

**IN THE COURT OF INDIAN OFFENSES FOR THE SOUTHERN PLAINS REGION
ANADARKO, OKLAHOMA**

FILED
Court of Indian Offenses
Southern Plains Region

AUG 19 2020



By: _____
Court Clerk/Deputy

MATTHEW KOMALTY, their agents,)
employees, executive staff and representatives,)
all in their individual and official capacities,)

Plaintiffs,)

v.)

Case No. CIV-20-046

ANGELA MCCARTHY, MICHAEL PRIMUS,)
MARILYN BREAD, JESSIE SVITAK, ANITA)
JOHNSON, BEN WOLF and MODINA WATERS,)
all elected District Representatives and members)
of the Kiowa Tribal Legislature,)

Defendants.)

ORDER GRANTING PRELIMINARY INJUNCTION

This matter is before the undersigned upon presentment of a complaint and Application for Injunctive Relief by the above named Plaintiff, the Chairman of the Kiowa Tribe (“the Chairman”). On July 30, 2020, Plaintiff alleged Defendants violated his due process rights guaranteed by the Kiowa Constitution in the lead-in to an “Impeachment Hearing” which began that morning. The Court granted a requested Temporary Restraining Order and restrained Defendant Kiowa Legislature (“the Legislature”) from continuing with the hearing pending court hearing on the matter. The Court notified counsel for the Defendants, and set a hearing for August 5, 2020 on the request for Preliminary Injunction. The Court instructed the parties to brief the issues. The hearing was held and the matter is ripe for decision.

Specifically, the Chairman complains the notice of public hearing he received on June 23, 2020 was inadequate, that proceedings began without him being advised of established rules and principles governing the hearing and the evidence to be presented against him, and the

impeachment hearing itself all resulted in violation of his Constitutional rights. Defendants entered a special appearance and challenge the jurisdiction of the Court to hear the matter. They counter that the Legislature unanimously voted to issue Articles of Impeachment on June 23, 2020, and gave the Chairman thirty days' notice of the hearing. They claim they do not have to establish or account for any procedures other than what is set out in the Kiowa Constitution. One party sees the events as a violation of the Kiowa Constitutional right to due process; the other believes no such infraction exists.

The Court having received briefing on the issues and hearing argument of counsel, and being further apprised with supplemental pleadings and exhibits, as well as having reviewed judicial opinions from other tribes, federal jurisdictions and the United States Supreme Court, on similar issues, finds as follows:

Jurisdiction and Burden of Proof

Under *Ex parte Young*, state officials can be sued for injunctive relief in their official capacities for violating federal law. 209 U.S. 123 at 167, 28 S.Ct. 441 (1908). This is because federal law is the "supreme authority of the United States," and no subordinate sovereign, like a state or tribe, can impart to the official immunity from the supreme law of the land. *Id.* This doctrine "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012); see also *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001); *Edelman v. Jordan*, 415 U.S. 651, 667-68, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (stating that plaintiffs may seek prospective injunctions against officials, which may have "an ancillary effect on the state treasury," but not damages for past actions). The doctrine set out in *Ex parte Young* applies to tribal officials as well as state

officials. *Big Horn Cty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) ("[S]uits for prospective injunctive relief are permissible against tribal officers under the *Ex parte Young* framework.") (citing *Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901 (9th Cir. 1991), *as amended* (Mar. 18, 1991), *overruled on other grounds by Big Horn Cty. Elec. Co-op., Inc.*, 219 F.3d 944).

Article VIII, Section 5 (a) and (d) of the Kiowa Constitution provides for the jurisdiction of the Kiowa Tribal Courts:

(a) The Trial Courts shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, and customs of the Tribe, including cases in which the Tribe or its officials and employees shall be a party. Any such case or controversy arising within the jurisdiction of the Tribe shall be filed in the Trial Court before it is filed in any other court. This grant of jurisdiction shall not be construed to be a waiver of the Sovereign Immunity of the Tribe.

