Navajo Nation Constitutional Feasibility and Government Reform Project

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EXECUTIVE SUMMARY

- The concepts of **Nation-statism and constitutionalism** are *inappropriate and ineffective* as applied to the Navajo Nation.
- **Decentralization of government needs to be thoroughly examined.** The current government originates from Western political history and carries a contrasting experience from that of the Diné. This has created a political system supporting a "strong man" which is historically incongruous.
- The Diné must rethink their government to **reflect cultural values and norms.**
- The Diné need to utilize **new terminology when communicating governance ideas**. We have adopted Western concepts of government that do not reflect our cultural knowledge.
- The prevailing institutions (norms and values) need to be addressed, understood, and deconstructed when examining governance and its implementation.
- **The separation of powers is a problematic system** - one codified on the basis mistrust - creates a multitude of limitations. An implicit, non-codified separation of powers, based in *the Diné concept of trust*, adequately reflects traditional concepts of cooperation and integration. Conversely, the current system only works within a model of mistrust and does not foster efficiency or confidence.
- **Judicial review** is an essential component to *critique* government.

Alternative Governance Models:

- **A status quo** model emphasizes little change but alludes to *efficiency* in government.
- **A bicameral parliamentary model** stresses the integration and cooperation of a *traditional and legislative body to form and execute laws* while decentralizing power by entrusting the Navajo people with the approval of all laws. *Implementation: 15 years.*
- **A decentralization model** stresses *national and community issues with greater empowerment to social subgroups and agencies.* It outlines a government that reflects more fully traditional and customary laws and norms and replaces the President with an 11-member Executive Board. The Council remains nearly as-is with the exception 12 non-voting delegates specifically dedicated to certain social subgroups and non-profit organizations. *Implementation: 3 years.*
- **A dialectical model based in Navajo political philosophy** stresses the complete integration of Diné thinking as the premise behind all institutions in the governance system and critically calls into question each aspect of politics, deconstructed and succeeded by Navajo reasoning. *Implementation: Continuous in that it follows a traditional sustained cycle of balance to bring about present government while recognizing the past and future in an overarching narrative.*

INTRODUCTION TO THE REPORT

THIS REPORT WILL REVIEW three important elements related to the constitutional feasibility and government reform of the Navajo Nation. The first section will outline the foundational principles related to constitutionalism and ask whether constitutionalism and the nation-state are appropriate functions for the Navajo Nation to pursue, given its historical norms, values, principles, and given the passage of the Foundational Laws.

The second section will specifically look at historic notions of governance and power and how that relates to the doctrine of the separation of powers in the Navajo Nation. The section describes how the separation of powers currently enshrined in the Navajo Nation Code is different from the actual practice of the separation of political powers. It suggests that the compartmentalization of powers into agencies will hinder the interests of the people and will be less culturally valid.

The third section is a treatise on the practice of judicial review in the Navajo Nation and suggests that it paramount to government reform. The de facto separation of powers within judicial review is highly respected.

The last section details recommendations for government reform.

SECTION I: CONSTITUTIONALISM

By Andrew Curley

Part I: Constitutionalism

AS TRIBES REFORM THEIR GOVERNMENTS, the question whether Native Nations should adopt constitutions or not has become increasingly expressed. The assumption from proponents of constitutionalism is that such governance will put tribes on "paths toward economic self-sufficiency, political self-determination, and cultural rejuvenation" (Kalt 2007: 78). This argument assumes that constitutional governments will help tribes "get...things done, defin[e] sovereignty, develop...economically" and "affirm 'this is who we are.'" Others have argued that constitutions might help tribes in a globalizing world context (Champagne 2006: 12). The central neglect from many of these commentaries, however, is the question of nation-statism and whether such a model is continually appropriate for Indian Country. African historian Basil Davidson addresses this conflict 40 years after African decolonization. Much of the learned experiences from Africa, where tribal people attempted to forge nation states and failed, should presage our current starry-eyed approach to government reform; but let us first consider what is being claimed by proponents of constitutionalism on the Navajo

Nation and whether or not the Navajo Nation Code, for example, already satisfies many of these claims. In this paper, we argue: 1) "constitutionalism" is a Western-descended political concept; 2) despite of this, the Navajo Nation Code already serves as a "constitution" based on popular definitions of the concept; and 3) the question of nation-statism remains at the heart of our contemplation of Navajo governance and more thought should be taken as to whether or not we should continue using this increasingly outmoded political model. Finally, we make recommendations for an ideal Navajo government based on the above considerations.

WHAT IS "CONSTITUTIONALISM"?

MANY SCHOLARS DIFFER about the meaning of constitutionalism, but nearly all agree that "constitutions," as a political concept, are descended from "Western" political thought. For example, University of South Pacific senior lecturer in Developmental Studies, Jan-Erik Lane, identifies three sources for constitutionalism or similar doctrines of political rule. Lane (1996: 20) claims that constitutionalism is rooted in: 1) Germanic law and feudalism; 2) Roman Law and notions of "natural law," and 3) Aristotelianism. Harvard University Professor of International Political Economy Joseph Kalt (2006: 187) argues, conversely, that constitutions are "a society's rules for making and enforcing its collective rules and decisions, including the legitimate allocation of power and authority over rule-making and decision-making," broadening its meaning to core human observations—whether modern or pre-modern. Kalt makes general anthropological and sociological pronouncements but conflates culture and sources of political authority with the discernible political phenomenon of constitutionalism allowing for every society to interpret constitutionalism as something historic to their culture when this is obviously not the case. Every society, whether modern or pre-modern, has had social rules and norms but how these were documented and enforced differ considerably from what constitutionalism implies and requires as a format. Kalt (2006: 188) argues that, "constitutions are ubiquitous across human societies and hardly conceit of Western culture." He continues (2006: 189):

> While a tradition of scholarship once more commonly described indigenous pre-conquest government as 'informal' or nonexistent because, for example '[t]he concept of government is rooted in European political philosophy and tradition, and it denotes a bureaucratic organizational system of legitimate public power,' such a definition of *government* is unsupportable, and such characterizations are problematic in the extreme. A society that operates under a council presided over by four appointed chiefs who attained their positions by performing appropriately within a system that considered it proper that those considered 'supreme elder clansmen' preside over council deliberations is not an informal system—unless *formal* must mean written down in codified form and bureaucratized, as described in high school civics textbooks.

The problem is that, "written down" and "codified form and bureaucratized" are exactly what we mean by constitutionalism. For example, Jan-Erik Lane (1996: 5) describes constitutions as "a compact document that comprises a number of articles about the State, laying down rules which State activities are supposed to follow." This is precisely the "formal" system of governance Kalt describes above. Kalt raises an adequate critique about the problem with "traditional" scholarship for indigenous peoples. Often, nonnative scholars approach traditional forms of social and political authority from a point of condescension, but in refuting the patronizing tone of "traditional" Native American scholarship Kalt does not need to mischaracterize historic indigenous institutions as operating similarly to Western forms of political authority—namely highly centralized, bureaucratic hierarchies called "governments." These institutions, including "written down" constitutions that define their parameters, are forms of social authority that evolved out of highly repressive social orders in Western Europe in which lords oversaw virtual slave-like conditions of fiefdoms and later the environment of early capitalism. To equate traditional indigenous forms of political authority with the barbarism of nation-statist governments descended from Western European cultural conflicts is to do disservice to the true equality and freedom that existed in pre-contact North America.

Converse to Kalt's argument, it is easy to identify the history of constitutionalism; which is not the same as the lineage of political structures or systems of authority. Jan-Erik Lane (1996: 3) writes, "It is premature to talk about a 'constitutional theory' as such." Rather than articulating a discernible "theory," Lane (1996: 3) argues that usage of constitutionalism is a "loose set of concepts and models whose theoretical relevance is up in the air and whose empirical validity is debatable." Yet we are told by proponents of constitutionalism, or constitutional reform in Indian Country, that making constitutions "effective" will "provide a powerful defense" in protection of tribal sovereignty and help tribes organize [themselves] to spur economic development (Kalt 2007: 80-81). In this sense, Kalt argues that constitutions might serve as a way to improve governance and with improved governance, he and University of Arizona Professor of Sociology Steven Cornell assert, tribal economic development is more possible. The central correlation at Cornell and Kalt's claims is the correlation between "economic development" and effective governance within tribal communities.

This is a tenuous correlation at best. Take for example Cornell and Kalt's report, "Where's the glue? Institutional and cultural foundations of American Indian economic development." In this paper, Cornell and Kalt use a Boolean statistical analysis to demonstrate that effective governance promotes economic development. Cornell and Kalt measure "economic development" by the "number of tribal members employed" and the increase in tribal member income between the years 1977 and 1989 (Cornell and Kalt 2000: 459). Cornell and Kalt assert that they seek "casual" factors that contribute to economic development for about 70 Indian tribes. The problem with this assertion is

that the Boolean method is an experimental method that at best can demonstrate correlation among variables but in no way is able to demonstrate causation. That is to say, Boolean statistical analysis can show what stands out between independent and dependent variables, but does not in any way demonstrate causation. When assessing how "x" leads to "z" one finds "a, b, and c" cropping up a lot. Further evidence is required to confirm that, "a + b + c" or any of these variables in isolation or combination might move "x" to "z." Cornell and Kalt found that within their Boolean analysis, "strong chief executive" and "strong legislature" where more frequently present within tribes they predetermined as moving on a path of economic development. (Cornell and Kalt 2000: 465). Yet there has not been any evidence produced to demonstrate that a "strong chief executive" and a "strong legislature" are causal factors for "economic development" (within the already narrow measure for economic development). As Jan-Erik Lane stated earlier, "empirical validity" regarding the effects of constitutionalism in any society is debatable (Lane 1996: 3).

Lane and Kalt have some consensus on the broadness of constitutionalism. Whereas Kalt thinks constitutionalism is any form of social or political authority, Lane argues that supporting documents, principles or passage of laws, even if created in disparate circumstances and non-codified, are processes of constitutionalism. Essentially the main difference between their approaches is the institutions through which constitutionalism works. Lane specifically envisions systems of hierarchy that are nation-statist forms of governance as means through which constitutionalism and constitutional principles are enacted. Kalt is more general in his description of constitutionalism. Furthermore, both Lane and Kalt agree that constitutions can be unwritten and non-standardized. For example, Kalt (2006: 188) writes:

> From Great Britain and Israel to the Navajo Nation and a number of the New Mexico Pueblos, constitutional rule—replete with institutional structure, traditional-laden rules of procedure, claims to de jure primacy, and de facto practical acceptance as the monopoly wielder of legitimate force—exists in fact despite the absence of a written 'constitution.'

Lane claims much the same. He writes, "states without a constitution have a series of documents of constitutional import—what causes confusion is when states both have a constitution and documents of constitutional import" (Lane 1996: 5).

Lane uses the United Kingdom as an example of this constitutional format, and identifies the following doctrines as contributing to the functioning of institutions in Great Britain: the Magna Carta in 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, the 1832 Reform of the House of Commons and the 1911 Reform of the House of Lords (Ibid: 6). In this sense, the Navajo Nation already has a constitution, both in Kalt's definition and Lane's since the Navajo Nation Code operates in a nation-state

format. Then what is being proposed might more accurately be called "constitutional reform" rather than a constitutional project.

With constitutionalism, Kalt talks about two things: what *is* a constitution and what *ought to be in* a constitution. In the later action, Kalt hopes to demonstrate how American Indian tribes can "seek...cultural and social well-being and sovereignty" "as well as economic development" through their constitutional reform process. That is to say, constitutions improve "the rules of the game" within a tribal government which then create the conditions under which the above detriments might be ameliorated (Kalt 2007: 192-193). One of the essential criterions for "success[ful]" constitutions according to Cornell and Kalt is "legitimacy." This is a central tenant in early sociologist Max Weber's contemplation on the sources of authority, for him particularly religious authority.

Many scholars use legitimacy to describe a regime whereas Cornell and Kalt use the concept as a prescriptive measure, that is, to persuade governments to gain legitimacy from their polity (Kalt 2006: 198). When citizens choose not to obey the decrees of a government, such as what happened on the Navajo Nation in 1989, then that government suffers from a lack of legitimacy, but it is usually difficult for a government not to have legitimacy. Weber identifies three sources of authority, which grant institutions and governments legitimacy: 1) charisma (in a leader); 2) tradition; and 3) procedure (Weber 1905/2002). Cornell and Kalt, however, argue that "constitutional legitimacy" comes from 1) structure of authority; 2) scope of authority; 3) location of authority; and 4) source of authority, the last of which is closest to Weber's original meaning. This is where Kalt becomes enigmatic. Kalt writes, "When the superstructure of governance provided by the constitution is consonant with a community's norms regarding these dimensions of authority, that constitution is culturally matched to the community" (Kalt 2006: 198). However, if a constitution is "a society's rules for making and enforcing its collective rules and decisions, including legitimate allocation of power and authority over rule-making and decision-making" (Ibid: 187), then what is the "constitution" that Kalt is referencing in the above statement that must be "consonant with a community's norms"? Clearly we are talking about two different constitutions yet no distinction is made between the them. Lane has slightly different categories for constitutionalism, but they are overall more similar to Kalt's than different. Lane (1996: 8) writes:

> [A] state does not have to have such a constitution [i.e., a written constitution], as States may operate on the basis of constitutional practice made up of customary law and conventions. Secondly, the existence of a codified constitution does in no way guarantee that the country in question is ruled in accordance with this document...the stronger the role of customary law, precedents and conventions, the lesser is the relevance of the formally enacted constitution…

> …[T]he second meaning of 'constitution,' standing for the actual principles or maxims in terms of which the country is ruled. Except for States which suffer from anarchy or civil war or which are about to be dissolved or have just recently been founded, each state has a constitutional practice. This practice need not be in accordance with the formally enacted constitution nor must there be a single constitutional document giving guidance. 'Constitution' here refers not to a written document, but to the actual manner in which a country is ruled, the regime or the set of fundamental state institutions" (Ibid: 8)

Lane explains that there are two parts to any given constitution, its hermeneutic side and its behavioral side (Ibid: 10). The hermeneutic side is how a constitution is interpreted from a written text. Much like how the U.S. courts settle constitutional questions by interpreting the meaning of what has been written. Whereas the behavioral side of a constitution refers to how these constitutions are actually implemented.

Lane creates a spectrum of constitutional formalism from the complete codification to constitutions that derive their meanings through customary law. It should be pointed out that much of the constitutional debate for the Navajo Nation stems from a desire to create a formalized, codified constitution as opposed to using what might be more appropriate: a constitution based on customary law. Lane identifies continental Europe as relying more on statute law. On continental Europe, the laws are made by a centralized government and then implemented throughout the nation. In this mode of governance, there is little legal room for local custom and culture. In the United Kingdom, which does not have a formalized constitution, "codification" of laws is rejected and customary law is in much greater use (Lane 1996: 14). The United States, Lane argues, is a blend of the two systems.

Currently the Navajo Nation leans more toward the U.K. model of constitutionalism, though there has been a movement within the last 30 years to dramatically shift toward constitutionalism as it is found in continental Europe. Lawmakers on the Navajo Nation believe strongly in codification, and have a zealous desire to transfer customary law into statutory law as is evidenced in the passage of the Fundamental Laws of the Diné. Cornell and Kalt have a similar process in mind when they advocate for a "cultural match" between formalized constitutions and customary law (Kalt 2006: 198). In advocating for constitutionalism in Indian Country, Kalt is not talking about using local custom in an informal process (though he identifies this as constitutionalism). He, instead, envisions a separate, codified document similar to that found in the U.S and continental Europe. What he and others do not acknowledge in this process is that codification of constitutionalism in Indian Country will dramatically change the nature of customary law (which can be called constitutionalism) from behavioral to hermeneutic.

Part III: Kalt and a Constitutional Criterion

TO FURTHER THE POINT, let us consider Kalt's criteria for constitutionalism and demonstrate where the Navajo Nation Code already satisfies much of it. Let us begin with Kalt's broader definition of constitutionalism and work our way toward more specificity (as Kalt refines his own definition several times throughout his essays on the topic). First, as stated earlier, Kalt argues that constitutions are "a society's rules for making and enforcing its collective rules and decisions, including legitimate allocation of power and authority over rule-making and decision-making" (Kalt 2006: 187). This broad criteria requires only two things: 1) that a constitution is a "society's rules," and 2) these rules allocate power for both rule-making and decision-making. Already in this definition we have the rubrics for a Western-European parliamentary body. Kalt is leading us to separation of powers between "rule-making"—which is legislative and "decision-making" which is executive. These divisions in social power came out of feudalism and the compromises between lords and kings, specifically over issues of taxation and war. The U.S. parliament, the U.S. "Congress," is directly descended from centuries of Anglo political struggle. Part of the compromise between the warring factions was to separate duties, "rule-making" and "decision-making." The lords would make the rules and the king would carry these rules out.

Conversely, we had a *naat'áanii* system in which these roles were not clearly defined, because there was no political tension, or factionalism that demanded such division. That is to say, historically *naat'áanii* could both make rules and help make sure they were carried out. They were political leaders whose functions were both legislative and administrative. That is why we currently have such difficulty conforming to the rules of Western-descended parliamentary bodies and why council delegates find themselves creating policy and overseeing administrative issues.

Returning to the definition of constitutionalism offered by Kalt, under this definition we have a constitution in the Navajo Nation Code—which separates the powers of the Navajo Nation Council from that of the president, but such a division is already in conflict with traditional leadership models.

Kalt restates his above definition slightly different, claiming constitutions are "the rules for making and enforcing the rules and decisions of a society's coercive institution(s) of collective action and dispute resolution (Kalt 2006: 191). This is an area where Kalt's definition becomes problematic. Here he is trying to justify courts and police forces as inherently constitutional. Justifying coercive state power as a natural or good thing should always raise red flags. Falling into this general definition are fascist and dictatorship governments which Lane argues are usually farcical constitutional regimes since more often than not these governments have liberal constitutional governments with laws that have been suspended under decrees of "emergency rule" or the like. In other words, dictatorships historically suspend constitutional rule,

whereas Kalt continues this point in a footnote, "….a dictatorship can have a constitution by which it makes decisions and rules, and under which it structures its enforcement of decisions and rules of conduct" (Kalt 2006: 215). Theoretically this is possible, but the historic record demonstrates constitutional rule is often suspended during dictatorships.

Even in this sense, however, the Navajo Nation Code satisfies Kalt's criterion. Within the Navajo Nation Code the roles of the judiciary and police force (the Navajo Nation's coercive institutions) are clearly articulated. The 1985 Judiciary Act created a separate branch of government for the courts and the Council's respect for judicial review has been demonstrated, such as in the case of Judy v. White. In the time of Peter MacDonald there was a power struggle between MacDonald and the Council for authority over the police force and courts, but much of this ambiguity in authority has since been corrected with the reforms to Title II in the Navajo Nation Code.

In another essay on constitutionalism, Kalt declares that, "[a] constitution is a fundamental framework that empowers the people to state who they are, define how they will make community decisions, solve their disputes, and stay a people" (Kalt 2007: 79). In this definition, Kalt is arguing that a constitution is a "framework" which is able to do x, y, and z. By framework Kalt implies codification. In this sense, the Navajo Nation Code also satisfies this requirement. Within Titles I, II, and VII of the Navajo Nation Code general provisions are established, which allow for "the people to state who they are. The Navajo Nation Government is articulated which "define[s] how [the Navajo] will make community decisions" and "Courts and Procedure" is shown which establishes how the Navajo Nation will "solve their disputes."

Continuing in this line of thinking, Kalt further defines constitutions as "the overall architecture for how that nation's citizens will rule themselves. It sets out roles and responsibilities such as who will make the laws, ordinances, and rules for protecting the interests of the community and getting done what the community needs to get down, who will decide if the community's laws are valid, who will decide if the community's laws have been broken, who will be responsible for protecting the community's interests when other governments and parties threaten those interests, and how the community can change the rules if it needs to" (Kalt 2007: 79-80).

Here Kalt becomes tautological but such tautology is useful in understanding specifically what he is advocating as constitutional reform within Indian Country. Again, Kalt divides the roles of constitutionalism into separate categories that correspond to typical divisions in government. The first "roles and responsibilities" which are "Who will make the laws?" clearly refers to the legislative branch. The second group or roles, "Who will decide?" refers to the judicial branch, and the third group of roles, "Who will be responsible?" refers to the executive branch. It is clear that Kalt believes that divisions of power are best for the functioning of a nation-statist government.

As has been established earlier, the Navajo Nation Code already sets out "the overall architecture" of government, but does it establish the "roles and responsibilities" Kalt feels is requisite within a constitutional design? Let us examine each role and responsibility he advances and determine if the Navajo Nation Code satisfies these. For who "will make the laws, ordinances, and rules for protecting the interests of the community" we can safely claim that Title II of the Navajo Nation Code does precisely this. Chapter 3 of Title II states, "[t]he Navajo Nation Council shall be the governing body of the Navajo Nation and shall consist of 88 delegates." In this sense "governing body" establishes the power referenced by Kalt above. In addition, Title II establishes an executive branch administered by an elected president whose responsibilities are to "serve as Chief Executive Officer of the Executive Branch of the Navajo Nation government with full authority to conduct, supervise, and coordinate personnel and programs of the Navajo Nation," which satisfies the role of "who will be responsible." As for who "will decide," Title VII of the Navajo Nation Code states "[t]here is a Judicial Branch of the Navajo Nation" which is to "apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts" and who should "utilize *Diné bibee haaz'áánii*…to guide the interpretation of Navajo statutory laws and regulations." In this general criteria for constitutionalism the Navajo Nation Code satisfies all requirements.

Later on in his essay, Kalt advances what are the rudiments of a "capable constitution," moving decisively away from broad definitions to clear delineations. In this section Kalt identifies five basic areas modern American Indian constitutions should address: 1) citizenship; 2) structure of government; 3) lawmaking and administration; 4) dispute resolution; and 5) oversight of the government. For the first category, citizenship, Kalt writes, "Perhaps the most fundamental question in designing a constitution is the question of who it is that is self-governing." This is an important consideration for Indian tribes who have been historically bound by federal definitions of "membership," which either involved "blood quantum" or proved ancestry.

The Navajo Nation still operates off a blood quantum requirement, necessitating one of the highest degrees of blood quantum (at one-forth) to qualify for Navajo Nation membership. This requirement is established in Chapter 7 of Title I in the Navajo Nation Code, entitled "Membership in the Navajo Nation." Here we have established our membership requirements based on a Bureau of Indian Affairs "official roll" to determine blood quantum which exists at one-fourth currently.[1] No other nation-state in the world requires such a definition for citizenship except for Israel which privileges Jewish lineage for full citizenship. Such basis of membership is either racist or not designed to be implemented through a nation-state political format. This category of

[1] For a good discussion on the origins of blood quantum on the Navajo Nation, see Paul Spruhan's "The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation."

membership will become one of the more difficult issues facing the Navajo Nation as blood quantum eventually attenuates through successive generations. Nevertheless, the Navajo Nation Code fulfills this requirement successfully for the time being.

