

12

IN THE SUPREME COURT
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
P.O. BOX 102
CONCHO, OKLAHOMA 73022

CHEYENNE-ARAPAHO
SUPREME COURTS OF OKLA.
FILED
IN THE SUPREME COURT

MAR 23 2007

SECRET CIV PAGE 1853
IMAGE
COURT CLERK
DEPT

Darrell Flyingman, Governor
Plaintiff/Appellant,

vs.

Case No: CNA-SC-07-01

Robert Wilson, Acting Treasurer
Defendant/Appellee,

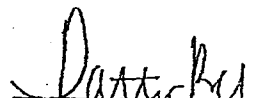
BEFORE: Chief Justice Ryland L. Rivas, Associate Justice Dennis W. Arrow,
Special Justice Karen Eby, Special Justice Taiawagi Helton, and
Special Justice Lindsay G. Robertson

JUDGMENT OF THE SUPREME COURT
OF THE CHEYENNE-ARAPAHO TRIBES

NOW COMES the Court Clerk for the Supreme Court, Patty Bell, pursuant to
Section 461 of the Appellate Procedure Code of the Cheyenne-Arapaho Tribes of Oklahoma, and
hereby enters judgment in this action in accordance with the decision of the Cheyenne-Arapaho
Supreme Court filed March 23, 2007.

DONE this 23rd day of March, 2007.





Patty Bell
Court Clerk
Cheyenne-Arapaho Supreme Court

Exhibit B

JUSTICE ARROW delivered the Opinion and Order of the Court, in which CHIEF JUSTICE RIVAS and SPECIAL JUSTICES EBY, HELTON, and ROBERTSON join.

I.

A.

Over the last several years, the effective governance of the Cheyenne-Arapaho Tribes has been stymied by the refusal of Business Committee Representatives to convene for constitutionally-required meetings (in some instances, for years), and by the federal-law and tribal-law criminal convictions of tribal officials, including Business Committee Representatives, on embezzlement and other corruption charges. *See, e.g., Bullcoming v. Cheyenne-Arapaho Tribes*, 9 Okla. Trib. ___, ___ & nn. 1-5 (Cheyenne-Arapaho 2006) [No. CNA-SC-05-06], slip op. at 13 & nn. 1-5 (providing all-too-numerous examples of both passive nonfeasance and active malfeasance by Business Committee Representatives, and affirming fourteen tribal-court embezzlement convictions of a sitting Business Committee Representative); *Wilson v. Business Committee*, 8 Okla. Trib. 109, 120-43 (Cheyenne-Arapaho 2003) [No. CNA-SC-02-02] (describing early-2002 problems in convening the Thirty-third Business Committee for meetings required by the 1975 Constitution).

Against this background, many members of the Cheyenne-Arapaho Tribes re-examined the Business-Committee-focused governmental structure established by the Tribes' 1975 Constitution, which traces back to the 1937 Constitution adopted in the immediate aftermath of the Oklahoma Indian Welfare Act. *See generally* Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967 (authorizing Oklahoma's federally-recognized tribes to adopt constitutions and by-laws pursuant to regulations to be established by the Secretary of the Interior). Upon re-examination of the 1975 Constitution, the governmental structure it established — and indeed, that Constitution in its entirety — were found wanting, and by a 608 to 201 vote of tribal members at a Secretarial Election, that Constitution was replaced on April 4, 2006. On May 17, 2006, through appropriate delegates, the Secretary of the Interior confirmed the results of the April 4 election, and two days later notified the then-Business Committee Chairman that the new Constitution had come into force on the date of the election — April 4, 2006. *See Bullcoming*, 9 Okla. Trib. at ___, slip op. at 10 (quoting the relevant documents). With the exception of any federal-law preemption, the 2006 Constitution is therefore the supreme law of the Cheyenne-Arapaho Tribes, *see* CHEY.-ARAP. CONST. [2006] art. II, § 1.

B.

