

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.

Robert Wilson, Acting Treasurer
Defendant/Appellee,

Case No: CNA-SC-07-01

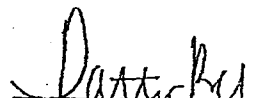
BEFORE: Chief Justice Ryland L. Rivas, Associate Justice Dennis W. Arrow,
Special Justice Karen Eby, Special Justice Taiawagi Helton, and
Special Justice Lindsay G. Robertson

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 delegees, 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

confronted the Tribes in April 2004, in *Blind v. Wilson*, 9 Okla. Trib. ___, ___ (Cheyenne-Arapaho 2006) [No. CNA-SC-04-03], slip op. at 4-5, we affirmed the District Court's April 2004 interim appointments of Mr. Blind and Mr. Wilson.

On March 18, 2005, and in a different lawsuit, the District Court directed Southwest Casinos, gaming operator of the Tribes' Concho and Clinton *Lucky Star* casinos, to remit the proceeds of those enterprises to Robert Wilson in his Interim Treasurer capacity. See *Wilson v. Blind*, 9 Okla. Trib. ___ (Chey.-Arap. D.Ct. 2005) [No. CNA-CIV-05-18], slip op. (interim order directing monthly gaming distributions). [We describe the components of that case occurring *after* the adoption of the 2006 Constitution immediately below.]

Robert Wilson continued to function as Interim Treasurer throughout the remainder of the Thirty-fourth Business Committee's constitutionally-prescribed term of office. Following the Fall 2005 elections, that Committee's existence formally ended, and under the 1975 Constitution the Thirty-fifth Business Committee succeeded it by operation of law after December 31, 2001. The Thirty-fifth Business Committee selected Darrell Flyingman as its Chairman, but the record does not document the selection of a new Treasurer.

B.

Following the entry into force of the 2006 Constitution on April 4, 2006, special elections were conducted for the newly-created positions of Governor and Lieutenant Governor, *see generally* CHEY.-ARAP. CONST. [2006] art. IX, § 15(c) (providing for that election), and under the new Constitution what was the Thirty-fifth Business Committee became the First Legislature by operation of law on April 4, 2006, *see id.* art. IX, § 15(a), (b). On July 7, 2006, the Election Commission certified the election of former Chairman Darrell Flyingman as the first Governor of the Tribes, effective with his swearing in on July 5, 2006. See Letter from Cody Zimmer, Chairman, Election Commission (July 7, 2006), at 1. The First Legislature selected Ida Hoffman as its first Speaker. Cf. CHEY.-ARAP. CONST. [2006] art. VI, § 1 (establishing that office).

On July 17, 2006, Southwest Casinos filed a Motion for Clarification (or alternatively, a Motion for Interpleader) in Case No. CNA-CIV-05-18, discussed above, in which it noted the adoption of the new Constitution and sought judicial direction regarding the proper tribal recipient of *Lucky Star* proceeds. On July 19, 2006, the newly-named Cheyenne-Arapaho Trial Court [formerly the "District Court"] entered an order in that case holding "that Robert Wilson remains the Tribes' Treasurer until such time that a Department of Treasury is established and a Tribal Treasurer is nominated and confirmed in accordance with the Constitution." *Wilson v. Blind*, 9 Okla. Trib. ___ (Chey.-Arap. Trial Ct. 2006) [No. CNA-CIV-05-18] (clarification order). On August 18, 2006, the Trial Court clarified its July 19 clarification order, ordering further: "Southwest Casinos is to turn \$ over to Robert Wilson until Department of Treasury established. \$ to be handled in accordance to new Constitution with respect to expending, etc." *Wilson v. Blind* [No. CNA-CIV-05-18] (minute order). Southwest Casinos has apparently complied with that order from the date of its issuance to the present date, and all parties apparently agree that there was approximately \$6 million in *Lucky Star* proceeds in one or more bank accounts controlled by Robert Wilson as of February 23, 2007.

On August 28, 2006 (and although he had not been a party to the case below), Governor Flyingman filed with this Court a Notice of Appeal of Case No. CNA-CIV-05-18. That appeal, captioned *Wilson v. Blind* and numbered CNA-SC-06-06, is not before us today.

C.

Flyingman v. Wilson [No. CNA-SC-07-01], which is before us today, began with the filing in the Trial Court [in a case therein numbered CNA-CIV-06-88] of an Emergency Motion for Writ of Mandamus by Governor Flyingman against Interim Treasurer Wilson on December 26, 2006. In *Flyingman* [for ease of identification, hereinafter "01"], after recounting both the circumstances under which Mr. Wilson became Interim Treasurer and the circumstances under which Mr. Wilson came to control *Lucky Star* proceeds, the Governor invoked the new 2006 Constitution in seeking a judicial order directing the Interim Treasurer to deposit the *Lucky Star* proceeds into the tribal treasury. The record reveals the existence of multiple 2006 communications (all after the adoption of the new Constitution) in which Governor Flyingman ordered Interim Treasurer Wilson to deposit the *Lucky Star* proceeds into the tribal treasury, and in which those demands were rejected by Interim Treasurer Wilson. As plaintiff below, the Governor also sought damages against the Interim Treasurer for lost interest due to Mr. Wilson's alleged failure to promptly deposit the gaming proceeds into financial institutions wherein interest could be earned, and other related relief.

At the core of the Governor's Trial Court case in "01" was the argument that the Trial Court's extension of Mr. Wilson's status as Interim Treasurer by its July 19, 2006 and August 18, 2006 orders in Case No. CNA-CIV-05-18 violated several separation-of-powers provisions of the 2006 Constitution, *see generally supra* at 3-6 & nn.1-23 (enumerating some of the governance modifications effectuated by the 2006 Constitution). The Trial Court denied all relief on January 3, 2007, *see Flyingman v. Wilson*, 10 Okla. Trib. __ (Chey.-Arap. Trial Ct. 2007) [No. CNA-CIV-06-88], slip op. at 3-5, and Governor Flyingman appealed to this Court. While in this appeal the Governor disputes many of the Trial Court's findings and conclusions, excluding issues more directly presented to this Court by *In re Executive Authority* [No. CNA-SC-07-02], discussed below [for ease of identification, hereinafter "02"], the core of the Governor's "01" argument for reversal of the Trial Court's decision in No. CNA-CIV-06-88 is effectively threefold.

