

IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION

FILED

JAN 15 1999

TIME
CHEROKEE NATION
JUDICIAL APPEALS TRIBUNAL

DREW WILCOXEN,

Plaintiff,

v.

JOE BYRD, in his capacity as
Principal Chief of the Cherokee
Nation, and individually,

Defendant.

Case No. JAT 98-16-B

FOR THE PLAINTIFF:

Nathan H. Young, III
239 West Keetoowah
Tahlequah, Oklahoma 74465

FOR THE DEFENDANT:

Linda L. Donelson
Office of Law and Justice
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P. O. Box 948
Tahlequah, Oklahoma 74465-0948

BEFORE:

Dwight W. Birdwell, Chief Justice

ORDER

DREW WILCOXEN ("Plaintiff" or "Wilcoxen") brings this action seeking declaratory relief and monetary damages against JOE BYRD, in his capacity as Principal Chief of the Cherokee Nation, and individually ("Defendant" or "Byrd"). Following the filing of Defendant's Answer, Plaintiff filed a Motion for Summary Judgment¹, and Defendant responded to that Motion. On December 30th, 1999, a hearing was held on Plaintiff's

¹ Either party may move for summary judgment by alleging that there is no genuine issue as to any material fact and by alleging that the moving party is entitled to judgment as a matter of law. 20 CNCA App. Rule 21.

Motion. At the hearing both parties were represented by counsel, documentary evidence was submitted and accepted into evidence, witnesses called by the parties were examined and cross-examined, and both lawyers presented argument to the Court on the evidence submitted and Cherokee law.

Recusal

After Byrd filed his response to Wilcoxon's Motion for Summary Judgment, Byrd filed a Motion for *In Camera* Hearing, citing 20 CNCA § 59 [the "Recusal Motion"]. A hearing was held on Byrd's Recusal Motion on December 30th, 1998, prior to the hearing on Wilcoxon's Motion for Summary Judgment. At the Recusal Motion hearing, Byrd's counsel asked that the Chief Justice recuse [disqualify] himself from the case.² Byrd's lawyer stated that her client instructed her to express his *concerns about your impartiality in this matter*.³

Byrd's lawyer stated that Byrd was concerned, *because of the situation where orders have come from the Judicial office indicating that Mr. Wilcoxon is a District Judge and has ordered in the past that hearings be held in front of Judge Wilcoxon*.⁴ The argument put forth by Byrd's lawyer is both clever and novel. It is also fatally flawed.

In effect, Byrd is arguing that his actions, such as the May 15, 1997, letter to Wilcoxon⁵, and refusal to pay Wilcoxon (except for the intermittent payment of Wilcoxon's judge's salary)⁶ constitute an adjudication by Byrd that Wilcoxon's term expired in April, 1997, and the Court should have followed Byrd's decision on the matter without question.⁷ This argument has the cart before the horse, and is contrary to Article IV, Distribution of Power, and Article VII, Judicial, of the Cherokee Constitution. **IT IS THE JUDICIAL APPEALS TRIBUNAL, AND NOT THE PRINCIPAL CHIEF, WHO MAKES THE DECISIONS AND WHOSE DECISIONS**

² The Defendant's lawyer demonstrated commendable professionalism with the dignified manner in which she brought and dealt with the Recusal Motion, and such conduct is appreciated by the Court.

³ Transcript, page 4, lines 16-17.

⁴ Transcript, page 4, lines 17-21.

⁵ Plaintiff's Exhibit 2.

⁶ The May 15th letter and issues regarding payment are discussed herein, later.

⁷ Said another way, Byrd's apparent argument is: Anyone who disagrees with Byrd's decisions is prejudiced and biased against Byrd. One either obeys Byrd or disobeys Byrd; neutrality is impossible. Therefore, no court can sit in judgment of Byrd's decisions.

This sort of rationale may work in a third-world country, but it is not consistent with a constitutional, democratic republic form of government, such as is provided for in the Cherokee Constitution. There is no provision in the Cherokee Constitution for the establishment of a dictatorship, nor is there any provision in it which places any Cherokee man or woman above Cherokee law, regardless of his or her place in the world.

ARE FINAL INsofar AS THE JUDICIAL PROCESS OF THE CHEROKEE NATION IS CONCERNED.⁸

The Court recognizes that when a party claims bias and prejudice, little can be done to satisfy the party other than recusal. Therefore, even though the Defendant's argument in support of recusal was invalid, the Court denied the Recusal Motion on the grounds of the rule of necessity. *The majority view [of American courts] is that the rule of disqualification of judges must yield to the demands of necessity. Simply stated, the rule of necessity means that a judge is not disqualified to sit in a case if there is no other judge available to hear and decide the case.*⁹

Byrd did not ask that the case be heard by Justice Viles, or Justice Keen¹⁰. One can infer the reason why; he didn't want either one of them either.

