



Petitioner, Principal Chief John D. Red Eagle, brings this action pursuant to section 8 of the Declaratory Judgments Act. He challenges Congress' interpretation of Article XII of the Constitution in promulgating Congressional Rule 12, ("Removal Rule" or "Rule 12") and challenges its application to him in a removal action, which is presently pending before Congress. The gravamen of the Principal Chief's claim is that certain provisions of Rule 12, both on their face and as applied, violate his right to due process in contravention of Article XII Sec. 2 and other provisions of the Osage Constitution. In response, Respondents, the Osage Nation Congress,<sup>2</sup> urge among other things that Congress' interpretation of Article XII is correct, that Rule 12 is in accord with both the language and intent of Article XII and fully protects Petitioner's due process rights.

We find we have jurisdiction under section 8 of the Declaratory Judgments Act. Removal under Article XII of the Constitution is delegated exclusively to the Osage Nation Congress. Its removal power, however, is not boundless. The due process requirements contained in Article XII require notice, opportunity to be heard and justification for removal. Article XII also limits Congress' power by directing a Supreme Court Justice to preside at the removal trial, which contains inherent safeguards regarding the removal trial itself.

While we deny the Principal Chief's request to void the entire removal process, we invalidate those provisions of Rule 12 that are inconsistent with Article XII requirements, but those provisions do not substantially impact the pending removal process.

### **FACTS AND PROCEDURAL HISTORY**

On July 8, 2013, Congressman William Supernaw introduced a motion to form a Select Committee of Inquiry ("SCOI") to investigate 15 allegations against the Principal Chief as a

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<sup>2</sup> Our reference to "Congress" as Respondent includes the Speaker, Raymond Red Corn, the Select Committee of Inquiry and its Chair, Congresswoman Alice Buffalohead.

potential basis for removal from office. Under Rule 12, the SCOI members are selected by a Supreme Court Justice. Those members were selected by Chief Justice Meredith Drent and the SCOI met on August 19, 2013.

The SCOI issued its report on October 28, 2013, finding that sufficient evidence existed to remove the Principal Chief from office for actions taken while in office. The Principal Chief then filed this action in this Court on or around November 7, 2013, which alleged that the removal process violated Articles IV, V, VIII and XII. On November 12, 2013, the Principal Chief filed a Motion for Expedited Restraining Order to enjoin Congress' planned vote on whether to proceed with a removal trial. That motion was denied by this Court on November 13, 2013. On November 15, 2013, all twelve members of Congress voted to proceed with a removal trial. The motion to remove was based on the following alleged conduct:

- (1) Malfeasance in office;
- (2) Undermining the integrity of the office;
- (3) Disregard of constitutional duties and oath of office;
- (4) Arrogation of powers; and
- (5) Abuse of the government process.

On November 18, 2013, this Court issued an order to set deadlines to file briefs in support of each party's respective arguments. Those briefs were timely filed and served.

### **STANDARD OF REVIEW**

As we held in *Red Corn v. Red Eagle*, in interpreting the disputed provisions of the Constitution, "we must evaluate constitutional provisions by reviewing the document as a whole, considering each provision as it relates to the others and giving each word its plain meaning when read in context to avoid absurd or inconsistent results."

### **ANALYSIS**

**A. The Principal Chief's petition pled sufficient facts to trigger the provisions of ONCA 12-103(8)(a), which authorizes this Court to resolve disputes over the interpretation of language or provisions of the Osage Nation Constitution.**

In *Red Corn v. Red Eagle*, SPC-2013-01, we established the criteria for bringing an action under section 8 of the Declaratory Judgments Act by requiring a petition to allege facts that demonstrate a dispute over the language or provisions of the Constitution. The Principal Chief's complaint alleges that Congress adopted Rule 12 in violation of Article XII, among other provisions in the Constitution. The dispute between the two branches is primarily over an interpretation of Article XII requirements. The Principal Chief alleges that those requirements prohibit the pending removal proceedings against him. In determining the requirements of Article XII, we are authorized by the Declaratory Judgments Act to issue appropriate relief based on those requirements.<sup>3</sup>

We find that the issues thus presented fall within the purview of the Declaratory Judgments Act and take jurisdiction accordingly. In doing so, however, we note that this case presents unique issues and circumstances and our jurisdictional ruling is restricted to the particular facts presented. Since we find that jurisdiction is proper under the criteria we identified in *Red Corn v. Red Eagle* we do not address the issue of justiciability under the political question doctrine raised by Congress.