Kiowa Law explicitly waives sovereign immunity of officials from court proceedings through the "Tribal Member Access to Justice Act of 2018". That act states:

(e) Due to the sixteen (16) months of delay in the implementation and operation of the Tribe's new court system approved by the voters in May 2017, and pursuant to Article VIII, Section I (a) of the Constitution, the Legislature hereby creates a lower court of special jurisdiction called the "Internal Dispute Court" to hear and decide cases that federal regulations (25 CFR Part 11.118) do not allow the CFR Court to adjudicate without the Tribe's consent including such cases as an election dispute, a suit against the Tribe, and any internal tribal government dispute; provided, that if the Judicial Branch does not immediately accept the filing and adjudication of any case filed in the Internal Dispute Court after the enactment of this Act, then the Legislature hereby grants the Court of Indian Offenses jurisdiction to hear and decide cases involving an election dispute, a suit against the Tribe, or any internal tribal government dispute and the Legislature hereby expressly waives Sovereign Immunity pursuant to Article X of the Constitution for such purposes, until such time as the tribe operates its judicial branch of government pursuant to the Constitution as defined in Article 10, Section 1; Sovereign Immunity. (emphasis added).

This Court is advised the Kiowa Tribal Court is not yet operational, therefore the Act provides this Court has jurisdiction to hear and decide cases involving intergovernmental disputes.¹

The Kiowa Constitution, Article XII, Section 3 is entitled “Impeachment and Removal of a Chairman and Vice-Chairman”. It states:

The Legislature shall have the power to impeach and remove a Chairman or Vice-Chairman for good cause beyond a reasonable doubt by a unanimous vote of the Legislature. The Legislature shall have the burden of proving good cause beyond a reasonable doubt. A Chairman or Vice-Chairman subject to removal shall be provided with adequate notice, be informed of the charges in writing, be given an opportunity to address the Legislature in a public hearing, and be given an opportunity to contest the charges, and prepare and present a defense including presenting witnesses and other evidence. The process to seek the impeachment and removal of the Chairman or Vice-Chairman shall not extend beyond ninety days. The Chairman and Vice-Chairman shall not be subject to impeachment and removal at the same time.

The Plaintiff Chairman has requested the Court to enjoin the Legislature from continuing with its Article XII proceedings until such time as it establishes a process that is supported by the Kiowa Constitution with requisite due process. To be entitled to injunctive relief, the Plaintiff Chairman has the burden of showing: 1) Plaintiff is likely to succeed on the merits of his claims; 2) Plaintiff is likely to suffer irreparable harm without the injunction; 3) the balance of equities tip in plaintiff’s favor; and 4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Lundgrin v. Claytor*, 619 F.2d 61(10th Circuit 1980).

¹ The Court is not fully apprised of the reason, if any, why the Tribal Court remains non-operational. However, this Court does not believe that in passing a new Constitution which includes the framework for a Judicial Branch, the Kiowa People meant to leave themselves with no forum for resolving disputes if one or more divisions of the Kiowa Tribal Court is not operational. The Kiowa legislature settled the issue with the Tribal Member Access to Justice Act, which became law upon signature of the Chairman in September 2018.

Analysis

While the Kiowa Constitution clearly establishes that official impeachment and removal power lies with the Kiowa Legislature, and removal by a legislature is widely viewed as a political activity, the Court does not find there is a “textually demonstrable” commitment by the Kiowa People to give its Legislature plenary and unreviewable power to violate the Constitutional rights of those subject to a removal proceeding. *See Baker v. Carr*, 369 U.S. 186 (1962). To the contrary, the Preamble of the Kiowa Constitution states that the Kiowa People in authorizing their Constitution seek to “safeguard individual rights.” The Constitution’s first article, entitled “BILL OF RIGHTS” at Section I, states:

The government of the Tribe shall not make or enforce any law which:

(f) discharges any person from employment without due process, or takes any private property or possessory interest in private property for public use without due process and just compensation...

(k) denies to any person within its jurisdiction the equal protection, application, or opportunity under the law or deprive any person of liberty or property without due process of law...

The emphasis on due process is clear and requires each branch of government to observe its guarantees. The Kiowa Constitution is the supreme law of the land, and every official is bound by its dictates and limitations. *Kiowa Constitution*, Article II Section 1. As such the matter before this Court is not a non-justiciable political question, and the Court finds it has jurisdiction over the subject matter and parties.

In any case alleging violation of due process, the individual right to fair treatment must be weighed against the clearness of the particular guarantee afforded the individual, taken together with the magnitude of the tribal interest as applied to the particular facts. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976), cert. granted 431 U.S. 913, 97 S. Ct. 2172,

53 L. Ed. 2d 223 (1977). Due process is a flexible concept that calls for such procedural protections as the particular situation demands. With impeachment and removal of a tribal official², there is a widely recognized right to notice of the claims against the official and an opportunity to be heard in opposition to them. The content of the notice must be such as to fairly advise the official of the issues to be addressed, given with enough advance notice to afford him/her an opportunity to prepare a defense. Notice must be clear, definite, explicit and unambiguous. A notice is not clear unless its meaning can be apprehended without explanation or argument.

