SUPREME COURT OF THE OKLAHOMA INTERCOLLEGIATE LEGISLATURE

JOHNNY AMAN, MATTHEW BRENCHLEY, COREY SHIREY, COLTON THOMPSON. In their official capacity as Senate Judiciary Chairman, House Representative, Senator and House Representative, respectfully. Plaintiff, vs. BRITANY BURRIS, In her official capacity as Attorney General of the Oklahoma Intercollegiate Legislature. Defendant.	Case No.: SU2015-001 CITE AS: *AMAN Et Al, V. BURRIS, SU2015-001* ARGUED: 7-11-2015 DECIDED: 7-11-2015 DECISION PUBLISHED: 7-17-2015

SYLLABUS

On May 25th 2015, Governor Peyton Sweatman appointed three individuals to fill three of the five vacant seats on the Oklahoma Intercollegiate Legislature's (OIL) Supreme Court. These appointees were regarded as recess appointments by the Governor, having not received senate confirmation. The appointees would also grant the Supreme Court quorum to conduct official judicial business. On or about May 26th 2015, the Attorney General was presented with four legal questions regarding the constitutionality of the recess appointments and

rather or not they may be granted full judicial power a nominated and confirmed justice receives on the Court. The questions presented were the following:

1. *"Can the Governor appoint justices when the Oklahoma Intercollegiate Legislature is in recess?"*
2. *"Can the Supreme Court convene if a quorum of the Court is not met?"*
3. *"Can the three judicial nominees sit to hear a possible case, if one should arise, concerning any opinion regarding the above stated issues?"*
4. *"Is a special session of the Senate the only way currently allowed for the Governor to appoint Supreme Court Justices?"*

The Attorney General answered *"no, no, yes and yes*," to the questions presented respectfully. A complaint and subsequent lawsuit was filed by the petitioning plaintiffs on June 18th 2015. They challenged the opinion in respects to questions one, three and four. The Court presented itself with the following questions and answered them accordingly:

JUSTICE RODRIGUEZ TOOK NO PART IN THE DECISIONS REACHED BY THE COURT.

WITH JUSTICE NIEMAN, JUSTICE COLSTON,

JUSTICE HILSHER, JUSTICE MAYFIELD

AND JUSTICE TURNER CONCURRING,

CHIEF JUSTICE MAXWELL DELIVERED THE OPINION OF THE COURT IN RESPECTS TO

PART I:

I

Before this Court can take into consideration the questions presented by the parties involved, we shall entertain the "traditional authority clause" that the Oklahoma Intercollegiate Legislature abides itself by and has been for years. Opposing sides strike interesting and strict formats in their interpretation of the Constitution and statutes, but they both share that it is improper for the three individuals to receive full recess appointee power a confirmed justice enjoys. This is troublesome for the Court to accept because we must review the possibility that they do possess that power under a traditional authority clause.

Throughout the history of the Oklahoma Intercollegiate Legislature, Governors have long accepted the practiced tradition of appointing justices after their election. Records show this is most common after the spring sessions when justices of the Court retire due to graduation and newly elected Governors pack the Court with their judicial legacy appointments. Out of the four sitting justices currently on the Court, only one has not been a recess appointment.[1] More so, the

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[1] Associate Justice Colston was nominated by Governor Thomason in April of 2015 at spring session and was subsequently confirmed by the Senate. Chief Justice Maxwell, myself, was nominated by then Governor-Elect Sweatman and subsequently confirmed by the Senate at the same session; however, previously I was

Senate has long held acceptance to this practice by the Governor. Even more daunting to the parties who challenge this tradition today, the Court has long abided by this practiced tradition – routinely conducting itself accordingly with the whim of acceptance by the Governor and Senate. The Governor would appoint someone to a vacated seat, the Senate would not confirm or deny until the next session, and the nominated individual would sit on the Court with full judicial powers a nominated and confirmed justice would enjoy – unless they were otherwise denied by the Senate. The Court cannot and will not turn a blind eye to this or all inherited traditional powers for that matter. Inherited powers are those passed down from one generation of authority to the next. For years the Senate has determined not to exercise its power of advice and consent for recess appointed justices before regular session. (Article Five, Section 5.1 Oklahoma Intercollegiate Constitution.)