As to the structure of government, Kalt writes "…sovereign governments typically have three major tasks, corresponding to three branches of government: 1) legislative—making the laws, rules, and regulations of the nation; 2) executive—administering the laws, rules, regulations and programs of the nation; and 3) judicial—resolving disputes over and enforcing the laws, rules, and regulations of the nation" (Kalt 2007: 86). To this Kalt adds a "fourth task" of government and that is "oversight." This is a divergence from standard Western political theory, the idea that governments have the responsibility to "oversee" themselves.

Oversight has historically been implied as the responsibility of the people, the general citizenry of the nation. In other words, oversight has always been assumed, but who has oversight is at issue. There are such institutions within the Federal Government, such as "the Government Accountability Office," with a similar task. There are mechanisms such as impeachment and recall initiatives that serve these functions for both lawmakers and the general citizenry but we will return to the topic of "oversight" in a moment. For now, suffice it to say that the Navajo Nation Code establishes the basic "structure of government," which corresponds to the above divisions of roles and responsibilities. Titles II and VII establish the three branches of government, with more power weighed toward the legislative branch for historic reasons (i.e., the attempted usurpation of power by former Chairman Peter MacDonald in 1989).

In the next section of Kalt's criteria for "capable constitutions," he argues against parliamentary governments and more toward structured, three-branch presidential type governments. He says that general councils, which are offshoots of IRA-type constitutional governments, caused tribal "instability, dysfunction, and destructive effects on economic development [i.e., luring investors], law and order, and social conditions." Supporting this conclusion on "general councils" Kalt cites his and Steven Cornell's 2000 report, "Where's the glue? Institutional and cultural foundations of American Indian economic development." Nowhere in this report, however, is anything mentioned of tribal "instability, dysfunction, and destructive effects on law and order and social conditions. The focus of this paper is on economic development and what Kalt and Cornell have established as some correlating variables to nations they perceive as moving toward "economic development." Their measures are: increased employment and increased income (Kalt 2007: 88; Cornell and Kalt 2000). To be specific, Cornell and Kalt address culture as it relates to institutional performance and (ergo) economic development. The cause and resolution of social problems and issues of law and order are not addressed in the above essay. We have to be very specific about this because it is one thing to argue that institutional instability stymies economic

development (which is a tenuous claim), but to say that purer forms of democracy (such as is found in a general council system) causes destructive effects on "social conditions" or "law and order" is an entirely different claim.

Kalt further argues that lawmaking and administration should be conducted through institutions that culturally match a society's historic institutions and contemporary norms. (Kalt 2007: 88-89). He writes, "[t]ribe-specific cultures and histories play critical roles not only in the selection of parliamentary versus direct-elect council and chair systems, but also in the degree of centralization of governmental authority" (Ibid: 89). Here the Navajo Nation is out of cultural compliance if "culture" can be unified into a general term. Historically the Navajo: 1) had disaggregate political units, 2) had leadership, i.e. *naat'áanii* which did not separate the roles of law-making and administration (Wilkins 2003: 69), 3) had no hierarchies, meaning they had roles of responsibility, not authority, and 4) had political institutions that did not have coercive powers. If we wanted to move more toward a "culture match" in the Kalt sense to the term, the Navajo Nation should abandon the Office of the President, which has been fraught with difficulties since its inception, weaken the Council vis-à-vis the power of Chapter governments and create regional decision-making units similar to the function of agency meetings currently, but we will elucidate this more later.

Next Kalt considers Native courts. He claims that they should not be subject to political interference (Kalt 2007: 91). This seems axiomatic at surface, but creating a bureaucratic culture in which the courts' authority is respected is difficult. Indian people should realize this more than any people as some of the hallmark decisions in Federal Indian Law are also decisions that shaped the role of the U.S. Supreme Court within the Federal Government. Known as the "Marshall Trilogy," these three Supreme Court decisions, which were sympathetic to Indian welfare but an infringement on Native rights, attempted to check the power of the state of Georgia from removing Indians out of their homeland. Nevertheless, then President Andrew Jackson ordered the forceful removal of the Cherokee Nation from Georgia to Oklahoma, an act commonly referred to as the "Trail of Tears." In this action, President Jackson ignored the ruling of the U.S. Supreme Court. It would take a number of years more before the concept of "judicial review" became an accepted doctrine within U.S. lawmaking. It is not something that is ensured in the constitution. Even if it were, a general culture of acceptance for this doctrine must be present for it to work successfully.

In the Navajo circumstance, for example, the Navajo Nation Supreme Court ruled in *Judy v. White* that Navajo Nation Council delegates cannot increase their salary on their own accord. Given the reading of Title II, this seems straightforward, but some delegates threatened reprisal against the court for ruling against their efforts. Nevertheless, the ruling was upheld and political backlash did not ensue. Kalt takes issue with the fact that "judicial functions of dispute resolution and law enforcement are constitutionally under the control and funding of the tribal council," as if this were

some sort of parliamentary anomaly. In this scenario, Kalt argues, judiciaries do not constitute a separate branch of government so long as the parliamentary body controls its purse. It is correct to argue this area of control might cause a problem, but that does not negate the fact that the judiciary is still protected from other types of manipulation. In the case of the U.S. judiciary, Congress still controls the amount of funds that are made available to it. This does not mean that the judicial branch is farcical and really under the control of the Congress. In truth, the judicial branch in any government is subject to ideological manipulation of the executive branch through the appointment process which is demonstrated more robustly in the U.S. Supreme Court, but control of the purse has not shown to be a significant threat to judicial branches of governance. In our own circumstance, in *Judy v. White,* some council delegates talked about withholding funds from the Navajo Nation Supreme Court, but possible public outcry convinced lawmakers not to turn reactionary. Again, the public consciousness is a requisite check against abuse of government power. Nevertheless, Kalt's point about formal control is accurate and this has caused problems in the past where the Chairman had tremendous influence over the judicial branch. Laws designed to strengthen the independence of the judicial branch might prove useful even on issues of funding.

Finally Kalt considers government oversight. Kalt asks a general question that confronts all nation-states and larger systems of power, "[w]ho or what prevents those who have the power of government from turning that power to the service of their own interests at the expense of the community as a whole" (Kalt 2007: 96). Kalt identifies three areas through which governments can create oversight over government: 1) cultural constraints; 2) separation of powers; and 3) a fourth branch of government. All of these areas might lend toward better accountability or government oversight, but are in no way a guarantee for effective government oversight.

Take for example "cultural constraints." Kalt argues that if the leadership of government is in harsh discordance with cultural expectations of leadership, citizens will exercise oversight over their government and remove the offending parties. He uses the Nixon "Watergate" scandal as an example in which U.S. cultural oversight mandated that Nixon's abuse of power come to an end (Ibid: 96). In truth, there was very ineffective cultural oversight over the Nixon administration. Years of protest did not prevent him from continuing and escalating a criminal war in Indochina, he and the head of the FBI targeted and (in some cases) instigated violence against known dissidents, but only when the Democratic Party became a target did official rebuke come from this powerful party in the legislature. This is not effective cultural oversight, but merely class and political oversight.

How does culture work within institutions, found within the nation-state model, that are designed to promote class interests? This is a problem we will address in the next section on nation-statism. Historically, it seems as though aggregation of too much power with Diné governing institutions was not allowed, though there seems to be a

high tolerance for increased power within a headman or *naat'áanii* based on charisma. For example, the headmen Narbona, Manuelito, and Chee Dodge are leaders who seemed to carry more power than the historic *naat'áanii* role might prescribe. In our modern era, it seems as though Peter MacDonald was the closest to demonstrating this type of charisma.

Next Kalt identifies separation of powers as a recommended method to make government more accountable. Kalt makes a broad argument that checks and balances are needed to ensure one branch of government, or one powerful faction has some restraint from realizing hegemonic authority. This seems like a reasonable assertion and historically this model has proven effective at stymieing runaway governments (Kalt 2007: 97-100). One consideration lacking from Kalt's analysis, especially when discussing parliamentary systems of governance, is the role of political parties within these systems. Usually parties correlate with differing ideological (i.e., class interests) existent within a polity. The fact that many Native Nations lack political parties is arguably a result of three factors: 1) the decline in democratic culture in the United States (Putnam 2002); 2) the waning relevance of its two major political parties; and 3) the lack of class-based politics. The nascence of the classist agitation is observable in interesting places, but as of yet the Navajo poor have not organized against the emerging wealthier, bureaucratic class in Window Rock. Occasionally, protests have flared and agitation against government has become more common. Factionalism (i.e. loyalty to one leader or another) is the closest thing yet to party divisiveness currently operating on the Navajo Nation. This type of agitation is very similar to party politics, but not quite the same thing.

In his commentary on constitutionalism, Kalt specifically mentions recent transitions within Navajo politics. In 1989, the Chairman, who was popularly elected like a president, was moved out of the legislative branch and made to "administer" a newly created executive branch, modeled off the U.S. Constitution and its division of powers. This was largely done to check the accrued powers of the Chairman's office. Much power was transferred from the Chairman to the legislature, dispersed among 88 elected delegates (Kalt 2007: 98). It should be noted here that the Harvard Project on American Indian Economic Development tends to laud the efforts of the Navajo Nation in separating the legislative from the executive. This is seen to put a necessary check on unaccounted power, which had been invested in the Chairman previously. However, as government moves from a strong-man type, which has been the case under the chairman model, to a parliamentary style, there needs to be more effective checks of power within the Council, especially among factions of power that gain control over the legislative process. Rather than a separation of powers between legislative and executive branch, or between any branches of government at all, the authority of Window Rock should be "checked" by the will and mandates of the localized communities, likely represented through chapter or agency governments.

Kalt concludes his contemplation on the separation of powers by stating that the general citizenry should have a method by which they can check the power of government. He writes, "Separations of powers are constitutionally embedded by reserving certain powers for the general citizens" (Kalt 2007: 99). Even by this criterion the Navajo Nation Code has a mechanism by which the people assembled can add to or change existing laws. This process has become notorious as of late, since the Navajo Nation President Joe Shirley has taken it upon himself to use a tool otherwise designed for the general citizenry to attack the legislative branch of government. Found in Title 11 of the Navajo Nation Code are two methods by which laws can by put before the people in a general election vote: the *referendum* and *initiative*. Referendums are proposed laws and/or amendments to existing laws that are referred to the people by the Navajo Nation Council. Initiatives are proposed laws and/or amendments that require a certain percentage of endorsement from the general body of registered voters to be both placed on the ballot and, in some instances, enacted into law. The legal technicalities of these processes are found in the recent memo feud between the Attorney General of the Navajo Nation Louis Denetsosie and acting Chief Legislative Council Frank Seanez. It is too soon to comment how this feud will be resolved, but the question centers on the mechanisms by which the Navajo people are allowed to alter their government. It is safe to assume, however, the tools which the Navajo people can use to "check" governmental powers will continue to be protected within the Navajo Nation Code.

Finally Kalt discusses something that he calls a "fourth branch" of government. The term branch is a bit of a misnomer since what Kalt is talking about specifically are separate institutions that can negate the decrees of an elected government. Kalt gives these institutions much accolade claiming they "are showing the world compelling alternatives in the form of a fourth branch of government that reaches beyond the familiar legislative-executive-judicial framework" (Kalt 2007: 100). There is both good and bad to this claim, but what Kalt seems to have in mind is a traditional institution, such as the clan mothers of the Haudenosaunee that have the power to remove corrupt, inept, or malign leaders from power. The problems with using "traditional" institutions within governance is that you take a role-based institution, such as the *naat'áanii* in the Navajo circumstance, and move it out of its historical context to give it hierarchal power. In fact, this fourth branch of government is not unique to Indian Country. In more dogmatic religious contexts, such as Iran, the unelected *mullah* of the country can remove and disqualify political candidates based on their own predilections. In more totalitarian parts of the world, such as China and North Korea, the political party has ultimate control over the political process. In Indian Country, similar processes are threatening to usurp the accountability of elected governments, such as factionalism based on religious faith, and struggle for power within the civil and spiritual contexts rather than through the political process.

Within the Navajo Nation Code, and specifically within the Fundamental Laws of the Diné, something peculiar exists. Another framework of government separate but similar to that established in Titles II and Titles VII and with a strange addition: the "National Security Branch" or *Naayee'jí Nahat'á*. This division of government is in charge of the physical security of the nation, much like an army or police force. Under "Diné Traditional Law":

> The leader(s) of the National Security Branch…are entrusted with the safety of the people and the government. To this end, the leader(s) shall maintain and enforce security systems and operations for the Navajo Nation at all times and shall provide services and guidance in the event of severe natural crisis or military-type disasters...

Fortunately no one has yet taken this clause literally. It is likely that drafters of the Fundamental Laws of the Diné did not realize they were not just calling for the creation of certain institutions, like an army or police force that could respond to national emergencies, but unconsciously framing the perfect formula for a military dictatorship on the Navajo Nation. The power given to the National Security Branch would have made the former fascist generals of Chile and Argentina salivate at the sight of it. Rather, they had empowered the coercive auxiliaries of the central government to "check" the democratic will of the people, regardless of whether the nation was experiencing an emergency or not. By placing these institutions within a fourth branch of government, the National Security forces theoretically have a right to refute any legislation coming from the democratically elected government. What is more, in the declaration of an emergency, which only must fulfill the descriptions of broad categories such as "severe natural crisis" or "military-type disasters," the National Security Branch assumes total, dictatorial powers over the "civilian" elected leadership. Notwithstanding what the drafters of the Fundamental Laws of the Diné had in mind, what they created was a recipe for a fascist government and military rule. It might be advised that the Navajo Nation work only with accountable, democratically elected institutions and not fool around with so-called "fourth branches of government."

Thus far we have demonstrated that without enacting any additional legislation, the Navajo Nation Code already satisfies both the broad and specific definitions and requirements of constitutional rule. Relying on the criteria generated by the most experienced research projects in Indian Country, namely the work from Joseph Kalt and Steven Cornell from the Harvard Project on American Indian Economic Development and the Native Nations Institute out of the University of Arizona, we have shown that in no major areas is the Navajo Nation Code lacking in satisfying definitions of constitutionalism. Possibly all that remains is nomenclature, converting insignificant details of the Navajo Nation Code, such as "titles" into "articles." As far as can be determined, there is no major area of democratic values and norms lacking in the Navajo Nation Code. What is striking, however, is how all of these institutions,

especially that of a central government, are inconsistent with our historical and traditional mode of political organizing. In the next section, we will consider the concept of nation-statism and demonstrate where it might more accurately be at the root of much of the ills we currently face as a nation and a people.

Part IV: Nation-Statism

IT IS OF PRIMARY IMPORTANCE to realize that constitutionalism operates within a set of institutions, namely the nation-state, which developed out of Western Europe during the 17th Century. To put it another way, much of the problems inherent with our current method of government and many of our cultural setbacks stem from the adoption of Western political institutions without proper adjustments made for our differing political and social context. Speaking about Africa after decolonization, Basil Davidson (1994: 11) writes:

> Africa's crisis of society derives from many upsets and conflicts but the root of the problem is different from these: different and more difficult to analyze. The more one ponders this matter the more clearly is it seen to arise from the social and political institutions within which decolonized Africans have lived and tried to survive. Primarily this is a crisis of institutions.

Within the Navajo context, the nation-state format in which new and culturally foreign institutions were fit stems from the creation of the first "business council" in 1922—a mechanism designed to grant mineral and land concessions to foreign corporations. This political structure was a dramatic and completely foreign mode of governance for Navajo society. Major differences include: the centralization of power, standardization and uniform application of laws, and the official demarcation of boundaries. Historically, political power was disaggregate, lacking official boundaries and consisting of multifarious interpretations of Diné cosmology and laws. At the time of its inception, the nation-state format was not something needed by the natural community of the Diné. Rather, it was created to serve the interests of the Federal Government and outside corporations. In other words, the Navajo dramatically altered their natural political institutions for the benefit of outside forces, not in the consideration of the Navajo community (Kelly 1968: 48).

At the time of its adoption, there was vehement resistance against this method of governance among the Navajo populace. In the 1930s Jacob C. Morgan, later to become tribal chairman, led campaigns to oppose Navajo concessions of mineral wealth, the Bureau of Indian Affairs livestock reduction initiative, the creation of the first tribal council, and the 1937 Navajo constitutional effort (Iverson 2002: 158). It was not until he was named Chairman that Morgan ended his political opposition against the centralization of Navajo government. Other forms of resistance occurred more subtly.

Justices within tribal courts used traditional methods of justice to resolve Navajo offenses despite the BIA mandate to operate otherwise. It was the Navajo judiciary that took the lead in incorporating traditional values and concepts into the legal (i.e., political) logic of the centralized Navajo government. This led eventually to the formal incorporation of the peacemaking courts in the 1980s. Converse to this trend, the Navajo courts decided at this time that statutory law would trump common law when the two conflict on a given issue. In other words, the will of the central government supersedes cultural principles rooted in Diné culture. This is one of the most significant advancements of implementing the nation-state in the Navajo governance. In addition, the much lauded concept of "sovereignty" is a Western political concept originally intended to justify the divine and absolute power of monarchs in Western Europe in its most barbaric stage. Though it is universally agreed among Indian peoples that the right to "self-determination," or the ability to determine their own affairs, exists, sovereignty has the negative effect of justifying hierarchal rules (i.e., the centralized government) when such justification might not otherwise exist. In other words, in attempt to defend ourselves from outside encroachment, we have used mechanisms that transmogrifies our culture and historical political institutions into something new and utterly foreign. Whether this is positive or negative development is a separate question, but we must acknowledge first that this process has indeed taken place.

Forty-years after the process of decolonization in Africa, renowned African historian Basil Davidson wrote:

> That so little was foreseen (about the nation state project) is easy to understand. Any questioning of nationalism, of the credentials of nation-statism as the only feasible route of escape, had to seem very close to betrayal of the anti-colonial cause. To warn of nation-statism's likely disaster in the future of Africa, just as it had lately been in the past of much of Europe, was what no one, but no one anywhere, appears to have thought sensible until years later (Davidson 1994: 115).

Some might argue that the problems of Africa at the time of decolonization are different enough from the issues faced by North American indigenous peoples to negate any such analogies. However, some of the literature on American Indian political and economic development cites some of the early African anti-colonial writers. Native American studies and political science professor David E. Wilkins (2006: 46) writes, "As Frantz Fanon optimistically noted in discussing the state of African nations in their early decolonization years, the people 'are equal to the problems which confront them.'" This is a positive characteristic of colonized people on the brink of decolonization. However, as Basil Davidson continually reminds us, the institutions that replaced these colonial regimes often merely replicated, rather than removed, systems of oppression within colonial society. Furthermore, he argues that the people were not ready for the adoption of foreign institutions as a mechanism of self-government. Almost

immediately after decolonization, Africans realized this problem. They created a new appellation for this given circumstance in which they were still materially connected and, therefore, dependent on Western powers for their survival. This process they eventually called "neocolonialism," or the rule from outside through use of cooperative indigenous governments, what the British called during their colonial apogee "indirect rule."

It should become evident that the first tribal or "business" council created in the early 1920s was a federal attempt at indirect rule of the Navajo. We could argue that the Wheeler-Howard Act, or "Indian Reorganization Act" of 1934 was undertaken in the same vein (Kelly 1968). That this process was not explicit does not diminish the effect and control of federal governmental bureaucracies on the internal politics of Native societies. This eventually evolved into the bureaucratic ruling class that runs the tribe today. Davidson described a similar effect in Africa during decolonization. Accordingly, postcolonial independence was handled by men who considered themselves "literate and civilized" and "who understood constitutional law and practice and could move around at ease in the world of nation-statist sovereignties" (Davidson 1992: 34). This created a tension between what Davidson called "traditionalist" or those with traditional political authority such as tribal chiefs, and "modernizers," the "self-selected elite" who would come to rule many of the emerging nation-states following the decolonization of Africa.

We detect a similar effect on the Navajo Nation with the bureaucratic class in Window Rock and their opprobrium for traditional authority or local governance. For example, when commenting on Council Reduction, President Joe Shirley's Chief of Staff Patrick Sandoval claimed that he is worth (in terms of pay) three council delegates. Council Delegates, however, are the most immediate connection between local communities and the central government. The fact that Sandoval believes that his position in Window Rock is worth three representatives is very telling on the attitude toward localized issues.

Additionally, local and traditional ethos is important for the survival of the Navajo people. As Davidson writes about Africa, "Pre-industrialized societies had to shape its behavior to fit its environment—otherwise it would perish" (Davidson 1992: 81). Accordingly, colonizers granted independence to these nations so long as they adopted their former colonizers' institutions, mainly the nation-state format with a capitalist economic orientation. As Davidson wrote, "Acceptance of the postcolonial nation-state meant acceptance of the legacy of the colonial partition, and of the moral and political practices of colonial rule in its institutional dimensions" (Ibid: 162). Essentially, colonizers do not relinquish their colonies unless it serves their material interests (a continued source of raw materials as the likeliest reason). Those trained in the mechanics of these new institutions, including attorneys, educators, business administrators and other professional degree holders, tend to absorb the spirit of the

organizations in which they eventually serve. Those with professional degrees are inclined to look scornfully on the habits and values of traditional living as these seem to be outmoded and inconsistent with the modern way of thinking. As evidenced in this trend in Africa, Davidson examines the economic policies of nation-states in their burgeoning era. He claims that much of the economic focus during that time was the development of industrial sectors within urban sectors and not on the agricultural or pastoral activities that had maintained subsistence for generations (Ibid: 211). In the case of the Navajo Nation, we realize that the entire tribal government has been largely created by and for the extractive industries. With this, we have tried to redirect many of these resources toward business development and large-scale industry.

The use of nation-statist political and economic development has perverted our former institutions, forcing us to make stretched analogies between traditional governance and contemporary governance. The dramatic redefining of "constitutionalism" by Joseph Kalt and Steven Cornell is just one example. Often times we are confronted with these analogies to justify our continued drift toward a nation-state format, but it is important to remember that a nation-state is a framework in which to implement new and (for the Navajo) foreign institutions, such as a centralized system of governance and social services. These institutions are not historical to Navajo society which already had functions and/or roles that served similar purposes, albeit in a dramatically different context and at a much smaller level. Hierarchies within historical Diné institutions, such as the family, clan, and *naat'áanii*, extended vertically no more than a few levels. Whereas contemporary institutions such as the Navajo Nation Government, police force, and departments of social services, have rigid and deep bureaucracies creating multiple layers of hierarchies.