*Actual disqualification of a member of a court of last resort [such as this Court] 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. In other words, 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.** The doctrine operates on the principle that a biased judge is better than no judge at all. Under such circumstance, it is the duty of the disqualified judge to hear and decide the controversy, however disagreeable it may be.*¹¹ [Emphasis added].

In this lawsuit, if the members of the Judicial Appeals Tribunal were to recuse themselves, then, Wilcoxon would be denied his Cherokee constitutional right to have the matter adjudicated. Wilcoxon has a fundamental, constitutional right in this cause to have "his day in court", and the Tribunal cannot, and will not, allow anyone a chance to destroy that right.

Facts

At the hearing on Plaintiff's Motion for Summary Judgment, it became clear that there was no genuine issue as to any material fact in this lawsuit, and the Court so finds. The parties' disagreement concerns Cherokee law and its application to the undisputed facts. The Tribunal has original jurisdiction *to hear and resolve any disagreement arising under any provisions of the ...[Cherokee] Constitution or any enactment of the Council..... The decision of the Judicial Appeals Tribunal shall be final insofar as the judicial process*

⁸ Cherokee Const. art. VII.

⁹ 46 Am Jur 2d, Judges § 92. [citations omitted].

¹⁰ The Tribunal is composed of three (3) Justices. Cherokee Const. art. VII. At the time the lawsuit was filed, October 20, 1998, and on the date of the hearing, December 30, 1998, the members of the Tribunal were Philip H. Viles, Jr., Ralph F. Keen, and Dwight W. Birdwell. Cherokee Nation Council Legislative Act No.7-95.

¹¹ 46 Am Jur 2d, Judges § 92. [citations omitted].

of the Cherokee Nation is concerned.¹² The Court finds the facts to be as follows.

Wilcoxon was nominated for the office of Associate District Judge in 1995 by then-Principal Chief Wilma Mankiller.¹³ On February 13, 1995 the Council of the Cherokee Nation approved Chief Mankiller's nomination of Wilcoxon as Associate District Judge.¹⁴ In the minutes of the Council meeting of February 13, 1995, it is stated,

President Ketcher presented on behalf of Chief Mankiller the nomination of Drew Wilcoxon to serve as Associate District Judge. Diane [sic] Barker Harold [sic] ("Harrold"), who resigned to serve as District Attorney, has resigned as District Judge for the Cherokee Nation.

Councilman Crittenden moved for the confirmation of Drew Wilcoxon to serve in the capacity as Associate District Judge. Councilman Byrd¹⁵ seconded the Motion. Motion carried.¹⁶

It is plain to see that there is no indication from the Minutes of the Council meeting that the Council intended Drew Wilcoxon to serve less than a full term as Associate District Judge. In other words, contrary to what the Defendant argues, there is no statement in the Minutes that Council only intended Wilcoxon to serve the balance of Harrold's term. The meaning of the Council minutes is clear: Harrold resigned and Wilcoxon was appointed without any limitations on his term. Wilcoxon testified that no one ever stated to him that he was serving only the remaining balance of Harrold's term.¹⁷

On February 16, 1995, the Cherokee Nation issued a "News Release"¹⁸ regarding the actions of Chief Mankiller and the Council, including the resignation of Harrold, and the appointment of Associate District Judge Wilcoxon. There was nothing in the News Release stating that Wilcoxon was only serving the remainder of Harrold's term, or that he was otherwise intended, by anyone, to serve a term of less than four (4) years.

Wilcoxon took the oath of office on February 23, 1995.¹⁹ On February 24, 1995 the

¹² Cherokee Const. art. VII.

¹³ Transcript, page 7, lines 21-22. Plaintiff's Exhibits 3, 6, and 7.

¹⁴ Plaintiff's Exhibit 3, page 2. Minutes of the Tribal Council Meeting of February 13, 1995.

¹⁵ Now Principal Chief Byrd, the Defendant herein.

¹⁶ *Id.*

¹⁷ Transcript, page 18, lines 13-20.

¹⁸ Plaintiff's Exhibit 6.

¹⁹ Transcript, page 8, lines 10-11. Plaintiff's Exhibit 1, Cherokee Nation Associate District Judge Oath of Office.

Cherokee Nation issued another "News Release"²⁰, and it speaks for itself.