Under these directives, the court's first inquiry is whether the Chairman will likely succeed on the merits of his claim that the Defendants violated his constitutional rights in the manner in which they provided him notice. Both parties provided the Court with a letter dated June 23, 2020 from the Speaker of the Legislature to the Chairman as evidence of the notice of the proceedings, which states "a public hearing will be conducted on the 23rd day of July 2020 at Red Buffalo Hall, Carnegie Oklahoma at 10:00 am." The letter continues to advise that the Legislative Branch "are enacting Constitutional Powers to conduct the impeachment process", and that "failure to appear to contest the charges of said allegations stated within the Articles of Impeachment presented by the Legislative Order KL-CY-2020-0016 on the 23rd day of June, 2020 will be acknowledged as confirmation of the charges." The letter lists two attachments- Articles of Impeachment and Legislative Order KL-CY-2020-0016.

² "Impeachment" is the process by which a legislative body levels charges of misconduct against the holder of a public office. "Removal" can come about as the result of impeachment, after an affirmative vote of conviction, and usually as result of a separate vote. In some instances, the impeachment process does not result in conviction, and in others impeachment does not result in removal. In this case, there is no clear guidance on whether the Legislature views removal, or possibly something less, as the outcome of impeachment. The Legislative Hearing Agenda provided to the Court does not list a removal vote as an agenda item.

The attached “Articles of Impeachment” are an unnumbered three page document listing five charges, which declares on the first page in bold caps it is a “WORKING DRAFT OF CHARGES.”³ The second attachment, Legislative Order KL-CY-2020-0016, has headings “To” and “Subject,” which both state the Order is intended to begin the impeachment process by the “legislative process.” It contains two “Whereas” statements, but no “Therefore” recitation or any other indication what the Legislature was ordering or voting on. There is no mention of any Articles of Impeachment in KL-CY-2020-0016, or that the Order is approving an attachment. June 23, 2020 appears on the bottom of the document, but the certification signed by the Speaker declares the Order was voted on by the Legislature on June 22, 2020. The purported Articles of Impeachment include an introduction that states they are being presented by the Speaker on June 23, 2020. There is no document reflecting approval of final Articles of Impeachment by the Legislature on or after July 23, 2020.

On these facts alone, it appears the Chairman would likely succeed on the merits of his improper notice claim. The Speaker’s letter referenced as “Notice of Hearing” sets out a public hearing date, place and time for same and is in order, but that information cannot overcome deficiencies in the purported Articles of Impeachment and the Legislative Order. At best, the Order indicates the Legislature voted to start the impeachment process. It certainly doesn’t contain the clear, unambiguous, explanation-free language that is required to properly notify the Chairman of what he is officially being charged with by the Kiowa Legislature.

³ The Court inquired at hearing if this was in fact a draft and was told by the Legislature’s counsel it was not, and that the “draft” language was a typo which through inadvertence had not been removed. No party produced Articles of Impeachment that were not marked “working draft” or contained within an official order, approved meeting minutes or any other document which reflected they had been voted on by the Legislature.

Nothing in the cited Legislative Order indicates the Legislature voted on any “Articles of Impeachment.” Given what appears to be a fairly robust process for presenting and recording the Legislature’s actions, the court finds these omissions to be procedurally defective. If in fact the Articles contain a scrivener’s error, correction and the passage of a Legislative order that also corrects the glaring omissions in the order itself can happen quickly according to the Speaker. With something as important as notice of impeachment charges and proceedings which could result in removal from office, due process requires the Chairman be given definite, unambiguous notice of formally adopted charges, which is lacking in what was provided to him and to the Court.

Furthermore, the Speaker’s letter states that the failure of the Chairman to contest the charges stated within the Articles of Impeachment will be “acknowledged as confirmation of the charges.” This language suggests the Legislature is negating the Constitution’s mandate that the Legislature bears the burden of proof with respect to its charges. The function of a burden of proof, as that concept is embodied in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence society thinks they should have in the correctness of factual conclusions for a particular type of adjudication. The burden of proof serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. *United States v. Weed*, 389 F.3d 1060 (10th Cir. 2004).

