



OSAGE NATION ATTORNEY GENERAL OFFICE

Holli A. Wells
Attorney General
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Clinton N. Patterson
1st Asst. Attorney General



1071 Grandview Lane
Pawhuska, OK 74056
attorneygeneraloffice@osagenation-nsn.gov

Trial Court of the Osage Nation
FILED

MAR 24 2016

By KBunde

**OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2016-01
(For Official Publication)**

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation.

This Office has received your request for an Official Attorney General Opinion regarding the constitutionality of the Budget Parameter and Limitation Act (ONCA 13-67) and the related ONCA 13-50, as amended by ONCA 14-85, in light of the recent Supreme Court decision in *Standing Bear v. Whitehorn*, Case No. SCO-2015-01 (2016).

To which you ask:

Does the Budget Parameter and Limitation Act (ONCA 13-67) and the related ONCA 13-50, as amended by ONCA 14-85, violate the Constitution of the Osage Nation?

I. INTRODUCTION AND SUMMARY

Pursuant to the Osage Nation Office of Attorney General Act at 15 ONC § 3-109, you properly ask for an Attorney General Opinion on the constitutionality of the Budget Parameter and Limitation Act (ONCA 13-67) (collectively “Budget Parameter and Limitation Act or Act”) and the related ONCA 13-50, as amended by ONCA 14-85. As explained below, I am of the opinion that several provisions of the Budget Parameter and Limitation Act are unconstitutional. With no

severability clause in the Act and no judicial authority to rely on, I am further of the opinion that the entire Budget Parameter and Limitation Act is void as unconstitutional. However, the “related” ONCA 13-50, as amended by ONCA 14-85, is not part of the Budget Parameter and Limitation Act and its provisions do not violate the constitution.

II. DISCUSSION

As a fledgling tripartite government, there is little case law to form an opinion on your question. However, the Supreme Court made it clear in their recent decision that they intend to make “a uniquely Osage jurisprudence” and decline to consider “the standards and values created by State and Federal governments in creating their constitutional jurisprudence.”¹ Using the Supreme Court’s wisdom and guidance, I will refrain from using State and Federal principals and instead focus on Osage law and jurisprudence to answer your question.

First, I will discuss the Budget Parameter and Limitation Act sections I deem in violation of the Constitution.

A. Section 2. Employee Salaries

Section 2 of the Budget Parameter and Limitation Act states that “Salary and wage increases shall be made solely according to the provisions of a merit based system established in Osage law *and policies and procedures approved by the Osage Nation Congress*...[emphasis added]” Policies and procedures are the standard course of action that has been adopted by an organization and the method for carrying it out.² Here, Congress uses the Article VI, Section 22 mandate to create a merit based employment system and combines it with legislation in Section 2 of the Budget Parameter and Limitation Act to give themselves final approval authority over ways

¹ *Standing Bear v. Whitehorn*, SCO-2015-01 at 3 (2016).

² *Black’s Law Dictionary*, 1345, 1398 (10th ed. 2014).

and means in which the merit system is implemented. This required Congressional approval of the policies and procedures is a violation of separation of powers under Article V.

Congress established the merit based employment system under the Osage Nation Workforce Pay for Performance Act at 19 ONC § 3-101, et seq. The Pay for Performance Act governs employee compensation and states “The *Osage Nation Human Resources Department* is hereby authorized to implement a Pay for Performance Compensation System, and to develop, adopt, and publish rules and regulations and policies governing Osage Nation employment...”³ The Office of Human Resources is an Executive Branch Department.⁴ Section 2 of the Budget Parameter and Limitation Act purports to give Congress authority to approve the Human Resource Department policies and procedures. The Supreme Court opined in *Standing Bear v. Whitehorn*, “Congress’ establishment of such qualifications, duties, and responsibilities encroaches into the Executive’s constitutionally designated powers to designate the daily operational duties of persons in its employ in the Human Resources Department.”⁵ Therefore, the legislative mandate in Section 2 requiring Congressional approval of the policies and procedures violates Article V and VII of the Constitution.

B. Section 3. Budget Limitation and Authorizations

Section 3 of the Budget Parameter and Limitation Act sets limitations on line item shifting and restricts payment of salaries at a certain level. For example, Section 3A states “Line item shifting shall not be used to establish new positions without the specific approval of the Osage Nation Congress.” This provision gives Congressional approval authority over all new positions not in existence at the time of appropriation, no matter which branch of government desires the

³ 19 ONC § 3-104(A) [emphasis added].

⁴ *Standing Bear v. Whitehorn*, SCO-2015-01 at 17 (2016).

⁵ *Id.* at 16, 17.

new position. This provision is also in violation of the separation of powers clause at Article V of the Constitution.