*DREW WILCOXEN was recently appointed by Principal Chief Wilma P. Mankiller **to a four-year term as associate district judge for the Cherokee Nation District Court. Wilcoxen took his oath Feb. 23** in a ceremony held at the Cherokee Nation District Courthouse, in Tahlequah. Pictured from left are Chief Justice Dwight Birdwell, District Court Judge Tina Glory Jordan and Wilcoxen. [emphasis added].*

Prior to May of 1997, the right and duty of Wilcoxen to serve as an Associate District Judge of the Cherokee Nation was not questioned by anyone.²¹ However, in May, 1997, Byrd sent a letter, dated May 15, 1997, addressed to Wilcoxen which stated,

Thank you for your years of service as an Associate District Judge.

***Your appointment was for a period of four years. That term expired on April 9, 1997.** The Principal Chief has the authority to appoint District Judges and I will announce a new replacement in the very near future. Therefore, please arrange to transfer any pending files, other pertinent documents, and Cherokee Nation equipment that you may have in your possession to District Judge Tina Jordan at the Cherokee Nation complex. [Emphasis added].*

Thank you again for your service.

*Sincerely,
/s/ Joe Byrd
Principal Chief*

The letter is ambiguous in its wording, but not in the intent expressed. Wilcoxen was sworn in to office on February 23, 1995. Clearly the time period from February 23, 1995 to the date stated in the letter, April 9, 1997, is not four (4) years. However, the meaning of the letter was not ambiguous, Byrd intended to remove Wilcoxen from office.²²

²⁰ Plaintiff's Exhibit 7.

²¹ Transcript, beginning at page 9, line 22.

²² The Spring and Summer of 1997 were traumatic times for the Cherokee Nation. The May 15, 1997, letter from Byrd to Wilcoxen was not an isolated incident. The Court takes judicial notice of the following.

Byrd fired the tribal prosecutor. *Andre' Diane Blalock v. Cherokee Nation*, Case No. JAT 97-40. (The tribal prosecutor had filed criminal charges against members of the Byrd Administration). Byrd also fired certain Cherokee Nation Marshal Service officers. *William Patrick Ragsdale, et al. v. Cherokee Nation*, Case No. JAT 97-42; *Stacy R. Eubanks v. Cherokee Nation*, Case No. JAT 97-43. (In February,

Following the May 15, 1997 letter, Wilcoxon continued with his duties as Associate District Judge as best as he could.²³ Notwithstanding the notice that his term had ended, the Byrd Administration paid his monthly Associate District Judge's compensation to him for three (3) of the months subsequent to May, 1997.²⁴ Wilcoxon testified that his monthly compensation as Associate District Judge was \$1,500 per month.²⁵ Wilcoxon testified that his unpaid compensation, through February, 1999, would be \$28,000.²⁶

Even though most of the District Court files were locked away, presumably at the Complex, Wilcoxon, nonetheless, attempted to conduct his docket subsequent to May of 1997, and lawyers for the Cherokee Nation appeared before him.²⁷ Sometimes, but not always, lawyers with the Cherokee Nation made an objection, on the record, to appearing

1997, Cherokee Nation Marshals had served a search warrant pertaining to documentary evidence of alleged criminal activity by members of the Byrd Administration as part of a criminal investigation).

The Council of the Cherokee Nation consists of fifteen (15) members. Cherokee Const. art. V, § 3. *No business shall be conducted by the Council unless at least two-thirds (2/3) of members thereof regularly elected and qualified shall be in attendance, which number shall constitute a quorum.* Cherokee Const. art. V, § 4. In violation of Cherokee Constitution, and Order of the Tribunal [*Paula Holder, et al. V. Joe Byrd, et al.*, Case No. JAT 97-14, entered April 24, 1997] regarding notice of Council meetings, and the minimum number of members of Council required to compose a quorum of Council (which is 10), the Council illegally met, and on May 3, 1997, with only 8 of the 15 members of the Council voting, the 8 Council members purported to "impeach" the entire Judicial Appeals Tribunal. [Amazingly, also in April, 1997, the same 8 members of the Council who voted for the "impeachment" of the Tribunal Justices, had vigorously argued that a quorum of Council required no less than 10 members be present. See brief filed by attorney, Clifford A. Wright, April 3, 1997, *Robin C. Mayes v. Don Crittenden, et al.*, Case No. 97-10].