The 1975 Cheyenne-Arapaho Constitution recognized the Tribal Council (comprised of all enrolled tribal members at least eighteen years of age) as the "governing body of the organization," CHEY.-ARAP. CONST. [1975] art. I, § 2, and authorized the Council to act with respect to defined matters unless it chose to delegate some of its powers to the Business Committee, *see, e.g., id.* art. II, § 4; *id.* art. IV, § 1. But as a practical matter, the Business-Committee, consisting of eight Representatives elected from Cheyenne or Arapaho districts, *see id.* art. VI, exercised virtually all of the governmental powers of the Tribes.

In addition to any of its own powers that the 1975 Constitution authorized the Tribal Council to *delegate* to the Business Committee, *see* CHEY.-ARAP. CONST. [1975] art. IV, § 1, the 1975 Constitution directly granted to the Business Committee general governmental powers in matters not expressly *denied* to it by that Constitution, *see id.* art. IV, § 2. A quorum of five of the eight Business Committee Representatives was required to lawfully transact business at Business Committee meetings. *See id.* art. I, § 5.

Under the 1975 Constitution, tribal administrative functions were generally overseen by a Business Manager selected by the Business Committee, *see id.* art. I, § 4, and the tribal Chairman, Vice-Chairman, Secretary, and Treasurer were *selected by and members of* the Business Committee, *see id.* art. VIII, § 4. The Treasurer was granted “custodian[ship] of all monies . . . under the jurisdiction or control of the Business Committee,” subject to whatever procedures the Business Committee might establish. *See id.* art. IV, § 4. Execution of tribal laws was performed by an Attorney-General/Prosecutor selected by the Business Committee. And although the Twenty-Sixth Business Committee established a tribal court system to free the Tribes from the federally-administered (and largely unloved) “CFR court” system, *see* Resolution No. 100588S232, Ordinance No. 8101005 (Oct. 5, 1988) (enacting, *inter alia*, the Cheyenne-Arapaho Courts Code); *cf.* 25 C.F.R. pt. 11 (2006) (establishing “CFR courts” for tribes not having their own tribal-court systems), the 1975 Constitution established no Judicial Branch of tribal government. At least arguably (and perhaps much more than that), under the 1975 Constitution the Business Committee could well have abolished the Tribes’ tribal-court system entirely.

Excluding for the moment the powers of the pre-2006 Tribal Council (for which the 1975 Constitution provided neither facilitating staff nor structure), for most practical purposes the 1975 Constitution thus created an omnipotent one-branch tribal government (consisting of the Business Committee) in which any four of the eight Business Committee Representatives could prevent that Committee from ever meeting, *see* CHEY.-ARAP. CONST. [1975] art. I, § 5. [Were that not enough, in 2002 the then-current Business Committee Chairman (with the support of two former Chairmen) took the position in open court that under Article XIV, § 1 of the 1975 Constitution, any Chairman could also *independently* prevent the Business Committee from ever conducting a meeting by simply refusing to call one. *But cf. West v. Franklin*, 7 Okla. Trib. 465, 473-74 (Chey.-Arap. D.Ct. 2002) [No. CNA-CIV-02-41] (rejecting that interpretation), *appeal dismissed*, 8 Okla. Trib. 404 (Cheyenne-Arapaho 2004) [No. CNA-SC-02-03].]

Although both this Court and the Cheyenne-Arapaho District Court (as it was formerly named) were frequently called upon to break deadlocks by compelling Business Committee Representatives to at least *convene*, *see, e.g., Bullcoming*, 9 Okla. Trib. at __, slip op. at 1 n.2 (citing a dozen or so such examples), the passive aggression (and as history would demonstrate, corruption) of a number of elected Business Committee Representatives proved a more potent force for stalemate and gridlock than the structurally weaker tribal judicial system could overcome. So while some Business Committee Representatives either “strategically” or through simple neglect-of-duty refused to participate in the convening of constitutionally-required meetings (and consequently the Business Committee could not lawfully convene), some Representatives (and/or others) embezzled or otherwise diverted tribal funds while the Business Committee as an entity did absolutely nothing at all.

C.

