copied in time to bring to the meeting.

5. I believe an additional week is needed beyond Tuesday, September 20, 2016 to find the material subpoenaed and make copies.

6. Additionally, after consultation with attorneys, there are legal questions on what documents are privileged and confidential and which documents are not. I do not know what the difference might be so I need to have all the documents I am gathering reviewed by the attorneys and I do not know how long that will take.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Mary Wildcat

Mary Wildcat

Subscribed and sworn to before me this 14th day of September, 2016.

My Commission expires:

VICKI SHERYL DECKER
NOTARY PUBLIC – STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded Through RLI Insurance Company

Sheryl Decker

Notary Public

EXHIBIT
I. 2

AFFIDAVIT

I, Christian "Casey" Johnson, Hereby Swear and Affirm,

1. I am the Director of Operations of the Osage Nation.

2. On September 9, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 to give testimony and produce information and documents listed in 18 separate paragraphs.

3. Since receiving the Subpoena Duces Tecum I have been working with my staff and the Office of the Chiefs to prepare a complete response.

4. Even though we have tried to copy all documents to respond to the Subpoena Duces Tecum we do not have enough time to have everything copied in time to bring to the meeting.

5. I believe an additional week is needed beyond Tuesday, September 20, 2016 to find the material subpoenaed and make copies.

6. Additionally, after consultation with attorneys, there are legal questions on what documents are privileged and confidential and which documents are not. I do not know what the difference might be so I need to have all the documents I am gathering reviewed by the attorneys and I do not know how long that will take.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Christian "Casey" Johnson

Subscribed and sworn to before me this 14th day of September, 2016.

My Commission Expires:

MRS SHERYL DECKER
NOTARY PUBLIC – STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded Through RLI Insurance Company

Notary Public

EXHIBIT
I.3

AFFIDAVIT

I, Samuel Alexander, Hereby Swear and Affirm,

1. I am the Acting Treasurer of the Osage Nation.

2. On September 9, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers at the Education Committee Meeting on the 20th day of September, 2016 at 1:30 to give testimony and produce information and documents listed in 13 separate paragraphs.

3. Since receiving the Subpoena Duces Tecum I have been working with my staff and the Office of the Chiefs to prepare a complete response.

4. Even though we have tried to copy all documents to respond to the Subpoena Duces Tecum we do not have enough time to have everything copied in time to bring to the meeting.

5. I believe an additional week is needed beyond Tuesday, September 20, 2016 to find the material subpoenaed and make copies.

6. Additionally, after consultation with attorneys, there are legal questions on what documents are privileged and confidential and which documents are not. I do not know what the difference might be so I need to have all the documents I am gathering reviewed by the attorneys and I do not know how long that will take.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Samuel Alexander

Subscribed and sworn to before me this 14th day of September, 2016.

My Commission Expires:

MRS SHERYL DECKER
NOTARY PUBLIC – STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded Through RLI Insurance Company

Notary Public

EXHIBIT
tabbies
I. 4

AFFIDAVIT

I, Scott Johnson, Hereby Swear and Affirm,

1. I am the Director of the Human Resource Department of the Osage Nation.

2. On September 8, 2016 I was served a Subpoena Duces Tecum from the Osage Nation Congress commanding me to appear at the Congressional Chambers on or before the 19th day of September, 2016 to produce documents listed in two separate paragraphs.

3. Since receiving the Subpoena Duces Tecum I have been working with my staff and the Office of the Chiefs to prepare a complete response.

4. After consultation with attorneys, there are legal questions on what documents are privileged and confidential and which documents are not. I do not know what the difference might be on all these documents so I need to have all the documents I am gathering reviewed by the attorneys and I do not know how long that will take.

I declare that the above and foregoing statements are true and correct to the best of my knowledge.

Scott Johnson

Subscribed and sworn to before me this 14th day of September, 2016.

MRS SHERYL DECKER
NOTARY PUBLIC STATE OF OKLAHOMA
COMMISSION # 07007058
My Commission Expires July 25, 2019
Bonded Through RLI Insurance Company

My Commission Expires:

Notary Public

EXHIBIT
I.5