First, the Governor argues, because Mr. Wilson is also the elected Cheyenne District 2 Legislator, both the general separation-of-powers provision of Article II, Section 2 of the 2006 Constitution (dividing the new tribal government into four branches) and the more specific language of new Article II, Section 3 (forbidding, unless otherwise specifically constitutionally authorized, officials of any branch from exercising any powers of any other branch) render unconstitutional the Trial Court's post-2006-Constitution renewal of Mr. Wilson's Interim Treasurer status. The Legislature, the Governor argues, is the "Legislative Branch," and the Treasurer is made an Executive Branch official by new Article VII, Sections 1(c) and 4(e). Essentially, the Governor's position under new Article II reduces to the following: Robert Wilson may not simultaneously be a Legislative Branch Legislator *and* the Executive Branch's Treasurer (even if only "Interim").

Second, the Governor argues, the Trial Court's July 19 and August 18, 2006 orders in No. CNA-CIV-05-18 were independently unconstitutional under new Article VI, Section 4(e), which provides that "[n]o Legislator shall be otherwise employed in any governmental capacity."

Third and in any event, the Governor maintains that he lawfully nominated William E. West to be Executive Director of the Department of Treasury (and therefore, by constitutional definition, the Treasurer²⁵) by a communication to the Legislature on August 9, 2006, and that in light of the responsive legislative action (or inaction) described later in this opinion, Mr. West has now become tribal Treasurer under the applicable "automatic-confirmation-by-operation-of-law" provision of the new Constitution, see CHEY.-ARAP. CONST. [2006] art. VII, § 4(h).

Directly related to the above issues are the questions of whether new Article VII, Section 1(c) itself created a Department of Treasury, and/or whether such a Department was created by the Twenty-ninth Business Committee when it adopted a tribal Accounting and Finance Manual in 1995, see Resolution No. 092395S190 (Sept. 23, 1995).

Our review of the record as a whole thus suggests that "01" [*Flyingman v. Wilson*] essentially presents the "Who, if anyone, is the Treasurer?" question (and some closely-related questions) to this Court.

D.

In re Executive Authority [No. CNA-SC-07-02] ["02"] began with Governor Flyingman's filing in the Trial Court [in a case therein numbered CNA-CIV-06-89] of an Emergency Motion for Declaratory Judgment on December 27, 2006 — the day after he filed his Emergency Motion for Writ of Mandamus in what is now "01" herein. In various filings in what is now "02" in this Court, the Governor first noted that anyone spending tribal funds not lawfully appropriated is guilty of the constitutional crime of embezzlement under Article VII, Section 4(b) of the 2006 Constitution; contended that while a legally-cognizable budget may or may not have been adopted for 2006, it is clear that none has been adopted for 2007; and in consequence sought a judicial order authorizing him to spend money on what he deems "essential governmental functions" to avoid what he argued would have otherwise been a complete shutdown of tribal government. See Emergency Motion for Declaratory Judgment *passim*; Complaint *passim*, *In re Executive Authority*, No. CNA-CIV-06-89 (Chey.-Arap. Trial Ct. Dec. 27, 2006). Appearing *pro se*, and apparently attempting to represent the Legislature, five Legislators (including Robert Wilson in his capacity as Cheyenne District 2 Legislator) replied in writing on December 29, 2006 to deny many of the Governor's factual assertions and/or characterizations, to deny the existence of an emergency, and to request that the Trial Court take no action on the matter.

On January 3, 2007, the Trial Court denied all relief. See *In re Executive Authority*, 10 Okla. Trib. ____ (Chey.-Arap. Trial Ct. 2007) [No. CNA-CIV-06-89]. Governor Flyingman appealed to this Court, and in its present posture "02" presents us with a significant number of separation-of-powers and appropriation-and-expenditure issues for resolution.

²⁵ See CHEY.-ARAP. CONST. [2006] art. VII, § 4(c) ("The Executive Director of the Department of Treasury shall be called the Treasurer.").

E.

On February 16, 2007, by Order of Chief Justice Rivas, this Court consolidated "01" and "02" for purposes of appeal, and scheduled oral argument for February 23, 2007. The parties submitted supplementary briefs pursuant to this Court's February 16 Order, and both "01" and "02" were submitted following lengthy and comprehensive oral argument on February 23, 2007.

In the interests of promptness, efficiency, and urgency, we decide "01" in this Opinion and Order, and will issue an Opinion and Order in "02" shortly after the filing of this Opinion. We decide the case before us today on the basis of the situation existing at the time "01" (and for that matter, "02") were submitted — February 23, 2007. Because any matters occurring after that date are not now before this Court in either "01" or "02," we express no opinion on the legality of (or any legal consequences flowing from) any actions that may have been taken by any tribal official or Branch after February 23, 2007.

III.

A.

Through their attorneys at oral argument, all parties to "01" (and for that matter, "02") reached common ground that the 1975 Constitution is essentially dead. Nevertheless, Article II, Section 1 of the 2006 Constitution provides in part that "[a]ll the existing laws of the Tribes shall remain in full force and effect unless such laws are contrary to . . . this Constitution." For "01" purposes, Interim Treasurer Wilson urges that whatever the new Constitution's separation-of-powers provisions may require prospectively, they are superseded in this instance by the Trial Court's continuing power to perpetuate the Interim Treasurer appointment that he held under the old Constitution despite the fact that he is also the Cheyenne District 2 Legislator in the new Legislative Branch. We disagree.

Nothing could be clearer than the fact that in ratifying the 2006 Constitution, the voters of the Cheyenne-Arapaho Tribes overwhelmingly repudiated one-branch, Business-Committee-style government (which, as noted above, had proven ineffective at preventing corruption, and which had tempted far too many Business Committee Representatives into self-interested "gaming" of the system, passive aggression, and the ultimate abandonment of their responsibilities to the Tribes). Yet in some respects Mr. Wilson's position seems to view the legal issues as if the new Constitution had been *defeated*, with the new Legislature (and its Legislators) capable of exercising powers much as did the old Business Committee (and its Representatives). But while under the old Constitution a Business Committee Representative was *always* the Treasurer, we hold today that under the new Constitution a Legislator *may never be* the Treasurer. We do so for the following reasons.

Article II, Section 2 of the new Constitution divides the Tribes' governmental powers among four branches, and taken together, Article VII, Sections 1(c)²⁶ and 4(e)²⁷ make clear that *the Treasurer is an Executive Branch official*. As the Cheyenne District 2 Legislator, Robert Wilson is already a *Legislative Branch official*, and Article II, Section 3 (entitled "Separation of Powers") provides in full:

No official of any branch of Government shall exercise any power granted in this Constitution or properly delegated by law to any other branch of Government except as expressly directed or permitted by this Constitution.

CHEY.-ARAP. CONST. [2006] art. II, § 3 (emphasis added).

We have carefully searched the 2006 Constitution for authority to deviate from Article II, Section 3's general commands with respect to the particular office of Treasurer, but found none. We have carefully searched the numerous briefs submitted by Interim Treasurer Wilson, through his counsel, for persuasive argumentation that authority for such deviation exists, but found none. Indeed, what we *do* find is that were Article II, Section 2 and Article II, Section 3 not enough, the 2006 Constitution also provides categorically (and even more specifically, with direct reference to Legislators) that "[n]o legislator shall be otherwise employed in any governmental capacity."