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<sup>3</sup> We are authorized under the Declaratory Judgments Act to determine the legal rights and relations of a petitioner and grant appropriate relief based on that declaration. Although there are limits to our jurisdiction under the Declaratory Judgments Act, nothing has been raised in these proceedings that falls outside the authority granted by the Act.

**B. The Principal Chief is an elected official of the Osage Nation subject to the removal provisions of Article XII.**

Removal is the process by which an elected or appointed official is terminated from service to the Osage Nation. It can be initiated by the Principal Chief under Article V of the Constitution by bringing the matter before Congress, or by Congress under Article VI by motion, or even by the Osage people under Article XI. Both removal clauses in Article V and Article VI refer to the removal requirements in Article XII, which will be the focal point of our opinion.<sup>4</sup>

First, however, we find that the Principal Chief is an elected official subject to removal under Article XII. The Principal Chief argues that the Article XII Removal provisions do not apply to him arguing that the failure to identify the Principal Chief in Article XII indicated an intent to exempt him from removal. We reject the Principal Chief's argument entirely.<sup>5</sup> The word "all" in front of "elected and appointed officials" in Article XII means the whole quantity of elected and appointed officials.

Article VII, section 5 of the Constitution unambiguously also states the position of Principal Chief is an elected office: "The Executive Branch shall consist of the elected offices of the Principal Chief and Assistant Principal Chief...." The plain language of the Constitution holds the Principal Chief is subject to Article XII Removal.

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<sup>4</sup> The Principal Chief's argument relies in interpretations of other Articles in the Constitution as well, but we find a detailed analysis of those provisions is unnecessary given the specificity with which Article XII assigns removal authority.

<sup>5</sup> The Principal Chief also attempts to argue that "Osage tradition and culture with its view of the sacred status of Chiefs" somehow exempts the Principal Chief from removal. Even from a historical and cultural perspective, however, we note that the chiefs, while held in high esteem, were limited in their power. "Greater authority rested in the collective hands of priests who controlled the relationship between the Osages and the external world, both visible and invisible. In matters of both war and peace, they were the ultimate authority....[T]he whole tribal structure and even the offices of the chiefs were creations of the priests." Bailey, Garrick and Francis La Flesche, *The Osage and the Invisible World: from the Works of Francis La Flesche* at 44-45. (1995).

**C. Article XII removal powers are exclusive to Congress and occur independently of any judicial process.**

Congress initiated the existing removal proceedings pursuant to Article VI, section 17 of the Constitution, which states: “The Osage Congress shall have the power to remove elected and appointed officials of the Osage Nation, and said removal must be conducted in accordance with Article XII of the Osage Nation Constitution.”

As representatives elected by the Osage people, it is expected that Congress act as champions and advocates for the Osage people. Unlike the judiciary, whose credibility is based upon its objectivity, Congress is not required to be unbiased, impartial or objective at all times. Instead, Congress is charged with being fully apprised of the issues its constituents face and to formulate positions and opinions to address those issues in a manner that benefits the Nation as a whole.

If Congress determines that an official engaged in conduct unworthy of his or her office, it has a responsibility to investigate it, and is authorized by the Constitution to take appropriate action outside of the judicial process. To hold that Article XII removal is dependent upon conviction in a judicial proceeding renders the Article XII process superfluous because it is one of only two mechanisms to terminate an officer’s service.<sup>6</sup> Not even the Judiciary has the authority to remove an official. Article XII Removal is reserved to Congress and Congress alone.

Such responsibility is not without limits, however, and for purposes of Article XII Removal, we examine the requirements of Article XII, which must be logically integrated with the Constitution as a whole, with each word or phrase given meaning and purpose.

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<sup>6</sup> The other being the citizen recall provisions in Article XI, section 8.

**D. Article XII provides the standard for removal, the framework for removal procedure and substantive protections for the accused.**

Article XII is a relatively short article containing only two sections:

**§ 1. Grounds for Removal**

All elected and appointed officers of the Osage Nation[s] shall be subject to removal from office for cause, including but not limited to willful neglect of duty, malfeasance in office, habitual abuse of alcohol or drugs, inability to meet qualifications to serve, conviction of a felony or conviction of a misdemeanor involving moral turpitude while in office.

**§ 2. Rules and procedures**

Removal of Osage Nation Officers shall originate in the Osage Nation Congress, except as otherwise provided in the Osage Nation Constitution. The motion for removal shall list fully the basis for the proceeding and must be approved by a two-thirds (2/3) vote of the members. Trial on removal shall then be conducted by the Osage Nation Congress with the accused afforded due process and an opportunity to be heard. An Osage Nation Supreme Court Justice, designated by the Supreme Court, shall preside at the trial. Concurrence of five-sixths (5/6) of the members of the Osage Nation Congress is required for a judgment of removal. The judgment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit in the Osage Nation, but shall not prevent proceedings in the courts on the same or related charges.