In assessing the text and purposes of the 2006 Constitution, it would be a feeble-minded court that turned a blind eye to those unfortunate facts, most if not all of which were more-than-amply proven in cases appealed to this Court. Most notably for present (and likely many other) purposes, and at this juncture as a purely textual matter, the 2006 Constitution modifies the pre-existing structure of Cheyenne-Arapaho government, *inter alia*, by:

1. Explicitly dividing the powers of the Cheyenne-Arapaho government among four branches: the Tribal Council, Legislative Branch, Executive Branch, and Judicial Branch;¹
2. Forbidding “any official of any branch of Government” from exercising any power constitutionally or otherwise-lawfully granted “to any other branch of Government” except as otherwise expressly constitutionally provided;²
3. Authorizing the Legislature to create “Regulatory Commissions” and/or “Executive Boards,” but locating them in the Executive Branch and disqualifying Legislators from membership on those entities;³
4. Providing for the at-large joint election of a Governor and Lieutenant Governor within the newly-established Executive Branch, and investing the Governor with the “[e]xecutive power” of the Tribes;⁴
5. Mandating that the occupants of the newly-created positions of Governor and Lieutenant Governor receive “reasonable compensation as established by law,” and limiting the legislative power to adjust that compensation;⁵
6. Establishing a Judicial Branch as an independent constitutional branch of government, and constitutionally establishing its duties, its jurisdiction, and its membership;⁶

¹ See CHEY.-ARAP. CONST. [2006] art. II, § 2.

² See CHEY.-ARAP. CONST. [2006] art. II, § 3; *cf. id.* art. VI, § 4(e) (“No Legislator shall be otherwise employed in any governmental capacity.”); *id.* art. VI, § 5(g) (“No Member of the Legislature may also be a member of any Commission created by the Legislature.”); *id.* art. VI, § 5(h) (“No Member of the Legislature may also be a member of any Board created by the Legislature”).

³ See CHEY.-ARAP. CONST. [2006] art. VI, § 5(g), (h).

⁴ See CHEY.-ARAP. CONST. [2006] art. VII, § 1(b); *id.* § 4(a).

⁵ See CHEY.-ARAP. CONST. [2006] art. VII, § 5.

⁶ See CHEY.-ARAP. CONST. [2006] art. VIII, §§ 1-5.

7. Mandating that Justices and Judges receive "reasonable compensation as established by law," and limiting the legislative power to adjust that compensation;⁷
8. Establishing an Office of Tribal Council, and the position of Coordinator for the Office of Tribal Council, to provide facilitating staff and structure supporting the effective functioning of the Tribal Council;⁸
9. Preserving the Tribal Council's right of referendum;⁹
10. Defining the sovereign immunity of the Tribes *and tribal officials* with significant particularity;¹⁰
11. Mandating the creation of enumerated Executive Branch Departments, and providing that each of those Departments "shall have one Executive Director," nominated by the Governor and subject to confirmation by the Legislature, but providing for "automatic-confirmation-by-operation-of-law" in the event of inaction by the Legislature;¹¹
12. Subjecting appointments for the Judicial Branch offices of Judge and Justice to "automatic-confirmation-by-operation-of-law" in the event of inaction by the Legislature and/or Tribal Council;¹²
13. Eliminating any general quorum requirement for action by the Tribal Legislature;¹³
14. Authorizing the Governor to break tie votes in the Legislature;¹⁴

⁷ See CHEY.-ARAP. CONST. [2006] art. VIII, § 8.

⁸ See CHEY.-ARAP. CONST. [2006] art. V, §§ 3-5.

⁹ See CHEY.-ARAP. CONST. [2006] art. XI.

¹⁰ See CHEY.-ARAP. CONST. [2006] art. X.

¹¹ See CHEY.-ARAP. CONST. [2006] art. VII, § 1(c).

¹² See CHEY.-ARAP. CONST. [2006] art. VIII, § 2.

¹³ See CHEY.-ARAP. CONST. [2006] art. VI, § 5(a) ("All actions by the Legislature shall be made by majority vote of the Legislators *present* unless otherwise *specifically* indicated by this Constitution."); *id.* art. VI, § 7(a)(iii) (same).

¹⁴ See CHEY.-ARAP. CONST. [2006] art. VI, § 5(a) ("Tie votes in the Legislature shall be decided by the Governor.").

