

**RESOLUTION OF THE  
NAVAJO NATION COUNCIL**

**21<sup>st</sup> NAVAJO NATION COUNCIL - Fourth Year 2010**

**AN ACT**

**RELATING TO INTERGOVERNMENTAL RELATIONS, GOVERNMENT SERVICES,  
JUDICIARY, AND AN EMERGENCY; ENACTING THE SPECIAL PROSECUTOR  
AMENDMENT ACT OF 2010; AMENDING TITLES 2 AND 7 OF THE NAVAJO  
NATION CODE**

**BE IT ENACTED:**

**Section One. Enactment of the Special Prosecutor Act of 2010**

The Navajo Nation Council hereby enacts the Special Prosecutor Amendments Act of 2010

A. The Navajo Nation hereby finds that the status providing for the appointment and operation of a Special Prosecutor, and the Special Division of the Window Rock District Court were originally adopted in 1989.

B. The Navajo Nation further finds that the statutes providing for the appointment and operation of a Special Prosecutor, and the Special Division of the Window Rock District Court are in need of amendment in order to address changed circumstances since 1989.

C. The Navajo Nation finds that the Chief Legislative Counsel should be provided additional authority to apply for the appointment of a Special Prosecutor, and to be otherwise involved in the operation of the Special Prosecutor in a manner similar to the Attorney General of the Navajo Nation.

D. The Navajo Nation finds that the appointment of judges to the Special Division of the Window Rock District Court should require confirmation by the Navajo Nation Council.

E. The Navajo Nation finds that this matter constitutes an emergency pursuant to 2 N.N.C. §164 (A)(7)(a) as the current unamended provisions of law threaten the sovereignty of the Navajo Nation.

**Section Three. Amendment of Title 2 of the Navajo Nation Code**

The Navajo Nation Council hereby amends Title 1 of the Navajo Nation Code, as follows:

**NAVAJO NATION CODE ANNOTATED  
TITLE 2. NAVAJO NATION GOVERNMENT  
CHAPTER 5. EXECUTIVE BRANCH  
SUBCHAPTER 39. DEPARTMENT OF JUSTICE  
ARTICLE 6. SPECIAL PROSECUTOR**

§ 2021. Application for appointment of a Special Prosecutor

A. The Attorney General or Chief Legislative Counsel shall conduct a preliminary investigation pursuant to the provisions of this Section whenever he/she receives that official is referred from the Navajo Nation Council information sufficient to constitute grounds to investigate whether any of the persons listed in Subsection (B) of this Section has committed a violation of any federal or state criminal law or any law or regulation of the Navajo Nation, or committed any act upon which the Navajo nation may have a civil cause of action. The Attorney General may take no longer than 60 days to conduct such preliminary investigation.

B. The persons referred to in Subsection (A) of this Section are:

1. The President of the Navajo Nation
2. The Vice-President of the Navajo Nation
3. Any member of the Executive Staff of the Office of the President or the Vice President.
4. The Chairperson of any standing committee of the Navajo Nation Council;
5. The Attorney General, in which case the Deputy Attorney General shall perform the functions of the Attorney General pursuant to the provisions of §§ 2021- 2024 of this title;

6. The Director or Acting Director or Deputy Director of any Division, Department, Program or Office of the Executive Branch of the Navajo Nation; and

7. Any other official, employee or agent of the Navajo Nation, where the Attorney General determines that investigation or prosecution or civil litigation against such person by the Attorney General or other officer or employee of the Department of Justice may result in a personal, financial, or political conflict of interest.

C. In determining whether grounds sufficient to investigate exist, the Attorney General or Chief Legislative Counsel shall consider the degree of specificity of the information received and the credibility of the source of the information.

D. Upon completion of the preliminary investigation, if the Attorney General or Chief Legislative Counsel finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, or that the matter may be handled by the Attorney General, the Office of the Prosecutor or other officials, or employees of the Department of Justice without resulting in personal, financial or political conflict of interest, the Attorney General or Chief Legislative Counsel may take such lawful action or inaction as ~~he/she~~ that official deems appropriate.