The Osage Nation Congress may prescribe additional rules and procedures that are necessary to implement the provisions of this Article.

To give Article XII its full meaning within the context of the Constitution, we will review its language and identify those limits to congressional action as well as define what due process protections are required.

**1. Grounds for Removal**

We have already found that “all elected and appointed officials” means the whole quantity of the Nation’s elected and appointed officials, which includes the Principal Chief. The more controversial language begins with “shall be subject to removal from office for cause.” The term “shall” indicates that removal from office is not a discretionary act; it mandates removal “for cause.”

The Principal Chief attempts to limit removal “for cause” using the provisions of Article XI, section 8, which states, “The grounds for recall of an officer other than a judge are serious malfeasance or nonfeasance, during the term of office, in the performance of the duties of the office or a conviction, during the term of office, of a felony or conviction of a misdemeanor involving moral turpitude.” When read together with the language in Article XII, the Principal Chief argues, it means that Congress cannot remove an officer for a mere allegation and removal must be based on “some objectively ascertainable measure.” (Pet. Brief in Support p. 17.)

We agree with the Principal Chief that due process requires the phrase “for cause” to be an ascertainable measure, but it should not be so narrowly defined that an official’s misconduct goes completely unaddressed. Because we view the removal provision as one of only two mechanisms by which an elected or appointed official can be forcibly removed from office, we consider “for cause” in the employment context for an officer in a position of trust. In this context, “for cause” requires the official’s conduct to result in actual or potential harm to the Nation, its reputation or any of its resources (financial, human or otherwise). This is intentionally a broad spectrum of potential actions and consequences designed to give flexibility while establishing a means to determine whether an official simply made an unpopular decision or engaged in misconduct.

We also note that “including but not limited to” is a key phrase that means the words following it are not intended to be an exhaustive list of unacceptable conduct. Even the categories of “malfeasance in office” (aka “wrongdoing”) and “willful neglect” are so broad as to encompass many types of objectionable conduct. Regardless of whether any other government uses this language or similar language, we determine that the Osage Nation should—and has—set its own standard on acceptable conduct by government officials.

## 2. Rules and Procedures

Removal “originate[s] in the Osage Nation Congress.” The Constitution does not dictate the means and methods by which Congress determines whether a motion for removal is warranted. Congress’ ability to investigate should not be encumbered, allowing it to gather as much information as possible. The basis for removal must be contained in any motion to remove; Congress cannot simply vote to remove based on unspecified actions. Congress is also bound by the Constitution’s Code of Ethics when conducting its investigations and Congress cannot violate the inalienable rights of those Osage citizens who may be subject to a removal trial. These issues, however, are not properly before us. Ethical violations must be addressed under the Osage Nation Ethics Law (16 ONC Ch. 6) and the Principal Chief has failed to articulate an equal protection violation or establish a constitutionally protected liberty or property right.<sup>7</sup>

The Constitution provides further safeguards by requiring the entire Congress to participate in the removal process. It raises the required number of votes for a removal trial to eight (8) of the 12 members of Congress as opposed to a simple majority of votes of those present during a session. It requires 10 of 12 members of Congress to vote in favor of removal after a trial is conducted.

Article XII, by its plain language, places removal firmly in Congress’ hands by charging it with conducting the removal trial. In this context, “conducted by” means the tribunal where

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<sup>7</sup> We agree with other jurisdictions that have determined that an elected office is not a constitutionally-protected property right. See, e.g., *Snowden v. Hughes*, 321 U.S. 1 (1944); *Velez v. Levy*, 401 F.3d 75, 86-87 (2d Cir. 2005). An official holds office “for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office.” *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). Elected office “is a public trust, not the private domain of the officeholder.” *Id.* An elected or appointed office is a service in the realm of agency and trust. To state otherwise would improperly elevate the official’s individual needs over those of the Osage constituency to be free from government officials who may be unable or unwilling to perform the duties of office or who do so for personal gain.

the removal trial will take place. Congress is the tribunal and the final decision-maker regarding removal.

### **3. Due Process**

The parties argue over the concept of “due process” and what is required by Article XII. We find that the due process language contains both procedural and substantive protections. For purposes of Article XII Removal, the basic elements of due process are: (a) notice, (b) opportunity to be heard and (c) that removal from office is justified.