CHEY.-ARAP. CONST. [2006] art. VI, § 4(e) (emphasis added).

The 2006 Constitution is not the 1975 Constitution. The new structure of government is not the old structure of government. The new Legislature is not the old Business Committee. The new Governor is not the old Business Manager. The new Treasurer is not the old Treasurer. In consequence, Robert Wilson, Cheyenne District 2 Legislator, may not simultaneously be the (Executive Branch) Treasurer of the Tribes — even on an interim basis. For that individually-dispositive reason, the January 3, 2007 decision of the Trial Court in *Flyingman v. Wilson*, Case No. CNA-CIV-06-88, is VACATED.

For "01" purposes, however, all of the above analysis only decides that under no circumstances may *Robert Wilson* be the Treasurer or Interim Treasurer of the Tribes, leaving three closely-related issues for us to consider: (1) Whether there is now a Department of Treasury over whom *anyone* might be Executive Director (and therefore Treasurer²⁸); (2) If so, whether *William E. West* is now the Treasurer, or whether that office is (or may be) vacant; and (3) What precise *relief* we should order with respect to the Treasurership in view of our resolution of the other Treasurer-related issues. It is to those matters that we now address our attention.

²⁶ See CHEY.-ARAP. CONST. [2006] art. VII, § 1(c) ("The Executive Branch shall be comprised of Departments created by law which shall include . . . a Department of Treasury . . ." (emphasis added)).

²⁷ See CHEY.-ARAP. CONST. [2006] art. VII, § 4(e) ("The Executive Director of the Department of Treasury shall be called the Treasurer." (emphasis added)).

²⁸ See *id.* (quoting new Article VII, Section 4(e)).

B.

In full, Article VII, Section 1(c) of the 2006 Constitution (which appears in the "Executive Branch" Article, and is entitled "Composition") provides:

The Executive Branch shall be comprised of Departments created by law which shall include at a minimum a DEPARTMENT OF HOUSING, a DEPARTMENT OF JUSTICE, a DEPARTMENT OF LAW ENFORCEMENT, a DEPARTMENT OF ENROLLMENT, a DEPARTMENT OF HEALTH, a DEPARTMENT OF EDUCATION, a DEPARTMENT OF SOCIAL SERVICES, a DEPARTMENT OF TREASURY which shall include an Office of Internal Auditor, a Budget Office, and a Finance Office, and any additional Departments created by law subject to the approval of the Tribal Council. The Executive Branch shall also be comprised of a DEPARTMENT OF ADMINISTRATION which shall include an Office of Records Management, an Office of Personnel, a Property and Supply Office, a Procurement, Grants, and Contracts Office, and a Planning and Development Office. Each Department shall have one Executive Director.

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

We construe "shall" as mandatory — not merely permissive. The fact that the 2006 Constitution enumerates nine Departments²⁹ that "shall . . . at a minimum" exist, along with "additional Departments created by law subject to the approval of the Tribal Council," *see id.* (emphasis added), makes clear that the use of the qualifying phrase "created by law" in the first line of Article VII, Section 1(c) does not empower the Legislature to *refuse* to create any of the enumerated nine Departments at its discretion. In light of the 2006 Constitution's separation-of-powers-based governmental structure, and the fact that the new Constitution provides further that "[t]he Executive Branch shall be comprised of a Governor and Lieutenant Governor," *id.* art. VII, § 1(a) (emphasis added), and "shall be comprised of [Executive-Branch] Departments," *id.* art. VII, § 1(c) (emphasis added), any possible interpretation of Article VII, Section 1(c) that allows the Legislature to paralyze the Executive Branch by refusing to create the Departments through which the Executive Branch may actually *function* would by itself defeat the new Constitution's separation-of-powers structure. This we will not do. "Shall" means "must," and in the instant context we construe Article VII, Section 1(c) to require our recognition of the *existence* of the enumerated nine Departments even if the Legislature fails in its independent duty to create them.

The nine Departments enumerated in Article VII, Section 1(c) may thus be deemed to have effectively been created by the Constitution itself, and what, if anything, the Legislature may do with respect to those Departments' *internal structures* (while allowing them to effectively function) is a question we need not address today. For now, it suffices to say that there currently exists at least the

²⁹ Those nine are the Departments of (1) Housing; (2) Justice; (3) Law Enforcement; (4) Enrollment; (5) Health; (6) Education; (7) Social Services; (8) Treasury; and (9) Administration. *See* CHEY.-ARAP. CONST. [2006] art. VII, § 1(c).

shell of a Department of Treasury over which *someone* may be Executive Director (and therefore tribal Treasurer).³⁰

C.

As noted above, Darrell Flyingman's term as Governor under the 2006 Constitution formally began with his swearing-in on July 5, 2006. *See supra* at 8. On August 9, 2006, in a memorandum from the Governor (on the Governor's letterhead) to all Legislators (captioned "Departments Created by Law") [hereinafter "August 9 memorandum"], the Governor began: "According to the 2006 Constitution, Article VII — Executive Branch, Section 1 — Composition — (c), the following departments have been created by law. Although many of the departments are in place, but under program titles established by former resolutions." A chart, consisting of three vertical columns, headed, respectively, "New Department," "Former Name," and "Director" immediately followed.

In the left, or "New Department" column, the Governor listed the nine Departments mandated by Article VII, Section 1(c), and the eight subordinate Offices (within the Departments of Treasury and Administration) also mandated by that provision. In the center, or "Former Name" column, the Governor listed the name of the former entity (if any) that corresponded to the new Department (or Office). In the right, or "Director" column, the Governor named the persons he had selected to be the Executive Directors of the Departments. [Where no individual was named in the "Director" column, in place of a name appeared the words: "Will Advertise for Director."] The Governor concluded the August 9 memorandum by thanking the Legislators for their consideration of the matter, and stating that he looked forward to meeting with them in the future.

Six of the nine Departments mandated by new Article VII, Section 1(c) had the names of Executive Directors listed at the corresponding place in the "Director" column; three had "Will Advertise for Director" instead of a name. In the center, or "Former Name" column corresponding to the "Department of Treasury" listing appeared the words "Tax Commission." In the right, or "Director" column corresponding to the "Department of Treasury" listing was the name "Bill West."