Ultimately, the main problems with nation-statism for the Navajo Nation is the centralization of political authority, the creation of hierarchies, over bureaucratization and the emergence of class. Centralization of authority differs from the localized function of our historical political institutions. This has led to increased animosity toward Window Rock from the more distant communities. The creation of hierarchies is divergent from the more egalitarian, role-based Navajo society of historical times. That is to say, political position had function, not scopes of authority. Creating hierarchies creates dissonance within Navajo society, where responsibility to family and clan relatives is prioritized, but now must be nullified to meet the needs of larger institutions. Of course the most frequently identified aspect of Navajo governance preventing "economic development" (i.e., the development of a service economy) is the bureaucratic nature of tribal divisions designed to assist Navajo entrepreneurs. Removing bureaucracies through increased emphasis on local rule seems a necessary first step in the process.

The emergence of class has become a serious issue on the Navajo Nation. At present, there seems to be two broad classes, with subtle subdivisions found in each of

these. The dominating class is the technocratic class or the administrators within government service institutions in Window Rock. The second class is everyone else, including: the pastoral workers, the unemployed, the seasonally employed, service-sector employees and low-rank government officials. Often, the dominating class looks down upon the rest of Navajo society, especially upon the more rural folk whom they view as backward and uneducated. This has manifested itself in recent efforts at government reform in which the executive branch has attacked the legislative branch in an attempt to remove influence from the representatives of distant communities and further centralize power in Window Rock.

Nation-statism has created a crisis in institutions, with the Navajo Nation trying to replicate foreign hierarchal establishments under the false assumptions that these are needed for modernization. Furthermore, "traditional" nation-statism, as Davidson calls it, or nation-statism from the 19th Century is waning in use and import. This mode of government has proved destructive in every society in which it has been instilled, the Navajo Nation being no exception. For us, factionalism and conflict around such factionalism have been some of the more obvious results, but others include an increased difficulty applying customary law, the revisionism of our historic institutions to match the basic tenets of modern regimes, and an overall distortion of our people's history to conflate with the development of the West. In Europe, where the concept of nation-statism began, this political institution is becoming less and less useful. With globalization and the integration of markets and technologies, Europe has organized itself to broad, continental confederate powers, i.e. the European Union. Furthermore, local culture and custom has seen revitalization, as in Scotland, Bavaria and the Basque sections of Spain. In Latin America, Africa and Asia, regional alliances similar to the European Union are burgeoning. For Native Americans, such alliances are not too unfamiliar, from the confederated tribes in modern New England to the National Congress of American Indians, tribes have proven adaptable to political alliances. Economic integration is not something new for the Navajo Nation. Historically we participated in a robust Southwestern regional economy that has been destroyed since U.S. contact. To revive our economy, it would be good to start with an infrastructure we have already created and begin trading again amongst our indigenous neighbors and closing off dangerous economic penetration from U.S. corporations found in border towns. These are all large and difficult transitions, but we must first acknowledge them as desirable solutions to our current political difficulties and our economic malaise.

SECTION II: GOVERNANCE & SEPARATION OF POWERS

By Moroni Benally

Introduction

THE NOTION OF GOVERNANCE IS PROBLEMATIC in the context of the Navajo Nation. The concept is purely and distinctly a Western notion and is laden with western[2] notions of political theory. Frances Morphy writes concerning her Indigenous society in Australia, "There is the word 'fair'...one of the words characterized…as being unique to English. And that really was the end of any attempt to engage seriously with what might or might nor be principles of governance derived from the Yolngu world-view" (Morphy 2008: 2). What we can infer from Morphy is that even the language used to describe and characterize a system of governance is laden with notions that "may or may not be" derived from an Indigenous worldview.

What Morphy calls into question is the cultural commensurability or validity of using western terms of governance to describe Indigenous systems of organization. While this paper is not a treatment of cultural appropriateness[3], it will take the position that if western terms of governance are used to describe Indigenous notions of organization then there must be partial ontological commensurability for it to be called culturally valid or appropriate. Morphy furthers her argument by stating, "We cannot assume a priori that when people from different cultural backgrounds use a particular form of words or a particular term that they mean the same thing by it" (Ibid: 11).

Raimon Pannikar takes a similar approach in understanding the nature of culture and its implications on systems of organization,

> There is no way to establish a hierarchy of cultures, not to pretend that the values of a culture can be always applied to others, that is, there is no way to make absolute or universalize our own values. We can only speak of human invariants, that is, those invariants common to all humanity…(Pannikar XXXX: 16)

For Pannikar, then, even a values system informing the organization of a specific society has its own unique elements and is difficult to translate from one culture to another. While this exercise may be beyond the immediate scope of the nature of this project, it is useful in that it helps situate the current discourse in the Navajo Nation of government reform and its intersection with Navajo culture in a context that can be understood.

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[2] The term "western" intentionally spelled in lowercase by the author.

[3] For a sophisticated treatment of the issues underlying cultural construction see Ethnicity and Race: Making Identities in a Changing World by Stephen Cornell and Douglas Hartmann.

The historical system of organization of the Navajo people surrounded a code of ethics derived from a set of principles laid out by the value of *Sa'ąh Naaghái Bik'eh Hózhóón* (SNBH). Loosely defined, SNBH is a notion of longevity, resilience, eternal goodness (Wyman 1970; Lewton, et al. 2000; Benally 1999). This historical system was largely spiritual in its practice and pronouncements had little binding authority; however, from the stories or *hajííneí bąhané* we find a system that is binding and leaders with authority and power to delegate and exact obedience (Haile 1981; Zolbrod 1984).

This section will do two things. Part I will address current issues in the problematics of governance in light of the foundational principles, values, and norms of the Navajo. Part II will address the development of the separation of powers as it relates to constitutionalism and to the historical and current systems of organization and governance.

Part I: Governance and Systems of Organization of the Diné

GOVERNANCE

THE IDEA OF THE MODERN NATION-STATE which is contended to have emerged with the Peace of Westphalia and the development of sovereign nation-states is well suited for the idea of governance. In those nation-sates the mechanism for legislation and action over the people is embedded, according to the norms set forth by the idea of sovereignty. Traditional governance systems often refer and are subject to varying interpretative frameworks. Western concepts of governance are deeply embedded in the vocabulary used to describe, often objectively, traditional societies. Thus the problematics of the concept of governance has no real space in the Diné worldview. Therefore, the need arises to identify the traditional concept upon which a system of organizing and decision-making took place. This concept can then be modernized to reform the Navajo Nation, rather than the current process of retrofitting western democratic political theory onto the extant notions of Diné organization.

The Harvard Project on American Indian Economic Development suggests that self-determination is key to the development of Indian Nations, or "that Indian nations should determine their own futures" (Cornell and Kalt 1998: 188). By this Cornell and Kalt suggest that "shaping those futures will require not simply the assertion of sovereignty – a claim to rights and powers – it will require the effective exercise of that sovereignty" (Ibid: 188). What is not stated, but apparent in the subtext is the idea that self-determination, which is conflated with sovereignty, must be effectively exercised on the terms of others, not on the terms of the Indian Nation, "[t]he solution is to build a nation in which both investors and human beings can flourish. The nation-building approach says the solution is to put in place an environment in which people want to invest" (Ibid: 192).

The obvious question that is never asked by Cornell and Kalt is whether the notion of nation-statism, and the specific approach to economic development, are veridically consonant with the culture. Rather, they take an approach to cultural appropriateness that goes like this, "If the people want it, then it is culturally appropriate." However simplistic this may appear, that is the substance of their definition of culturally appropriateness, while cloaked in language of cultural constructionism and the dynamic nature of culture. Cultural "match" refers to the match between governing institutions and the prevailing ideas in the community about how authority and the prevailing ideas in the community about how authority should be organized and exercised. Such prevailing notions are part of the culture of a tribe or of any governing cohesive society (Ibid: 201; Cornell & Curtis, et al. 2004).

The arguments submitted by the Harvard Project and the Native Nations Institute are very similar. The guiding definition of governance used by the Native Nation Institute is "establishing rules we can depend on to coordinate our actions and achieve our goals" (Cornell & Curtis, et al. 2004: 3). Cornell explicates the notion of governance by stating,

> In some societies the rules are spelled out in written constitutions, codes, and procedures, and the structure of government is obvious. In other societies, the rules are not spelled out anywhere; instead, they exist in traditions or practices that everyone understands and participates in, and people learn the rules by being effectively socialized to them by parents, teachers, and elders. (Ibid: 5)

In his exposition, Cornell argues that not all governing institutions are effective. Yet, he fails to qualify what is meant by effective? One can infer from the research of the Harvard Project and Native Nations Institute that "effective" means to successfully engage in the dominant economic system (Cornell & Curtis et al. 2004; Cornell & Jorgensen et al 2005; Kalt & Singer 2004).

In short, the notions of governance posited by the Native Nations Institute of the University of Arizona and the Harvard Project include a loose framework focused on rules and their enforcement. The United Nations define governance as "the process of decision-making and the process by which decisions are implemented (or not implemented)" (Sheng xxxx: 1). The World Bank defines governance as,

> The rule of the rulers, typically within a given set of rules. One might conclude that governance is the process – by which authority is conferred on rulers, by which they make the rules, and by which those rules are enforced and modified. Thus, understanding governance requires an identification of both the rulers and the rules, as well as the various processes by which they are selected, defined, and linked together and with the society generally (Worldbank).

PROBLEMS WITH THE TERM "GOVERNANCE"

These conceptions of governance are consistent with the Harvard Project and Native Nations conception of governance where governance is essentially based on enforceable rules and norms. For the Harvard Project governance in Indian Country is restricted and distilled to a set of criteria that focuses on stable institutions and policies, fair and effective dispute resolution, separation of politics from business and management, a competent bureaucracy, and cultural match (Cornell & Kalt 1998: 196). These criteria reduce the concept of governance to activities and power relationships that involve mostly government (Johnson 1997: 1). However, Cornell and Kalt recognize the voice of the people so their concept of governance is government thick and people thin. This conception of governance is "seen as a concept that encompasses a series of mechanisms and processes" (Ibid: 1).

Furthermore, Harvard focuses on the term "capable governance" meaning institutions of self-governance:

> ...have to back up this [decision-making] power with capable governing institutions that *keep politics* in its place, *deliver on promises*, *administer programs and manage resources efficiently*, and send a message to investors – from community citizens considering taking a job with tribal or First Nation government to those thinking of starting a small business on [I]ndigenous lands - that they will be treated *fairly* and that their investments of time, energy, ideas, or money will not be hostage to politics" (Cornell & Jorgensen, et al 2005:4-5, emphasis added).

The components of governance articulated by the Harvard Project and Native Nations Institute include the notion of fairness as a major criterion for capable governance. Yet as Morphy found, these "context-free moral precepts" were not applicable to Aboriginal systems of organization (Morphy 2008: 4). The question that must be asked of the Harvard and Native Nations notion of capable governance is upon *whose* notions of fairness does that society conduct itself? Morphy further writes, "Anglo-Australians tend to assume that, for all their difference, Indigenous principles of governance appeal, as western principles of governance do, to what are assumed to be universal concepts such as 'fairness' (Ibid: 6).

What Morphy brings to the fore in the discourse of governance, as it pertains to Indigenous populations, is the fact that the approach to governance assumes a position of universality of context-free moral precepts. "

> The realization that our Anglo notions of governance are as culture-bound and relativistic as anyone else's – in other words that they are not founded on self-evident truths – is hard to achieve…But [standard approaches to governance] treated [Indigenous peoples] as if principles of governance could simply be grafted onto existing ideas because of an assumption about the universality of concepts such as 'fairness' and 'honesty' (Ibid: 7).

Thus Morphy points out exactly, those notions of western concepts such as fairness may not be commensurate with Indigenous notions, and therefore Indigenous people may have different conceptions of governance.

CONSTITUTIONALISM AND GOVERNANCE

M.J.C Vile's classical work *Constitutionalism and the Separation of Powers* focuses on locating the epicenter of governance systems, those systems which have political authority and formalize those governance systems "in order to provide a check on the exercise of political power and to grant access for citizens" (Sala 2001: 12). In other words, when a governance system is disaggregated and power is diffused over multiple political sites, then "it is difficult to devise a constitutional means to establish transparency, accountability, and representativeness of political authority" (Ibid: 12). Thus the common understanding and function of constitutions is "define and identify the locus of political authority….lay out the rules and locate political sites for governing" (Ibid: 11).

In the Navajo context, a formalized set of rules currently function as the "constitution" of the Nation. Yet, this is problematic in that it does not recognize notions of traditional conceptions of organizing, and further recognizes only one set of rules and locus of authority.

DINÉ "GOVERNANCE"

In Diné, organizing principles can be traced back to *hané*. To clearly articulate the notion of power in traditional governance, an understanding of that governance system must be established. The use of the English language obviously has its limitations in advancing a Navajo view. In the Navajo tradition, there are many instances from which a governance system can be pieced together; the first derived from the myth held collectively by the people, and second from the historical activities labeled loosely under the auspices of governance.

Before one can proceed, the question must be asked: *Governance eí ha'át'ísh olyé? Dóó ha'át'ísh eí bitsesileí?* These two questions ask, "What is the meaning of governance?" and "What are the roots or foundations that inform the concept of governance?" The short denotation of the word is "the action or manner of governing." The root of the word, "govern" means to conduct the policy, actions, and affairs of (a state, organization or people). The implication is that there is a homogenous body united in some way whose actions are binding on some way on all within that homogenous body.

This idea begs the question, in light of the Fundamental Laws of the Diné, "What, if any, were the powers and the character of the power embedded in the governance system of traditional Diné?" This analytic exercise is useful because it serves as a baseline from which to understand the "traditional" notion of power in

governance. To understand this "power" a context must be provided. Navajo concepts are context dependent, amenable to change, and very dynamic. Yet, it is important to capture the ethos, or fundamental underlying principle, attached to the notion of power embedded in governance.

According to Herbert Benally, professor of Navajo Philosophy and Culture at the Diné College, there are three major epochs of governance in Diné history. Each of the epochs details an understanding of the source of authority and power upon which these governance systems derive their authority.

EPOCH I

The first epoch details the struggle that occurred at the separation of the sexes; a treatise on the theoretical understanding of power and political philosophy of the Diné. The source of authority is understood as being one of divine investiture within First Man or *Ałtsé Hast'ii.* Woman Chief, mother of *Ałtsé Asdzáa,* at the provenance of the separation of the sexes and upon hearing First Man struck First Woman with a fire stick because he heard she committed adultery, stated,

> You usually begin your talks by saying 'all things exist through me! All things that are planted exist through me,' you say in your talks. 'My feet stick through the earth and my head through the sky,' you say in your talks. 'Furthermore, of the holy beings I am the very highest,' you claim in your talks (Haile 1981: 14-15).

This story is illustrative of the source of authority in the particular system of organization that exists within the myths of the Diné. First Man derives his source of authority and power from the sky or from the heavens, "*Nahasdzáá bikáá dinís'eez inda yádiłhił biyi' ninisht'á dishnúigo yásht'ı́*'" (Ibid: 76). In this Navajo selection, the term from whence the source of authority and power are derived is *Yádiłhił* or the heaven, replete with divinity and holiness. Thus, First Man had power from heaven making him the "holy highest one" (Ibid: 33). Yet, the principles upon which this power was exercised were operative only by commitment to the principles of goodness and operational only by gentle persuasion and compassion, as articulated by SNBH. Thus the act of First Man striking First Woman and First Woman committing adultery weakened that power. This led to the disintegration of the authorial powers of First Man over the population and, subsequently, the disintegration of the governance system of that society.

EPOCH II

The second epoch of Diné governance is the historical Diné. The traditional Navajo government was organized around the principles of *Hózhóójí dóó Hashkéejí,* or the nurturing and protection aspects of governance. Traditionally, those who accepted SNBH were adopted and became Diné. Today, there are many clans whose origin is not Diné. Also traditionally, citizenship was being Diné and there was an obligation and

duty to uphold and protect and practice the principles of *Hózhóójí*. Thus the deontological principles associated with SNBH were broadly categorized as *Hózhóójí dóó Naayeejí*. These principles served as the guiding principles for behavior, interaction with others, distribution of power and wealth. It outlined principles of happiness, of peace, contentment, and guidelines and norms of relationships with all creation. Therefore, and to reiterate, one became Diné by accepting the principles of SNBH. Thus, Diné is a concept that is deeply embedded in SNBH and its explicatory ceremonies associated *Hózhóójí* and *Naayeejí.*

The Diné created the *Naachid*. The purpose of this ceremony was to protect and nurture the Diné. An individual who was selected to participate in that council was called *naalchi'í*. *Hashkéejí Nat'aah* protected the people from any harm, from negativity, and from themselves as they moved away from the principles of *Hózhóójí*. *Hózhóójí Nat'aah, Nahat'á* nurtured the individual, assisting the people to live in accordance with the principles of *k'é*, to aide the community to maintain their relationships with all creation.

While the people were united in a sense, that they subscribed to a common identity, they were not organized into an institution that could be influenced by specific decisions. The tradition of the *Naat'áanii* system is often described as a political institution that wielded some regional spheres of influence (Wilkins 2003: 68). The *Naat'áanii* system expressed their weak authorial powers in what is known as the *Naachid*.

The *naat'áanii* are said to have been present to provide discipline (Ibid: 69). Yet that notion is problematic when one observes that the *naat'áanii* were mere guides who did not posses any real power, as understood in Western terms, that being of authority or control over another entity, person, or situation. Rather, their power was that of influence and persuasion. The decision of the *Naachid* "were not binding on the assembled Navajo (and certainly not on any outfits not present) and those who disagreed with the gathering's decisions were not compelled to obey and suffered no reprisals"(Ibid: 71).

The source of power and authority for the *Naat'áanii* came from the confidence the people had in their abilities to make decision (albeit non-binding) consonant with either the Blessing or Protection Way. This system of organization or governance as understood historically was highly theocratic without the authority of enforcement and control.

EPOCH III

The current system of organization, or governance, is organized around the set of written codes of the Navajo Nation, with the implicit assumption that the people are the source of authority for the establishment of powers and authorities of the Navajo Nation. However, the federal-Indian relationship complicates the notion that the power

of the Navajo government comes from the people with *Oliver v. Udall* (1962, 306 F. 2d 819), "While Congress retains paramount authority to legislate for and enforce its laws on all the tribes in certain respect, it has recognized the authority of Indian governments over their reservations and if this power is to be taken away from these it is for Congress to do it" (1 NNC: 1 annon. 1).

It is implied by statutory law that the citizens of the Navajo Nation are the ultimate source of power and authority of the Navajo Nation Government. "There is hereby established the Legislative Branch of the Navajo Nation Government. The Legislative Branch shall consist of the Navajo Nation Council and any entity established under the Navajo Nation Council." The § 101 (A) shall not be amended unless approved by a majority of all registered Navajo voters through a referendum" (2 NNC: 101 (A-B)). And, "The Navajo Nation Council shall be the governing body of the Navajo Nation and shall consist of 88 delegates. This section § 102 (A) shall not be amended unless approved by a majority vote of all registered voters in all precincts" (2 NNC: 102(A)). The statute is clear that the people have the authority and power. Yet, the power is also exercised by elected officials and executive agencies within the Navajo Nation that have the power to control and coerce, this power stems from their authority from and granted by the people.

Part II: The Problematic of the Doctrine of Separation of Powers

THE DOCTRINE of the separation of powers is problematic in the Navajo Nation today. This separation of powers, under a presidential system of governance and a trifurcated branch of government, characterizes the Navajo Nation today with the passage of the government reform in 1989. The stated need for this separation of powers and, more importantly the checks and balances which are said to live within the notion of separation of powers, arose precisely because a single political office amassed amazing political power in the Navajo Nation.

The doctrine of the separation of powers currently understood in the Navajo Nation Code is that of a tripartite separation of power distributed over three branches of government: the legislative, the executive, and the judiciary. "There is hereby established the Navajo Nation government consisting of the Legislative, Executive and Judicial Branches, and the political subdivision of which are not under any branch of the Central government" (2 NNC 1:1). This separation of powers is understood to function in the same manner as the classic American understanding of the separation of powers. Geoffrey Marshall delineated the classical understanding of the separation of powers and distilled it to five major ideas:

> 1) The *differentiation* of the concepts, 'legislative,' 'executive,' and 'judicial.' 2) The *legal incompatibility* of office-holding as between members of one branch of government and those of another, with or without *physical separation* of persons. 3) The *isolation, immunity,*

> or *independence* of one branch of government from the actions or interference of another. 4) The *checking and balancing* of one branch of government by the action of another 5) The *co-ordinate* status and lack of accountability of one branch to another" (Marshall 1971: 100).

Thus the function of the separation of powers is to ensure that one branch of government does not amass more power than another.

James Madison wrote in *Federalist 47*, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many and whether hereditary, self-appointed, or elective, may justly be pronounced the very definitions of tyranny" (quoted in Tomkins 2001: 4). The purpose of this separation is purported to be liberty of individuals and efficiency of government and

> ...the separation of powers further rests on the idea that these separate functions should be assigned to separate governmental bodies or branches. The great good which this functional parceling out of political power promises, as we shall see, is not justice in the ancient sense but liberty in the modern sense (Diamond 1978: 36).

The classical notion of the separation of powers emerging from Montesquieu to Madison notes that liberty is the end of the functional separation of powers, in that the separation guarded against tyranny (Kesler; Alvey and Ryan 2005). "Tyranny is a danger because man's passions and reason are not perfectly harmonious; his reason may be distorted by desire" (ibid: 3).

The consensual foundational need articulated for the separation of powers is the basic distrust of people (Kesler; Wolf 2007). "Instead, the new science [separation of powers] would take man as he actually is, would accept as primary in his nature the self-interestedness and passion displayed by all men everywhere and, precisely on that basis, would work out decent political solutions" (Diamond 1978: 38). The Harvard Project and Native Nations Institute have also identified the separation of powers as necessary for an effective governance system, "All societies face the problem of preventing those who exercise the legitimate powers of government from using that power to transfer wealth – or additional power – to themselves" (Cornell and Kalt 1992: 24).

There are two fundamental purposes for the functional separation of powers: efficiency of government and liberty (Fisher 2005: 162). Barber (2001) suggests that the separation of powers is to promote interests of efficiency of government, rather than to safeguard liberty.

