

FILED MAY 20 2020

By



IN THE SUPREME COURT OF THE OSAGE NATION
PAWHUSKA, OKLAHOMA

SHANNON L. EDWARDS,
Osage Nation Congress Member,

Petitioner,

v.

OSAGE NATION SUPREME COURT,
Chief Justice Meredith D. Drent,
Associate Justice Elizabeth Lohah Homer,

OSAGE NATION CONGRESS,
Joe Tillman, Speaker of the Osage Nation
Congress,

SELECT COMMITTEE OF INQUIRY,
Alice Goodfox, Chairperson,

Respondents.

CASE NO. SCO-2020-01

**ORDER OF DISMISSAL; OPINION OF THE
COURT**

Per Curiam.

BEFORE THE COURT is the petition of Shannon L. Edwards (“Petitioner”) in her capacity as a member of the Osage Nation Congress to request this Court to enforce its holdings in its 2014 opinion *Red Eagle v. Osage Nation Congress*, et al., to rescind actions of the Chief Justice and an Associate Justice, and to issue an order to show cause as to why Congress should not be restrained from conducting its pending removal proceedings against Petitioner.

For the reasons set forth below, we hold that Petitioner’ petition must be dismissed for lack of subject matter jurisdiction. We note that this petition is time-sensitive, and find that further briefing by the named parties would not aid in the decisional process because the petition alone provides sufficient information for this Court to make findings regarding the threshold issue of jurisdiction.

1. The Rule of Necessity applies to matters in which the Supreme Court and its individual justices are named parties in proceedings before the Supreme Court.

Before we review the contents of Petitioner's petition, we are compelled to address, *sua sponte*, whether this Court, which is named as a Respondent in this matter, should recuse itself from these proceedings. Following the footsteps of other courts, we conclude that under the "rule of necessity" we are not compelled to do so, principles of sovereign immunity and judicial immunity notwithstanding.

The rule of necessity is recognized in numerous tribal, state, and federal jurisdictions, including the United States Supreme Court. It is a common law principle that requires a judge to continue to preside over a matter even where that judge has an interest in the matter and where there is no provision for calling another judge to preside over the matter in a court of last resort. "The rule recognizes that, where necessary, it is far preferable to provide a judicial forum whose impartiality might be questioned, than to provide no forum at all" *Henry v. Confederated Tribes of Grand Ronde Cmty. of Oregon*, No. C-02-08-005, 2003 WL 25759656 (Grand Ronde Tribal Ct. Apr. 4, 2003), *aff'd sub nom. Henry v. Confederated Tribes of Grand Ronde*, No. A-03-05-001, 2004 WL 5599326 (Grand Ronde C.A. June 30, 2004). The Kaw Court of Appeals similarly held when "there exists no constitutionally credible provision for post-recusal filling of vacant seats, the justices have a duty to decide the controversy notwithstanding their imputed lack of impartiality." *In re Removal of McCauley*, No. APP-03-01, 2003 WL 24313571, at *12 (Kaw Mar. 4, 2003) (citing *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 11, 984 P.2d 200, 218).

The Cherokee Nation Judicial Appeals Tribunal applied the rule of necessity when it considered a motion for the entire tribunal to recuse itself. In response, the tribunal stated, "[a]ctual disqualification of a member of a court of last resort will not excuse the member from

performing his official duty if the failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to the court, adjudicated.” See *Crawford v. Barker-Harrold*, No. JAT 97-36-B, 1999 WL 34966831 (Cherokee Jan. 25, 1999). If there is no tribunal to hear the matter, then the petitioner is denied the ability to seek relief.

The rule of necessity is applied in situations where the judges themselves are defendants to the case. *Bolin v. Story*, 225 F.3d 1234, 1238 (11th Cir. 2000) (holding that the rule of necessity required the appellate panel to preside over the complaint even when “[in] ordinary circumstances, each of [them] would be disqualified from hearing this appeal by virtue of being named as defendants.”); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) (denying a party’s motion to recuse a judge because the party sued the judge in a separate matter.)

There is no alternative Osage tribunal to adjudicate Petitioner’ petition regarding the intra-tribal political act of removal. There are no provisions in the Osage Nation Constitution or Osage Nation law that provide alternatives to the three seated Justices.¹ By naming two of the three Justices as parties, there is no longer a quorum to review the petition. Under the rule of necessity “when all judges would be disqualified, none are disqualified, and disqualification will not be permitted to destroy the only tribunal with power in the premises.” *Crawford*, 1999 WL 34966831.