Traditional inherited powers are special powers that are not specifically outlined in the Constitution or Statutes. Some traditional powers are not necessary for the overall function(s) of the Oklahoma Intercollegiate Legislature.[2] Others are necessary, if not vital, to the success of the Oklahoma Intercollegiate Legislature as an organization intent on promoting and educating civic and governmental involvement. As demonstrated, we conduct ourselves as leaders accordingly and expect delegates to engage our practice and conduct themselves accordingly as well; however, no legal protections are given nor

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appointed as an associate justice a week before the fall session in 2014 by Governor Thomason and confirmed a week later by the Senate.

[2] Examples include recruitment seminars, scrimmages, candidate forums, meetings with high ranking academia/government officials etc.

endorsed for the traditional powers. For that very reason, this Court will strongly consider this practice as lazy and not afforded the blanket of protection the laws grant at this present time. This Court will not legislate from the bench, creating official powers protected by the law when that law doesn't even exist to protect. That type of power is reserved to other branches in the tree of government. The legislature/executive magistrate should never expect their lack of actions to be compensated by their neighbors down the tree.

The way the law stands now, any inherited traditional power that is essential to the function of the Oklahoma Intercollegiate Legislature is unconstitutional and/or not protected by statutory law. This principle is neither controversial nor new. This organization should be in the business of educating new incoming delegates on proper governmental process. We cannot do so if we are abiding by "shadow laws" outside their knowledge that are not explicitly stated within the Constitution or statutes. We cannot educate incoming leaders in our organization on proper government process if we are not following proper governmental process. Simply put, the best way to mock governmental process is to follow governmental process. The Court will not allow this organization to operate within the shadows on judicial appointments any longer beyond today.

WITH CHIEF JUSTICE MAXWELL, JUSTICE HILSHER,

JUSTICE TURNER, AND JUSTICE MAYFIELD CONCURRING, AND JUSTICE NIEMAN IN DISSENT

ASSOCIATE JUSTICE COLSTON DELIVERED THE OPINION OF THE COURT IN RESPECTS TO PART II:

II

The next issue before the Court concerns the Governor's power to appoint Justices during a recess of the legislature:

- *Does the Constitution grant the Governor this power of recess appointment or is it strictly prohibited?*

Article Five, Section One, Subsection 1 of the OIL Constitution states that the Governor shall appoint members of the Court when vacancies arise. This implies that the Governor has the power to appoint members of the Court during a recess of the legislature, should vacancies on the Court occur during a recess. Advice and consent of the Senate must not be strictly construed to mean a confirmation of the Justice. Confirmation rests as its own independent process. The Senate can voice its consent of an appointee in any way; it can be procured through conversation, or it can written down and mailed on a postcard if that method is so desired. The issue before the Court is whether or not the Governor possesses the power to appoint Justices in such a manner, and the answer the Court provides is that he indeed does possess that power. Thus, the three Justices in question have been appointed to the Court by the Governor in his official capacity and their appointments were constitutional; however, they still lack confirmation by the Senate.

WITH CHIEF JUSTICE MAXWELL, JUSTICE COLSTON, JUSTICE HILSHER, AND JUSTICE TURNER CONCURRING, AND JUSTICE MAYFIELD IN DISSENT

ASSOCIATE JUSTICE NIEMAN DELIVERED THE OPINION OF THE COURT IN RESPECTS TO PART III:

III

The third question which this Court was asked to consider was whether those Justices appointed during recess enjoy the full powers and bonafide membership that are possessed by confirmed Justices. This Court answers this question with a resounding no. As these Justices have not been subject to the full consent of the Senate given to those Justices who have already been through the confirmation process, we find no statutory authority to give the full powers and authorities of a confirmed Justice to those who have been appointed during recess. This means that, at least until recess appointments have been approved by the Senate, these appointees have no official or binding powers, like those enjoyed by bonafide Justices. Were we to assume that recess appointees had the same powers as any other Justice who had already gone through the confirmation process and been scrutinized by the Senate, it would follow that there would be no check on judicial appointees and thus completely void Article V Section 5 subsection 1 of the Constitution of the Oklahoma Intercollegiate Legislature, which mandates that "The Governor shall appoint *with the advice and consent of the Senate* members of the Supreme Court when such vacancies shall arise." Thus, this Court finds that, despite the fact that the Governor has the authority to appoint Justices in recess, the powers of these Justices is constrained until such time as the Senate gives its full advice and consent.