> The separation of powers in modern constitutionalism predates the emergence of democracy by some hundreds of years, and was designed, neither opt safeguard liberty nor enhance efficiency, but to render government constitutionally accountable – and,

> more specifically, to render it constitutionally accountable through the operation of constitutional politics, rather than constitutional law" (Tomkins 2001: 26).

Tomkins suggests that the separation of powers is necessary to keep government accountable by allowing politics to act as checks and balances, and not to institutionalize separation formally in constitutional or statutory law.

It is contended by the Harvard Project that the formal separation of powers and limitations of power lead to economic development, "without constitutional checks and balances, such as an independent judiciary of some sort, tribal politicians are positioned to turn authority into personal power or gain. Such conditions discourage investment because potential claimants see little chance of fair adjudication of their claims" (Cornell and Kalt 1992: 25). This claim is broad enough to circumscribe most critiques by its vagueness, but still fundamentally advocating a system of compartmentalized government branches. Yet others argue that, "Madison's separation of powers was far less a separation of the functions or checks on constitutional authority, but something far more important, a separation of political power" (Nourse 1996: 452). It would seem that Harvard is advocating a separation of political power, while that may be a marginal concern, Harvard is also concerned about institutions and state emphatically that institutions matter in Indian Country,

> By developing institutional solutions that can effectively solve problems and that fit each tribe's cultural standard, tribes can create an environment in which development has the support of the institutions themselves and is less dependent simply on the quality of the people in office. In doing so tribes increase their power: the power to attract investment, to pursue distinctive tribal goals, and to exercise their sovereignty in meaningful ways (Cornell and Kalt 1992: 34).

The thrust for Harvard advocating that institutions matter (where separation of powers is manifested, often in a tripartite fashion) is the end, which is investment in Indian Country. The end of reforming government is to sustain investment, which is perceived as being key to the development of that Indian Country, and which leads to the exercise of sovereignty in meaningful ways. Yet this institutionalist perspective appears problematic when the Foundational laws[4] are put forth, that is the end of Navajo existence is the establishment of *hózhóón* and the expression of *relations* in meaningful ways.

The notion of separation of powers is problematic in that culturally and traditionally there was no such notion of a formal separation of powers into compartments. Certainly there was a distinction in the *Naachid* of the *Hózhóójí Nat'aah* and the *Hashkéejí Nat'aah;* but this was not a separation of powers, nor necessarily a check on the authorial influence of the other. While there were checks on positions of

[4] Fundamental Laws of the Diné

influence or "political power" to use the jargon of modern political theory, the historical Navajo held power collectively by the people and those who were chosen as moral examples or *naatáanii*. Thus power was held collectively in one body. However, that notion of a single source of power has become irrelevant in the ever-westernizing Navajo experience. Thus a modern equivalent that comes close to the historical status of power is the separation of powers in a Westminster System. That is, as Tomkins argues, "Separating power so that those in this position (the crown and its ministers) can get way politically with *less*" (Tomkins 2001: 26).

The tripartite system of powers in the Navajo Nation, at least in the theoretical realm, is culturally inappropriate as "the vertical or functional separation of powers generally acts against the interests of citizens" (quoted in Tomkins 2001:24). In that, Tomkins suggests that the compartmentalization of powers in terms of law is less organic and less responsive to the needs and interests of the people as it tends to rigidity. Whereas a horizontal separation of powers is less compartmentally based, and uses politics to facilitate a checks and balances rather than law, this approach, it is argued, is more appropriate, dynamic, and fluid at responding to the needs and interests of the people.

In the current tripartite system in the Navajo Nation, the functional compartmental approach is taken for the separation of powers. The Legislative has its specific functions and roles, the Executive has it particular functions and roles, and so does the Judiciary. As a result the functional purpose of the separation of powers works against the interests of the citizens, in that the separation of powers work to sustain an institution that compartmentalizes power. However, in the case of the Navajo Nation government, while there may an extant functional separation of powers in theory, in practice those powers are, separated into two bodies, which derive their source of authority from the same source: the people. These two bodies are the legislative and the judicial.

While judicial review is an adopted practice, the Navajo Nation Council, via the voice of the people, has the ultimate authority to disassemble the Judiciary.

> The Navajo Nation Bill of Rights (1986) is a fundamental, overriding stature which, by its own terms and necessary implication, allows judicial review to decide whether another law or an act of the Navajo Nation Government is void because of a violation of fundamental rights. We have judicial review authority because the Navajo Nation Council made the policy decision that there would be a fundamental law which is superior is to other laws, and which cannot be changed without a vote of the Navajo Nation" (Bennett v. Navajo Board of Election, 6 Nav. R. 319, 324 (Nav. Sup. Ct. 1990)).

The current system of the Navajo Nation is attempting to mimic the American Presidential system of separation of powers which has a constitutional basis, where powers are formally compartmentalized into departments. The foundation upon which

this functions is one of distrust. Each of these branches derives their source of power from the Constitution. In the Navajo Nation, separation of powers is not compartmentalized. That is the source of authority for these several branches of the Navajo Nation is the Navajo Nation Council itself. Yet, there is profound respect for the separation of powers or the separation of political powers between the judicial and legislative, yet not so much with the executive. Despite there being the legal allowance for the Council to disband the other branches, it does not; tradition and implicit trust in the ability of the judiciary to check the Council's power is functional and operational.

This system of governance surrounding the separation of powers is more appropriate to the traditional notions of governance with epochs one and two, that is, with the source of power and authority being persuasion and influence and the permission of others to checks one's power. However, the statute of the Navajo Nation Code attempts to implement and mimic the American orthodox system of separation of powers, underscored by the compartmentalization of powers within branches where the source of authority is derived from the Constitution. This is not the current practice of the Navajo Nation, despite its statutory law; it has successfully weakened the executive branch and controls it through legislative oversight and the overriding of vetoes.

SECTION III: JUDICAL REVIEW IN THE NAVAJO NATION

By Robert Yazzie

Introduction

WHILE THERE IS SOM DISCUSSION about whether the Navajo Nation should have a written constitution or not, this paper does not address that specific issue. The question here is the extent to which provisions of the *Navajo Nation Code* can be read and applied as if they were parts of a constitution. The process or procedure of reading the *Code* in that way will therefore be called "constitutionalism."

An adequate consideration of the question requires 1) a definition of "constitutionalism" in giving code provisions "constitutional" treatment; 2) an examination of the doctrine of judicial review in the Navajo Nation; 3) a discussion of policy considerations in favor of constitutionalism and against it; and 4) some conclusions on what should be done with this research.

Part I: Constitutionalism

THERE IS A LONGSTANDING Western law tradition of a form of fundamental law that prevails over any law adopted by a government. The initial name for it was "natural

law" and it was said to prevail over law adopted by humans because it was a form of Divine Law, laid down by God. While natural law (in the Western sense) has been largely abandoned in the United States for various reasons, the concept of a prevailing or overriding law persists in the fields of constitutional law and international human rights law.

The modern form of a "prevailing law" that trumps other laws is a constitution. The word itself was used to refer to the "English Constitution." There is no one single document in it as it is comprised of various statutes that traditionally have fundamental status (such as the Magna Carta of 1215 and the English Bill of Rights of 1689) and unwritten English customs (also known as the "Lex Non Scripta" or unwritten law). Therefore, it has been said that the English Constitution is an "unwritten" constitution. The question is what one should do when there is a conflict between a written or unwritten constitutional provision and some other law.

The doctrine that courts have the authority to declare a statute enacted by a legislature void or unenforceable usually is said to come from a case decided in 1610 by Sir Edward Coke, in the "Dr. Bonham's Case" (8 Co. Rep. 107a, 114a C.P. 1610). The Royal College of Physicians convicted and imprisoned Thomas Bonham for practicing medicine without a license. He challenged the imprisonment, and Coke, sitting in the Court of Common Pleas, ruled that the College's charter had to be read strictly to prevent the loss of liberty. He also ruled that since the College was a party to the case, it could not act as a judge. Coke writes:

> [I]t appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

There are two concepts that come from that statement. The first is that the common law, based on case decisions, can control or override acts of Parliament. That cannot be taken at face value. Where a statute is vague, unclear, or conflicts with a clear provision of common law, the common law principle is favored. Furthermore, it is favored when the strict application of a statute would cause unjust results. The idea that common law may prevail must be coupled with Coke's citation to "common right and reason," repugnancy [to the law], or the impossibility of performance of the given statutory provision. American judicial review is based upon statements of what is "reasonable" or standards to measure when a statute is "repugnant" to principles of the Constitution or its Bill of Rights.

The United States and the Navajo Nation have doctrines of judicial review where a court can declare that a statute is invalid, void, or unenforceable. The English doctrine is that if a statute is vague or contrary to a provision of common law, the statute will be read strictly in an attempt to harmonize it with common law. While the English do not

readily admit it, there have been instances where English judges have refused to enforce a statute that directly clashes with the common law. Therefore, the term "constitutionalism," as applied to ways to read certain statutes and apply them to other statutes, refers to a process where a "fundamental" statute will trump or override another statute or act of the Navajo Nation Council.

Part II: Judicial Review in the Navajo Nation

THE CONCEPT OF JUDICIAL REVIEW was established in Navajo Nation law in the 1978 case of *Halona v. MacDonald* (1 Nav. R. 189 (Ct. App. 1978). The Navajo Nation Council appropriated $70,000 to pay for Chairman Peter MacDonald's private legal expenses. Six Navajos brought a legal challenge to the appropriation. There were two issues in the case, first, whether the Navajo Nation Court of Appeals had the authority to review and pass upon Council enactments, and second, whether the appropriation was invalid.

The Court ruled, on the first issue that, "There is no question in our minds about the existence of such authority. When the Navajo Tribal Council adopted Title 7...of the Tribal Code, it did not exclude review of Council actions from its broad grant of power to the courts" (Ibid: 204). The Court then looked to the requirement in the Indian Civil Rights Act of 1968 that tribes must honor due process of law and equal protection of the law and found that due process requires judicial review (Ibid: 204).

The Court then reviewed various Navajo Nation statutes on appropriations and found that the appropriation was not valid. It also raised the issue of whether Navajo Nation law prohibited the expenditure of public monies for a private purpose, and said:

> This question can only be answered by reference to Navajo tradition and by an analysis of Navajo history, especially as that history related to the land which produces all Navajo income. The Navajo People are supreme and all residual power lies with the People. In the end, all monies spent by the Navajo Tribal Council are monies of the Navajo People (Halona v. MacDonald, 1978: 211).

How did the decision by Judges Homer Bluehouse, Murray Lincoln (retired Chief Justice) and Marie Neswood that judicial review is part of Navajo Nation law fare? First, the Council did not eliminate that power in the Judicial Reform Act of 1985 that revisited the Judicial Code. Second, the Navajo Nation Council had this to say about the Navajo Nation courts in the Title II Amendments:

> The Judicial Branch has been reorganized by the Judicial Reform Act of 1985, Resolution CD-94-85, and treating the Judicial Branch as a separate branch of government has proven to be beneficial to the Navajo Nation and has provided stability in the government (Resolution CD-68-89, Section 3, Preamble).[5]

[5] "Amending Title II of the Navajo Tribal Code and Related Actions"

While that mention of the courts did not use the term "judicial review," its principles were very much on the minds of Council members. Section 2 of the Preamble states:

> Recent controversy involving the leadership of the Navajo Nation has demonstrated that the present Navajo Nation Government structure allows too much centralized power without real checks on the exercise of power. Experience shows that this deficiency in the government structure allows for, invites and has resulted in the abuse of power.

Section 4 of the Preamble states:

> The lack of definition of power and separation of legislative and executive functions have also allowed the legislative body to overly involve itself in administration of programs thereby demonstrating a need to limit the legislative function to legislation and policy decision making and further limit the executive function to implementation of laws and representation of the Navajo Nation.

Section 5 provides:

> There is an immediate need to reorganize the Navajo Nation government by defining the powers of the legislative and executive branches and impose limitations on exercise of such powers.

The Navajo Nation Supreme Court revisited the doctrine of judicial review after the 1989 Title II Amendments in the 1990 case of *Bennett v. Navajo Board of Election Supervisors* (6 Nav. R. 319 (Nav. Sup. Ct. 1990). Kay C. Bennett filed a declaration of candidacy for the office of President of the Navajo Nation, and the Board of Election Supervisors rejected the application on the ground that she did not satisfy a provision of the Election Code that required candidates to have either served in an elected office or been employed "within the Navajo tribal organization" (Bennett v. Navajo Board of Election Supervisors, 1990: 319-320). While the Navajo Nation Supreme Court found that the statute was void because it was vague and did not give meaningful standards for action, the Court addressed the "Scope of Judicial Review" following the reorganization of the court system and the remainder of Navajo Nation Government in 1985 and 1989:

> The decision traced the origin of judicial review to the 1958 resolution that created the courts (actually, one of two) to command, "these courts be made effective and respected instruments of justice" (Ibid: 322).[6]

[6] Citing the preamble of Resolution No. CO-69-58, October 16, 1958.

> The Court then noted that the Navajo Nation adopted and amended the Navajo Nation Bill of Rights and provided that none of its provisions could be abridged or deleted by amendment without a referendum vote (Ibid: 322-323).

After reviewing a few other developments, the Court said that:

> The law of the Navajo Nation has evolved to recognize the full independence of the courts of the Navajo Nation as a separate branch of the Navajo Nation Government. Navajo law has self-imposed limitations upon the legislative and executive branches, and it recognizes basic and enforceable Navajo human rights. This Court, the Navajo Nation Supreme Court, has been empowered to enforce all these organic laws through the application of the rules of law, equity, and tradition. Following over thirty years of legal evolution, there is not a fully-developed principle of judicial review of Council actions (Ibid: 323).

The Court used the term "organic laws" to refer to the Navajo Nation Bill of Rights, the Judicial Reform Act and the Title II Amendments. An "organic law" often refers to an Act of Congress that establishes a territory, and it usually has a constitution-like statement of government authority and powers and a bill of rights. In finding those statutes to be "organic" or fundamental, the Court then stated the rule of judicial review for the Navajo Nation:

> The question of conflicting enactments of a legislature is one of statutory construction, and the actual question posed is whether the Navajo Nation Council intended one law to prevail over another. That was clearly the intent of the Council. In enacting an entrenched declaration of basic Navajo human rights, creating a Supreme Court to ultimately enforce them, and in placing self-imposed limitations upon the legislative and executive branches of government, the Navajo Nation Council provided both the jurisdiction and the foundation for judicial review by the Navajo Nation Supreme Court (Ibid: 323).

Are there any other "organic" laws? The first that comes to mind is Resolution No. CN-69-02 (November 13, 2002) that adopted a resolution "Amending Title I of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine'." Can it be used in judicial review of Council actions?

The case that first comes to mind is *Judy v. White* (No. SC-CV-35-02 (Nav. Sup. Ct. August 2, 2004)) the decision that invalidated pay raises for the President, Vice President, and Council delegates. It is important to recognize that the decision did *not* use the Fundamental Laws for the ruling that the pay raises were invalid. Instead, the decision used provisions of Title II on legislation to find that the raises were invalid because the Council did not follow its own requirements (Ibid, Slip OP. at 18-24). Navajo common law, called *Dine' Bibee haz'áanii* in the opinion, and authorized by 7 N.N.C. § 253, was used to find that the plaintiffs had the right to bring the suit.

It is important to note how the Navajo Nation Supreme Court applies The Fundamental Laws. We see the rule in the case of *Tso v. Navajo Housing Authority* (No. SC-CV-10-02 (Nav. Sup. Ct. August 26, 2004)). That was a sexual harassment damage action where the Navajo Housing Authority claimed that it was exempt from execution of a judgment for damages, it did not have to pay because of a statutory exemption. The Navajo Nation Supreme Court ruled that, "We hold that the Navajo Nation Council may override a statutory exemption if there is clear intent in the plain language and/or structure of the later law to include the exempted individual or entity in a generally applicable regulation" (*Id.*, Slip Op. at 5). A footnote follows that sentence, and it explains how the Court applies Navajo common law:

> As the test we announce today requires clear intent in the plain language or structure of a statute to override an exemption, we do not fill any omissions or interpret ambiguous language under *Diyin Nohookáá Diné'é Bibee Haz'áanii* (Navajo Common Law). Our general rules of statutory construction changed with Council passage of Resolution Nos. CN-69-02, November 13, 2002, "Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine' and CO-72-03, October 24, 2003, "Amending Title VII of the Code, which mandate that we interpret statutes consistent with Navajo Common Law.
>
> We have applied this mandate when the plain language of a statute does not cover a particular situation or is ambiguous, but have applied the plain language directly when it applies and clearly requires a certain outcome.[7]

This approach flows from the relationship between the judicial and legislative branches in our current Navajo form of government, as it is ultimately the responsibility of the Navajo Nation Council to make policy for the Navajo people, and our Court to apply it when clear and valid.[8] When unclear, we apply the tools of statutory interpretation given to us by the Council, which require us to give meaning to the Council's ambiguous language consistent with the fundamental principles of the Navajo people. Here, we expect the Council to have clearly spoken to override NHA's clear

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[7] Compare *Judy v. White*, No. SC-CV-35-02, slip op. at 25 (August 2, 2004) stating that the Court is bound by plain language of Sovereign Immunity Act, *Fort Defiance Housing Corp. v. Allen*, No. SC-CV-01-03, slip op. at 4 n. 2 (Nav. Sup. Ct. June 7, 2004) declining to apply Navajo common law when plain language is clear, and *Chapo v. Navajo Nation*, No. SC-CV-68-00, slip op. at 7-9 (Nav. Sup. Ct. March 11, 2004) applying plain language of Sovereign Immunity Act with *Thompson v. Greyeyes*, No. SC-CV-24-04, slip op. at 7-8 (Nav. Sup. Ct. May 24, 2004) interpreting Domestic Abuse Prevention Act to avoid conflict with Navajo Common Law, and *Fort Defiance Housing Corp. v. Lowe*, No. SC-CV-32-03, slip op. at 6-7 (Nav. Sup. Ct. April 12, 2004) applying Navajo Common Law to Forcible Entry and Detainer Act when ambiguous and when procedure for filing appellate bond is not provided by statute.

[8] (See *White*, No. SC-CV-35-02 "Declining to apply attempted legislation when improperly passed); *Allen*, No. SC-CV-01-03, slip op. at 4 applying plain language of statute over court rule).

exemption from forcibly paying a monetary judgment, as the existence or waiver of that exemption significantly affects the financial viability of a necessary tribal program (Ibid., Slip Op. at 5-6 n. 1).

Here, as in the *Bennett* decision, the Court was careful to point out that it was enforcing the law the Council enacted, and carrying out the intent of the Council. Likewise, the Court said that it uses The Fundamental Laws in the way the Council directed in the Laws and in the most recent revision of the Judicial Code. The Court takes great care in applying The Fundamental Laws that it will not use them to override Council actions that are valid and specific. The Court has not said that The Fundamental laws are "organic" in the same way as the Navajo Nation Bill of Rights, the Title II Amendments and the Judicial Reform Act.

There may be some fear that the Navajo Nation Supreme Court will declare that there is an unwritten customary constitution in the Navajo Nation. Such a fear would be supported by a statement of issues on appeal that asks, "Whether the requirements of 11 N.N.C. § 8(A)(1) violate Navajo common law which functions as an unwritten constitution." (*Begay v. Navajo Nation Election Administration*, No. SC-CV-27-02, slip op. at 2 Nav. Sup. Ct. July 31, 2002). Despite the mention of an "unwritten constitution" as an issue, the actual decision does not apply Navajo common law as one. The opinion mentioned strong support of the role of families in meeting the needs of family members and the value of respect at page eight of the slip opinion. Vagueness is mentioned at page nine, but the vagueness doctrine is driven by the due process provision of the Navajo Nation Bill of Rights and not Navajo common law. It is clear from the holding on the violation of a statute that required Navajo Nation residence for public office that the Court overturned a decision about Edward T. Begay because that requirement was not equally applied to other candidates (Slip op. at 10). While the Court did not specifically say so, that holding falls under the equal protection requirements of the Navajo Nation Bill of Rights and not Navajo common law.

The Court did not rule that Navajo common law is an unwritten constitution, and referring to one in a statement of issues is only dictum. It is not binding as law. This decision was issued on July 31, 2002 and the Navajo Nation Council adopted The Fundamental Laws of the Diné on November 13, 2002. The more recent decisions of the Navajo Nation Supreme Court make it clear that even if the Court flirted with the notion of declaring that there is a customary and unwritten constitution, it clearly follows the clear and valid commands of the Council.

SECTION IV: RECOMMENDATIONS FOR THE FUTURE

Preface: Approaches for an Alternative Model Government

By Robert Yazzie

WE UNDERSTAND that the achievement of an ideal model government is difficult and further recognize that despite any society's best efforts, it may never fully be realized. All societies deal with differing ideologies in their respective governance systems; they deal with deviance and justice and how to maintain order within their systems. They also deal with internal and external pressures such as bureaucracy within government or the lack thereof, global influence, economic pressure, whether or not to change or maintain social norms, the extent and implementation of social institutions, or environmental concerns of sustainability. There are still countless pressures that shape or form governance systems within societies.

When approaching governance there are several elemental questions that must be posited in order to fully conceive the purpose of government, like, "What is government? Do we even need government? What are the pressing social issues in our society? How can government address them? Should government be actively involved in the solution or perhaps as a mechanism to foster community solution? Should government be involved in the personal and communal lives of the people, regulating social norms and setting guidelines and policies or should government be more lax offering only basic services? What are those basic services and how are they funded? Are they culturally sustainable? What about the perpetuation of culture? How does government regulate or protect it? Should it even do so? How do government and culture intersect? How do people and government interact? Where is government going? What ideologies fuel government to its 'ultimate destination'?"

In the following subsections we will address some of those concerns and issues as well as visiting many others. Many of these ideas are innovative and creative approaches to look at governance for the Diné. We will also be offering several alternative models but before we analyze the pros and cons of these various governance systems there is a basic query that must be internalized throughout this examination: *What are the goals of the Navajo Nation?* The following alternative models specifically target certain goals and ideals, but without a thorough inspection of Navajo Government it will render these models fruitless.