Needs may arise during the fiscal year that require a department to add new employment positions to fulfill its constitutionally mandated duties to the Osage people. Section 3A requires Congressional approval before creating a new employment position for both the Executive Branch and the Judicial Branch. This fundamentally allows Congress to make employment decisions for the other two branches. However, "Congress cannot usurp another branch's constitutional obligation by legislation."⁶ And, "Legislating job qualifications and job descriptions goes beyond establishing an employment system."⁷ Therefore, it is my opinion Section 3A usurps the constitutional obligations of the other branches by legislatively giving Congressional approval of their employment decisions and is thereby in violation of Article V of the Constitution.

For the same analysis directly above, it is also my opinion that the line item shifting and salary restriction provisions in Section 3B, C, D and E arrogate the powers vested in the other two branches by going beyond the constitutionally endorsed establishment of a merit based system; and therefore are in violation of the separation of powers provision at Article V.

C. Section 4. Prohibition Against Line Item Shifting

Section 4 of the Budget Parameter and Limitation Act disallows line item shifting into line items that were not within the appropriation bill at the time of its enactment. Again, for the reasons set out in Section B above, it is my opinion that the similar prohibitions against line item shifting contained in Section 4 are beyond any constitutional appropriations authority granted to the legislative branch by the Constitution and instead constitutes a legislative usurpation of the inherent power granted by Article V to the other two branches of government.

⁶ *Id.* at p. 17.

⁷ *Id.*

D. Section 5. Categorization of Approved Budgets by Divisions

Section 5 states “Approved budgets shall be organized by Divisions as established by law or Executive Order.” This section mandates that all budgets be submitted by “Divisions” before Congress will appropriate. I understand this section eases Congress’ heavy burden during the legislative appropriation session, and I am all for helping in that monumental task. However, Congress is legislatively mandating Executive to organize into divisions, when Executive may or may not feel it is in their best interest to do so, or face lack of appropriation by Congress. This Section legislatively forces Executive to organize into divisions, which constitutionally is solely an Executive decision protected by Article VII.

The Supreme Court rejected the argument that “Congress possesses the inherent authority to impose conditions, restrictions, or Limitation in its appropriation laws when such conditions violate the Constitution.”⁸ Further, the Supreme Court stated “The Constitution does not expressly authorize Congress to condition its appropriation on certain actions taking place.”⁹ For these reasons, it is my opinion that the language in Section 5 requiring “approved budgets shall be organized by Divisions” and thereby legislatively forcing the Executive to organize into divisions violates Article V and Article VII and is unconstitutional.

However, I am also concerned about the enforcement of Section 5. For instance, what if Executive felt it was not in their best operational and functional interest to organize into divisions and in turn submitted annual budgets to Congress that were not organized by divisions, as required by Section 5? Would Congress enact a law placing Executive into Divisions as allowed by Section

⁸ *Id.* at 11.

⁹ *Id.* at 10.

5, but undoubtedly unconstitutional? And then, would Congress then refuse to appropriate money to Executive?

The Constitution at Article VI, Section states “The Osage Nation Congress shall enact, by law, an annual expenditure of funds which shall include an annual appropriation of operating funds for each branch of the government for each fiscal year.” The Supreme Court stated “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).”¹⁰ And, “No provision in the Constitution should be interpreted to allow one branch to bring governance and/or constitutionally required programs to a screeching halt.” Perhaps more noteworthy, the Supreme Court went on to say “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’” and cited the Code of Ethics at Article X. I take this as not mere surplusage. This says to me that not only is Congress constitutionally mandated to fund the Executive and its programs, but that failure to do so is a violation of the Code of Ethics.

Based on the reasoning that Section 5 violates Article V, Separation of Powers, and its enforcement (and in turn failure to fund Executive operations) violates Article VI, Section 23, it is my opinion that Section 5 of the Budget Parameter and Limitation Act is unconstitutional.

E. Section 6. Prerequisites for Consideration of Approved Budgets and Independent Budgets; Annual Projected Revenue Reports and Section 8. Approved Annual Budget and Support Documentation as Prerequisite to Appropriation; Establishing a Deadline for Submission; Independent Budgets

Both Section 6 and Section 8 contain “prerequisites,” so we will discuss these two sections together for economy. A prerequisite is “something that is necessary before something else can

¹⁰ *Id.* at 11.

take place or be done.”¹¹ Section 6 prohibits approved budgets from being introduced until a motion to adopt an Annual Projected Revenue Report for the same fiscal year is passed on the floor of Congress. Section 8 requires all general appropriation budgets to be submitted by July 15th of each year in a form that complies with the Budget Parameter and Limitation Act. It can be assumed by naming these sections “prerequisites” that if these conditions are not met, then Congress will not consider the approved budgets for appropriation.