Three days later, one of the members of the First Legislature (not otherwise identified by the record) introduced a legislative bill entitled the Legislative Procedures Act. *See* Bill No. 01-08-01, 1st Leg., Aug. 13, 2006 [hereinafter "Bill No. 01-08-01"]. That Bill contained a section (Section 1.5) entitled in material part "Procedures for the Confirmation of Nominees." Subsection 1.5(1) began with the recital that "certain actions . . . do not make laws affecting the public and . . . are not therefore Legislative Proposals, . . . includ[ing] confirmation of the Governor's nominees . . ." Again in material part, Subsection 1.5(7), entitled "Additional Requirements for Administrative Resolutions Confirming the Governor's Nominees," provided that where legislative confirmation of a gubernatorial nominee is required,

³⁰ In light of our resolution of the Department of Treasury question directly under Article VII of the 2006 Constitution, we need not resolve the alternative hypothesis that the Twenty-ninth Business Committee created a shell "Department" of Treasury, cognizable as such after the 2006 Constitution's ratification under new Article II, Section 1 as an "existing law[s] of the Tribes . . . [not] . . . contrary to the [new] Constitution," when that Business Committee adopted a tribal Accounting and Finance Manual in 1995. *See generally* Resolution No. 092395S190 (Sept. 23, 1995).

the Governor *shall submit to the Legislature a proposed resolution confirming the nominee, along with a curriculum vitae of the nominee and a certification by the Director of the Department of Administration that the nominee fulfills all criteria established by law for the position, the proposed salary for the position, budget justification for the position, and that the nominee is the most qualified candidate for the position.*

Bill No. 01-08-01, § 1.5(7) (emphasis added). The record does not document the existence of any legislative confirmation hearings with respect to Mr. West at any time, or any other legislative response to the Governor's August 9, 2006 memorandum before December 9, 2006. On that date, by a 6-0 vote, the Legislature adopted Bill No. 01-08-01.

As noted above, the Trial Court issued its second clarifying order in Case No. CNA-CIV-05-18 on August 18, 2006; that order directed Southwest Casinos to remit the *Lucky Star* proceeds to Robert Wilson. *See supra* at 8. The above-discussed gubernatorial demands (and refusals by Mr. Wilson) to deposit the *Lucky Star* proceeds into the tribal treasury then ensued, with the Governor finally writing a December 21, 2006 letter to Mr. Wilson maintaining that in light of the Legislature's failure to hold hearings on (or vote on) Mr. West's "Executive Directorship" in the more than four months following the August 9 memorandum, Mr. West had been automatically confirmed as Treasurer by operation of law under Article VII, Section 4(h) of the new Constitution. The Governor's late-December filing of the Trial Court lawsuits underlying what are now "01" and "02" herein (and Mr. Wilson's and/or various other Legislators' responses thereto) brought 2006 to an unhappy close.

The Governor lost both "01's" and "02's" underlying cases in the Trial Court on January 3, 2007, and two days later Mr. Wilson, in his Interim Treasurer capacity, directed the tribal Controller, Gary Baker, "immediately to begin the process of adding [Mr. Wilson] to all signature cards for any type of account or fund bearing the name of the Cheyenne and Arapaho Tribes." *See Memorandum from Robert Wilson to Gary Baker (Jan. 5, 2007), at 1.*

The same day, Governor Flyingman wrote Ida Hoffman, Speaker of the First Legislature, "re-nominat[ing] William West as Treasurer and the Executive Director for the Department of Treasury of the Tribes." In that letter, however, the Governor also reasserted that Mr. West had already been confirmed by operation of law as a result of legally-cognizable inaction by the Legislature following his August 9 memorandum. *See Letter from Darrell Flyingman to Ida Hoffman (Jan. 5, 2007), at 1.* On January 9, Speaker Hoffman replied:

Contrary to your belief that Mr. West was properly nominated and confirmed, this correspondence will serve as an official notice to the Executive Branch, of the following: The Legislative branch has not received a proper nomination from the Executive Branch. Mr. William West *has not been confirmed* by the Legislative Branch and additionally has not been authorized to serve as Acting or Interim Treasurer. We will once again provide the Executive Branch the proper procedure to follow

See Memorandum from Ida E. Hoffman to Darrell Flyingman (January 9, 2007) [hereinafter January 9 Reply], at 1 (emphasis in original). Speaker Hoffman then referenced the Trial Court's January 3, 2007 ruling in No. CNA-CIV-06-88 (which we have vacated above, *see supra* at 12), and attached a copy of Bill No. 01-08-01, which the Legislature had adopted a month before. She concluded: "Your 'Nomination of William West as Treasurer' is being *returned to you*. Please, comply with the necessary requirements. Should you have any questions, or need additional information, please have Mr. Monetatchi, Lt. Governor, contact our office." See January 9 Reply at 1-2 (emphasis added).

The entire five-month sequence of events regarding the Treasurership from August 9, 2006 (the date of Mr. West's arguable first nomination) to January 9, 2007 (the date of Speaker Hoffman's "return[]") of Governor Flyingman's January 5 nomination or re-nomination of Mr. West) is reminiscent of the kind of bickering, system-gaming, gridlock, paralysis, and ultimate stalemate for which recent Business Committees became infamous (and that was reflected by the Thirty-fourth Business Committee's implosion). The ratifiers of the 2006 Constitution tried very hard to do something about all that when they adopted the new Constitution's gridlock-breaking changes. *Cf. supra* at 4-6 (describing and characterizing the changes numbered 10 through 17). We do not believe that the more than three-fourths of Cheyenne-Arapaho voters who ratified the 2006 Constitution were attempting to substitute one system of gridlocked stalemate for another when they voted for the new Constitution.

At a high level of generality, we noted above that the new Constitution first established four branches of tribal government, then divided powers among them and provided checks and balances protecting (and limiting) each. More specifically, it assigned the executive power to the Governor, and established Executive Branch Departments through which the Governor might "execute, administer, and enforce the laws . . . [and] court orders." See CHEY.-ARAP. CONST. [2006] art. VII, §§ 1(c), 4(a). In an attempt to contribute to *intra*-Executive Branch cooperation (essentially by facilitating any future Governor's ability to work with senior Executive Branch officials in whom he or she had confidence), the new Constitution causes the Governor and Lieutenant Governor to be elected "as a team," renders the latter constitutionally "subordinate to" the former, *see id.* art. VII, §§ 1(a), (b), and invests the Governor with the power to nominate departmental Executive Directors, *see id.* art. VII, § 4(h). But to prevent too great an accretion of power in the Governor, his or her power to nominate is subjected to the counterweight of Legislative Branch confirmation. *See id.* The drafters and ratifiers of the 2006 Constitution also knew about gridlock and its causes, however, and provided for automatic "confirmation by operation of law" of gubernatorial Executive Director nominees in cases of legislative inaction. *See id.*

The Governor urges that self-aggrandizement, "system-gaming," and for constitutional purposes, legislative inaction are precisely what occurred following his submission to the Legislature of the August 9, 2006 memorandum. In reply, Mr. Wilson (and apparently, other Legislators³¹) urge