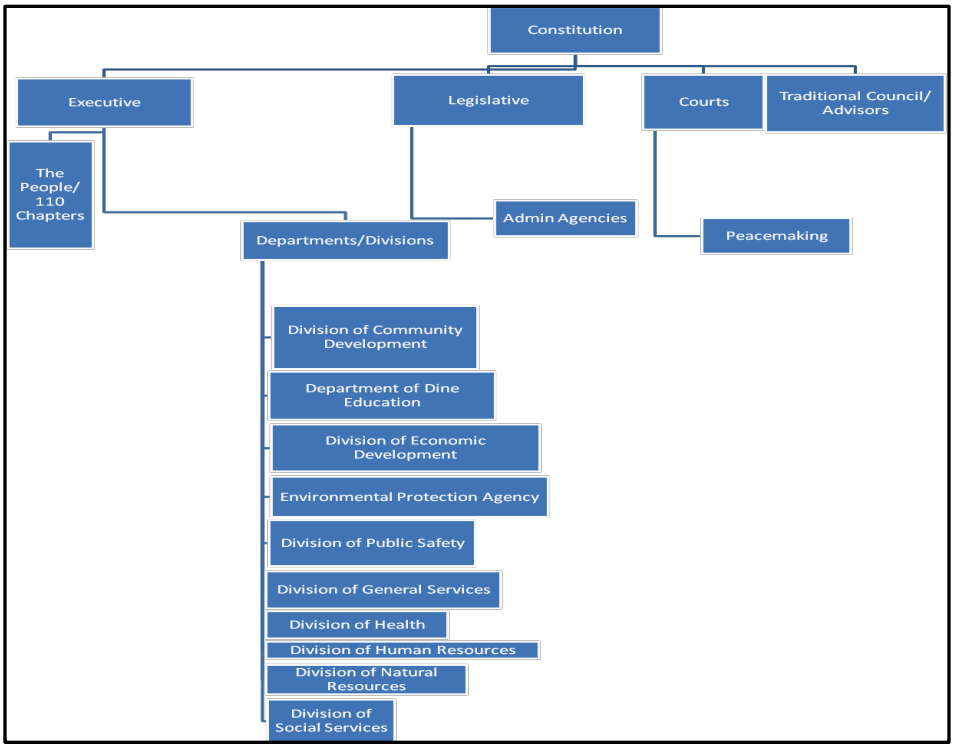
The achievement of an ideal model government is difficult. However, the task can be approached by addressing social, cultural and other issues that are related to governance. These are some of the goals for a model or models: 1) To incorporate cultural knowledge and principles in a model in a meaningful way; 2) To achieve legitimacy, both political and popular; and 3) to find a balance between rules of law and

The Fundamental Laws of the Diné. Government cannot be achieved in a massive way overnight. Government reform should be initiated on a small scale with incremental change, bit by bit and piece by piece. Reform is difficult because of resistance to change by individuals who have entrenched interests or those who are afraid of change.

ISSUES AND FACTORS [9]

There are various issues in government reform that must be addressed, and there are factors to be considered to construct governance models. All the issues listed here are equally important, and all are interconnected. Given our consideration of social, economic, cultural and other governance issues in a Navajo context, the allocation of power must be driven by the Diné traditional concept of human relationships. They are summarized (but not completely stated) in 1 N.N.C. § 203 (2005).

Table 1: General Structure of Bureaucracy



CONCLUSION

These are only some of the factors to be considered and discussion will identify others. These are factors to be address in structuring a model to achieve governmental forms and procedures that will offer new alternatives. There should be creative and innovative approaches. For example, a provision of *Diné bibee nahaz'áanii* at 1 N.N.C. § 202(G)

[9] For a more thorough list of *Issues and Factors* see the Appendix.

(2005) provides for development, and that can be read much as the United Nations Declaration on the Right to Development (1986). It states that there is a human right to development, and it requires inclusion of the population in planning and a fair distribution of the proceeds of development. Navajo Nation law provides that the Navajo People are supreme, with all residual power in the hands of the People, and all monies spent by the Navajo Nation Council are monies of the Navajo People (*Halona v. MacDonald*). Accordingly, there is a fiduciary duty Navajo Nation leaders have to the People when leaders deal with resources and revenues. There should be extensive discussion of distributive justice issues and how they can drive reform.

Model 1: The Presidential Three-Branch Model

By James Singer

HISTORY

IN 1989, the Navajo Nation Government passed legislation which, in essence, completed the move to mirroring the United States three-branch system. The hope for this move was based upon the thinking that by instituting this kind of model a system of "checks and balances" between, primarily, the legislative and executive branches, respectively, would be created. The changes were enacted to prevent a "strong-man" from acquiring unchecked power as had been seen with former Chairmen.

The reality is a bit different. The reform, although a step in the direction to "check" power, is flawed; the legislative branch continues to exercise ultimate control over the institutions that would empower the executive branch. At the whims of the Council, the executive is, more or less, at the mercy of the legislative. It has created a strong-weak system of governance in that the legislative is by far much more powerful that the executive.

This is not necessarily a condition that might be frowned upon. Several governments around the world that have dealt with "strong-men" purposely have limited the executive branch's power after adopting the three-branch model. It allows the power to be spread out over a larger group of people - an entity. However, within the legislative branch, the power is concentrated within the office of the Speaker and it is within this office where effective government is transmitted.

REFORM

The current form of government has been successful in many ways. First, it has maintained stability as a government despite facing pressing internal social problems such as unemployment, inefficiency and lack of social services, lack of utilities among several communities, the loss of traditional culture, high drug abuse, and a growing young population. Second, it has been a beacon among indigenous peoples of

implementing the market-based, republican, three-branch model despite its inability to fully connect with traditional Navajo values and customs. Regardless of these ontological differences, the Navajo Nation Government has pushed forward to maintain this form of government. Since the reform no major riots or demonstrations have ever come close to toppling this system and, although never formally approved by the Navajo people as the legitimate form of government, through tacit consent the Navajo people have either accepted this system or are highly patient with it. A large overhaul of the system may not, therefore, be necessary, though a few suggestions are offered to evaluate the purpose of this model.

CHANGE NOTHING

For the sake of turning the system on its head, which may incite unrest, deviant behavior, and a possible power vacuum, maintaining the status quo "as is" prevents taking those risks. Change is not for faint-hearted leaders or peoples, but only for those who are either courageous, daring, or reckless enough to undertake such a project.

WHERE IS GOVERNMENT GOING?

This question must be internalized throughout the Navajo Nation system. This same system, used in the United States, has different cultural goals than do the Navajo. Unlike the Navajo, the United States is not concerned as much with their own sovereignty, but in protecting their interests abroad. They are not concerned with preserving, protecting and perpetuating their cultural traditions, but in the unilateral advancement of their own globalized culture. Their political agenda also changes every two to eight years, depending on which of the two political parties hold the majority of the system. No major long-term institutional goal has been made for the United States, except, perhaps, for the unspoken further success of their market system and the generation of mass amounts of wealth. Unlike traditional Navajo thinking, which revolves in a certain circular, intangible "history" and a worldview based upon balance and harmony, which may be maintained throughout one's lifetime - the United States, follows a linear history, groping at the elusive "utopia" where capitalism may one day bring them. This system is, therefore, at-risk, due to the lack of sustainable long-term goals. For the Navajo, sustainable long-term goals must be assessed, initiated, and maintained in the system regardless of changes of power.

BUREAUCRACY

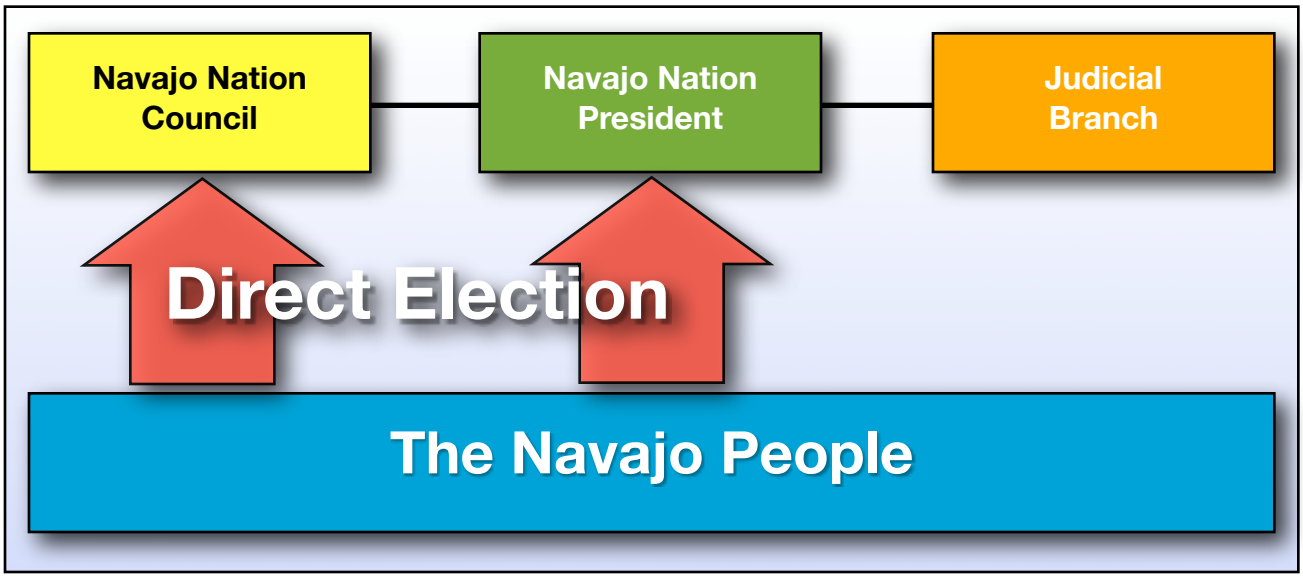
In order for any organization to function efficiently, some degree of bureaucracy is needed. The Federal Government, however, has set up a web of bureaucracy when it comes to the Federal-Tribal relationship. This has been reflected into the Navajo Nation Government, but instead of fostering efficiency, in many cases it has become an obstacle. When looking at a possible streamlining of the bureaucracy, the tribal

institutions and the intergovernmental relationships must be thoroughly evaluated. These possible changes, not only should be within the system, but also as a social movement to deconstruct the existing cultural norms among the people and their reliance on the bureaucratic system.

LAND OWNERSHIP

This model is one where private property reigns. The privatization of land is a means to generate wealth. Currently, the vast majority of Navajo land is held in common. Does the privatization of land reflect traditional Navajo values such as common land?

Table 2: Current Three-Branch System



DUAL SOVEREIGNTY

With the formation of the three-branch system is the idea of "dual sovereignty" or federalism. This struggle between states' rights and a powerful central government led to a compromise where both states and the central government share power but also may act, to some degree, independently of one another allowing the states to have more direct control over local issues while allowing the central government to regulate and maintain unity. Currently, and in all reality, the central Navajo government holds all real power with little emphasis placed on local governance (as seen with the dismal results of the Local Governance Act). Policy may be formulated which would emphasize local governance without sacrificing instability in the central government.

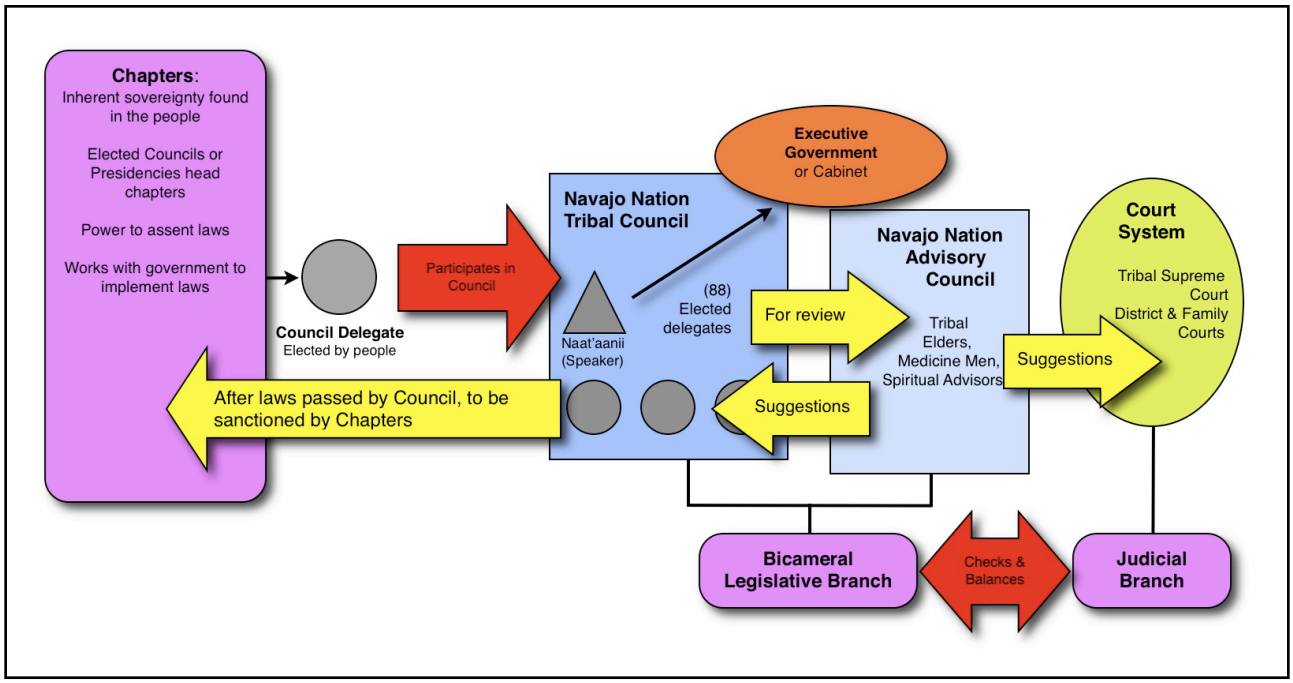
Model 2: The Bicameral Parliamentary Model

By James Singer

HISTORY AND CONTEXT

A PURE PARLIAMENTARIAN MODEL very similarly reflects the structure that is already implemented as the primary form of tribal government. In this section we will explore some of the similarities and changes that would need to occur and the advantages and weaknesses of this model from a cultural standpoint. To better understand this model we will explore briefly the antecedents of the parliamentary model system and its influence on the global stage.

Table 3: Constructing a Parliamentary Model for the Navajo Nation



The parliamentary model is utilized in many states throughout the world. Notable countries include, Australia, Canada, Japan, and perhaps, most influential, the United Kingdom; for the latter is the standard by which the Commonwealth has based their systems. This, the Westminster model, is a structure that has evolved over the space of 1,000 years in Great Britain and has been influenced by the people's gradual involvement in government and limitation of the Sovereign's power. The rise of parliamentary government is based heavily in British Common Law, traditions, and customs. Over the years this now bicameral system has transferred the great power of law-making into the hands of the representative house - the House of Commons. This house is headed by a Prime Minister who forms a government or cabinet which entity usually submits bills to be debated and approved in the House of Commons. The Upper

House or House of Lords has had its power gradually limited and is the non-representative body in this bicameral model. The Crown, upon recommendation from the Prime Minister, formally enacts laws, though this has become a much more customary role. Even though the Crown *does* have the power to refuse enactment and even overturn Parliament, this power has never been exercised.

The Navajo culture, its traditions and customs, has, like Great Britain, evolved over hundreds of years. Traditionally, the local Navajo populace has given the leaders (*naat'áanii)* a form of a "vote of confidence" upheld through their charisma and ability to maintain the functions of Navajo society and also to exact "justice" (in the Navajo sense). Therefore, we see the idea of popular consensus to create community leaders acting as an authority to maintain society. This idea is expressed in its codified form in NNC Title I, Chapter 2, Section 203, A-B which states:

> It is the right and freedom of the Diné to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of the generations yet to come; and
>
> All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the people and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bibee nahaz'áanii;

How then, do we "mesh" our Navajo framework into a system whose cultural values and history are starkly different? How can we justify the implementation of a system whose foundation is not inherently Navajo, nor an organic conception that evolved from the Navajo worldview? What does this kind of government facilitate? Are these ideologies that the Navajo want to embrace? Can they be aligned within the Navajo framework? What symbolic representation does this kind of system portray? All these questions are valid, especially when considering this kind of model in the context of Navajo government reform.

Let us begin to look at some of the ontological questions to gauge the sustainability of this kind of model before moving onto some of technicalities of this "meshing" of ideas. Navajo society predates American society by several hundred years and has survived tremendous ordeals that have affected the way it perceives things including the physical and metaphysical. Navajo "government," like all governments, is not static but has adapted and evolved to meet the needs of the people. Influences from several cultures over hundreds of years have contributed to this evolution of Navajo governance and the adoption of extra-cultural ideas has ensured our society's survival, though it had become uniquely Navajo. However, when the United States encountered the Navajo they found no institution that resembled *Western* government and

concluded that the Navajo belonged in the state of tutorage, the guardian-ward, or federal-tribal relationship. Here we see the commencement of a unilateral relationship where American government and worldview was *imposed* upon the Navajo instead of being culturally *integrated and defined* on Navajo terms. Herein lies the key to the adoption of extra-cultural ideas - the ability to evaluate foreign concepts and see how they may fit within the already established worldview. This is when a culturally acceptable practice of "meshing" could be utilized (See NNC, Title I, Section 201-J). Therefore, when we look at the parliamentary system, although it is culturally inappropriate in its actual form, when tailored to meet the needs of Navajo people it can become a part of the culture if given appropriate value and meaning and if it can truly reflect the worldview and goals of those participating in it.

When we look at the parliamentary model we must ask: "What kind of things does this government facilitate?" It is accepted among political scholars (Curtis, 2006) that one of the main reasons for this form of government's "success" is due to its political stability. This stability is what allowed countries who have adapted this system to develop economically and why many of them continue to be economically "successful." We must then ask, is this, economic development, *the* key societal goal of Navajo "success"? It is probably safe to say that it is *a* societal goal, but not the *only* one. As indigenous peoples have evaluated Western societies, especially the market-driven ones, they have noticed that there has been little balance between profit and the other social institutions, such as the family, culture, or environmental sustainability. It has been resisted throughout the world among indigenous communities. It has not fit their needs and has usually caused more harm than good.

This model of government also fosters a strong central government which, when dealing with small communities, may alienate them or cause strains on the society and its members. Therefore, when considering a parliamentary model, it is suggested that attentive consideration be given into how much stress should be placed on the market system. If economic independence is a step towards greater sovereignty or autonomy then this might facilitate that independence; but along with this comes mixed results from several states. It has worked for some, but many find democracy challenging, e.g. Pakistan, Peru, Venezuela, and Zimbabwe (Rudra 2005). Rudra (2005: 707) theorizes that this can be countered by increasing safety precautions and political equality.

What kind of societal goals do the Navajo have? What is Navajo government's role in achieving these goals? Tribal sovereignty has always been an issue for the Navajo. Will this kind of government facilitate this? In the Navajo worldview, the conception of a successful life differs from some of the market-driven societies like the United States. Max Weber (1905) theorizes that Protestant-dominated cultures sought after economic gain and the acquisition of wealth to ensure salvation in Christian heaven. Profit and wealth have evolved over time to be included as highly sought after societal goals with the exposition of this wealth as a form of status symbol and

embodiment of "godliness." The Navajo conception is quite different in that it revolves around the balance of several aspects, including the physical, metaphysical, communal, and environmental. Markets can fall into this worldview when evaluated through these lenses and balanced accordingly. The parliamentary model may be adapted to fit this worldview, but up until now has not been evaluated as a sustainable model to do so.

With these basic guidelines in mind we compare the parliamentary model with the Navajo worldview. It is already very similar to the current government which has a strong legislative body and a judicial system based in tradition and custom. As far as structure goes, the only major change would be the elimination of the "executive branch" as we know it; although the incorporation of such is found within the legislative body framework. For the sake of avoiding confusion, creating new terms (which may have some cultural symbolic significance if chosen so to do) will not be addressed at this time, but if this model is to be incorporated then this may be something to investigate.

The Legislative Body has been formed as a unicameral or a bicameral system. One house is a representative body elected by popular vote and the other is a body of appointed officials, usually consisting of nobles or other hereditary appointments. This second house has limited powers and the main lawmaking body where the power rests is invested in the representative body. A Prime Minister is selected by one who can hold a majority of the power. It usually is the leader of the dominant political party in the representative party. The Prime Minister is the "appointed" by the Crown and s/he forms a government or executive cabinet which is subject to approval by the legislative body and becomes the primary source of policy and lawmaking. The Prime Minister and its government must retain goodwill among the legislative body, for if this is lost then a vote of no-confidence may uproot the Prime Minister and its government.

In the Navajo context, the Westminster model may be applied with some adaptations. A bicameral legislative body can be created which reflects Navajo society. Delegates are to be elected, much as they are now, and congregate in a representative house - the Navajo Nation Council. The Council delegates would choose among their peers one who would be able to command a majority of this body. Since there are no formal political parties in Navajo government a majority party leader would not be selected. This office, which in many aspects *reflects* powers invested in the Speaker of the Council *and* the President, selects an executive cabinet from the elected body, with the approval from the elected body. This cabinet of *naat'áanii* is accountable to the legislative body and the Navajo people and serves as the mediating liaison between the Navajo people and the Federal Government. This cabinet is headed by the "Speaker" and could consist from six to twelve members.

It is recommended that more equal representation be given in this elected body and to do so we will look at concepts of Elitist Democracy and Equality. Schumpeter argues that the people do not rule: their role is to elect those who do; democracy,

therefore, is a system of elected and competing elites. This Jeffersonian model based in an elite ruling class does not exemplify a true participatory system; however, the idea of rotation in government, as suggested by Jefferson's contemporaries, kept government invigorated and minimized stagnation, hence, it is recommended that term limits be placed on delegates to embody this concept of equality, but so much as to deter or exclude good leaders from government participation.

A delegate candidate undergoes a runoff election, in which the top candidates in the first round square off in the second round. This model of elections would be more appropriate in a system where no formal political parties exist. It allows the populace to vote for whom they actually believe will better fulfill the office instead of tactically selecting one candidate only because they do not like the other without any real feeling towards the first. The practice of "the-enemy-of-my-enemy-is-my-friend" is a common practice in American national politics between the Republican and Democratic Parties respectively, but may be avoided, or at least lessened, in a runoff election campaign.

Term limits would be that a delegate may be elected to one six-year term with the possibility of immediate reelection to a two-year term for a total of eight years. The delegate must then vacate the office for the space of four years before running for another six-year term. If the delegate was not reelected for the two-year reelection term s/he must still wait four years before running again. The idea is that there should be new representation every six or eight years respectively.

In accordance with the Navajo worldview, everything has a female and male part. *Wáashindoon,* or the idea of Government as introduced to the Navajo by the Americans, has been a highly patriarchal institution. Navajo philosophy takes into account the value of both female and male perspectives and that by using these perspectives helps to maintain harmony. Navajo government, therefore, may reflect this notion of equality and harmony by alternating male and female representatives every six to eight years. It is recommended that after the conclusion of the current delegates' term in office that a lottery be held to determine which chapters will send a female or male delegate with half of the representation being female and the other male. No changes in the current number (88) of delegates need be changed.