By favoring a strong standard for removal, the Kiowa People made clear that the Legislature cannot simply make allegations and proceed to removal without proof. Rather, the Kiowa Legislature has the burden of proving conviction for good cause beyond a reasonable doubt. In the context of a tribal official, “for cause” has been analogized to the standard for removal of a company officer in a position of trust. It 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. *See Red Eagle v. Red Corn*, SPC 2013-03 (Osage Nation S. Ct. 2014).

Proof “beyond a reasonable doubt” means the trier of fact is fully satisfied and entirely convinced to a moral certainty- the equivalent of a precise and unquestionable answer. *Abangan v. Ho-Chunk Nation Election Board*, SU 02-02 (Ho-Chunk Nation S. Ct. 2002).

Those standards cannot be fulfilled by the Kiowa Legislature merely putting forth allegations that are subsequently uncontested and proclaiming that omission as proof. The Notice of Hearing contains an erroneous statement of the depth of conviction each legislator must have to affirmatively vote to remove the Chairman. This information had been conveyed not only to the Chairman and the other legislators, but also to the Kiowa Community. The fourth prong of the test, namely that an injunction is in the Kiowa public interest, is satisfied until such time as the proper burden of proof and means by which that burden is met is properly conveyed to the interested parties and the Kiowa People.

Plaintiff also complains that the procedures governing impeachment and removal are not memorialized in writing, but rather appear as written or spoken announcements at any given time. Under Article 6, Section 6 of the Kiowa Constitution, the Legislature certainly has the power to set its own procedures, provided those procedures are *consistent with the Constitution*. The United States Supreme Court has stated unequivocally that the courts are the appropriate place to review the constitutionality of those procedures. *Powell v. McCormack*, 395 U.S. 486, 521 (1969) (“deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution”). It cannot be said that procedures guiding

removal are unreviewable, especially those that are haphazardly created in the midst of a pandemic for an activity as serious as the removal of an elected tribal official.⁴

While the Chairman's due process claims in this regard do not necessarily need to be measured against the United States Constitution's procedural guarantees for impeachment, nor can they be measured against the structure the Kiowa government has set for such proceedings, because there admittedly isn't any. According to both counsel, there are no Kiowa laws, orders, rules, motions, minutes, or other reviewable processes associated with impeachment and/or removal, even as the Kiowa Constitution in this regard lends itself to a deliberate process. As such, the Court will review what has been put before it as removal process pronouncements to see if Kiowa Constitutional constraints are met. That outcome will dictate whether under the third prong of the test, the balance of equities tip in the Chairman's favor.

Defendants point to the broad guidelines in the Constitution as sufficient to carry out legislative proceedings, but implementation to date suggests unfairness. Meaningful notice in the case of due process consists of both substantive and temporal (time) components. In other words, the Chairman must be given a reasonable amount of time to respond in opposition to the evidence presented in support of the impeachment claims, and to know how that response should be made. It appears the Legislature intended the Chairman to contest the charges in person with his witnesses and exhibits at the public hearing on July, 23, 2020, however, on the day before the hearing, it unilaterally moved it back a week. This certainly could have impacted the Plaintiff's

⁴ The Legislature's counsel described the Plaintiff's concern about holding a public in-person hearing in the midst of a COVID-19 surge in Oklahoma in late July as "exaggerated." The Legislative Speaker's announcement of her onset of coronavirus symptoms about ten days after she attended the hearing, and her subsequent positive test might suggest otherwise.

preparations and plans with respect contesting the charges. When plaintiff requested the same continuance in the same manner, his request was denied.⁵

Additionally, counsel for Defendants admitted they issued subpoenas for documentation to be delivered and utilized by the Legislature at the hearing on one day's notice. The Legislature subpoenaed previously unannounced witnesses to appear upon two days' notice. Plaintiff alleges he was not privy to the identity of the witnesses or in receipt of any documents presented at the hearing before July 30. Furthermore, the only indication of how the Legislature intended to proceed with the hearing was an agenda. The Court has no indication when this agenda was approved by the Legislature (it is was or if same is required), or provided to the Chairman. A one page handout entitled "Legislature Hearing Rules to be Enforced by the Sergeant-of-Arms", was produced, but these so-called rules only address the expected behavior of the attendees.⁶