³¹ Mr. Wilson's counsel, Kyme A.M. McGaw, represented to this Court at oral argument that in addition to representing Mr. Wilson (apparently only in his Executive Branch capacities) she also represents some legislators in their individual capacities. Be that as it may, we note that no one other than Mr. Wilson is a party adverse to Mr. Flyingman in this case, and that in her Notice of Appearance herein she purports to represent only Mr. Wilson. *See* Notice of Appearance at 1 n.1, *Flyingman v. Wilson*, No. CNA-SC-07-01 (Chey.-Arap. S.Ct. Jan. 29, 2007) ("This representation is limited to defendant Wilson in his official capacity as interim court-appointed Treasurer promoting the interests of financial accountability, adherence to tribal law, and legal operation of the Cheyenne-Arapaho tribal

to this Court that the nomination requirements and processes established by Subsection 1.5(7) of Bill No. 01-08-01 were valid exercises of legislative power, and moreover were factually justified by the Governor's refusal to communicate to them important information about the qualifications and background of Mr. West (and/or other gubernatorial nominees). Through counsel, the Governor contests the accuracy of that characterization.

Happily, we need not resolve any factual disputes about the Governor's willingness *vel non* to share information with the Legislature, or the good faith of the Legislature, or the good faith of the Governor, or anything of the kind, because we today hold that irrespective of any such underlying facts, on its face Subsection 1.5(7) of Bill No. 01-08-01 unconstitutionally intrudes on the power of this Governor (and any future Governor) to exercise the power to nominate Executive Directors under Article VII, Section 4(h) of the 2006 Constitution. Our conclusion is reconfirmed by the "separation of powers" provisions of new Article II, Sections 2 and 3.

The Legislature, to be sure, has the power to make "laws and resolutions in accordance with the Constitution," *see* CHEY.-ARAP. CONST. [2006] art. VI, § 5(a), and enjoys also "the power to set its own procedures consistent with [the] Constitution," *see id.* art. VI, § 5(c). But Subsection 1.5(7) may not be justified as a rule of purely internal procedure under Article VI, Section 5(c) because it manifestly purports to also bind the Governor. Neither is it an otherwise-constitutional law or regulation under new Article VI, Section 5(a) because it unconstitutionally intrudes on the Governor's authority, *see* CHEY.-ARAP. CONST. [2006] art. VII, § 4(h), to nominate to an Executive Directorship of a Department any person not disqualified by the 2006 Constitution itself, *cf.*, *e.g.*, *supra* at 3 & n.3, 12 (citing some such constitutional provisions).³²

Even though the Legislature may obtain a background check on any gubernatorial nominee (or anyone else) from commercial sources for a very small sum of money, it would certainly seem politically advisable for any Governor to share information about his or her Executive Director nominees with the Legislature for an obvious reason: while any Governor is free to nominate for an Executive Directorship anyone he or she pleases with the constitutional qualifications for the position (and may choose to share any information or no information at all on nominees with the Legislature), the Legislature may vote "no" on any individual nominee for any among the wide variety of reasons not prohibited by the Cheyenne-Arapaho Constitution.

government."). While the conflict-of-interest possibilities both for attorneys representing tribal officials who attempt to simultaneously serve in two Branches and for those officials themselves should be obvious, we specifically note that on December 29, 2006, Robert Wilson signed the *pro se* Trial Court Response of the First Legislature to Governor Flyingman's Motion for Declaratory Judgment (in the case now "02" herein) in his capacity as Cheyenne District 2 Legislator. [Ms. McGaw's Entry of Appearance in "02" is identical in form substance to her Entry in "01," but she spoke quite freely on behalf of the Legislators whom she informed this Court she also represented at the consolidated February 23, 2007 "01"/"02" oral argument.]

³² Section 1.5(7)(a) of Bill No. 01-08-01 provides one of several examples of the extent of Bill No. 01-08-01's interference with prerogatives constitutionally assigned to the Governor, by requiring the Executive Director of the Department of Administration to certify that any gubernatorial nominee "is the most qualified candidate for the position." What that might mean even theoretically is one problem. But the core of the instant separation-of-powers-based problem is that Subsection 1.5(7)(a) substitutes the judgment of the *Executive Director of the Department of Administration* (with respect to who is the "best qualified candidate") for the judgment of the Governor, effectively stripping the Governor of *his* constitutional discretion in the appointment of departmental Executive Directors.

But the anti-gridlock, anti-passive-nonfeasance “automatic-confirmation-by operation-of-law” provision of new Article VII, Section 4(h) was placed into the new Constitution for a reason, and if the Legislature wishes to avoid its operation, the Legislature must, in an otherwise-proper manner, vote against the nominee within ninety days of its receipt of the nomination. If it does not, the nomination is automatically confirmed by operation of law. The framers of the 2006 Constitution inserted Article VII, Section 4(h) into the Constitution to prevent passivity-induced and/or “system-gaming”-induced gridlock, and given both the text and recent tribal history this Court will not be passive about enforcing Article VII, Section 4(h)’s “confirmation-by-operation-of-law” component. To avoid its operation, all the Legislature need do is *vote in a timely manner on the Governor’s Executive Director nominees*. For the sake of governmental efficiency, political accountability, and avoiding gridlock, Article VII, Section 4(h) asks no more than that.

That said, the question remains whether the Governor’s August 9 memorandum, described in significant detail above, see *supra* at 14, may be deemed a lawful and Article VII, Section 4(h)-cognizable nomination of William E. West to be Executive Director of the Department of Treasury (and therefore Treasurer of the Tribes³³). We hold that it was.

When Mr. Wilson’s counsel was asked at oral argument for her responses to this matter, she argued, perhaps on behalf of the Legislature as a whole,³⁴ that had the issue been tried she would have made an offer of proof to the effect that the Legislature did not understand the August 9 memorandum to *contain* nominations. But we cannot imagine a greater prescription for Executive Branch (and tribal governmental) paralysis than for us to construe the operation of Article VII, Section 4(h)’s “automatic-confirmation-by-operation-of-law” provision — an *anti-gridlock* one — as contingent upon the Trial Court’s assessment (or our own), likely months after the fact, as to whether the Legislature (or perhaps worse, individual Legislators) subjectively construed a written and official communication from the Governor as actually nominating the persons identified by the Governor as departmental Executive Directors, depending on the Legislature’s (or individual Legislators’) subjective perceptions of the Governor’s intent in transmitting such a document. Once the Governor transmits to the Legislature a document arguably presenting Executive Director nominees (and no party herein disputed the fact of transmission), the Article VII, Section 4(h) test must be an objective one — whether a reasonable Legislator, familiar with the Constitution (or at least taking the time to review it) would have understood that document to nominate for Executive Directorships the persons listed by the Governor as the Directors of the corresponding Departments. While we would prospectively *recommend* to future Governors the use of the term-of-art “nominate,” we find that a reasonable Legislator familiar with the Constitution (or who at least took the time to review it) would have understood Governor Flyingman’s August 9 memorandum to nominate William West to be Executive Director of the Department of Treasury (and thereby to be Treasurer of the Tribes). When ninety days elapsed without an otherwise-valid negative vote on Mr. West’s nomination by the Legislature, that nomination was confirmed by operation of law. See CHEY.-ARAP. CONST. [2006] art. VII, § 4(h).