The second house of appointed officers in this bicameral model is comprised of elders (*hastóí*), medicine men (*hataałii)*, spiritual advisors, and teachers of traditional laws. NNC Title I, Chapter 2, Section 201-G outlines the necessity of these roles in society. Many indigenous societies incorporate elders and shamans as their leaders and rely upon them as sources of traditional knowledge and how to apply this knowledge, at times, in a contemporary context. In our context, this second house would serve as an advisory body with no real power to pass laws or vote on legislation. Possible resolutions, laws, bills, etc. from the elected legislative body would be reviewed or inspected by this advisory body. Suggestions would be made which incorporate Navajo principles and offer another perspective. These officers would be appointed by the

executive cabinet for life or until one retires (as opposed to administration appointments which might only reflect the interests of the governing cabinet). It is suggested that this body be consisted of twelve to twenty-four officers, but more or less may be adjusted as needed. No advisory official may hold the office of a delegate and vice versa.

The Judicial Branch in the current Navajo government has been rather progressive in the implementation of traditional Navajo concepts as seen in the Peacemaker Courts and the drafting of the Fundamental Laws of the Diné. In the parliamentary model, sometimes the courts are a committee under the jurisdiction of one house, though many models show the judicial branch as an independent body within the model to create a system of "checks and balances." Currently, under the Navajo law, the Judicial Branch (as well as the Executive Branch) is subject to the oversight of the Legislative Branch. This would not necessarily need to be changed. The courts would report to both houses of the legislative body though the advisory body would also serve as an advisory body to the courts.

CONTEXTUALIZING ABSOLUTE SOVEREIGNTY IN A PARLIAMENTARY MODEL

In the Westminster model, the absolute sovereign is the Crown. The Crown is invested with all power over Britain and has, through official documents, acknowledged, or granted power to Parliament to run the government, to raise taxes, to pass laws, etc. The Crown has become more of a symbolic or customary role. However, power is still invested in the Crown to overturn laws and even dissolve Parliament. The Crown also assents laws passed by Parliament.

In our Navajo model we must ask, "Who or what is the *absolute sovereign* in Navajo society?" The Navajo have never had a King or Queen, no true "divine investiture" of power in one single person. Instead, in the Navajo worldview, we are told that we are all holy and, in many ways, divine beings. Of course, our argument for *absolute sovereign* is not vested in this idea of a divine right to rule, but rather, that the idea of equality and inherent sovereignty as a people, or communal sovereignty, is better aligned to the Navajo worldview. This concept is also found in the origins of ancient democracy which claims government is "ruled by the people" and has been incorporated into the American political psyche. In American government this inherent power is invested in a President whom the people elect for terms of four years. The Navajo have not technically invested this inherent power in any government. Through tacit consent the current Navajo government has *assumed* power and has been sustained by the Federal Government, however, the Navajo people as a whole have never "assented" this government and therefore, true inherent sovereignty is found in and among the people and not with the Navajo Nation Council as has been assumed.

With the absence of the Crown, but understanding that this inherent sovereign power is found among the people as a whole, in order for this government to be

legitimized it must be taken to the people, most likely in referendum. The concept of *assent by the people* may take form in this government. As laws are passed in the elected body they would be taken back to the community in the chapters to be enacted. The Speaker will address these congregated chapters and the chapter government assents the laws. Instead of being a sole act of the Council it would combine responsibility and accountability between this body and the local communities. The communities, therefore, have the ability to overturn legislation before its enacted, much like the Crown or President. It suggested that effective channels of communication between the people and their representatives be constructed to maximize political stability.

CONSIDERATIONS

If this form of government is to be pursued as an end model then there are several obstacles that stand in its way. First and foremost is whether or not this is a form of government that can adequately embody Navajo principles and meet the needs of the Navajo people. This form of government may not minimize the effects of bureaucracy nor preconceived notions of what government can or cannot do. Extensive education and deconstruction of these cultural symbols must be executed among the Navajo populace in order for this, or any form of culturally appropriate government, to meet the needs of the people.

Any consideration is that although we have been able to integrate traditional knowledge into government as a type of advisor for law, this form of government is one that is primarily suited for economic development, globalization, and success in the empirical, market-based world. As mentioned earlier, if this is a goal towards economic independence then this may be a viable option, however, this form of government may lack the ability to balance other aspects of the Navajo worldview such as the physical, metaphysical, familial, and environmental in addition to economics.

Both of these mentioned considerations are overarching issues that need to be addressed when considering this option. Logistically, other considerations include slight changes in the Navajo Nation Code to Title II, Section 101 & 102 where clauses state that changes to certain aspects of the government must require a majority of registered Navajo voters. This clause would be more adequately conducive to reform if the clauses would state that only a simple majority of voter turnout is necessary. NNC Title II, Section 105 outlines delegates' terms in office. This would have to be written to allow for the six-year term, possible two-year reelection term, and mandatory vacation between terms as well as a separate clause that enacts alternate female and male terms.

Table 4: Implementation of Bicameral Parliamentary Model

Timeline	Event
Year 1	• Make changes regarding Navajo voting majorities (NNC Title 2, Sections 101 & 102 and others with similar clauses) • Approve government reform plan with the Navajo People through referendum • Evaluate costs for reformation • Approve the appropriation of funds from the Navajo Nation for government reform implementation • Evaluate Local Governance Act and repeal it if goals have not been met
Year 2	• Begin creating infrastructure to communicate with Chapters in preparation for future assent. • Begin moving some Executive divisions under jurisdiction of the Legislative Branch • Draft legislation for the implementation of run-off elections • Draft legislation for the Speaker's terms in office to a maximum of eight years.
Year 3	• Begin using the run-off elections model in tribal government • Enact legislation for the implementation of delegates' terms in office to begin with next election • Enact legislation for the Speaker's terms in office to a maximum of eight years. • Continue to move Executive divisions under Legislative jurisdiction • Finish creating infrastructure for effective communication systems between Central government and Chapters.
Year 4	• Begin formally placing Executive responsibilities in the Legislative Branch • Continue to move Executive divisions under Legislative jurisdiction • Create a standing committee of medicine men, spiritual advisors, elders, and teachers of traditional law to review some bills • Begin recruitment of potential individuals to participate on this committee • Quarterly State of the Nation addresses to be given using communication infrastructure • Evaluate
Year 5	• Continue formal placing of Executive responsibilities in the Legislative Branch • Continue to move Executive divisions under Legislative jurisdiction • Evaluate
Year 6	• Finish placing all Executive Branch powers under jurisdiction of the Legislative Branch • Dissolve the Executive Branch • Create a bicameral legislative branch, one consisting of the Navajo Nation Advisory Council and the other being called the Navajo Nation Tribal Council. The former created from the standing committee of medicine men, spiritual advisors, elders, and teachers of traditional law; the latter created from the pre-existing Navajo Nation Council • The Tribal Council agrees upon a leader or *naat'áanii* • The *naat'áanii* selects his/her government to be approved by the Tribal Council • Evaluate • Begin sending approval for legislation to communities • Evaluate
Years 7-15	• Evaluate and amend as needed

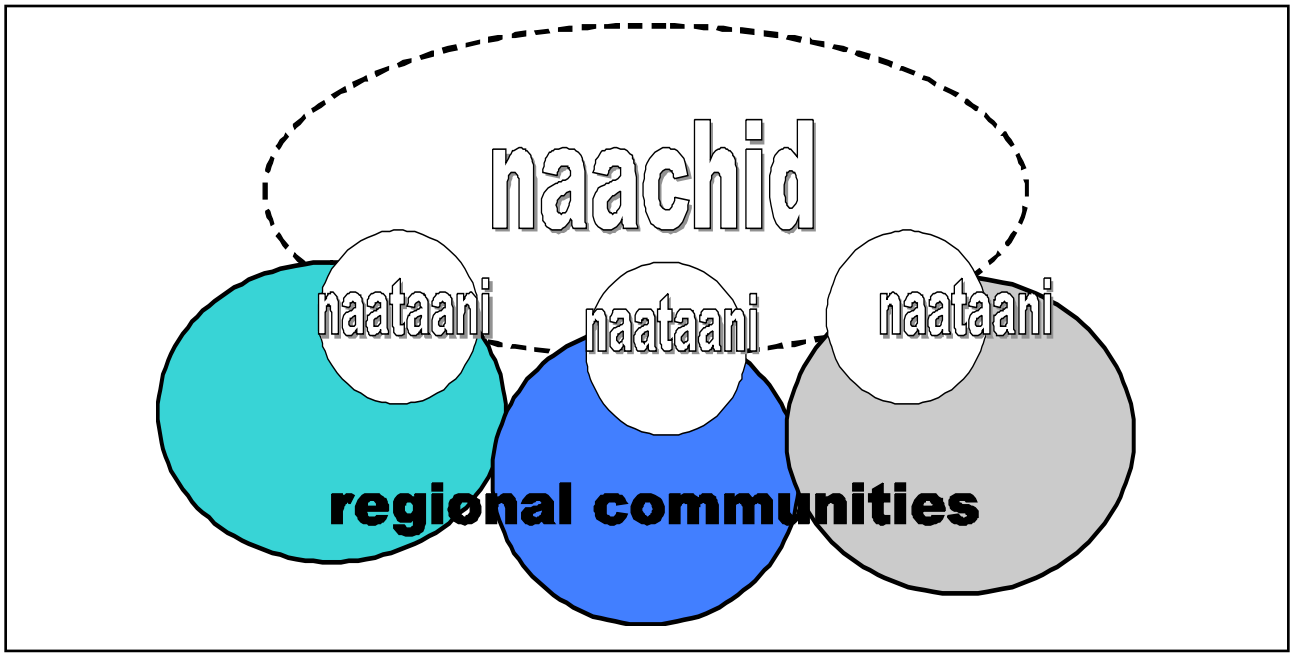
Model 3: Decentralization Model

By Nikke Alex, Andrew Curley, & Amber Crotty

CONFEDERATE MODEL OF GOVERNANCE

HISTORICALLY, the Navajo Nation had a decentralized form of governance that can be called a "confederation," using Western-based political terminology. That is to say, there existed a loose alliance of local governments which met about every four years in a regional *naachid*. These local governments were area families represented by a selected *naat'áanii*. This *naat'áanii* and other area leaders would meet in the semi-ritualistic *naachid*, where matters of war and peace could be discussed. There existed no central government at the time. This means, a regional *naachid* did not speak for the entire Navajo Nation; it was a gathering of local headmen for a specific region of the historic *Diné Bikéyah*. It has been documented that Navajo relations with Spanish colonists and governing officials were conducted through a *naachid*. This form of governance frustrated both the Spanish and eventually the U.S. Army, since a treaty established with one regional group of the Navajo did not apply for all the Navajo. This is a primary motivation for why the federal government created the Navajo Council in 1922; to centralize decision-making for the Navajo.

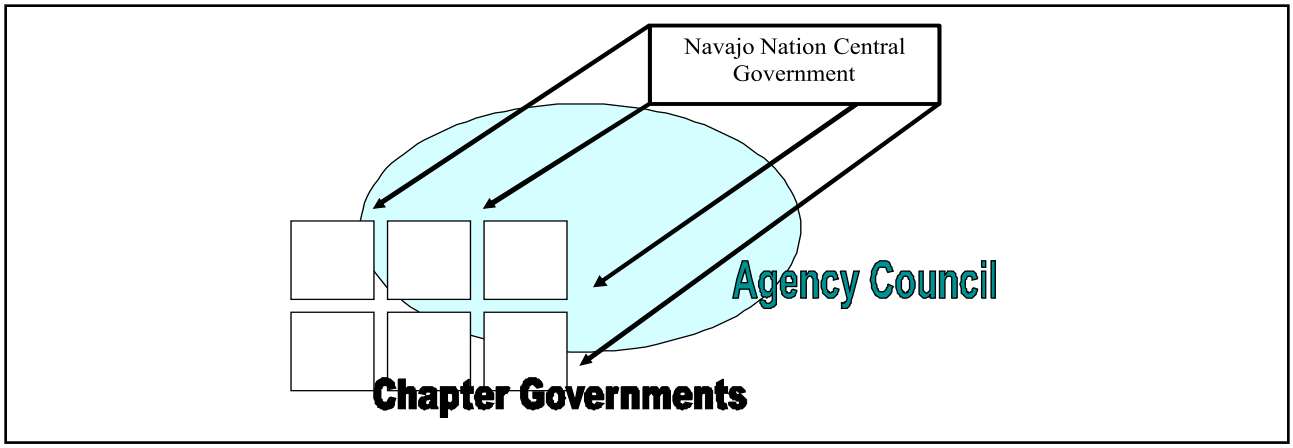
Table 5: Historic Model of Government



UNITARY MODEL OF GOVERNANCE

Currently the Navajo Nation operates under what is called a "unitary" model of government. In other words, all power is reserved in the central government (i.e., the Navajo Nation Council and the president). The local government units have very limited autonomy and take most of their directives from the central government. This has been the case since the creation of the Navajo Nation Council in 1922. A countering trend to the centralization of power is the Local Governance Act, passed in 1998. This act is designed to decentralize power from the central to the local government units.

Table 6: Current Model of Government 1922-2008



The current system of government is divided into three, equal branches of government. The people elect the members of two of the three branches directly, the legislative and the executive branches. The judicial branch, however, is made-up of appointees that the president nominates and the legislative branch confirms.

Under our recommended model of governance, the Navajo Nation would move from a three-branch model of government to a hybrid of the presidential and parliamentary systems of governance—similar to what France has experimented with shortly after World War II.

CENTRALIZATION OF POWER OF THE EXECUTIVE BRANCH

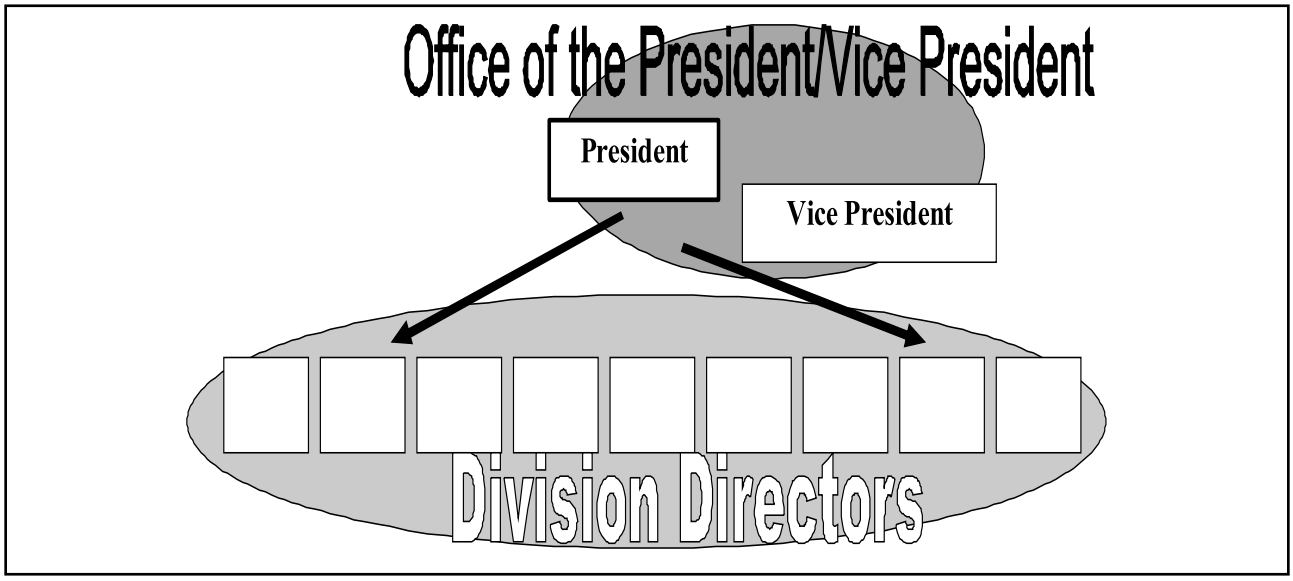
Currently the Office of the President and Vice President wields supreme authority over the executive branch. This has been the case since the dramatic government reforms of 1989. Before that, centralization of government authority was much worse, concentrated into the Chairman who effectively ruled over the legislative and executive branches of government. Division directors must follow the policy of the president and, in a professional context, defend these policies even if their previous professional or educational experience might lead to different opinions.

Centralization of power has created a new danger for the Navajo people, since one source of political authority means that outside interests with private intentions only need to corrupt a few powerful officials. Reforms in 1989 helped to decentralize government, but the majority of government remains centralized.

CURRENT TRENDS

While examining the current Navajo government system, we observe that the current system is not meeting the needs of the Navajo people. Through our research, we have found a disconnection between the average Navajo and Window Rock tribal employees. For example, in 2005, the NAIHS published the "2005 Navajo Community Health Statues Assessment." Through the Nation's demographics, we are able to examine and

Table 7: Current Power Structure of Executive Branch



interpret the health, economic, and the social needs of the Nation. Therefore, it is important to point out various key trends of disparities on the Navajo Nation.

The Navajo Nation population is roughly 253,124 enrolled Navajos with 168,000 living on the reservation. The Navajo Nation has a high percentage of children and a lower percentage of elders than the U.S. population. The Navajo population has a median age of 24 years, and the annual per capita income of $7,100 is one-third of the U.S. average. The median value of Navajo housing is $23,000, and over one-third of the homes lack the basic utilities of running water and electricity. The Navajo Nation has 33% fewer college graduates than the average U.S. population. Unemployment hovers at an overwhelming 75% and life expectancy for the Navajo is lower than the U.S. average, which indicates that many are dying a premature death.

While examining these basic demographics of the Navajo Nation, it is easy to conclude that Navajo social, educational, and health services are not meeting the basic needs of the people. Most of the programs established to help the people are centralized in Window Rock. The programs and government system were established to help the people and it has become almost inaccessible due to layers of bureaucracy. Therefore, it is imperative to look at decentralizing the current government system.

GENDER DIFFERENCES

A decentralized model will also address the gender differences in the current government system in a different manner. Before Bosque Redondo, Navajo women held very different social roles in their communities occupying a significant amount of respect and independence. In addition, gender differences were minimal, as compared to today's standard, both men and women holding equal status in society. Women were recognized for their experience and leadership within their homes and communities. The man-woman relationship was based on principles of duality and complementation where the man and woman were equals in their relationship.

The Euro-American occupation has greatly altered the gender norms in Navajo society. From the introduction of the wage economy to the introduction of the American federal type of government, the role of women has diminished. The integration of a Western form of government introduced Western social norms into Navajo society. Patriarchy and misogyny have greatly shifted gender norms and have become detrimental to the traditional concept of the Navajo family and Navajo governance. Although women still hold a high position in the family, they are not as visible in the modern Navajo.

The patriarchal form of American government has made women nearly invisible in government and has even denied Navajo women the right to express their concerns for their communities and families at the top of the government system as evidenced in the lack of women in the highest positions of government. This has disturbingly silenced the needs of children and women. At the community level, there have always been Navajo women leaders who have contributed to the development of the community.

The Navajo Nation has had an increase of nonprofit or non-governmental organizations (NGOs), which vary in cause; and, women run a majority of them. NGOs on the Navajo Nation promote concrete actions that aim at social, economic, environmental and public health concerns. Many of these organizations have very different visions for the Nation than those of the centralized bureaucrats of Navajo government. These NGOs on the Navajo Nation strive to preserve traditional Diné values, one of which has been the prominent role of women in Navajo society.

GRASSROOTS ORGANIZATIONS

Since most of these organization are lead by women and youth, their views and activities are often seen as radical. However, their visions and actions are in line with traditional Diné values. For example, NGOs and the grassroots movement throughout the Navajo Nation started the *Navajo Green Job Coalition Initiative*. The Coalition strives to create jobs in the energy-efficient, non-polluting sector of the Nation. There are many young Navajo people who are receiving a higher education and the very real problem of limited jobs when they return home to the reservation is a pressing concern. The creation of the Commission and the *Navajo Green Economy Fund* will shift the importance from the extraction of natural resources to industrial green jobs. In addition, the Fund will create local entrepreneurial opportunities where individuals and communities can initiate projects manufacturing wind turbines and solar panels or building green houses for the communities. Diné Natural Law guides the Navajo Green Economy Coalition's purpose in revitalizing and preserving traditional values and practices.

RECOMMENDATIONS

Since, women provide a fundamental contribution in passing down knowledge, it is crucial that women should be considered in this broader government reform. Since the Navajo population is very young, the youth and young adults also need a place in government reform. Through government reform the need to create a form of democracy without following the inhumane policies of the U.S. capitalist system may be supplied. A reformed government must reflect traditional Diné lifeways. Through innovation and decentralization, government reform will also more accurately reflect the Fundamental Laws and may ensure public participation.

The Navajo Nation historically resembled a parliamentary type of system with decentralized political units. This proposed model would foster movement in this direction. The Navajo people, despite years of using the adopted Western models, are still culturally attuned to the a traditional mode of governance.

We have established four major steps to move governance from a presidential model to something more like the historical *naachid*. These steps are: 1) reconstruct the concentration of power in the executive branch; 2) restructure agency councils to balance power between legislative and chapter house members; 3) increase the power of the agency councils; and 4) create new mechanisms through which NGOs can influence formal governmental processes.

OVERVIEW OF MODEL

There are key differences in this model to the current system. First, in this proposed model, the future executive branch would replace the Office of President and Vice President with an 11-member Executive Board, comprised of five female members, five

male members, and the Navajo Nation Speaker who is the rotating chair. The members are elected, two from each of the five agencies; whereas the Speaker is a member of the Navajo Nation Council and therefore represents the interests of both the legislative branch and his or her particular community. Though the Speaker would be a member of this Executive Board, s/he does not have ultimate authority over the rest of the Board and, therefore, has only a minor role, never becoming a controlling member of it.

Second, the Agencies would gain more autonomy than what they have now. Each Agency addresses different concerns due to the surrounding topography. Chapters would address their concerns at Agency Council and the Agencies would gain more representation due to the election of representatives on the Executive Board.

Third, no change in the election process of the current 88 Delegates would be altered. Currently, each delegate represents roughly 3,000 Navajo, which is an adequate representation as compared to the mainstream American system. One addition to the legislative body would be the addition of 12 nonvoting members. In total, the Council would consist of 100 members. The nonvoting members would represent the nonprofit sector and the youth of the Nation. Since the young population is growing at an astonishing rate and the role of women is in great need, the implementation of the nonvoting members of Council would help to eliminate some of the gender and age discrepancies.