E. Upon completion of the preliminary investigation, if the Attorney General or Chief Legislative Counsel finds that there are reasonable grounds to believe that further investigation or prosecution is warranted, and that the matter cannot be handled by the Attorney General, the Office of the Prosecutor or any other official or employee of the Department of Justice or Office of Legislative Counsel without resulting in personal, financial, or political conflict of interest, the Attorney General or Chief Legislative Counsel shall apply to the Special Division of the Window Rock District Court for appointment of a Special Prosecutor.

F. An application pursuant to Subsection (E) of this Section shall contain sufficient information to assist the special division to select a Special Prosecutor and to define that Special Prosecutor's jurisdiction. The Attorney General or Chief Legislative Counsel shall recommend at least three persons among whom the Special Division shall appoint such Special Prosecutor, shall recommend appropriate compensation, and shall recommend the extent of such Special Prosecutor's jurisdiction.

G. If for any reason the Special Division fails to comply with the provisions of § 2022(A) of this title, then the Attorney General or Chief Legislative Counsel shall exercise the powers of the Special Division under of § 2022 (A) and (C) of this title.

H. Whenever a Special Prosecutor is currently in office, and whenever the Attorney General or Chief Legislative Counsel receives information sufficient to cause him/her that official to apply for appointment of a Special Prosecutor pursuant to Subsection (E) of this Section, in lieu thereof the Attorney General or Chief Legislative Counsel may apply to the Special Division to enlarge the jurisdiction of such Special Prosecutor to include any such new matter.

I. No application or any other documents or materials supplied to the Special Division in connection with an application or appointment of a Special Prosecutor shall ~~not~~ be revealed to any person outside the Special Division or the Department of Justice without leave of the Special Division, or the written release of the Attorney General or Chief Legislative Counsel.

J. Whenever a matter is within the jurisdiction of a Special Prosecutor, the Attorney General, the Chief Prosecutor, the Chief Legislative Counsel and all officers and employees of the Department of Justice, shall suspend all investigations and proceedings regarding such matter, except insofar as such Special Prosecutor and the Attorney General or Chief Legislative Counsel agree in writing that such investigations and proceedings may continue.

K. Notwithstanding the provisions of Subsection (J) of this Section, the Attorney General or Chief Legislative Counsel may appear in any proceeding before any court or legislative or administrative body as an amicus curiae concerning any issues of law raised by any case or proceeding.

§ 2022. Duties of the Special Division

A. Within 10 days of receipt of an application pursuant to § 2021 (E) of this title, the Special Division shall appoint an appropriate Special Prosecutor from among the persons recommended by the Attorney General or Chief Legislative Counsel, and shall determine such Special Prosecutor's jurisdiction in accord with the recommendation of the Attorney General or Chief Legislative Counsel .

B. The Special Division may request, and upon request shall receive, the assistance of the Attorney General or Chief Legislative Counsel in securing the appointment of a Special Prosecutor.

C. The Special Division shall set the fees and expenses to be paid to a Special Prosecutor upon his or her appointment, in an amount agreed between the proposed Special Prosecutor and the Special Division. The Special Division may request, and upon request shall receive, assistance and cooperation from the Division of Administration and Finance Office of the Controller, Office of Management and Budget, and the Budget and Finance Committee of the Navajo Nation Council, in determining and arranging for funding such fees and expenses. The Special Division shall enter into an appropriate contract with the Special Prosecutor, in the name of the Navajo Nation, and shall comply with the requirements as may be applicable of 25 U.S.C. § 81. Notwithstanding any other provision of law, the presiding judge of the Special Division is hereby delegated the authority to execute, and shall execute the contract on behalf of the Navajo Nation. Such contract shall be a valid, binding and enforceable obligation of the Navajo Nation.

D. If a vacancy in office arises because of the death of a Special Prosecutor, the Special Division shall appoint a successor in the same manner as the initial appointment was made. The Special Division may appoint either a person recommended to the vacant office in the initial application, or one of three other persons to be recommended by the Attorney General or Chief Legislative Counsel at the Special Division's request.