WITH CHIEF JUSTICE MAXWELL, JUSTICE COLSTON, JUSTICE HILSHER, AND JUSTICE TURNER CONCURRING, AND JUSTICE NIEMAN IN DISSENT

ASSOCIATE JUSTICE MAYFIELD DELIVERED THE OPINION OF THE COURT IN RESPECTS TO PART IV:

IV

The Court was presented with the following question next:

- *Is a special session the only remedy to allow a recess appointed justice to become a fully vested, confirmed justice?*

No. The Governor may make recess appointments to fill vacancies in the Supreme Court when they arise, but a special session is not the only remedy to allow an appointed justice to become fully vested. Indeed, another potential remedy would be to wait to confirm the appointed justices during a regular session. Though recess appointments by definition occur when the legislature is not in session, the confirmation of those appointments could occur during either a special or regular session, not only a special session.

WITH JUSTICE NIEMAN, JUSTICE COLSTON AND JUSTICE TURNER CONCURRING, AND CHIEF JUSTICE MAXWELL AND JUSTICE MAYFIELD IN DISSENT

ASSOCIATE JUSTICE HILSHER DELIVERED THE OPINION OF THE COURT IN RESPECTS TO PART V:

V

Next, the Court presented itself with a question as to rather or not the issues brought before the Court are constitutional or political questions reserved for the legislature. At the outset, it is appropriate to determine whether there is

any reason this Court should not issue a ruling in the case at bar. Preliminary issues such as standing, mootness, ripeness can be dismissed as irrelevant without discussion. A preliminary discussion as to whether the issues in this case raise a political question. If the issues raised in this case are found to be a political question, then it would be inappropriate for this Court to issue a ruling. There are multiple factors in determining if an issue is a political question, but in short, a political question is an issue that is determined to fall squarely out of the judicial sphere and is appropriately heard only within either the executive and/or the legislative spheres. Furthermore, there must be some identifiable, intelligible standard for which this Court can follow to make a ruling. In the case at bar, the issues clearly fall within the judicial sphere. Court membership is clearly an area in which this Court has a substantial interest. More importantly, there is identifiable, intelligible standard found in the Constitution of OIL to determine the framework by which Justices are to be appointed. For instance, Article Sixth, Section 5 of the Constitution of OIL clearly states, "the Governor shall appoint, with the advice and consent of the Senate, members of the Supreme Court when vacancies shall arise." While it would be inappropriate for the Court to order the Senate to change their method of consent so long as the method has a rational basis, it is clear that there is a standard for judicial appointments. Thus, this Court finds that no issue in the case at bar creates a political question, and therefore, the case may be decided on its merits.

Nothing in this decision should not be understood to invalidate any past moot court competition, hearings or decision in which a recess-appointed Justice judged, heard, or decided, respectively. Nothing in this decision should be understood to invalidate this decision.

All recess-appointed Justices shall still register with their respective delegations as Justices at the next Session or Special Session. The three recess-appointed Justices who have not yet been confirmed will be put through the confirmation process as soon as the Senate is available.

THE OPINION RENDERED BY THE ATTORNEY GENERAL OF THE OKLAHOMA INTERCOLLEGIATE LEGISLATURE IS:

AFFIRMED IN PART AND VACATED IN PART.

THE OKLAHOMA INTERCOLLEGIATE LEGISLATURE INCLUDING ALL DELEGATES AND OFFICERS ARE HERBY BOUND BY THIS RULING AND ORDERED TO CONDUCT THEMSELVES ACCORDINGLY.

IT IS SO ORDERED.

JUSTICE NIEMAN'S FILED DISSENT:

In this case, the Court was asked to answer questions: (1) whether the issue at hand constituted a political question outside of the Court's jurisdiction, (2) whether traditional common law within the organization trumps statutory law, (3) whether the Governor has the authority to make recess appointments, (4) whether recess appointees not yet confirmed by the Senate have full powers equivalent to those of a bona fide Justice, and (5) whether special session constitutes the only method by which the Governor can legally make recess appointments. With regards to questions 1, 2 and 4 I concur with the Court's opinion, but must dissent with respect to questions 3 and 5.