Also in May, 1997, District Judge Tina Jordan, without permission from the Tribunal (which inherently has the responsibility for general superintendence of the District Court, and also through 20 CNCA § 52) removed the District Court files from the Courthouse and established an illegal "court" at the Cherokee Nation complex, which is under the control of the Byrd Administration. (Note in Byrd's letter of May 15, 1997, he ordered Wilcoxon to transfer files, etc. to the Complex). On May 14, 1997, the Tribunal issued an Order suspending Judge Jordan. Case No. JAT AD-97-02. On May 16, 1997, the Tribunal assigned all of suspended Judge Jordan's cases to Associate District Judge Drew Wilcoxon. The Tribunal also Ordered Judge Jordan to immediately return the District Court files to the Courthouse. Case No. JAT AD-97-03. Those District Court files have never been returned to the Courthouse.

Associate District Judge Drew Wilcoxon refused to join Judge Jordan's illegal court. On May 15th, 1997, Byrd sent his letter to Wilcoxon, set forth above, notifying Wilcoxon that he was no longer a Judge.

²³ Transcript, page 11, lines 14-16.

²⁴ Transcript, beginning on page 14, line 25, through page 15, line 2.

²⁵ Transcript, page 13, lines 15-19.

²⁶ Transcript, page 16, lines 12-15.

²⁷ Transcript, page 11, lines 14-23, and page 21, lines 17-22.

before him, but they proceeded with their representation following his overruling of the occasional objection.²⁸ Wilcoxon testified that the bulk of his case load involved juvenile affairs, adoptions, termination of parental rights and placements of children. He stated that he had received no cooperation from Indian Child Welfare ("ICW")²⁹, and this had caused hardship for a number of children who are awaiting adoption, or who are in a foster care placement and who are unable to be adopted because of parental rights not being terminated.³⁰

Remedies Requested

Wilcoxon seeks the following relief through this lawsuit.

- ▶ Declaratory judgment that his term of office as Associate District Judge of the Cherokee Nation has not expired.
- ▶ A writ or order to the Cherokee Nation Marshal Service and/or the BIA Police to seize the District Court files illegally seized and taken from the Cherokee Nation Courthouse, and to return them to the Courthouse.
- ▶ A judgment for back pay withheld.
- ▶ A judgment for attorney's fees and the cost of the action.

Issues

1. When does the term of office of Drew Wilcoxon, as Associate District Judge of the Cherokee Nation, sworn into office on February 23, 1995, end?

2. Depending on the Answer to Question 1, what remedy, if any, is Wilcoxon entitled to be awarded by the Court?

Discussion

The Court has found that there is no genuine disagreement between the parties as to any material fact in this lawsuit. Therefore, the task for the Court becomes one of applying Cherokee law to the facts, and issuing a ruling thereon, accordingly.

20 CNCA § 13, Terms of District Judges, is straightforward.

District judges and associate district judges shall be appointed for a term of four (4) years. Previous appointments and service by a district judge

²⁸ Transcript, page 22, lines 4-8.

²⁹ The Court takes judicial notice that ICW is controlled by Byrd.

³⁰ Transcript page 15, lines 8-19.

shall not disqualify the judge for continued appointment and service.

As can be plainly observed, there is no provision in §13 for filling partial terms. There is also no provision for a staggering of the terms of office of judges of the District Court, as there is in 20 CNCA §33³¹ concerning Justices of the Judicial Appeals Tribunal. The reason is simple. The Constitution provides that the Tribunal shall consist of three (3) Justices³² and 20 CNCA §33 staggers the terms of office of the Justices. There is no provision in the Constitution for the District Court, and 20 CNCA §12, Composition, does not specify a number of Associate District Judges other than “one or more.” Under §13, the term for a judge of the District Court is four (4) years. If there was something comparable to §33 regarding District Court judges, Byrd might have an argument; but there isn’t.

As a consequence, Byrd has relied somewhat upon 20 CNCA § 14, Oath of District Judge, and heavily upon 20 CNCA § 15, Disability or Vacancy of Office of District Judge, to support his position.

Byrd’s lawyer asked Wilcoxon if there was anything in the Oath of Office he took stating how long his term would be, and he replied, “no”.³³ Wilcoxon told the truth. The Oath of Office found in §14 is taken directly from Article XIII, Oath, of the Cherokee Constitution. Article XIII requires ALL elected or appointed Cherokee officers take and subscribe to the Oath before entering upon the duties of their respective offices. There is no reference in the constitutional oath to the length of the term of office for anyone. This argument lacks any merit.

Byrd’s lawyer did an excellent job in attempting to make §15 fit the facts and support her client’s position in the lawsuit. However, the argument made required an “apple”, and the facts of the case coupled with §15, to equal an “orange”. 20 CNCA §15, provides,

Whenever a district judge or associate district judge is unable to perform his duties of office or the office is vacant, his powers and duties shall devolve upon the associate district judge next in seniority who is able to act, until such disability is removed or another district judge is appointed and duly qualified.

