



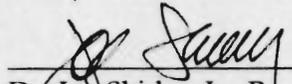
The Navajo Nation

DR. JOE SHIRLEY, JR.
President

BEN SHELLY
Vice President

MEMORANDUM

TO: Lawrence T. Morgan, Speaker
Navajo Nation Council

FROM: 
Dr. Joe Shirley, Jr., President
THE NAVAJO NATION

DATE: May 14, 2010

SUBJECT: RESOLUTION NO. CAP-17-10 *morgan gone 5/14/10 3:20*

First and foremost, this resolution serves to diminish the independence of the Attorney General and the Courts, violates the separation of powers doctrine, creates obvious conflicts of interest, is designed to shield and insulate members of the Navajo Nation Council from investigation of alleged misconduct, and unavoidably appears to be retaliatory in nature.

Resolution No. CAP-17-10 expands the authority of the Council's lawyer, who represents only the Council's interests, drafts legislation and defends political positions on its behalf. This expansion of authority clearly tilts the balance of power among the three branches of Navajo government to that of the Legislative Branch. Doing so would create a single superior Branch of government, and dispense with the concept of separation of powers as envisioned by the Council in 1989.

Separation of powers serves several goals. It prevents concentration of power in one branch, historically viewed as the root of tyranny, and provides each branch with means to defend against the encroachment and overreach of authority by the other two. In 1989, the Navajo Nation Council sought to prevent this with its adoption of CD-68-89, which states "...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."

It further 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 the 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."

Accordingly, the Council itself saw the need for a clear separation and equal distribution of powers among the three Branches in order to check "the abuse of power" by one Branch,

specifically naming the Legislative Branch. To function with full command, independence, and the respect of other jurisdictions, the Office of the Attorney General must likewise be protected from encroachments on its authority by the three Branches of government. Resolution No. CAP-17-10 brings us back to December 15, 1989, when the Council sought to prevent this distortion of government functions.

Pursuant to these amendments, only allegations raised and referred by the Navajo Nation Council *itself* could be subject to a preliminary investigation to constitute grounds for the appointment of a Special Prosecutor. This means that preliminary information obtained by the Attorney General's Office, the White Collar Crime Unit, the Prosecutor's Office, or any other authorized entity concerning possible misconduct of a government official, must be presented, reviewed and referred by the Navajo Nation Council *before* a preliminary investigation and appointment of a Special Prosecutor could be pursued. Obviously, under these amendments, the Council would have the authority to stop the pursuit of a preliminary investigation and the subsequent hiring of a Special Prosecutor when the subject of the investigation is a member of the Council.

These amendments further violate the separation of powers doctrine among the Branches by empowering the Chief Legislative Council with authority to conduct investigations and to oversee the prosecution of alleged wrongful conduct of elected and government officials except for Council delegates. Under the current law, these functions are carried out and overseen through an independent process supervised by the Judicial Branch. This resolution would give license to the Council's lawyer to use this authority to strengthen the political interests of Council members through investigations and potential prosecutions of Executive Branch officials while protecting Council members from similar investigations and prosecutions for alleged ethical and criminal infractions. Using lawmaking authority in this way is self-serving and counter to the public interest.

This resolution creates obvious conflicts of interest for the Navajo Nation Council. Not only does it empower the Council to confirm the composition of the Special Division of the Window Rock District Court, the body charged with appointing and contracting with the Special Prosecutor, but it is also the final decision-maker on whether good cause exists to remove an official or not. Under these amendments, the Council would be privy to information prior to and during the course of any given investigation. Regardless of whether the allegations are proven during the prosecution phase or not, being privy to such information would unfairly affect the Council's decision to remove an official. Pursuant to these amendments, the Navajo Nation Council is now the investigator, prosecutor, judge and jury. Because of this substantial conflict at each phase of the process, challenges under these amendments are likely.

Expanding the role of the Chief Legislative Counsel to prosecute elected or government officials is contrary to the original intent and purpose of the Office of the Legislative Counsel. The primary responsibility of the Chief Legislative Counsel and his office is to provide legislative drafting services and legal advice to the Navajo Nation Council and Legislative Branch entities. These amendments create an unnecessary duplication of services already provided for under the current law. From a fiduciary and financial perspective, especially considering the Nation's current multi-million dollar budget deficit, this resolution lacks any information about how much this duplication of services will cost.

Lastly, despite arguments to the contrary, the timing of this legislation unavoidably appears to be in reaction to the Attorney General's decision to pursue and investigate possible wrongful conduct of financial discretionary spending by Council delegates. The Attorney General reached his decision to do so independently and without consultation with me. As such, I believe we should allow the process to run its course without interference and without the enactment of what will appear to the public to be retaliatory measures. For us as leaders to expect our citizens to have respect for our governmental processes on their behalf, we cannot betray that trust with resolutions that appear to serve our interests rather than theirs as Resolution No. CAP-17-10 so clearly does.

For the reasons stated herein, I hereby veto Resolution No. CAP-17-10.

xc: Honorable Members of the Navajo Nation Council