The primary area of dispute regarding these issues concerns the interpretation of Article V Section 5 Subsection 1 of the Constitution of the Oklahoma Intercollegiate Legislature. Here the language of the Constitution states that "The Governor shall appoint, with the advice and consent of the Senate, members of the Supreme Court when such vacancies shall arise." In its opinion, the majority asserts that we should not construe the language of "advice and consent" strictly as referring to the Senate confirmation process, but should instead assume that the Confirmation process is completely separate and distinct from appointment with advice and consent. According to the majority, recess appointments are implied by the Constitution, though they give no substantive defense of this assertion. This assumption that the Constitution gives this implied power to the Governor to make recess appointments is clearly wrong within the traditional interpretations of this Court, as well as in the surrounding statutory context and the Constitution of the United States.

Traditionally, this Court has adopted a plain meaning, interpretation with regards to statutory language, meaning that we should apply usual or ordinary meanings of words, including dictionary definitions. Here, the specific disputed word is "appoint". The majority claims that the word "appoint" in the Constitutional language refers to a mere indication of desire, rather than a concrete action. This position is untenable; if one is appointed to perform a task, it is clear that they are not being considered to perform said task, but are now firmly placed in that role. This obvious meaning is supported by a simple definition from Merriam-Webster which defines the word "appoint" as meaning "to choose (someone) to have a particular job: to give (someone) a position of duty". Clearly this means that when Article V states that the Governor shall "appoint, with the advice and consent of the Senate" it means that an appointment cannot be made without said advice and consent.

The majority would also assert that "advice and consent" should not be directly tied to the Senate Confirmation process, claiming instead that advice and consent could be "procured through conversation, or it can be written down and mailed on a postcard". This is patently absurd as it not only circumvents the Senate's power of advice and consent by avoiding the concrete approval by a majority of the Senate body that comes from the Confirmation process, but indeed makes a mockery of the Constitutional language. When we examine the context of the Constitutional language with regards to appointments and advice and consent of the Senate, we find that, in the rest of Article V Section 5, two other instances of this wording, in subsections 2 and 3. In both of these subsections, the language states "The Governor elect, before taking office, shall

appoint with the advice and consent of the Senate…" referring to a time during session when the Senate is available to give its full advice and consent. Within this context, it is clear that "advice and consent" must be directly tied to Senate confirmation or other official approval. To do otherwise would be to ignore not only the plain meaning of the wording, but also its implied meaning within the framework of the Constitution.

A third way in which we could compare the language in Article V Section 5 Subsection 1 would be to examine it within the context of the United States Constitution. There, in Article II Section 2 it states that "He (the president)… by and with the Advice and Consent of the Senate, shall appoint… Judges of the supreme Court". Within a purely historical context, this advice and consent has been interpreted to mean a Senatorial confirmation process, and the identical language in the Constitution of the Oklahoma Intercollegiate Legislature heavily implies that it should be interpreted in the same way. This is reinforced by the fact that the Constitution of the United States contains a clause giving the executive the power to make recess appointments, which follows right after the previously mentioned section. Because of this, it is clear that recess appointments were to be distinct from the language of "Advice and Consent", particularly as such appointments are kept in check by definite ends to their commissions. The fact that the OIL Constitution contains no such provision for recess appointments is a signal that the authors had no desire to give such power to the executive. With all of these reasons, it remains obvious that the Governor of the Oklahoma Intercollegiate Legislature has no Constitutional authority to make recess appointments.

This then brings me to my second disagreement with the majority: Whether special session is the only way in which the Governor may lawfully make recess appointments. Following its earlier language, the majority asserts that a special session is not required for the Governor to make recess appointments, but mere for "an appointed justice to become fully vested." As discussed previously, the plain meaning of the word appoint directly ties it to the advice and consent of the Senate, and thus, outside of regular session, a special session indeed remains the only lawful way in which the Governor may make recess appointments. The majority seems to have confused an appointment with the expressed desire of the Governor; an official appointment may only be made while the Senate is in session to give its advice and consent, whether that be in regular session or special session. With regards to a desired appointment during the time that the Senate remains in recess, a special session remains the only Constitutional means by which the Governor may make such a recess appointment.

Accordingly, I respectfully dissent.