Table 8: Proposed Power Structure of Executive Branch

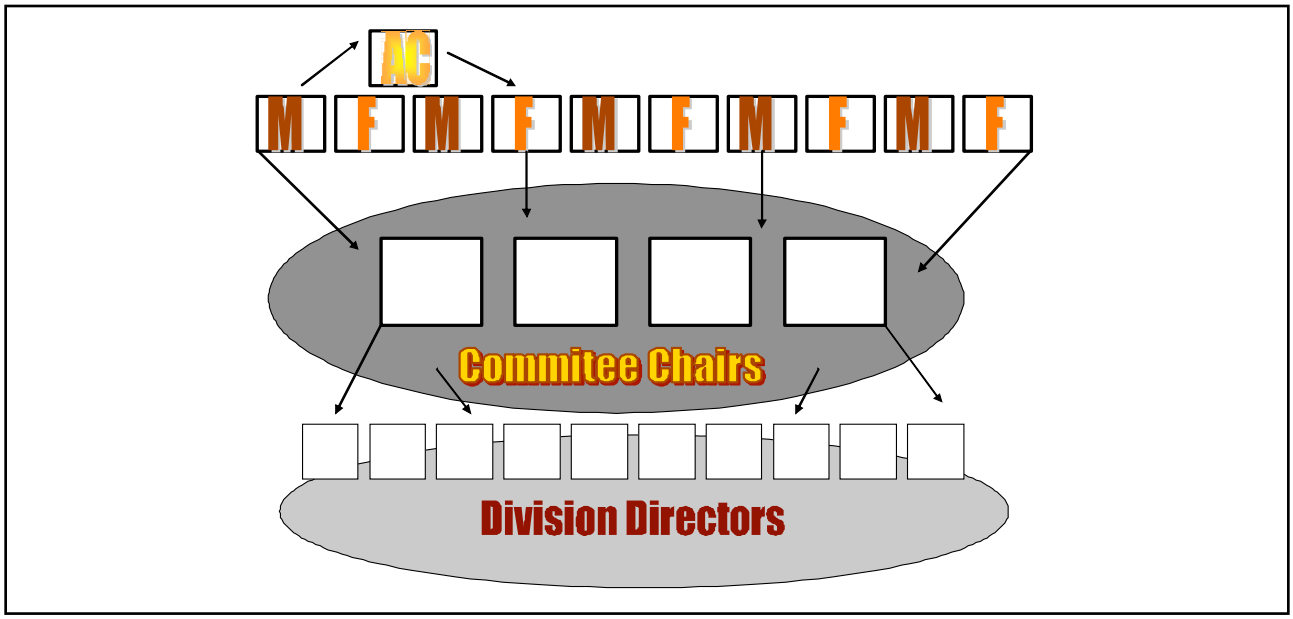
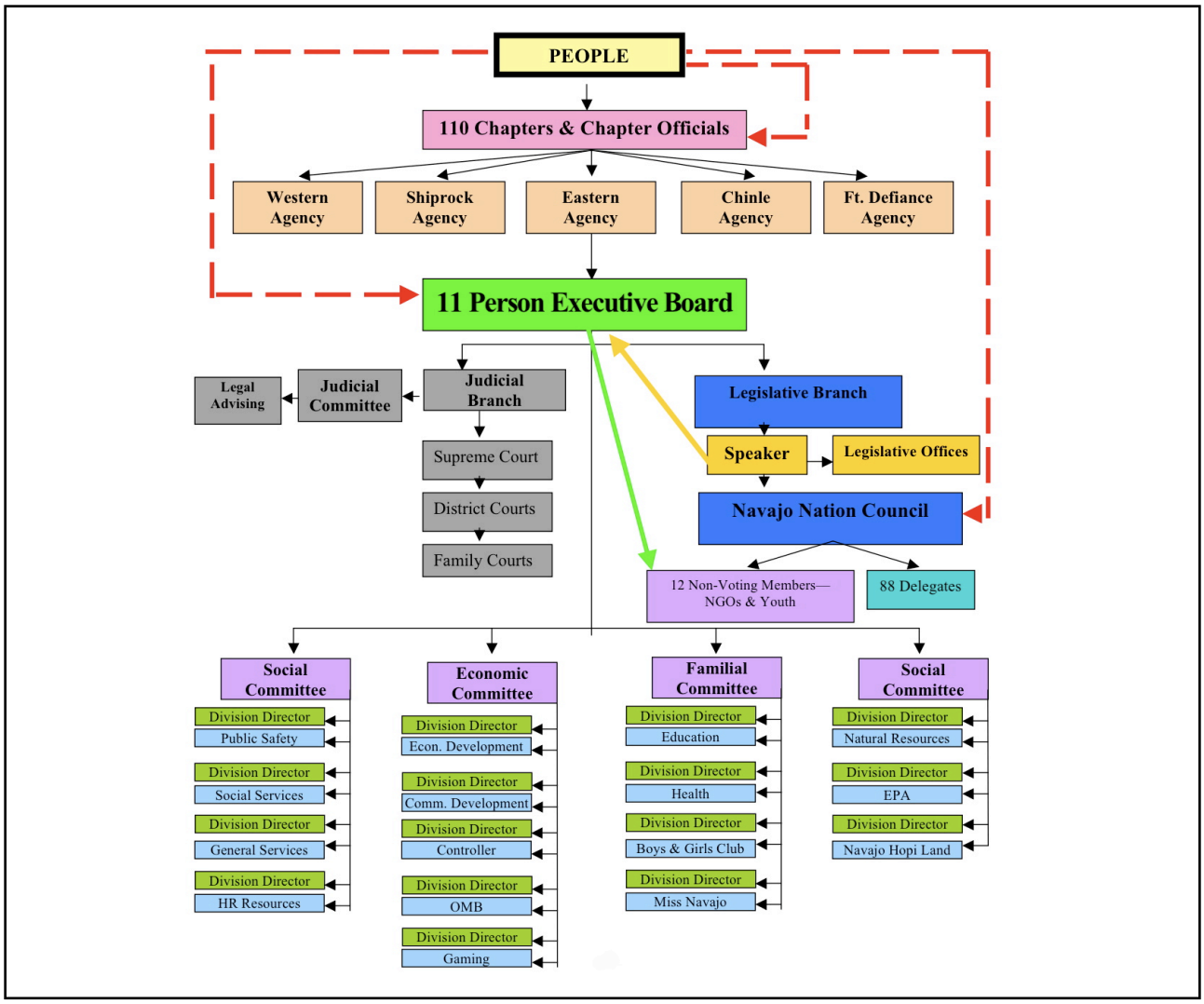


Table 9: Decentralized Government Model



Fourth, with the removal of the Office of the President and Vice-President, a further restructuring of the committees, commissions, and divisions would take place. Four standing committees would be formed to address the needs of the Navajo people which include: a social committee, an economic committee, families committee and an environmental committee. Under each committee is placed the appropriate program or division. For example, under the Environmental Committee, we place the Division of Natural Resources, the Navajo Environmental Protection Agency and the Navajo-Hopi Land Commission. Each committee would consist of twelve members, which would include ten delegates, and two nonvoting members of the Council. The Executive Board would appoint committee members.

Table 10: Implementation of a Decentralized Governance Model

Timeline	Event
Year 1	• Add the eight nonvoting members to the Navajo Nation Council who are appointed by the Navajo Nation Council
Year 2	• Have the Agencies vote for their male and female representative for the Executive Board • Remove the Executive Branch specifically Office of the Navajo Nation President and Vice President and replace with the Executive Branch • Have the Executive Branch appoint the Social Committee, Economic Committee, Familial Committee and Environmental Committee members that would include ten delegates and two nonvoting members of the Council • Have the Executive Branch appoint the Division Directors
Year 3	• Remove the Divisions from the Executive Branch • Add the Social Committee, Economic Committee, Familial Committee and Environmental Committee • Replace the appropriate Divisions and Commissions under the Social Committee, Economic Committee, Familial Committee and Environmental Committee • Remove irrelevant and redundant Divisions

Model 4: Diné Political Philosophy

By Moroni Benally

THE DINÉ GOVERNMENT RECLAMATION PROJECT will be based on traditional Diné political philosophy. The political philosophy is a categorical dialectical approach to the universe; that is, there are certain categorical imperatives that exist independent of cultural constraints and these categorical imperatives can be understood through a dialectical process that incorporates an agreement and compromise between the complementary forces that exist of *hózhóón* and *naayéé*. These forces are mere manifestations of the fundamental concept informing all practices in Diné: *Sa'ąh Naagháí Bik'eh Hózhóón* (SNBH).

In orthodox Diné political theory, sources of political power and authority are derived from SNBH and ultimately informed by it. Yet, this source of power and authority is predicated upon the practice of the principles articulated by *k'é.* The *naat'áanii*, as understood by traditional political theory, were endowed with power from the forces of SNBH: "My feet stick through the earth, my head through the sky" states the oral history of the origins of power of First Man (Haile: 16).

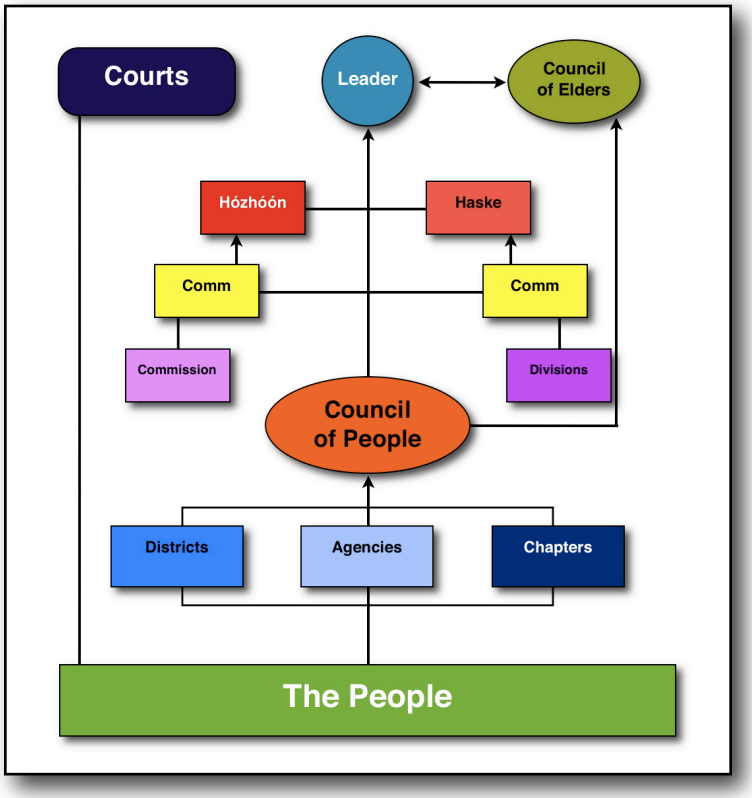
First Man exercises this authority in ways that are beneficial only to those around him. This invokes the principles of *k'é* as the foundational principles of leadership. Implicit in this function of leadership is a theory of representation and further implicit in the concept of *k'é* is a theory of rights and duties, notions of property, relationship, as well as a theory of economic order. To properly articulate and flush out each of these

theories is beyond the scope of this report. However, the table below distills each of these theories down to its basic core as derived from *k'é*.

A reclaimed Diné government is built on these core theoretical constructs. It is difficult to consider these core functions, when the paradigms with which one views and attempts to understand the political process is unavoidably guided and informed, whether consciously or unconsciously by western theories of political organization. While this severe limitation sets in, the problem of euro-centricity is ubiquitous.

Democracy is not a Diné concept. The concept of *demos*, or the people, and *kratia*, or power, and rule is fundamentally a western, or more specifically, a Greek notion that has been transmogrified to fit the political evolution of the west. Thus the concept itself is difficult to fit into a Diné conception because at the core of democracy is power of the people; yet the term power is not explicated. Historical reference shows that power of the people has metamorphosed and redefined itself in each particular context, but the underlying theme is that of the people's will and voice. Arguments have been propounded to claim that the Diné have a similar structure, historically, of the voice of the people that the institutions or norms enabled that voice are the same as those of differing traditions. However, this perception is tenuous at best. However, noting this staggering limitation, we move forward with an exposition of government, and with and explication and derivation of theories of western governance from the Diné tradition.

Table 11: Diné Political Philosophical Structure



The government must be able to exercise its authority derived, of course, from the people; but it has to be able to use that authority in ways that are beneficial to the people, consonant with their values, and more importantly in ways that do not create deficits or misuse in the development of a powerful central figure. The people are concerned, at least to a certain extent, with the government. If the stated purpose of government is to ensure that *hózhóón* is established, then the government must be able to exhibit signs of that in its deliberations as well as in decision-making bodies and in its other organs.

Table 12: Navajo Philosophical Theory

Theory/ Notions	Explanation
Theory of Representation	Based on *k'é* where *t'áá ałtsxó bahaz'ah*(full participation or open to all) or rather the people's voice must be given voice in all aspects; *t'áá ałtsxó lá' danízin* (general consensus) or that the people's will is a unified will that must be represented; *K'é bee áhíhódíníníáago bee ałhqnít'sáhákees* (reciprocity) that is there is a reciprocal arrangement that informs the relationship between representative and constituent. This relationship or concept is fairly young in the Navajo Nation and is still negotiating a presence within the culture of the people. However, the notion of a leader is not new, a leader who represents perfectly the will of the people is established.
Theory of rights and duties	Within the concept of *k'é* a theory of rights can be derived. That is there is *K'é bee áhiłdiníłnaago bee áłhaa nít´sáhakees (*reciprocity) and more importantly *t'áá ałtsxó ałhęełt'eego* (equality). These concepts allow for a theory of rights to emerge in the Diné context. There are certain rights, expectations, and duties that one can claim, demand, and expect, while other things there is obligation involved. Thus there is a theory of rights of access to the bounty of *Nahasdzáán Nihimá* and *Nihit'áá Yadiłhił.*
Notions of property	From the concept of *k'é* there is an implicit recognition or respect of the ownership of others, songs, prayers, stories, material goods, and so forth. Yet, the notion of property here is not one that implies exclusive ownership where one is free to do as she pleases. Rather this concept of property, while under the individual use of one person is recognized as that, but also understood that it can be understood as communal property if certain criteria are fulfilled, such as familial criteria.
Theory of economic order	The economic theory was that of constrained capitalism, where the onus of wealth was stressed. That is those who accumulated much were expected to be concerned and giving with their wealth to those who did not have much. This is a derivative of *k'é*, with the understanding that the knowledge and practice brings about both a spirit of constrained development, innovation, while having the struggles of the people at the fore front of any decision.

In a new governmental structure, institutions that hinder or act as obstructions to the implementation of the government plan must be explicitly engaged. These institutions are mindsets that have evolved over the years, the aspects of historical trauma that may, in particular, prevent the implementation of local reforms, such as a rearrangement of general assistance. A legacy of 500 years has led to the development

and establishment of dependent state and citizenry. Thus, the institution of dependency must be dismantled, the institution of bureaucratic process must be disengaged, the institution of capitalism must be deconstructed, and the institution informing the adoption of new and innovative ideas must be identified and disassembled. The justification of this deconstruction is to disabuse the citizens of notions that have been conflated over time of western and Navajo and the more contemporary fallacious assumption that there is no area of agreement between western and Diné. However, this is not to suggest that universality is the operable concept here.

Key institutions must be addressed before the implementation of the government reclamation project. Addressing institutional momentum is paramount to any endeavor of government reform. The underlying issue informing the institutional momentum is the effect colonization has had on the Navajo People and their governing bodies. This collective memory has been transmogrified over the past century and half. As a result there are certain societal norms that can potentially encumber the implementation of the government reform.

Taking an "institutionalist" perspective on Diné government reclamation, it is necessary to understand:

> The theoretical perspective used to analyse governmental reform in this paper is a broad institutional one, looking at the interaction between structural and instrumental features (national polity), cultural features (historical administrative traditions) and external constraints (the technical and institutional environments)" (Christensen and Lægreid, 2001).

This approach focuses on the complex and dynamic interplay between different internal and external factors as a way of understanding the organizational transformation occurring in the public sector generally and in the civil service specifically and its effects.

These institutions need to be sufficiently addressed in order for effective reform, or rather, reclamation to take place. The structural and instrumental features of the institutions at work in the Navajo Nation include the way things have always been done. The cultural features or the historical administrative traditions of the Navajo Nation must also be addressed; these include the bureaucratic mentality of the Navajo Nation, the sophisticated bureaucratic regimes that exist even at the chapter-level - the most fundamental level of government. These administrative traditions leach power and efficiency and, therefore, negatively impact the delivery of services to the people who direly need them.

Further, values are a key component that must be understood in the government reclamation process: "Values do have a central place in the theory of institutions. We need to know which values matter in the context at hand; how to build them into the

organization's culture and social structure; and in what ways they are weakened or subverted" (Peters 2007: 5).

The Navajo Nation is an institution, within that structure there are formal and informal pressures on that institution originating both internally and externally. These internal and external pressures are organizational resistance to change. Institutional concerns in the Navajo Nation have been posed before, and articulated, debated, and discussed by policy scientists, political scientists, and others. The common questions before them and before the Navajo Nation are: 1) What are the effects of differences in institutional arrangements for governmental effectiveness, if any? 2) Which institutions matter and how do they affect governmental performance? 3) If political institutions do facilitate differences in policy-making capabilities, how do these differences come about? 4) How, if at all, can knowledge about institutional consequences be applied?

Governmental effectiveness can be measured according to several standards. (Ibid: 27) Government should be responsive to the will of the people. Citizens should be able to hold their elected officials accountable for their actions. The second standard is that of particular policy outputs – for example, whether one chapter spends more on public services than another or promotes faster economic growth. Chapters may vary in the extent to which they provide welfare services because their citizens have different preferences for these services because one type of political institution might have been more effective than another in translating public preferences into policy outcomes.

Effectiveness, even at a broad range of tasks, is not the sole purpose of government (ibid: 29). Yet, that appears to be the rationale behind government reform; however, this report argues that the rationale is something larger, something more visionary. It is something that will have macro, micro, and intergenerational implications. In essence, it is articulating a sense of "people-hood."

Any governmental organization must necessarily serve some greater end. An exercise in teleology must be sufficiently conducted in order to ascertain those "greater" ends. To what end is this government? From a traditional perspective we understand that the government itself is requisite to answer and protect the will and voice of the people, but also to ensure the application of *K'é* in all things.

Clearly safeguarded by historical Diné was an acknowledged ownership of goods and products of labor (however "Lockeian" that appears to be). More importantly was respect for others' use of land and goods delineated by its use. Second, a respect for the moral order, that is, in extreme cases they were moments of punitive measures meted out, but the rationale for those measures rested on a notion of restoring a sense of harmony among kin. Third, is a respect for the needs of others, to ensure that all needs of others were met as best as they could be by those who have. Fourth was an assurance of reciprocal security, that is, one is assured that neighbors, often family, would be ready to protect against any encroachment, physical or spiritual. These four concepts appear to be the motivations of the historical Diné in their survival.

Therefore, the four aspects include: 1) rights and protection of property; 2) respect and assurance of civil order; 3) freedom to wealth with responsibilities; and 4) security from physical and spiritual dangers. Thus a government structure must be able to protect and safeguard these particular traditions of Diné, while also balancing and fulfilling its basic core function, enumerated below (see table 7). There are certain responsibilities of a central government based on the four aspects pronounced above.

The core functions of government derived from the Diné perspective include concern for the economic, social, familial, and environmental well-being of the Navajo Nation. Each of these areas corresponds to traditional notions of balance. Each of these core principles of government can be articulated and made operational by the core functions listed below (see table 7).

Table 13: Core Government Functions from the Navajo Perspective

Bik'ehgo Da'iináanii (Values/Ethics)	**Nihigáál** (Economic)	**Ałhą'ánáhoo'níił** (Familial)	**Haa'áyiih dóó Hodílzin** (Environmental)
Delivering increased value from post-secondary learning	Ensuring employment for all who want to work	Improving the (public) health of the Navajo Nation	Improving the quality of the Navajo Nation's resources
Improving the safety of people and property	Improving the vitality of businesses and individuals	Improving the condition of vulnerable children and adults	Improving the cultural and recreational opportunities throughout the nation
Protecting and improving public health and welfare	Promoting a stable and strong economy	Assuring proper help is provided to individuals who cannot meet their own basic human needs	Acting as a responsible steward of the environment
Protecting and improving public safety	Providing nationwide highway infrastructure	Supporting and perpetuating Navajo values, culture, lands, and trusts	Protecting and conserving Navajo Nation's natural and cultural resources
Ensuring an educated citizenry		Providing public education with the primary emphasis on K-12	Providing environmental protection
Providing law enforcement, courts, and corrections			

These core function lead to the three goals underscored by Navajo Philosophy:

1. To possess the language, thought, knowledge and teachings of Elders.

2. To live in a harmonious and peaceful ways (*hózhóójík'ehgo*)
3. To learn behavior becoming to *hózhóón*, a state where harmony and peace abounds.

It has been argued that there are ten specific capabilities of government, some of which can be translated to the Navajo experience (Ibid: 28):

1. To set and maintain priorities
2. Target resources (where they are most effective)
3. To innovate (when old policies have failed)
4. To coordinate conflicting objectives (into a coherent whole)
5. To represent diffuse, unorganized interests (in addition to concentrated, well-organized ones)
6. To be able to impose losses on powerful groups
7. To ensure efficient implementation of government policies one they have been decided upon
8. To ensure political stability so that policies have time to work.
9. To make and maintain international commitments in the realms of trade and national defense to ensure long-term well-being
10. To manage political cleavages to ensure that society does not degenerate into civil war.

The purpose of government is to ensure that peace is accorded to each individual. However, this model assumes a nation-statist position, in that that a specific governmental form can actually achieve that said peace. Is this really the purview of governments or is the purpose of government something more fundamental? Locke describes the purpose of government to protect "liberty" and "property." The American Founders describe the purpose of government to protect "liberty" and to enable the "pursuit of happiness." In Diné, the organic culture of the people states that the purpose of government is a construct that is foreign to them and not necessarily within the purview of the culture.

Government, then, in the Navajo context, is *Nahat'á,* or as commonly understood today the notion of *Wáásh*indoon. What is the purpose of *Nahat'á?* Why is it constituted? What do the people want from their government? What do they desire of their government? Is government indicative of something larger? If so, what?