This brings me back to the enforcement problem as with Section 5. What happens to the approved Executive budget if for some remote reason Congress was not able to pass the Annual Revenue Report or if Executive submitted its approved budget to Congress after July 15? Does that mean Congress would not appropriate operating money to Executive? As I discussed in Section D above, the Supreme Court ruled that Congress has a constitutional duty to appropriate operating money to Executive, cannot refuse to adopt an annual budget, and refusal or failure to do so may be deemed as a violation of the Ethics Code.¹² Additionally, in a somewhat circular argument, Section 8 requires the budgets to be submitted in a form that complies with the Act, which I have previously given my opinion that the Act itself is unconstitutional. Therefore, it is my opinion that Sections 6 and 8 of the Act, similar to Section 5, are unconstitutional as each violate Article V and their enforcement (and in turn failure to fund Executive operations) violates Article VI, Section 23.

F. Severability

The Budget Parameter and Limitation Act does not contain a severability clause. A severability clause is “a provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or

¹¹ *Black's Law Dictionary*, 1373 (10th ed. 2014).

¹² *Standing Bear v. Whitehorn*, SCO-2015-01 at 11 (2016).

unconstitutional.”¹³ Unlike the voluminous amount of Federal law on severability, there is no original Osage jurisprudence on this issue. However, I cannot create original Osage jurisprudence through Attorney General opinion. Since there is no severability clause that would save any constitutional provisions remaining in the Act (and Congress knows how to do so),¹⁴ it is my opinion that the entire Budget Parameter and Limitation Act is unconstitutional and void.

G. ONCA 13-50 Not Part of the Budget Parameter and Limitation Act

Congress enacted ONCA 13-50 to “define terms used in Osage Nation budgeting and appropriation legislation” and “to repeal Section 4 of ONCA 11-32, and its amendments.” Section 4 of ONCA 11-32 is the definition section of a previous Budget Parameter and Limitation Act.¹⁵ ONCA 13-67 repealed and replaced ONCA 11-32, but it did not contain a definitions section, nor did it reference ONCA 13-50. This demonstrates a clear intention by Congress to remove the definitions section from the Budget Parameter and Limitation Act and have the definitions apply to all “budgeting and appropriation legislation,”¹⁶ and not merely be a part of the Budget Parameter and Limitation Act.

As further evidence of Congressional intent, the ONCA 13-50 definitions are codified at 15 ONC § 1A-101 and the Budget Parameter and Limitation Act begins at 15 ONC § 1A-102. Yes, it is the very next section and hence they are “related” as you suggest. However, if the purpose was to include the definitions of ONCA 13-50 and limit them specifically to the Act, then they should have been the codified *before* any mention of the Budget Parameter and Limitation Act. They were not. I take this as an expression of Congressional intent and form the opinion that the

¹³ *Black’s Law Dictionary*, 1583 (10th ed. 2014).

¹⁴ See, e.g., Osage Const., Art. XXI (Severability); 20 ONC § 6, *Liquor Control Ordinance*, (ONCA 11-41); 26 ONC § 1-105, *Osage Nation Revenue and Taxation Act of 2006, as amended* (ONCA 14-83); 2 ONC § 8-904, *Child Support Enforcement*, (ONCA 07-20); and 12 ONC § 1-103, *Osage Nation Election Code*, (ONCA 15-76).

¹⁵ Repealed by ONCA 13-67.

¹⁶ ONCA 13-50 (Defining the purpose.).

definitions in ONCA 13-50 apply to all budget and appropriation legislation and the limitations are not limited to being part of the Budget Parameter and Limitation Act.

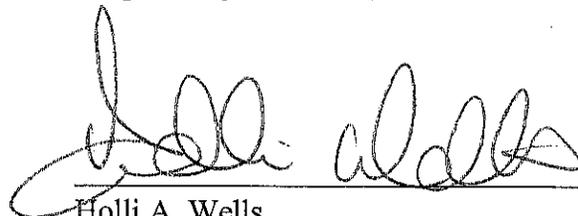
Further, ONCA 13-50 contains definitions to be used by recipients of Osage Nation funds “in order to avoid varying interpretations and to promote uniform understanding and application.”¹⁷ ONCA 13-50 does not legislate any power over another branch. As I discussed above and set out in *Standing Bear v. Whitehorn*, Congress has a constitutional duty to appropriate operating money to Executive, Congress cannot refuse to adopt an annual budget, and Congressional refusal or failure to do so may be deemed as a violation of the Constitution.¹⁸ The adoption of definitions for clarity and promotion of understanding cannot usurp this constitutional appropriation duty. Therefore, it is my opinion that ONCA 13-50, as amended by ONCA 14-85, does not violate the Constitution.

III. CONCLUSION

It is, therefore, the official opinion of the Attorney General, that:

Sections 2, 3, 4, 5, 6, and 8 of the Budget Parameter and Limitation Act (ONCA 13-67) violate the Constitution of the Osage Nation and further, the entire act is void as unconstitutional. ONCA 13-50, as amended by ONCA 14-85, although related, is not specifically a part of the Budget Parameter and Limitation Act, and does not violate the Constitution.

Respectfully submitted,



Holli A. Wells,
Osage Nation Attorney General

¹⁷ ONCA 13-50, Section 1.

¹⁸ *Standing Bear v. Whitehorn*, SCO-2015-01 at 11 (2016).