With respect to notice, we find that due process requires the accused to be advised of the conduct leading to removal and the rules of the removal process itself. The accused cannot properly prepare his/her position if Congress changes the basis for removal or the rules that may apply to the process. Accordingly, once a motion to remove has been made, the rules promulgated by Congress under Article XII, section 2 are the applicable rules, and any amendments or additions thereto cannot be retroactively applied to any pending proceedings. Similarly, once the basis for removal has been identified in the motion for removal, that motion cannot be amended or modified without restarting the entire removal process again.

We also find that the notice portion of due process requires a fixed burden of proof that cannot be arbitrarily amended. “Beyond a reasonable doubt” is not an appropriate standard. Removal is not a criminal process. The accused is not subject to imprisonment or fine. An appropriate standard would require Congress to establish with reasonable certainty that the official engaged in the conduct and that the conduct justifies removal. We find that the clear and convincing standard, that is, the allegations are substantially more likely than not to be true, is an appropriate burden to satisfy.

Because the Constitution is silent on whether the accused has a role in the process leading up to the removal trial, and Congress may determine through its investigations that removal is not justified, we find that the Constitution does not require that the accused participate in the activities prior to a motion to remove. Due process notice requirements include, however, advance disclosure of all evidence against the accused that will be used at any removal trial.

Finally, due process grants the accused the opportunity at trial to demonstrate why cause does not exist to remove him from office. The opportunity must include a reasonable time to prepare his argument and knowledge of the evidence being used against him. The reasonableness of the time period depends on the depth of underlying investigation and breadth of the allegations leading to the removal trial.

#### **4. Presiding Justice at the Trial**

Although the removal trial is conducted by Congress, it is presided over by a Supreme Court Justice selected by the Supreme Court. We have found no language in the Constitution that supports an alternative methodology for designating the Supreme Court Justice or that limits which Justice can serve. Accordingly, the Supreme Court is responsible for determining the appropriate Justice.

Presiding over a trial requires more than accepting documents and maintaining order; it requires ensuring fairness in the proceedings to all parties and issuing decisions on matters in dispute during the trial. Congress may be the decision-maker in terms of removal, but it is the presiding justice who must make rulings on matters during the trial, otherwise the language would be meaningless.

The Justice who presides at the trial has the duty to conduct a full and fair hearing, to take appropriate action to avoid unnecessary delay in the proceedings, and to maintain order. A full and fair hearing requires the presiding Justice to:

- (1) Rule upon offers of proof and receive relevant, competent, and probative evidence;
- (2) Regulate the course of the proceedings and the conduct of the parties and their representatives;
- (3) Hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purpose; and
- (4) Consider and rule upon all procedural and other motions appropriate in the trial.

The Constitution vests sole power to preside at trial in the designated Supreme Court Justice.

#### **5. Removal and Related Proceedings**

Under Article XII, Congress cannot require the accused to pay fines, to be incarcerated or even perform community service. Its decision cannot extend beyond<sup>8</sup> removal or disqualification from holding any other office (or position of trust, honor or profit) in the Osage Nation, which we interpret to include any of its businesses, enterprises, commissions, boards, committees or agencies. The limitation on removal trial options, when read in conjunction with the language in section 2 that states removal “shall not prevent proceedings in the courts on the same or related charges,” does not support the Principal Chief’s argument that removal proceedings are premature in the absence of adjudication of allegations contained in a motion to remove.

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<sup>8</sup> It is possible that “not extend further than” includes lesser consequences than removal, such as public or private censure.

## 6. Congressional Rules and Procedures

We have considered whether congressional rules are subject to Art. VI, section 14, which states: “Each order, resolution or vote, except such as relate to the business or adjournment of the legislature, shall be presented to the Principal Chief and is subject to a veto with an override provision.” Because removal under Art. XII is assigned to Congress, additional rules and procedures promulgated pursuant to Art. XII are treated as relating to the business of the legislature and not subject to the requirements of Art. VI, section 14. To read the language otherwise would render the exception meaningless and improperly expand the Executive’s role in the removal process beyond the limitations of Art. VII, section 16.

Article XII of the Constitution assigns Congress alone with the task of removing an officer of the Osage Nation, but limits the scope of Congress’ authority by directing a Supreme Court Justice to preside at the removal trial and ensuring procedural and substantive due process for the accused. With the relevant provisions of Article XII identified, we now turn to the Principal Chief’s request for relief.

### **E. Although there are provisions in Rule 12 that are inconsistent with our interpretation above, the Principal Chief has not established a violation of Article XII due process requirements.**

The crux of the Principal Chief’s argument is that Rule 12 violates the Constitution and that his due process rights have been violated. We take each of these issues into consideration.