What is needed for government restoration or reform? The People desire a government that is responsive to their needs; yet, their needs have shifted. *Hózhóón* is the goal of this government, under that expansive and inclusive concept is that of respect for others' "property," respect for others' space and their rights and duties, and respect for the duties of each individual to:

1. Abide by the principles of *hózhóón* as explicated secularly;

2. Cherish the Navajo Nation, its flag, and its anthem;
3. Cherish the noble ideal which inspired the Navajo Nation to struggle for freedom;
4. Defend the Nation and render national service when called upon to do so;
5. Promote *hózhóón* and the spirit of *k'é* among the Navajo Nation;
6. Value and preserve the rich Navajo heritage;
7. Protect and improve *Nahasdzaan Nihimá* and *Nihit'aa Yadiłhił*;
8. Develop critical thinking consonant with *nabik'íyat'í*;
9. Safeguard public property and to abjure (solemnly renounce or stop) violence;
10. Strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.

The purposes of the Navajo Nation are the protection and development of the individual and respect for the dignity of the individual, the democratic exercise of the will of the people, the building of a just and peace-loving society, the furtherance of the prosperity and welfare of the people and guaranteeing of the fulfillment of the principles, rights, and duties of the Navajo Nation. Education and work are the fundamental processes for guaranteeing these purposes.

The purpose of the Navajo Nation is to establish *hózhóón*. *Hózhóón* takes many forms in its economic, social, governmental, economic, political, educational, and environmental functions. Therefore, the government must be able to provide effective governmental services to the people and to meet their dynamic needs.

All Navajo Nation programs should be designed and operated to produce results that meet the needs of the individual citizen for quality, and the need of the taxpayer for low cost, but more importantly, that they vindicate the values of *hózhóón* and *k'é*. The basic questions under girding reform are: 1) Should it still be done? 2) Who should do it? and 3) Who should pay for it?

Thus the question to be asked is: What government structure would best produce results satisfactory to the people? The basic dichotomy of ideologies surrounding government include: 1) that the market is the best solution to the efficient and effective delivery of these services; and 2) that the government is the best way to ensure that all can have access to the much needed services and are not prohibited by costs of services.

The government must be able to safeguard the core functions and the principles articulated by *k'é*. To do so, there must a separation of powers based, not on the logic of *distrust*, but rather on the logic of *trust*, implicit trust of the institution and the people who occupy those institutions. This trust is extended so long as the people are able to give that trust status by upholding it through the continued practice of *k'é*. Thus the separation of powers must be an implicitly shared power, not a legally bound separation of powers.

Examples of where the core functions of government were not safeguarded include:

1. Desert Rock, despite the state function of government to protect the Natural World, the power plant was approved.
2. Gaming Facilities, despite there having been opposition to the gaming initiative and the function of government to listen to the "will" of the people, the gaming referendum was approved after three rejections.

These two examples are merely examples where the voice of the executive and the legislative overrode the voice of the people. Other examples that halt the delivery of services are the cumbersome oversight of executive function. The oversight of executive functions stems from the institutional momentum gained from the days of the chairmanship, under which the Chairman amassed enormous political power over all branches of government, and even attempted to exercise political power over the judicial branch. This failed. The Judicial branch retained its check of legislative authority which is legislative authority vested in the Chairman.

Supervisory committees are needed to supervise the agencies and regulatory bodies. These oversight committees must be derived from the local levels, that is, a more democratic regime than a republican one. A single elected leader to serve as the voice of the nation, but not to retain much power, only the power to sign bills into law. Consistent with Navajo thinking, there must be a check of power, but not a codified separation of powers. *Naat'áanii*, post-*Hwééldi* began to assume the duties of enforcers of law. Before that time, the idea of enforcement, understood today, may not have been so prevalent.

There should be a check on the powers of the leader, by the Council of Elders, who have veto authority over the leader and also by the Council of the People. The Courts of *Nahat'á* check the powers of the leader, the Council of Elders, and the Council of the People.

The leader will have two assistants – a *Hózhóójí* and *Hashkéejí Naat'áanii* – these are appointed by the Council of Elders, with nomination from the leader, but confirmed by the Council of the People. The Council of Elders consist of two (2) individuals from each agency, one *Hózhóójí* and one *Hashkéejí.* These are appointed and approved by the district and agency, and confirmed by the Leader. The Council of the People consists of elected officials from the various electoral districts of the Navajo Nation. The Council of the People has nonvoting status for community groups and NGOs, which are appointed by the chapters, districts, and agencies. These people are popularly elected. The Council of the People's acts are then checked by the chapters, the districts, and the agencies.

Institutions reflect not just legal forms but also normative understandings and expectations (Ibid: 31):

1. Institutional rules regarding the separation or fusion of executive and legislative power lead to differing decision-making processes in parliamentary systems and the federal checks and balances system, with parliamentary systems featuring stronger party discipline, greater recruitment of ministers from the legislature, greater centralization of legislative power in the cabinet and greater centralization of accountability.

2. These differences in decision-making processes give governments in parliamentary systems greater capabilities to perform a variety of policy-making tasks.

3. The greater capabilities of governments in parliamentary systems in controlling their environments allow them to make superior policy choices.

4. The greater capabilities of governments in parliamentary systems give them better prospect of turning their policy choices into policy outcomes consistent with those choices.

Incentives of cooperation in the party discipline in the parliamentary system is high, the U.S. is supposedly low. In the three-branch system, the filling of executive posts cannot be from the legislature, rather, they most often are policy specialists or professionals, not Policy generalist, and usually without political savvy. In the Parliamentary system, they are drawn from the legislative body. In the presidential system the cabinet members are often not called on to advise on areas outside their departments. In Parliamentary systems there may be the evolution of a strong-man.

Examples include the delivery of scholarship assistance to chapter members. This case includes the bureaucratic measure of following strict regulations created in the absence of the people and with the aid of the strong arm of the Local Governance Support Centers of the Navajo Nation.

The institutions on the Navajo Nation that need to be addressed have their provenance in the system, structure, and cultural history of the Navajo Nation. The systemic issues are concerned primarily with the inability of the current governance system to be responsive to the needs of the people which some would assume addresses issues of cultural relevance, but it does not.

It is argued, from an institutionalist perspective, that the higher degree of embedment of institutional norms in an institution, the greater the resistance to change. This begs the question in the Navajo context: to what extent has colonization affected, informed, and sustained the institutional embedment, and thus a resistance to change? How then does one change a government? In radical ways? In ways that are not being negotiated beyond the influence of research? What is the point of reform? It is a project of reclamation now? Why must the government be reclaimed?

There are a number of intersecting ideologies that inform the systemic issues surrounding the Navajo Nation Government. These ideologies have their provenance in Western thought, but more specifically, in a long legacy of western thought that has ultimately taken root within the minds of the Navajo people. At the risk of being categorized as colonial in tone and arrogant in style, this essay hopes to debunk the myth that knowledgeable intermediaries are not requisite for change, especially in the post-colonial context. Certainly, the facility of thinking of one's self as being salvable, purely based on their erudite position, is fallacious.

What then is the approach of government reclamation? Certainly it must be a "grassroots" attempt to reclaim the processes and forms of government that have colonized and ultimately homogenized the people and applied discordant practices that alienate them from those primordial ontologies that inform the way they see the world.

Ultimately, the purpose of Diné government is the establishment of *Hózhóón*. What does this mean? *Hózhóón* is a state of being where people live in harmony with each other and with the Natural world and, more importantly, they are striving for a peaceful life in all they do.

Table 14: Implementation of Diné Political Philosophy

Timeline	Event
Year 1	• Reform representational districts
Year 2	• Reform district and agency councils
Year 3	• Create non-voting member status of NGOs in the Navajo Nation Council
Year 4	• Establish Council of Elders with limited authority
Year 5	• Reform legislative process to include elements of *k'é*
Year 6	• Reform and reorganize the Divisions, Commissions, and Departments of the Navajo Nation
Year 7	• Establish Office of *Hózhóójí Nat'aah* and *Hashkée'jí Nat'aah* (with limited legislative authority)
Year 8	• Establish Office of *Nat'aah* or Leader, eliminate offices of Speaker and President, hold elections for Leader
Year 9	• Eliminate Navajo Nation Council and change to Council of People, reform so legislative authority is devolved to agencies, districts, and chapters
Year 10	• Empower the Council of Elders and Offices of *Hózhóójí* and *Hashkée'jí*
Year 11	• Place Commissions, Departments, and Divisions under the Offices of *Hózhóójí* and *Hashkéejí*
Year 12	• Enact legislation devolving legislative authority to Agencies, Districts, Chapters, and Council of Elders, hold elections

CONCLUSION

TO DATE, there has not been sophisticated treatment of government reform. Current reform objectives are based on negligent, second-rate research and on popular opinion. While the people's voice is important, government reform should not be based on reactionary thinking as a result of supposed government inefficiency. Government reform, without the added voice and support of the people, will not result in anything of substance.[10] While a constitution plays a marginal role, battling institutional momentum is vital to effective reform of the Navajo Nation.

Judicial review is a longstanding, legal doctrine in the Navajo Nation, and the Council has endorsed it on more than one occasion. The Navajo Nation Courts apply the Navajo Nation Bill of Rights, the Judicial Reform Act and the Title II Amendments as "organic" laws, but they have only used the Navajo Nation Bill of Rights and provisions of Title II to invalidate Council action. The Courts have never said that there is a customary unwritten constitution in the Navajo Nation. A close examination of case decisions shows that the Court has not used Navajo common law to invalidate any Council action. The Court carefully distinguishes between statutes that are vague or that violate basic rights when applying Navajo common law, and it states that it will not interfere with valid legislation or acts of the Council where Council action is specific and understandable.

Constitutionalism has worked well in the Navajo Nation, yet some difficulties still remain. One of the difficulties is that public officials and members of the public do not understand it, or understand it well. Therefore, there needs to be additional public discussion of the concept, including discussion on how it works in the Navajo Nation, how it promotes public confidence in law and government, how it supports the rule of law, and how it makes the Navajo Nation better than other governments. Finally, there should also be discussions of the roles of the three branches in relation to each other to carry out the purposes of government reform, including constitutionalism.

In conclusion, the Navajo Nation need not concern itself about thinking up lofty and contrived language to put within an official "constitutional" document since the Navajo Nation Code already satisfies many of the requirements of constitutionalism. What might be advised is legislation that will strengthen the power of the courts, amend the Fundamental Laws of the Diné to remove references to structure of governance (such as the establishment of the National Security Branch), and to restructure the executive branch—removing the office of president and strengthening the regional agencies into a *naachid* system. Strengthening the courts should not prove

[10] See Thailand for example.

difficult since its parameters are already found in Title VII of the Navajo Nation Code, and, therefore, not subject to electorate ratification. In addition, a super-majority vote is not needed to abolish the Office of President—it may only require a resolution from the Navajo Nation Council. In sum, this report argues a moving away from the U.S. Presidential model towards a limited-parliamentary model, based on a culturally appropriate system of traditional Diné thinking, with "checks" coming from empowered local communities.

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APPENDIX A

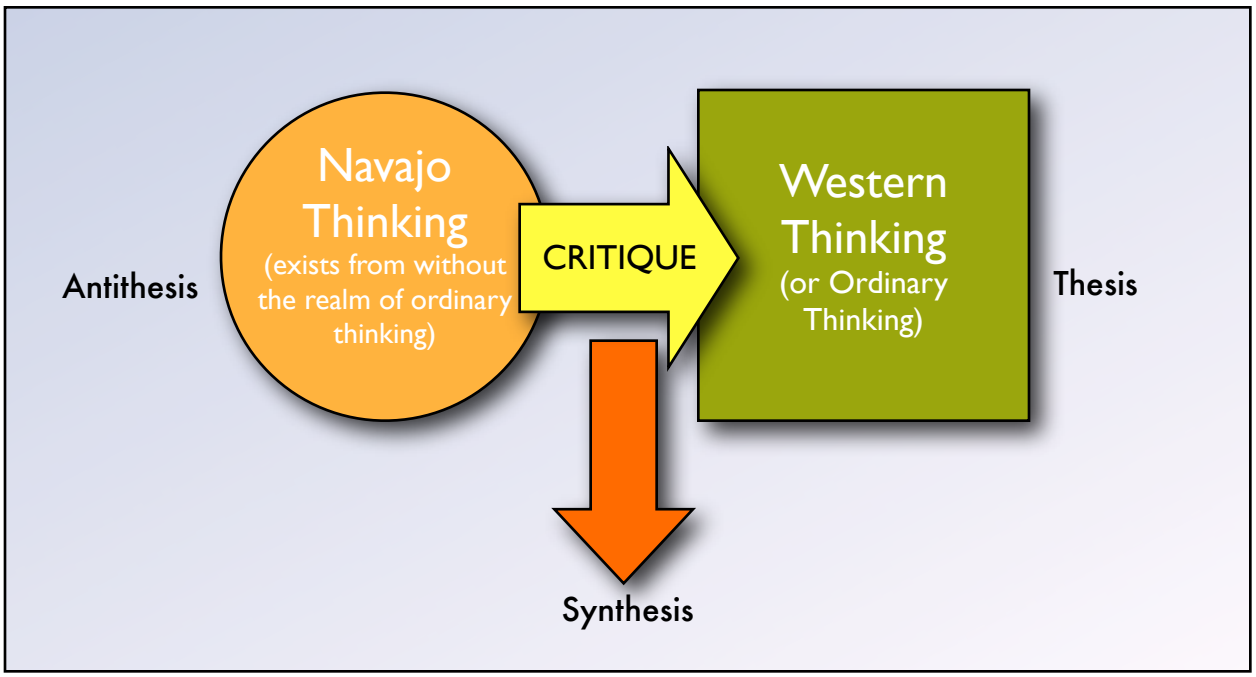
Issues and Factors

Popular Representation	Power	Fundamental Laws of the Diné	Decolonization
Whatever model is considered ideal should include an open government with inclusion, transparency, effective public participation, reciprocity, accountability, consensus and talking things out, equity, fairness for all (by class, gender affiliation, area of residence and spiritual affiliation), and implementation of the right to development in a manner that achieves distributive justice	Allocation of power and authority to the lowest manageable level of government	Methodology for the Diné choice of leaders; All Navajo Nation officials and leaders before taken office should be certified and uphold them to learn, apply and teach the Fundamental Laws of the Diné in their capacity as government officials	Identifying the residual effects of colonialism and dependence by restoring the balance envisioned in the Treaty of 1868
Effective local empowerment in the 110 chapters	Identification and definition of the disconnect between central government and communities and the grassroots	Effectively requiring communication with the people for guidance	Retraditionalization to revive the Navajo culture and life-way
Building public confidence	Oversight by checks and balances or other methods of checking abuses of discretion	Establishing standards so that leaders will use their experience and wisdom in the best interests of the people	Finding the roots and dependency (*shá*) and cutting them out
Effective governmental response to the needs of the people, in proper priority	Separation of powers to avoid the concentration of too much power in any given segment of government	A leadership that will ensure that the rights and freedoms of the People are honored	Effectively addressing resistance to new ideas
	Addressing a balance between centralized functions and the decentralization of power to the lowest effective level	Establishing ethical standards so that leaders carry out their duties and responsibilities in a moral and legal manner when representing the People	Eliminating dependence on bureaucracy in the allocation of discretion and oversight

Popular Representation	Power	Fundamental Laws of the Diné	Decolonization
	Checking unresponsive bureaucracy and entrenched interests	Remedies where leaders no long have the People's trust and confidence and should no longer hold that status	
	Controlling abuses of discretion and disregard for the law in effective judicial review	Protocols for Executive Branch leaders to represent the Navajo Nation to other peoples and nations and implement policies and laws enacted by the Legislative Branch	
		Policies and laws for the Legislative Branch to effectively and appropriately address immediate and future needs	
		Standards for the leaders of the Judicial Branch to uphold the values and principles of *Diné bibee nahaz'áanii* in the practice of peacemaking, obedience, discipline, punishment, interpreting laws, and rendering decisions and judgments	
		Framing and enforcing security systems and operations	
		Institutionalizing roles for elders, medicine people, and the teachers of the traditional laws, values and principles	
		Appropriately addressing various spiritual healings through worship, song, and prayer	
		Respecting the spiritual beliefs and practices of all and allowing for appropriate input and contribution of any religion to the maintenance of a moral society and government	

APPENDIX B

Further Analysis of Navajo Thinking as a Dialectical Approach in Governance



The discourse of ordinary thinking is one-dimensional. It is flat and stale. Nevertheless, it is a powerful mechanism for change, but not a change to diversify society, rather, it is the multidimensionality of society that changes into a single, vacuous dimension. Herbert Marcuse (1964/1991) makes the case for the use of dialectics to critique this ordinary thinking, a thinking based primarily in empiricism and is thus called *positivism*. This ordinary thinking expresses that positivism with its attendant systems is the principle that informs all thinking and discourse. Therefore, only that which can be proven through the use of science is valid and rational. All things which cannot be categorized are seen as irrational; therefore only through science is ordinary thinking accomplished.

The objective of positive thinking is to disenfranchise negative thinking, or metaphysics, debunk transcendent concepts, and envelope it within the realm of positivism; in essence, eliminating dialectics and perpetuating one-dimensionality. Differences, then, are never truly resolved but forced to fit within the categories of scientific inquiry. "Positivism is a struggle against all metaphysics, transcendentalisms, and idealisms as obscurantist and regressive modes of thought" (Marcuse 1964/1991: 172).

The question arises: "Why use dialectics? Is not this an exercise of western thinking?" The answer is straightforward, although Marcuse identifies the value of dialectics, this does not inherently make it "western." In fact, the use of dialectics arises out of the need to critique society, not from within, but from without. Consequently, in our struggle to define terms and explore Navajo ideas in governance, it has been shown that Navajo thinking exists *without* the bounds of ordinary thinking. It is, as Marcuse aspires, a mode of thinking altogether apart and unbound and a candidate in a dialectical approach for a critique.

The lenses that are usually applied to the analysis are derived from the same discourse that it critiques. For example, *conflict theory* is an economic theory that views society upon the

basis of power over scarce resources. Its assumptions, however, are based in western thought, such as the concept of self, of community, of economics as the driving force behind all other aspects of society and so on. However, this lens takes its context solely from *within* the discourse of ordinary thought. Through positive thinking then, problems and issues that arise are solved not by supplying new information, but merely rearranging what is already in use. The question arises about how effective are these lenses when used out of their original context?

Navajo thinking is altogether distinct and exists outside of the positivist discourse. Its context in society and its application set it apart. However, proponents to "modernize" Navajo society have used the positivist approach to debunk the Navajo thought process and prove it irrational, enveloping Navajo thought into the continuum of ordinary discourse as vapid and ignorant, only a subcategory of mysticism and myth. Today, in governance, this approach has been so successful in eliminating Navajo thinking from the forum, that leaders and academics purport that the only way to conceive a legitimate governance structure is to adopt western government, specifically the American three-branch system. Not only does this argument close any possibility to evaluate alternative systems even within the western continuum of thought, but more robustly excludes alternatives derived from outside this discourse, including one based in Navajo thought. Economic systems, familial structure, and ethics, likewise, follow a similar pattern.

In our analysis then to more fully examine theories and notions, a deconstruction method to get at "the roots" aides in the general understanding of concepts. Take, for instance, sovereignty. The issue of sovereignty has taken on many tones and has many definitions in Indian Country including those of the Navajo Nation. Before any discussion of definitions, one point must be made clear: that sovereignty is a purely Western concept. Its roots are not found within the continuum of Navajo thought and therefore exists without the normal bounds of thinking, never completely being reconciled. Sovereignty has been aligned to the term *naatsíílid* or rainbow, referring to the seal of the Navajo Nation which is to symbolize a "territorial boundary" but what is sovereignty and what are its roots?

Sovereignty has three component parts to its syntax: 1) the prefix *sove-*; 2) the term *reign*; and 3) the suffix *-ty.* In this analysis only the first two parts will be examined, the final suffix is a modifier that makes the idea a noun. *Sove-* is a Latin-based prefix that conveys the idea of *above, upon, over,* or *on. Reign* is just what that means to "hold royal office; to rule as king or queen; to prevail or predominate." In other words, sovereignty means "the power or ability to rule above all others; supreme power or authority; and the authority of a state to govern itself or another state."

The idea formed (discussed earlier in the report) as a result of the Peace of Westphalia, and although a complete analysis of this treaty will not be given at this time, suffice it to say, *sovereignty* is the idea of the power to rule as being *divine*, or "sanctioned by God." Furthermore, not only does sovereignty translate to "supreme rule" but also "divine rule" or "rule from on High." This notion continues today in the context of Indians (the Navajo included) as *tribal sovereignty.* The term is used to describe the Indians' surrender of certain powers to rule themselves and the lands they occupy and the United States' role as the "trustee." This policy began what is known as the "special trust relationship" between the United States and the Indians. The policy is, however, dehumanizing and a basic violation of international human rights but continues as the supreme doctrine in the federal-tribal relationship. (It should be noted that similar circumstances existed in Europe only a few centuries ago and by which accord immigrants departed from Europe. The term was called *feudalism* instead of *tribal*

sovereignty, *Lord* or *King* instead of *trustee*, and *serfdom* instead of *federally-recognized tribe*. Tribal sovereignty, therefore, is the limited ability of a tribe to govern tribal affairs - albeit defined by the federal government - with ultimate control or "plenary power" invested in the federal government.)

The idea that even remotely qualifies as sovereignty in Navajo thinking is *nanilo'* which is the notion of "rope" or "guide" or "being led as with a rope." The use of *naatsíílid* is taken out of context and inconsistent with Navajo thinking. Sovereignty, as mentioned, has different roots, historical experience, and philosophy - naturally producing a different outcome. The *hastóí sani* describe what in exists in Navajo thought as *aanih nó'holnííh,* meaning "it´s up to you," and *bííníghа,* meaning "ability or capability to act or choose" with these two ideas being informed by *k'é* to bring with them a sense or responsibility and relationship. This ability or capacity for independent action and choice informs the idea of self-reliance (rather the western notion of self-determination) and is one of the core principles in leading a resilient life based on *hózhóón.* The recognition of *aanih nó'holnííh* and *bííníghа* establish each individual being as distinct, but also as part of a larger, communal entity. Therefore, in formulating governance policy, use of *nanilo', aanih nó'holnííh,* and *bííníghа* are culturally appropriate notions and serve as a dialectic tool to critique the positivist notion of *sovereignty.*

Finally in this analysis, Navajo thinking is the antithesis to western thinking, or the thesis. The combination resulting in a synthesis, or what has been commonly referred to as "meshing." However, the latter implies neither a consistent nor equal parts combination. In this process of dialectic analysis, Navajo thinking has been applied to western thinking as a means to critique, but essential to this process is to also deconstruct the notions of western theory. A second step would then be, instead of using western thinking as the basis for construction, to substitute that with Navajo thinking and then use the results of the synthesized analysis to form a structure based on Navajo thinking.