

JUDICIAL BRANCH OF THE NAVAJO NATION

HERB YAZZIE
Chief Justice of the Navajo Nation

Eleanor Shirley, Associate Justice

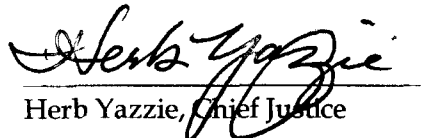


MEMORANDUM

To: Hon. Johnny Naize, *Speaker*
NAVAJO NATION COUNCIL

Hon. Members
NAVAJO NATION COUNCIL

From:


Herb Yazzie, Chief Justice

JUDICIAL BRANCH OF THE NAVAJO NATION

Date: April 5, 2011

Subject: Comments on Proposed Title II Amendments

As Branch Chief responsible for overall operations, I am submitting the below comments on proposed permanent amendments in Legislation No. 0148-11 which was distributed by the Nabi'ki'yati Committee of the Navajo Nation Council on Monday, April 4, with only 5 days provided for governmental and public comment.

Firstly, we strongly question the extremely short comment period of 5 calendar days provided not only for this legislation but, it appears, for all future proposed legislations pursuant to proposed 2 N.N.C. § 164(A)(7).

In the legislation, the Council has stated its desire "to modify the legislative process to provide for public notification of, and input on, legislation" and for "transparency." However, 5 calendar days is not a realistic timeframe for public input of any kind. Additionally, the only kind of public input permitted under the proposed legislation is that of chapter governments supported by a certified chapter resolution pursuant to

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proposed 2 N.N.C. § 164(A)(7). Every Navajo knows that convening a public discussion and obtaining a chapter resolution within 5 days is not possible. Five days is a difficult timeframe even for governmental programs. We note that this particular comment period is being held at a time when many of the nation's lawyers are out of town at the Federal Bar Association Indian Law Conference. There will likely be few substantial comments from government divisions and programs for this reason.

The extreme shortness of the comment period, and the exclusion of all public comment except through certified chapter resolutions, is shameful.

Secondly, and most importantly, the Supreme Court decisions upholding the reserved right of the People to amend Title II in *Shirley v. Morgan*, SC-CV-02-10 (May 28, 2010 and July 16, 2010) and *Nelson v. Initiative Committee to Reduce Navajo Nation Council*, SC-CV-03-10 (May 28, 2010) have not been adhered to by the Council. There is no indication that the Commission on Navajo Government Development has been reestablished or involved in these amendment proposals. The Commission was intended as the quasi-independent body that would solicit input from the public *prior* to any permanent amendment to Title II, and this has not been done.

The Navajo Nation Supreme Court has repeatedly stated that governmental power is derived from the people and what authorities they do not delegate or allow the government to have, they reserve to themselves. Per *Shirley v. Morgan* above, "We have elaborated that the power of the people to participate in their democracy and determine their form of government is a reserved, inherent and fundamental right expressed in Title 1 of our Diné Fundamental Law and the Navajo Bill of Rights" (Nav. Sup. Ct. July 16, 2010).

There appears to be no discernible effort in the proposed legislation to comply with the principle that governmental authority comes from the People, not the Council.

Furthermore, the proposed legislation consolidates to the 24 member Council the exclusive powers of government by affirming itself as the "governing body," and, notwithstanding the Supreme Court's order in *Nelson v. Initiative Committee to Reduce Navajo Nation Council*, persists in providing that 2 N.N.C. §§ 101 and 102 cannot be changed "unless approved by majority vote of all registered voters in all precincts." The Supreme Court ruled in *Nelson* that this provision is invalid because of the

impossibility of obtaining such a vote. The language should be changed to fit the ruling of the Court.

Thirdly, we strongly protest and reject that the proposed amendments effectively consolidates Council power over the Executive and Judicial Branches, even adding to itself the power of impeachment, while leaving itself invulnerable and unaccountable to any ethics oversight body.

Legislation No. 0148-11 proposes impeachment as a new Council power. The new provision gives the Council a general power of impeachment and allows for the Council to adopt its own rules after the amendment is passed, so that only the Council would limit itself on who may be impeached, and how the impeachment would be done.

Specifically in regards to the Judicial Branch, the proposed amendments would give the committees of the Council exclusive control over the qualifications, hiring, retention and removal of justices and judges without any input from the Judicial Branch, the public, or any independent commission.

That the Council would propose such exclusive control over the judiciary at a time when 11 members of the present Council are facing criminal trials in our district courts in relation to the exercise of their office can only be viewed as calculated to influence the outcome of these proceedings. In the long term, the proposed amendments will permanently weaken the Navajo Nation courts with respect to the Council, and render the Judicial Branch unable to hold the Council accountable for their actions through the judicial process for fear of justices and judges losing their jobs.

The judiciary has experienced great political pressures over the past several years. With a number of legislators still facing charges within the judicial system, legislators must not be placed in positions where they are able to exert any undue pressure on decisions of the courts.

Last week, the Judicial Branch had submitted a proposal to the Law and Order Subcommittee recommending the establishment of an independent nominating commission, with the participation of public members, whose job it would be to screen, interview, evaluate and recommend candidates for appointments to judgeship and justice positions. The Judicial Branch proposal would have allowed for representation

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from the courts, the DNA People's Legal Services and Navajo Nation Bar Association on an independent commission. The public would also be represented when a district court judge position is being considered. The legislature would continue to have final authority in confirmation, but the independent commission would ensure that judges with proper background, training and experience are selected and would help to prevent undue political interference in the selection of judges and justices. The branch proposal would comply with the spirit of the Supreme Court decision that there be public participation in this process, and would remove exclusive control of the legislature from the selection process, but still allow for the Council to retain ultimate authority to confirm.

Legislation No. 0148-11 does not include the recommendation of the Judicial Branch and instead, leaves the legislature, through the Law and Order Committee and the Navajo Nation Council, exclusive control over the hiring and retention process. There would be no avenue for public input in the process if the power remains with the legislature only.

Lastly, it appears that the Council persists in wishing to maintain oversight over Executive, Judicial, and local administrative matters. The history of the government has been that the Council has been involved in reviewing and approving contracts, which are administrative matters that should be left to branch administrators. The Council has also been involved in reviewing business site leases, grazing permit disputes, land use permits, and sand and gravel permits, etc. We believe that permit matters, in particular, should be reviewed and approved by local governments under the idea of local governance embedded in the Local Governance Act. Again, this is an issue that should have been given first to the People, instead of being rushed to passage.

During the orientation session for the 22nd Navajo Nation Council in Flagstaff in December 2010, there was hope of a collaborative governmental effort. The Judicial Branch at that time expressed to the legislators that if they wanted further explanation and discussion of Supreme Court cases, the branch would be willing to attend any such sessions requested. However, to this day, we have not received any such request.

The Navajo People expect all three branches of their new government to work together for the good of all after our prolonged period of contention. We must all rise to our

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responsibilities. The term *Nabi'ki'yati* means a "thorough discussion." As leaders, let us utilize that concept as we perform our governmental duties for the good of the Navajo People.