E. If a vacancy in office arises because of the removal pursuant to § 2024 (B), (C) or (D) of this title, the Special Division shall appoint an acting Special Prosecutor to serve until any judicial review of such removal pursuant to § 2024 (D) of this title is either completed or barred by time, after which time the Special Division shall take appropriate action. The Special Division may appoint either a person recommended to the vacant office in the initial application, or one of three other persons to be recommended by the Attorney General or Chief Legislative Counsel.

F. Upon the request of a Special Prosecutor, the Special Division may enlarge the jurisdiction of such Special Prosecutor whenever it appears that there exist new matters related to matters within his or her original jurisdiction which, had they been known by the Special Division at the time of such Special Prosecutor's appointment, would have been included within his or her jurisdiction.

#### § 2023. Authority and duties of a Special Prosecutor

A. A Special Prosecutor appointed pursuant to § 2022 of this title shall have full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor, as defined in 2 N.N.C. §§ 1963(A), (B), (G), (I), and (K); 1972; 1974(B); 1978-1984, with respect to all matters within his or her jurisdiction.

B. A Special Prosecutor shall have full power and authority to appear before any court of the Navajo Nation, the same as if he/she were admitted to the bar of such court, with respect to any matter within his or her jurisdiction or the duties and responsibilities of his or her office.

C. A Special Prosecutor shall have full power and independent authority to initiate or participate in any proceeding pursuant to 2 N.N.C. §§ 3751-3761, or before the Board of Election Supervisors, the Tax Commission or the Labor Commission, with respect to any matter within his or her jurisdiction.

D. Upon the authorization of the Navajo Nation Council, and subject to its continuing authority and supervision, a Special Prosecutor shall have the power and authority to commence a civil or administrative action against any person or entity, before any federal or state court or administrative body, with respect to any matter within his or her jurisdiction.

E. Notwithstanding the provisions of 17 N.N.C. § 1801, a criminal complaint signed and sworn before a judge of any court of the Navajo Nation by a Special Prosecutor shall be deemed a valid complaint.

F. With the prior consent of the Special Division, a Special Prosecutor shall have the power and authority to appoint, fix the compensation of, and assign the duties to and thereafter supervise such employees, including investigators, attorneys and consultants, as such Special Prosecutor deems necessary.

G. A Special Prosecutor may request, and upon request shall receive assistance from any Branch, Division, Department, Office or Program of the Navajo Nation, which may include access to any records, files or other materials relevant to any matter within his or her jurisdiction. Upon agreement by the Attorney General or the Chief Legislative Counsel, a Special Prosecutor may utilize the resources and personnel of the Department of Justice or Office of Legislative Counsel where necessary to perform such Special Prosecutor's duties.

H. A Special Prosecutor shall have all necessary and proper power and authority incident to the exercise of his or her other powers and authority.

## § 2024. Termination and removal of a Special Prosecutor

A. The appointment of a Special Prosecutor shall terminate when:

1. The Special Prosecutor notifies the Attorney General or the Chief Legislative Counsel and the Special Division that the investigation and prosecution of all matters within such Special Prosecutor's jurisdiction have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

2. The Special Prosecutor files a report in full compliance with Subsection (F) of this Section.

B. The Special Division, either on its own motion or upon the suggestion of the Attorney General or Chief Legislative Counsel, may terminate the appointment of a Special Prosecutor, upon the grounds provided in Subsection (A) (1) of this Section.

C. A Special Prosecutor may be removed, upon the following separate and distinct bases:

I. upon the two-thirds (2/3) vote of the Navajo Nation Council, or

II. by action of the Attorney General or Chief Legislative Counsel, ~~and only for good cause, physical disability, mental incapacity, or other~~ on the basis of any condition that substantially impairs the performance of such Special Prosecutor's duties.