Adequate notice of evidence submitted against a respondent is a "fundamental requisite" of due process rights. *See Dugan v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 104, 106 (Mashantucket Pequot Trial Ct. 1996). Refusal to afford an accused the opportunity to see copies of documentary evidence against him, and to know who will testify against him deprives one of his right to adequate notice in violation of due process. *See id.* The Court does not have to add or detract from the elements set forth in the Kiowa Constitution or deviate from the way the Legislature has heretofore crafted its legislation and processes to conclude that there must be some structure to the impeachment hearing and removal vote, and notice as to how it will be

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⁶ The document claims the rules are to be enforced by the Sergeant-of-Arms, but apparently that is not an official legislative position, as a tribal member attending the hearing, much to his stated reluctance, was asked to take an oath and upon installation act as enforcer for the day.

conducted. ⁷ That the Legislature apparently chose not to pass any substantive rules to govern the proceedings, but instead published only the above referenced document of unknown origin or legitimacy, illustrates the inequity that surrounds the July 30 proceedings.⁸ Again, the balance of equities and the best interests of the Kiowa People are served by written procedures which guide the impeachment and removal process.⁹

Finally, the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss, and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. *Lewis v. Ho-Chunk Nation Election Board, CV-06-109 (Ho-Chunk Nation Trial Court 2007)*. As Chairman of the Kiowa Tribe, Plaintiff will obviously suffer irreparable harm if the defective notice, draft statement of impeachment charges, improper burden of proof, and lack of opportunity to know the evidence to be in support of the Legislature's proof burden results in his impeachment and removal. In making this ruling, the Court is no way offering any opinion on the merits of the case against the Chairman. Rather, the

⁷ The Legislature has recognized such need by enacting a law regarding Executive Branch production of documents and testimony. The Lawmaking and the Production of Documents and Testimony Act of 2017 enacted by Resolution KL-CY-2018-017, contains detailed processes and procedures for such items as time frames for producing documents, requesting a continuance, etc. Unlike other legislative documents provided to the Court, this copy of Kiowa law has the impression of a seal, which would seem to indicate it is a copy of the official record.

⁸ The Legislature's Agenda of the Impeachment Hearing states there will be a "presentment of Guidelines and Procedure Rules." The Court is not aware it or the Chairman received those guidelines.

⁹ The parties discussed with the Court at hearing the fact that the Legislature's templates do not include a recitation that an act became law by failure of the Chairman to act on it within the prescribed time. This has caused confusion among the parties, counsel and the Court. Also unclear is who in the Legislature is authorized to sign official documents. In some instances, the Secretary of the Legislature is the signatory of documents provided to the Court, and in other documents it is the Speaker. Some of the documents submitted are incomplete, for example the blank certification of vote count in KL-CY-2018-022, Plaintiff's Exhibit E. The Court has spent considerable time trying to understand the significance and validity of the exhibits presented, which would have been made much simpler if it had received official pronouncements regarding Legislative procedure, and official copies of the laws, resolutions, orders, rules, policies and procedures, approved minutes, and/or official notices governing the issues.

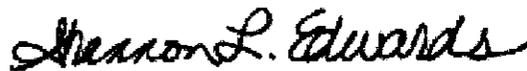
Court's intervention is only the result of the procedural due process failures which all Kiowa citizens are afforded. The Kiowa Tribe and government are at their sovereign best when they honor the promises made in their Constitution to their utmost ability.

Decision

IT IS THEREFORE ORDERED that Plaintiffs' request for a preliminary injunction is GRANTED. Defendants are enjoined from continuing impeachment and removal proceedings until such time as the Articles of Impeachment are properly passed, and notice of the charges, the witnesses and evidence and official rules of procedure are provided to the Chairman in a manner that complies with this order. The Court notes the Chairman in these proceedings has been provided a list of the witnesses called and to be called, and should be afforded a copy of their testimony and documentation presented and to be presented should the Legislature seek to reintroduce same at a subsequent hearing. Given the passage of time, the Chairman has surely availed himself of the opportunity to review and understand the evidence against him and is planning accordingly.

Once the items listed above are accomplished, upon verification by the Speaker of the Legislature, the Court upon application will dissolve the injunction, and the Kiowa Legislature is free thereafter to hold its impeachment hearing. In the alternative, it may appeal this Order, which the undersigned is quite sure will cause more delay than to simply correct the noted procedural due process violations. The Court is hopeful the parties will prioritize the health of leadership, the Tribe's employees, and the Kiowa Community in convening the next hearing.

Dated this 19th day of August, 2020.



Shannon L. Edwards, Chief Magistrate