³³ See *supra* at 10 n.25 (quoting CHEY.-ARAP. CONST. [2006] art. VII, § 4(e)).

³⁴ See generally *supra* at 16-17 n.31.

D.

The final questions we must address today relate to the precise contours of the relief we should order in this case, and whether remand will be necessary with respect to any aspect of this decision. Because, *inter alia*, the relief requested by Appellant Flyingman below is substantially equitable, we have significant latitude in fashioning the appropriate decree.

We first decide to order no remand in this case. Should any dispute arise regarding the enforcement of this Opinion and Order, any aggrieved party having legal standing may seek relief by the commencement of a *new* action before the Trial Court (or, in the extraordinary circumstances in which this Court may exercise original jurisdiction, with this Court). Our Order herein, which resolves "01" in its entirety, immediately follows.

IV.

A.

We hereby ORDER, ADJUDGE, AND DECREE that from the date and time of the filing of this Opinion and Order, Appellee Robert Wilson is no longer the Interim Treasurer of the Tribes. We further order that William B. West may assume all duties of the Treasurer prescribed in the 2006 Constitution, and any other duties legally appurtenant to his status as Executive Director of the Department of Treasury, as quickly as possible, and in any event should do so within two working days following the filing of this Opinion and Order. Mr. West shall formally assume office upon his providing notice to Governor Flyingman that he is ready for duty. We further order Appellee Robert Wilson to effectuate the deposit of all *Lucky Star* proceeds under his control, and all other funds rightfully belonging to the Tribes that he may now control, into the treasury of the Tribes forthwith, and in any event no later than on the second working day following the date of the filing of this Opinion and Order. We also order that Mr. Wilson provide a full and complete accounting of all funds he has received from any source rightfully belonging to the Tribes to Governor Darrell Flyingman, to Director of the Tribal Finance Office Gary Baker, and to Treasurer William West as quickly as possible, and in no event later than the fifth working day following the filing of this Opinion and Order. Pursuant to Article VII, Section 4(e) of the 2006 Constitution, we further order that Mr. West be bonded in a sufficient amount to protect the financial assets of the Tribes. We specifically authorize Governor Darrell Flyingman, under his power to enforce court orders, *see generally* CHEY.-ARAP. CONST. [2006] art. VII, § 4(a), to cause money to be drawn from the Treasury as necessary to effectuate the Order issued by this Court today, without any fear on his part of violating the "embezzlement" provisions of Article VII, Section 4(b) of the new Constitution.

B.

Provided that Appellee Robert Wilson promptly and fully complies with every component of this Opinion and Order that requires action by him, we DENY that portion of the relief requested in the Trial Court by Governor Flyingman that sought to have Mr. Wilson pay to the Tribes any and all

lost interest due to his failure (or alleged failure) to promptly deposit funds in interest-bearing accounts inuring to the benefit of the Tribes.

C.

Assuming *arguendo* that Bill No. 01-08-01 was otherwise lawfully enacted (a question we need not reach today), we further ORDER, ADJUDGE, AND DECREE that Subsection 1.5(7) of that Bill, entitled "Additional Requirements for Administrative Resolutions Confirming the Governor's Nominees," is unconstitutional. We further ORDER, ADJUDGE, AND DECREE that Subsection 1.5(1) thereof is unconstitutional *to the extent* that it is construed to in any way bind the Executive Branch, or to derogate from Article VII, Section 4(h) of the 2006 Constitution and its construction and application in this case.

D.

We ADMONISH all parties and/or interested parties that this Court strongly disfavors Motions for Clarification and the like. We hereby ORDER, ADJUDGE, AND DECREE that the filing of any such motion herein shall not operate to stay the legal effect of this Opinion and Order in any respect.

E.

We ADMONISH all parties and/or interested parties that Motions for Rehearing are *very* rarely granted by this Court, and that in no event are such motions appropriate for "gaming-the-system" purposes, for perpetuating gridlock, or for generating delay. We hereby ORDER, ADJUDGE, AND DECREE that the filing of any such motion herein shall not operate to stay the legal effect of this Opinion and Order in any respect.

F.

We ADMONISH all parties and/or interested parties that we have previously held that the filing of a Motion to Stay does not itself automatically stay the operation of Cheyenne-Arapaho court orders, *see Stonecalf v. Election Bd.*, 8 Okla. Trib. 396, 400-03 (Cheyenne-Arapaho 2004) [No. CNA-SC-03-09], and we hereby ORDER, ADJUDGE, AND DECREE that the filing of any such motion herein shall not operate to stay the legal effect of this Opinion and Order in any respect.

G.

We ADMONISH all parties and/or interested parties to this case that the legal issues herein are not the same as those presented by *In re Executive Authority*, Case No. CNA-SC-07-02 ["02"], also submitted to this Court following oral argument on February 23, 2007. We have stated above, *see supra* at 11, that we will issue an Opinion and Order in that case shortly after the filing of this

Opinion and Order. We express no views today with respect to the legal issues presented by that case.

H.

The mandate in this case shall issue immediately upon its filing.

I.

All pending motions in Case No. CNA-SC-07-01 not specifically addressed in this Opinion and Order are DENIED.

J.

The decision of the Trial Court, filed January 3, 2007 in *Flyingman v. Wilson*, Case No. CNA-CIV-06-88, is VACATED. Case No. CNA-CIV-06-88 is ordered CLOSED. Case No. CNA-SC-07-01 is also CLOSED.


K.

The Clerk of this Court shall provide copies of this Opinion and Order by appropriate methods to Appellant Darrell Flyingman; to Appellee Robert Wilson; to all Tribal Legislators; to Treasurer William E. West; to Director of the Tribal Finance Office Gary Baker; to appropriate financial institutions as directed by Governor Flyingman, Treasurer West, and former Interim Treasurer Wilson; and, upon request, to authorized Department of Interior personnel.

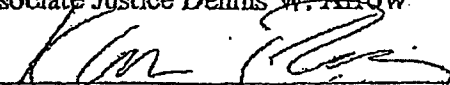
IT IS SO ORDERED.