15. Empowering the Governor to veto legislation subject to legislative veto override, but providing for “automatic-approval-by-operation-of-law” in the event of inaction by the Governor;¹⁵
16. Providing for the “automatic-approval-by-operation-of-law” of valid budgets submitted to the Council by the Legislature in the event of Council inaction;¹⁶
17. Substantially limiting the power to recall tribal officials;¹⁷
18. Rendering any person owing money to the Tribes ineligible to be a candidate for the office of District Legislator;¹⁸
19. Rendering any person owing money to the Tribes ineligible to be a candidate for the offices of Governor and Lieutenant Governor, and requiring financial disclosures of candidates for those offices;¹⁹
20. Mandating that the Legislature adopt an annual budget for submission to the Tribal Council for its approval (as described above and below), and establishing substantive and procedural requirements applicable to such budgets;²⁰
21. Enhancing the *structural* authority of the Tribal Council over the annual budget;²¹
22. Locating the office of Treasurer within the Executive Branch rather than the Legislative Branch; establishing the duties of that office; and requiring that the Treasurer be bonded;²² and

¹⁵ See CHEY.-ARAP. CONST. [2006] art. VII, § 4(g).

¹⁶ See CHEY.-ARAP. CONST. [2006] art. V, § 2(b).

¹⁷ See CHEY.-ARAP. CONST. [2006] art. XII.

¹⁸ See CHEY.-ARAP. CONST. [2006] art. VI, § 4(d).

¹⁹ See CHEY.-ARAP. CONST. [2006] art. VII, § 3(d), (e).

²⁰ See CHEY.-ARAP. CONST. [2006] art. VI, § 5(d).

²¹ Compare CHEY.-ARAP. CONST. [2006] art. V, § 2(b) (granting the “exclusive” power to approve the annual budget to the Tribal Council, subject to a default “Council-approval-by-operation-of-law” check in case of Council inaction), with CHEY.-ARAP. CONST. [1975] art. IV, § 1(a) (granting the Council authority to act “concerning” the approval of the annual budget, but authorizing the Council to delegate that authority to the Business Committee — apparently without limitation — by referendum vote).

²² Compare CHEY.-ARAP. CONST. [2006] art. VII, § 1(c) (placing the Department of Treasury within the Executive Branch), and *id.* art. VIII, § 4(c) (making the Executive Director of the Department of Treasury the

23. Creating the constitutional crime of embezzlement, prescribing the penalties for its commission, and defining "embezzlement" as "[s]pending government revenues or drawing moneys without authorization and appropriation by law and without a signature by the Governor."²³

The above-described list of the structural changes effectuated by the 2006 Constitution is not an exclusive list. Indeed, because of the complexity of this and most other constitutions, and because there is no objective way to determine the appropriate level of generality at which to describe the 2006 Constitution's changes,²⁴ no such list could be either comprehensive or in any sense "perfect." But when the changes brought about by the 2006 Constitution are assembled in the above manner, three observations become apparent from the textual changes even without reference to the historical background at all.

First, the drafters of the 2006 Constitution — and the more than 75% of tribal voters who approved it — thoroughly repudiated one-branch, Business-Committee-style government. In fact, the first eleven listed changes speak to the new four-branch government of divided powers, from the explicit establishment of the four branches [Change 1], to the disqualification of Legislators from holding positions in other Branches (or with the Tribes generally) [Changes 2 and 3], to the meticulous and detailed empowerment of the Tribal Council, Executive Branch, and Judicial Branch, and the consequential reduction in the powers of the new Tribal Legislature when contrasted with the powers of the old Business Committee [Changes 3-11].

Second are the constitutional drafters' (and tribal voters') concerns (to which the changes numbered 10 through 17 generally speak) about gridlock, stalemate, and the legal and practical consequences of passivity by tribal officials. The responsive changes range from the limitation of tribal officials' sovereign immunities when sued in equity in tribal courts by persons within the Tribes' jurisdiction to enforce tribal law [Change 10], to the numerous "automatic-approval-by-operation-of-law-in-the-event-of-inaction-by-the-responsible-entity" provisions [Changes 11, 12, 15, and 16], to the ability of the Governor to break tie votes in the Legislature [Change 14], to the veto-and-override system [Change 15], to the substantial constitutional limitation on the possibility of gridlock-generating "recall wars" [Change 17], to the remarkable (but historically understandable) elimination of any general quorum requirement for legislative action [Change 13].