#### 1. Rule 12 Provisions

Rule 12.1(5) of the Rules of the Osage Nation Congress (Revised October 16, 2013) sets forth the rules for the removal trial of elected and appointed officials of the Osage Nation. Rule 12.1 (5)(a) states that the Presiding Officer “shall preside over the removal trial.” It further states the Presiding Officer “shall preside over the Congress during the consideration of the Articles of Removal and the trial for removal.”

Based on the plain language of the rule, this Court finds that Rule 12.1(5) gives the Presiding Officer broad authority over the removal trial. In essence, this rule establishes that the Presiding Officer will serve as the Judge in the proceeding. The Court recognizes that Judges are like umpires in baseball or referees in football or basketball (American Bar Association, 2013). Their role is to see that the rules of court procedures are followed by both sides. Judges are also to rule on the admissibility and relevance of evidence. Judges are to be impartial in carrying out these duties, showing no favor to either side in a dispute. Such interpretation is consistent with the constitutional provisions in Article XII section 2 pertaining to Removal, and does not contradict any other provisions contained in the Constitution.

Given this interpretation of Rule 12.1(5), the Court is troubled by subsection (e) of this rule:

The Supreme Court Justice, as the Presiding Officer, may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Congress, **unless a Member of the Congress shall ask that a formal vote be taken on the ruling, in which case it shall be submitted to the Congress for decision without debate; or the Presiding Officer may at his or her discretion, in the first instance, submit any question to a vote of the Members of Congress. Upon all such questions the vote shall be taken in accordance with the Rules of the Osage Nation Congress** (emphasis added).

The Court finds that the emphasized language in subsection (e) usurps the power and authority of the Presiding Officer and violates the constitutional provisions contained in Article XII (“An Osage Nation Supreme Court Justice, designated by the Supreme Court, shall preside at the trial.”). Consequently, the Court rules that the language allowing Congress to vote on a ruling is invalid and will not apply to the removal trial proceedings.

We further find that the Constitution directs the Supreme Court to designate the Justice who presides at the removal trial. Rule 12.1(1)(e) directs a Justice of the Supreme Court to

appoint members of the SCOI and in doing so, renders that Justice ineligible to preside at the trial. This provision engages the Supreme Court outside the scope of its authority in Article XII, which is limited to designating a Justice to preside at the removal trial. We do not, however, find that this error is cause to void the entire removal process.

## 2. Due Process

Finally, we address the Principal Chief's claims that his due process rights were violated throughout the removal process. Revisiting Article XII and its due process requirements, we find that the Principal Chief at all times received proper notice of the allegations against him, that he had notice of the applicable rules, and that he has received the evidence against him.

Furthermore, he was given reasonable time to prepare for the removal trial. The removal trial is the Principal Chief's opportunity to address the charges against him. Because of the broad scope of the reasons for removal and because of Congress' exclusive role in the removal process, we can only hold that Congress has stated a reason for removal. The removal trial itself is where the parties must establish whether the Constitution supports their respective positions. Article XII due process requirements have been satisfied up to this point in the process.

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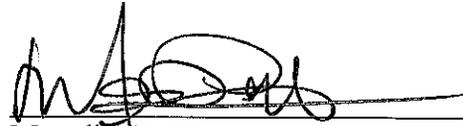
Given the gravity of the matter before us, we must consider our path forward and the precedent we have set. We acknowledge the influence of past historical and cultural Osage governments throughout our long history, and we acknowledge how we have continuously reshaped, restructured and reinvented ourselves as a Nation. Our ancestors were "logical, rational and pragmatic people struggling to understand and survive in a world of infinite complexity."<sup>9</sup> As we consider the complexity of the issues that arise before us, we use the lens

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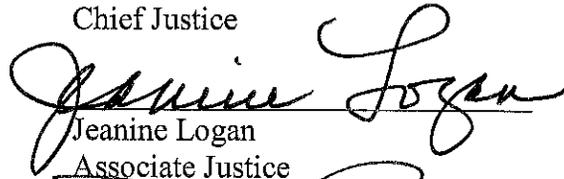
<sup>9</sup> Bailey, Garrick and Francis La Flesche, *The Osage and the Invisible World: from the Works of Francis La Flesche* at 285 (1995).

of a dynamic people who adapted and endured and in doing so we strive to carry their legacy forward with meaning and purpose.

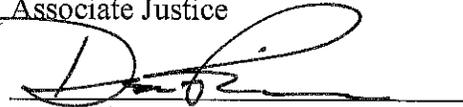
ORDERED this 2nd day of January, 2014.



Meredith D. Drent  
Chief Justice



Jeanine Logan  
Associate Justice



Drew Pierce  
Associate Judge, Sitting by  
Designation