

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

MUSCOGEE (CREEK) NATION
NATIONAL COUNCIL,

and

ROBERT TREPP, an individual Muscogee
(Creek) tribal citizen and DOES 1-10,
Inclusive

Petitioners,

v.

MUSCOGEE (CREEK) ELECTION
BOARD, A.D. ELLIS, in his capacity as
Principal Chief of the Muscogee (Creek)
Nation and MUSCOGEE (CREEK)
CONSTITUTIONAL CONVENTION
COMMISSION,

Respondents.

SUPREME COURT

FILED

DEC 03 2010

ROSANNA L. FACTOR, COURT CLERK
MUSCOGEE (CREEK) NATION

CASE NO. 2009-10

**RESPONSE TO THE DECEMBER 3RD FILING BY JUSTICE JONODEV
CHAUDHURI, JUSTICE AMOS MCNAC, AND JUSTICE HOUSTON SHIRLEY**

On December 3, 2010, without notice to the undersigned justices, Justice Chaudhuri caused to be issued an elaborate filing (December 3rd Filing or Filing) attempting to vacate this Court's December 21, 2009, decision (Decision) in the instant case. Justice Chaudhuri's Filing is *void ab initio* and is of no force and effect for the following reasons:

I. THERE WAS AN INSUFFICIENT NUMBER OF JUSTICES VOTING TO VACATE A VALID DECISION OF THE SUPREME COURT.

Title 27 § 3-101 and Supreme Court Rule 22 C. require four (4) or more justices to be in agreement for a valid and binding decision of the Muscogee Supreme Court. Justice Chaudhuri contends that in order to apply this long-standing Muscogee law, that six (6) justices must be seated at the time of the decision. Indeed, six (6) justices were seated at the time, but

nonetheless Justice Chaudhuri weaved a new theory in footnote 4, that only a simple majority is required to issue a Supreme Court decision. In doing so, he contradicts his own unsupported position and ignores Muscogee law and the Supreme Court Rules. The previous Supreme Court decisions have been made either by unanimous consent or the Court has recognized and abided by the requirement of Title 27 § 3-101.

Moreover, Justice Chaudhuri's reference to Supreme Court Appellate Rule 3-108 is misleading. Rule 3-108, Rules of Appellate Procedure provides:

The Supreme Court shall establish procedures for all cases and other matters before the Supreme Court. Such rules shall be transmitted, before their effective date, to the National Council, the District Court, and members of the Muscogee (Creek) Nation bar. Copies of the rules shall be made available to the Supreme Court at any time except that rules in effect at the time of filing of a matter in the original hearing body shall govern that matter until final resolution by the Supreme Court.

Thereafter, the Rules were developed and approved by the National Council in NCA 82-30, as amended by NCA 01-88, effective June 1, 2001. There is no possible reading of Rule 3-108 that authorizes Supreme Court rulings by simple majority vote. Three votes adopting the December 3rd Filing is simply insufficient. The December 3rd Filing was never lawfully decided and is void.

II. MUSCOGEE CONSTITUTIONAL AMENDMENT A-114 IS A LIMITATION ON THE SUPREME COURT'S EXERCISE OF ORIGINAL JURISDICTION.

Justice Chaudhuri agrees that Constitutional Amendment A-114 (A-114) is a valid constitutional amendment. He cannot agree on one hand that A-114 is valid and at the same time ignore its limitation on the Muscogee Supreme Court's exercise of original jurisdiction in

political disputes on the other hand. If the enactment of A-114 is valid, then this court is legally required to appoint a special judge to hear this type of dispute. The deprivation of original jurisdiction is not based on the legal issues raised by the parties or the perceived lack of facts in dispute. The duty to appoint a special judge is triggered by the identities of the parties. If there are facts in dispute, the special judge would then assemble a jury of Muscogee citizens. Whether a party fits within the scope of A-114 is for the special judge to decide. The special judge would make initial determinations on all legal issues raised including the constitutional interpretation of A-114, which has not yet been constitutionally challenged.

Although the Supreme Court never had exclusive jurisdiction to interpret the Muscogee Constitution,¹ the Muscogee people, by enactment of A-114, limit the Supreme Court's role in political disputes to appellate review only. Without the appointment of a special judge and determination of the case at the trial level, it is not ripe for appellate review. There is nothing for this Court to do at this time except appoint the special judge as constitutionally required due to the recusal of the District Court Judge. The forestalling of the appointment of a special judge does not give us back original jurisdiction over this case. There is nothing for us to do except appoint the special judge as constitutionally required. The December 3rd Filing is outside our jurisdiction and void.

III. THE DECEMBER 3RD FILING WOULD ACT AS A VIOLATION OF A MUSCOGEE CITIZEN'S RIGHT TO DUE PROCESS.

Finally, and importantly, recognition of the December 3rd Filing would improperly muzzle the litigants in flagrant violation of their due process rights under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, et seq. The December 3rd Filing attempts to silence the litigants in the underlying matter, remove the case from the District Court before either party/litigant has

¹ See, e.g., *Cox v. Childers*, 1 Mvs. L. Rep. 214 (D Ct. 1991) (District Court determined constitutionality of law).

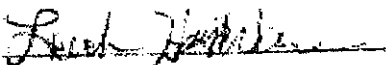
had an opportunity to develop his case, and dismiss the case at the Supreme Court level thereby preventing any possible appellate review. Such a restriction is unlawful and unthinkable. The December 3rd Filing, nothing more than a waste of Court resources, is unlawful and therefore void.

CONCLUSION

The December 3rd Filing was never validly decided by the Muscogee Supreme Court, this Court does not have the requisite constitutional authority to exercise original jurisdiction, and the Decision violates the litigants' due process rights. Additionally, the case is not yet ripe for appellate review. The only function this Court has at this point is the appointment of a special judge as required under our Constitution.

The December 3rd Filing is *void ab initio* and must not be recognized. This Court's original ruling dated December 21, 2009, must stand.


Denette Mouser, Associate Justice


Leah Harjo Ware, Associate Justice


Kathleen Supernaw, Associate Justice

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CERTIFICATE OF MAILING/DELIVERY

I, Connie Dearman, Deputy Court Clerk for the Supreme Court of the Muscogee (Creek) Nation, do hereby certify that on this 6th day of December, 2010, that I faxed and mailed a true and correct copy of the foregoing Supreme Court's Response with proper postage prepaid to the following:

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