§15 is clearly a “stop gap” provision to insure a smooth operation of the District Court. When, for example, a judge is ill, the judge next in seniority assumes that judge’s case load until the judge recovers. However, neither TERM of the incapacitated judge nor the “stand in” judge is affected by §15. §15 has no affect on the terms of judges of the District Court. The terms of the judges are four (4) years pursuant to §13, and §15 does not modify that fact in any fashion.

³¹ Amended, Legislative Act No. 7-95.

³² Cherokee Const. Art. VII.

³³ Transcript page 19, lines 5-14.

In the present case, Harrold resigned from her office. As Wilcoxon wasn't even then on the Court, he could not be *the associate district judge next in seniority who is able to act*. He did not "step into her shoes" until a replacement was appointed, he was the replacement, and under §13 that means he started with a four (4) year term.

Assuming Wilcoxon had been on the bench and was *the associate district judge next in seniority* when Harrold resigned, he would have only handled her caseload until *another district judge is appointed and duly qualified*. In this hypothetical example, Wilcoxon's term would have not been shortened by his assistance with the caseload until such time as the replacement judge was *appointed and duly qualified*.³⁴

In this lawsuit, Wilcoxon presented no evidence that Byrd had acted in any capacity other than in his official capacity as Principal Chief of the Cherokee Nation. Therefore, Joe Byrd, in his individual capacity, is hereby dismissed from this lawsuit. The Court further finds that Joe Byrd, acting in his official capacity, was acting as the alter ego of the Cherokee Nation. Institutions are artificial creations of humans, and when it is said they "act" or "do", those actions or doings are by and through, and can only be by and through, persons authorized to act on behalf of the institutions. Joe Byrd is the Principal Chief of the Cherokee Nation, he is its chief executive officer, and when he acts in his official capacity, as he did with the May 15, 1997, letter, his actions are the actions of the Cherokee Nation³⁵.

Holding

- ◆ The Court finds and holds that Joe Byrd, in his individual capacity, is dismissed from this lawsuit.
- ◆ The Court finds and holds that Joe Byrd, in his capacity of Principal Chief of the Cherokee Nation, was acting as the Cherokee Nation.
- ◆ The Court finds and holds that Drew Wilcoxon's term of office is four (4) years.
- ◆ The Court finds and holds that the term of office of Drew Wilcoxon, as Associate District Judge of the Cherokee Nation, sworn into office on February 23, 1995, will not end until no earlier than the last second of February 23, 1999.
- ◆ The Court finds and holds that Wilcoxon is granted a judgment against Defendant in the amount of \$28,000, which equals full payment for his

³⁴ In June, 1997, Byrd appointed J. Dewayne Littlejohn as an Associate District Judge, as Wilcoxon's replacement. Judge Littlejohn joined the kangaroo court at the Complex. Subsequently, he was suspended by the Tribunal from his duties as Associate District Judge.

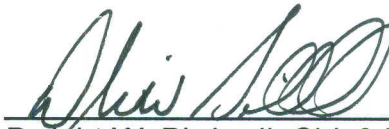
If the Court were to agree with Byrd's analysis of §15, the term of suspended Judge Littlejohn could be placed in question.

³⁵ Byrd's attorney, in this lawsuit, is an employee of the Cherokee Nation, and not Joe Byrd, the individual. In this lawsuit, she has acted upon the instructions of Joe Byrd, as Principal Chief of the Cherokee Nation, and not Cherokee citizen, Joe Byrd.

services up to the current expiration date of his term. The Defendant is granted five (5) business days to pay this amount, and if it is not so paid or tendered in good funds, execution shall proceed immediately against Defendant.

- ◆ The Court ORDERS the Cherokee Nation Marshal Service, if it still exists and is functioning, and if not, then the BIA Police under agreement with the Cherokee Nation, to immediately locate and seize the District Court files seized and taken from the Cherokee Nation Courthouse, and to return them to the Cherokee Nation Courthouse located in downtown Tahlequah, Oklahoma. Further, Byrd is ORDERED to fully assist and cooperate, and/or order his subordinates to fully assist and cooperate in such endeavor.
- ◆ The request for attorney's fees and costs will be considered, provided Wilcoxon files a motion as previously directed.

IT IS SO ORDERED THIS 15th DAY OF JANUARY, 1999.



Dwight W. Birdwell, Chief Justice of the
Cherokee Nation