Chief Justice Ryland L. Rivas



Associate Justice Dennis W. Arrow



Special Justice Karen Eby

Special Justice Taiawagi Helton

Special Justice Lindsay Robertson

CERTIFICATE OF MAILING

I, Patty Bell, Court Clerk of the Supreme Court for the Cheyenne and Arapaho Tribes do hereby certify that I mailed the following document to those names who appear below in Case No: CNA-SC-07-01, Darrell Flyingman, Governor vs. Robert Wilson, Acting Treasurer:

OPINION AND ORDER FILED MARCH 23, 2007

via U.S. Regular mail on the 23rd day of March, 2007.

Mr. Robert J. Lyttle
Attorney For Appellant
3334 W. Main St., #148
Norman, OK 73072
- Attorney For Appellant

Mr. Darrell Flyingman
Governor
P.O. Box 38
Concho, OK 73022
- Appellant

Ms. Kyme A.M. McGaw
1115 Norton Bldg.
801 Second Ave.,
Seattle, WA 98104
- Attorney For Appellee

Mr. Robert Wilson
Legislator
P.O. Box 38
Concho, OK 73022
- Appellee

Legislators:
Ms. Ida Hoffman
Ms. Janice Boswell
Mr. Nelson Clark
Mr. Mike Martin
Mr. Virgil Whiteshirt, Jr.
Mr. Richard Williams
Mr. Roy Dean Bullcoming
P.O. Box 38
Concho, OK 73022

Mr. William E. West
Treasurer
P.O. Box 38
Concho, OK 73022

Mr. Gary Baker
Finance Department Director
P.O. Box 38
Concho, OK 73022

Attorney General
Cheyenne-Arapaho Tribes
P.O. Box 38
Concho, OK 73022

Mr. Ryland L. Rivas
Chief Justice, Supreme Court

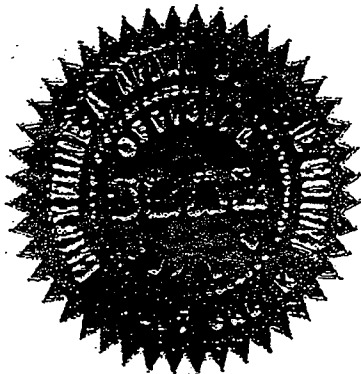
Mr. Dennis W. Arrow
Associate Justice, Supreme Court

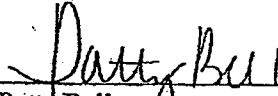
Mr. Amos Black, III
Associate Justice, Supreme Court

Mr. Taiawagi Helton
Special Justice, Supreme Court

Mr. Lindsay Robertson
Special Justice, Supreme Court

Ms. Karen Eby
Special Justice, Supreme Court




Patty Bell
Court Clerk
Cheyenne-Arapaho Supreme Court

13

IN THE DISTRICT COURT OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
P. O. BOX 102 - 700 BLACK KETTLE BOULEVARD - CONCHO, OKLAHOMA 73022

CHEYENNE-ARAPAHO
District Courts Of Okla.
FILED
IN THE TRIBAL COURT

BOARD of the
Cheyenne and Arapaho Tribes
PLAINTIFF,

Kirke Kickingbird - Attorney

-VS-

Case No. CNA-CIV-07-04 JAN 19 2007

DARRELL FLYINGMAN, Governor of the Cheyenne and
Arapaho Tribes, in his individual capacity
DEFENDANT.

Richard A. Monette - Attorney

DOCKET CIV PAGE 1819
IMAGE
[Signature] COURT CLERK
DEPUTY

COURT ORDER

Date FRIDAY - January 19, 2007

Judge Charles H. Tripp

Mr Kickingbird appears for Gaming Comm; Mr Monette appears for the
Governor; Ms Harrison appears for SW Casinos; Mr Morris appears
Att; Ms Hoffman Speaker of Legis. appears. Ct finds that ETRO has
ripened into a TRO & that show cause burden is met. Ct orders
that a complete forensic audit occur of the Gaming Comm & gaming
revenues & Lucky Star & other SW Casinos operating for Ct A Tribes. Specific
to meet to agree on who will do audit & who & how part will be made.

Hearing set for 4/16/07 @ 10AM. Mr Monette to do brief by 2/19/07

Reply brief of the other parties due 3/21/07 & reply brief set for 4/4/07.

Mr. Kickingbird appears for the Gaming Commission; Mr. Monette appears for the Governor; Ms. Harr-
son appears for S.W. Casino; Mr. Morris appears as the Attorney General; Ms. Hoffman-Speaker of t
Legislature appears. The Court finds that the Temporary Emergency Restraining Order ripened into
Temporary Restraining Order and that show cause burden is met. COURT ORDERS THAT A COMPLETE FORENSIC
AUDIT OCCUR OF THE GAMING COMMISSION & GAMING REVENUES & LUCKY STAR & OTHER SW CASINO OPERATIONS

cc: Kirke Kickingbird - Plaintiffs' Attorney THE C&A TRIBES. 5 parties to meet to agree on w
Richard A. Monette - Defendant's Attorney do the audit & who & how payments will be mad
Sandra Harrison - Intervenor's Attorney HEARING SET FOR 4/16/2007 @ 10AM. MR. MONETTE
Attorney General DO BRIEF BY 2/19/2007, RESPONSE BRIEF OF THE OTH
PARTIES DUE 3/21/2007 & REPLY BRIEF set for APR
4, 2007.

SO ORDERED.

HEARING DATE: 04-16-2007, 10:00 A.M.
D BRIEF DUE: 02-19-2007
P BRIEF DUE: 03-21-2007
REPLY BRIEF: 04-04-2007

Charles H. Tripp
JUDGE OF THE DISTRICT COURT
CHEYENNE-ARAPAHO TRIBES OF OKLA.
TELEPHONE NO: (405) 262-7330
FACSIMILE NO: (405) 262-7901

14

REDACTED

VOID CORRECTED

PAYER'S name, street address, city, state, and ZIP code Lucky Star Bingo & Casino 7777 N. Highway 81 P.O. Box 150 Concho, OK 73022 (405) 262-7612		1 Rents \$	OMB No. 1545-0115 2001 Form 1099-MISC	Miscellaneous Income
		2 Royalties \$		
		3 Other income \$	4 Federal income tax withheld \$	
PAYER'S Federal identification number [REDACTED]	RECIPIENT'S identification number [REDACTED]	5 Fishing boat proceeds \$	6 Medical and health care payments \$	Copy C For Payer
RECIPIENT'S name, address, and ZIP code [REDACTED] [REDACTED] [REDACTED]		7 Nonemployee compensation \$ 1522.80	8 Substitute payments in lieu of dividends or interest \$	For Privacy Act and Paperwork Reduction Act Notice, see the 2001 General Instructions for Forms 1099, 1098, 5498, and W-2G.
		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>	10 Crop insurance proceeds \$	
		11 [REDACTED]	12 [REDACTED]	
Account number (optional)	2nd TIN not <input type="checkbox"/>	13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$	
15		16 State tax withheld \$	17 State/Payer's state no. OK	18 State income \$