Third and finally (but equally importantly) are the interwoven constitutional checks (primarily addressed by the changes numbered 18 through 23) designed to minimize the possibility for financial mismanagement, embezzlement, and corruption. To minimize both actual conflicts-of-interest and the temptation to corruption, persons owing money to the Tribes are constitutionally disqualified from becoming candidates for any legislative or executive elective office [Changes 18 and 19]. Other

Treasurer), *and id.* art. VII, § 4(b) (establishing the method for filling Executive Director positions generally), *with* CHEY.-ARAP. CONST. [1975] art. VIII, § 4 (delegating to the Business Committee the power to select one of its own members as the Treasurer).

²³ See CHEY.-ARAP. CONST. [2006] art. VII, § 4(b).

²⁴ To take just one example: Does the change numbered "12" (regarding Executive Branch Departments) consist of one change, two changes, or three?

similarly-focused changes range from separating the power of appropriating tribally-controlled funds from the power to spend them [Changes 20 through 22], to specifying the nature and scope of the appropriations process [Change 20], to creating a constitutional crime of embezzlement [Change 23].

We emphasize once again that the twenty-three changes we enumerate above do not provide an exclusive list of even the *structural* changes, and that there are many others that, if not as significant structurally, may be more relevant to other cases than the twenty-three we describe today. But these are among the most striking structure-of-government changes to be found in the 2006 Constitution, and their overarching focus on (1) separating powers, (2) minimizing gridlock, and (3) preventing financial corruption and mismanagement are unmistakable. We keep in mind both the specific language of the new Constitution's text and the unfortunate historical experiences that so clearly generated that text as we resolve the important issues before us today.

II.

A.

As noted above, before the Fall 2005 tribal elections replaced it, the Thirty-fourth Business Committee had apparently failed to lawfully convene during the entirety of its two-year existence, and though its performance was the "straw that broke the camel's back," the problem of persuading Representatives to (and Chairmen of) the Business Committee to convene for meetings required by the 1975 Constitution did not originate with the Thirty-fourth Business Committee. See *Bullcoming*, 9 Okla. Trib. at __ & n.2 (citing cases).

Shortly after the Fall 2003 tribal elections constituted that Committee, however, the problems of tribal governance became more acute. Article VIII, Section 4 of the 1975 Constitution provided that Business Committee terms of office would begin on the January 1 following the biennial Fall elections (which occurred in the odd-numbered years), and required further that at its first meeting, every new Business Committee select from its membership a Chairman, Vice-Chairman, Secretary, Treasurer, and Sergeant-at-Arms. Nevertheless, by April 2004, no meeting of the Thirty-fourth Business Committee had occurred, and *a fortiori* no officers had been selected. In that setting, Robert Wilson and Darrell Flyingman, who are the adverse parties in *this* case, jointly petitioned the District Court to declare an emergency and appoint an interim Chairman and Treasurer pending the Business Committee's selection of its own. See Petition and Application for Emergency Order, *Wilson v. Blind*, No. CNA-CIV-04-38 (Chey.-Arap. D.Ct. Apr. 2, 2004).

On April 8, 2004, the District Court found that tribal employees and vendors were not being paid because of the absence of a recognized Chairman and Treasurer, and that a critical Indian Health Services contract was threatened because of the absence of a recognized Chairman to sign it. The District Court declared an emergency, invoked prior caselaw from this Court, appointed William Blind Interim Chairman and Robert Wilson Interim Treasurer until the Thirty-fourth Business Committee met to select its own, and ordered the members of that Committee to convene two weeks later to select a Chairman and Treasurer. See *Wilson v. Blind*, 8 Okla. Trib. 334, 336-37 (Chey.-Arap. D.Ct. 2004) [No. CNA-CIV-04-38] (emergency order); *cf. id.* at 351, 353-54 (on April 28, 2004, extending the interim appointments of Mr. Blind and Mr. Wilson after the Business Committee failed to convene for the Court-ordered April 22 meeting). Given the nature of the emergency that