Therefore, we hold where a petition names the Osage Nation Supreme Court as a party, the rule of necessity requires the Supreme Court to hear the matter regardless of its status as a party. Similarly, when a Justice of the Osage Nation Supreme Court is a party and the Justice’s

¹ Osage law addresses a remedial action when a vacancy occurs on the bench, but not when a judge or justice has recused him/herself from a case. The language allows the Chief Justice to temporarily designate a qualified person to serve on the court “until the vacancy is filled pursuant to the Osage Nation Constitution.” See ONCA 13-65, *An Act to authorize the Chief Justice of the Osage Nation Supreme Court to temporarily fill judicial vacancies; and to establish an alternate effective date.*

recusal would result in the Osage Nation Supreme Court unable to conduct its constitutional obligation to adjudicate disputes properly before it, then the rule of necessity requires that named Justice to remain on the matter.

2. The cause of action does not fall under this Court's jurisdiction.

Under Article VIII, section 2 of the Osage Constitution, this Court “may hear appeals, compel inferior Courts or their officials to act in accordance with the law, and exercise such other jurisdiction as may be conferred by statute.” Petitioner cites 3 ONC § 5-106 in support of her argument that she can seek relief directly from this Court because her petition is based on a case in which the Supreme Court exercised its original jurisdiction.

This Court's original jurisdiction is narrowly limited and controlled by statute. Specifically, 3 ONCA § 5–108(A) provides: “The Supreme Court of the Osage Nation is granted original jurisdiction over actions for declaratory judgment between the Legislative and Executive Branches of the Osage Nation, filed by either party against the other, to resolve disputes over interpretation of the language or provision contained in the Osage Constitution.” The petition before us meets none of these criteria. The petition does not allege a dispute between the Legislative and Executive branches and does not seek a declaratory judgment. Rather, it seeks injunctive relief in a dispute between Petitioner, in her individual capacity as a Member of Congress, and, among others, the Osage Congress and Osage Supreme Court.

To invoke this Court's limited original jurisdiction, Petitioner categorizes her petition as a petition for “further relief . . . after the determination has been made.” 3 ONC § 5-106. The determination referred to is *Red Eagle v. Osage Nation Congress, et al.*, SPC-2013-03, in which then-Principal Chief John Red Eagle filed a petition regarding the constitutionality of removal proceedings against him. We found jurisdiction was proper because the Principal Chief was

filing in his capacity as the head of the Executive Branch. Petitioner, however, was not a named party in the *Red Eagle* matter and filed a separate cause of action seeking relief outside the scope of enforcement. To allow Petitioner's petition to proceed under 3 ONC § 5-106 would potentially authorize any individual member of Congress or the Executive Branch to access this Court's original jurisdiction, which is contrary to the language of 3 ONC § 5-108(A), which granted *limited* original jurisdiction to this Court.

If Congress chose to broaden this Court's original jurisdiction, it would have done so through the enactment of legislation in accordance with Article VI of the Osage Constitution. There are no other provisions in the Constitution or in Osage law granting this Court original jurisdiction over petitions regarding Article XII removal proceedings against an individual member of Osage Nation Congress. In sum, we lack subject matter jurisdiction over this matter.

For these reasons, we hold that Petitioner's petition is not properly before this Court and must be dismissed for lack of subject matter jurisdiction.

ORDER

IT IS ORDERED, the *Petition to Enforce Supreme Court Judgment Invalidating Congressional Rule 12 Provisions, to Rescind Supreme Court Action, and to Issue Show Cause Order* is DISMISSED for lack of subject matter jurisdiction. The Court Clerk shall deliver copies of this opinion to the parties and close this matter.

SO ORDERED this May 19, 2020

By: /s/ Meredith D. Drent
Chief Justice

/s/ Drew Pierce
Associate Justice

/s/ Elizabeth Lohah Homer
Associate Justice

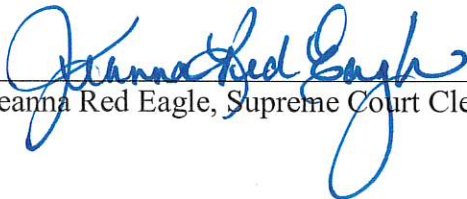
CERTIFICATE OF MAILING

I, Jeanna Red Eagle, Supreme Court Clerk, hereby certify that on the 20th day of May, 2020 a true and correct copy of the above ORDER OF DISMISSAL; OPINION OF THE COURT was sent via e-mail and first class mail, correct postage attached to the following parties:

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