Form 1099-MISC

REDACTED

VOID CORRECTED

PAYER'S name, street address, city, state, ZIP code, and telephone no: Lucky Star Casino-Concho 7777 N. Highway 81 P.O. Box 150 Concho, OK 73022 USA 405-262-7612		1 Rents \$	OMB No. 1545-0115 2002 Form 1099-MISC	Miscellaneous Income
		2 Royalties \$		
		3 Other income \$	4 Federal income tax withheld \$	Copy C For Payer For Privacy Act and Paperwork Reduction Act Notice, see the 2002 General Instructions for Forms 1099, 1098, 5498, and W-2G.
PAYER'S Federal identification number [REDACTED]	RECIPIENT'S identification number [REDACTED]	5 Fishing boat proceeds \$	6 Medical and health care payments \$	
RECIPIENT'S name [REDACTED]		7 Nonemployee compensation \$ 2915.68	8 Substitute payments in lieu of dividends or interest \$	
Street address (including apt. no.) [REDACTED]		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>	10 Crop insurance proceeds \$	
City, state, and ZIP code [REDACTED]		11	12	
Account number (optional)	2nd TIN not <input type="checkbox"/>	13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$	
15		16 State tax withheld \$	17 State/Payer's state no. OK [REDACTED]	18 State income \$

REDACTED

VOID CORRECTED

PAYER'S name, street address, city, state, ZIP code, and telephone no. Lucky Star Casino-Concho 7777 N. Highway 81 P.O. Box 150 Concho, OK 73022 USA 405-262-7612		1 Rents \$	OMB No. 1545-0115 <b style="font-size: 2em;">2003 Form 1099-MISC	Miscellaneous Income	
		2 Royalties \$			
PAYER'S Federal identification number <div style="background-color: black; width: 100px; height: 15px; margin: 5px 0;"></div>		RECIPIENT'S identification number <div style="background-color: black; width: 100px; height: 15px; margin: 5px 0;"></div>		3 Other income \$	4 Federal income tax withheld \$
				5 Fishing boat proceeds \$	6 Medical and health care payments \$
RECIPIENT'S name <div style="background-color: black; width: 100%; height: 15px; margin: 5px 0;"></div>		7 Nonemployee compensation \$ 15643.46	Copy C For Payer For Privacy Act and Paperwork Reduction Act Notice, see the 2003 General Instructions for Forms 1099, 1098, 5498, and W-2G.		
		9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>			
Street address (including apt. no.) <div style="background-color: black; width: 100%; height: 15px; margin: 5px 0;"></div>		10 Crop insurance proceeds \$		11 <div style="background-color: black; width: 100%; height: 15px; margin: 5px 0;"></div>	
City, state, and ZIP code <div style="background-color: black; width: 100%; height: 15px; margin: 5px 0;"></div>		12 <div style="background-color: black; width: 100%; height: 15px; margin: 5px 0;"></div>			
Account number (optional)	2nd TIN not. <input type="checkbox"/>	13 Excess golden parachute payments \$	14 Gross proceeds paid to an attorney \$		
15		16 State tax withheld \$	17 State/Payer's state no. OK <div style="background-color: black; width: 50px; height: 15px; margin: 5px 0;"></div>	18 State income \$	

VOID CORRECTED

PAYER'S name, street address, city, state, ZIP code, and telephone no. Lucky Star Casino-Concho 7777 N. Highway 81 P.O. Box 150 Concho, OK 73022 USA 405-262-7612		1 Rents \$	OMB No. 1545-0115 2004 Form 1099-MISC	Miscellaneous Income
PAYER'S Federal identification number [REDACTED]		2 Royalties \$	3 Other income \$	
RECIPIENT'S identification number [REDACTED]		4 Federal income tax withheld \$	5 Fishing boat proceeds \$	For Privacy Act and Paperwork Reduction Act Notice, see the 2004 General Instructions for Forms 1099, 1098, 5498, and W-2G.
RECIPIENT'S name [REDACTED]		6 Medical and health care payments \$	7 Nonemployee compensation \$ 6323.77	
Street address (including apt. no.) [REDACTED]		8 Substitute payments in lieu of dividends or interest \$	9 Payer made direct sales of \$5,000 or more of consumer products to a buyer (recipient) for resale <input type="checkbox"/>	
City, state, and ZIP code [REDACTED]		10 Crop insurance proceeds \$	11 [REDACTED]	
Account number (optional)		2nd TIN not <input type="checkbox"/>	12 [REDACTED]	13 Excess golden parachute payments \$
15		14 Gross proceeds paid to an attorney \$	16 State tax withheld \$	17 State/Payer's state no. OK [REDACTED]
18 State income \$		18 State income \$	18 State income \$	18 State income \$

Form 1099-MISC

Department of the Treasury - Internal Revenue Service

REDACTED

15

Tribal Council Informational Meeting

El Reno	December 19, 2006 (Tues.)	Concho Community Hall	6PM
Hammon	December 20, 2006 (Wed.)	Hammon Community Hall	6PM
Kingfisher	December 21, 2006 (Thurs.)	Rose Rock Bank Community Room 320 N Main	6PM
Geary	December 27, 2006 (Wed.)	Geary Community Hall	6PM
Canton	December 28, 2006 (Thurs.)	Canton Community Center 301 N Garfield	6:30PM

Meal Provided. Everyone Welcome!

This is an informational meeting to discuss the powers of the Tribal Council and the resolutions that will be on the Agenda on Saturday, December 30, 2006 starting at 10:00 AM at Concho Community Hall in Concho, OK. All resolutions are published in the C & A Tribal Tribune and on the C & A Website (www.c-a-tribes.org), and posted at Concho Administration Office, Concho Community Hall, BIA Agency and IHS. If you have any questions, please feel free to contact me,

[REDACTED], at [REDACTED]

SOUTHWEST CASINO & HOTEL CORP.
AS AGENT FOR LUCKY STAR BINGO

7777 N. HIGHWAY 81
P.O. BOX 150
CONCHO, OK 73022
(405) 262-7612

21077

12-14-06

86-73-1031

Wal-Mart
Four-Thousand Two-Hundred Eighty Dollars $\frac{00}{100}$

4280⁰⁰/₁₀₀

CITY NATIONAL BANK
LAWTON, OKLAHOMA 73502

REDACTED

⑈021077⑈ ⑆103100739⑆ ⑈1

Gift Cards
for meetings.