D. A Special Prosecutor may seek judicial review of any termination of his appointment by ~~the Navajo Nation Council, the Special Division, or the Attorney General~~ or the Chief Legislative Counsel, by filing within five days thereof a petition of review with the Supreme Court of the Navajo Nation. Notwithstanding any other provision of law, the Supreme Court shall have and shall accept jurisdiction to hear and determine said petition and ~~to take such remedial action as it deems appropriate to reinstate the Special Prosecutor.~~



E. Upon the termination of a Special Prosecutor's appointment pursuant to Subsections (B), (C) or (D) of this Section, such Special Prosecutor shall promptly file a report with the Special Division, the Navajo Nation Council and the Attorney General or the Chief Legislative Counsel in full compliance with Subsection (F) of this Section.

F. The report required by Subsections (A) (2) and (E) of this Section shall set forth fully and completely a description of the work of the Special Prosecutor, including the status and disposition of an cases brought, the reasons for not prosecuting any matter within such Special Prosecutor's jurisdiction which was not prosecuted, and an accounting of all funds received and expenditures made in the performance of his or her duties.

#### **Section Four. Amendment of Title 7 of the Navajo Nation Code**

The Navajo Nation Council hereby amends Title 1 of the Navajo Nation Code, as follows:

##### § 292. Composition

A. The Special Division of the Window Rock District Court shall consist of three judges or retired judges or retired justices, who shall be assigned in such manner and for such terms as is provided in this Section, for the purpose of appointing special prosecutors pursuant to 2 N.N.C. §§ 2021-2024.

B. Judges of the Special Division shall be appointed for terms of two years each, which terms shall commence on the date of the enactment of this Section, and thereafter on the date of every other anniversary of the enactment of this Section.

C. The Chief Justice of the Navajo Nation shall designate and assign three judges or retired judges or retired justices to the Special Division for each successive two-year term, subject to confirmation by the Navajo Nation Council. At least two of the judges shall be active permanent judges of District Courts of the Navajo Nation. The third judge may be either an active permanent judge of the Navajo Nation or a retired judge or retired justice of the Navajo Nation. Unless there are an insufficient number of active permanent judges from at least two District Courts, not more than one judge or retired judge may be assigned to the Special Division from a particular District(or

preceding trial) Court. The Chief Justice shall designate one of the judges to be the presiding judge of the Special Division.

D. Judges of the Special Division may only be removed during their terms upon their resignation, or by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council. Any vacancy in such division shall be filled only for the remainder of the two-year period for which such vacancy occurs and in the same manner as initial appointments to such division were made.

E. Except as provided under Subsection (F) of this Section, assignment to the Special Division shall not bar any other judicial assignment during the term of assignment to such division.

F. No judge of the Special Division shall be eligible to participate in any judicial proceeding concerning a matter which involves a special prosecutor appointed by the Division while such special prosecutor is serving in that office, or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office.

G. Within five calendar days of the enactment of this Section, the Special Division shall be created pursuant to Subsection (C) of this Section.

#### **Section Five. Effective Date**

The provisions of this Act shall become effective in accord with 2 N.N.C. § 221(B).

#### **Section Six. Codification**

The provisions of this Act which amend sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel.

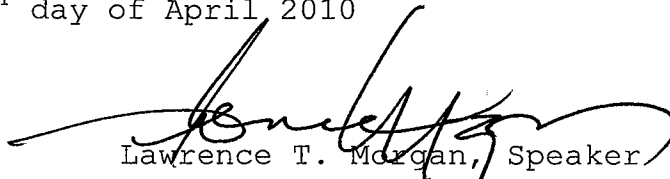
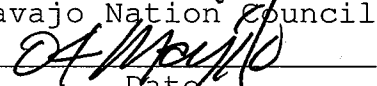
#### **Section Seven. Savings Clause**

Should any provisions of this Act be determined invalid by the Navajo Nation Supreme Court, or the District Courts of the Navajo Nation, without appeal to the Navajo Nation Supreme

Court, or any other court of competent jurisdiction, those portions of this Act which are not determined invalid shall remain the law of the Navajo Nation.

**CERTIFICATION**

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 61 in favor and 17 opposed, this 21<sup>ST</sup> day of April 2010

  
Lawrence T. Morgan, Speaker  
Navajo Nation Council  
  
Date

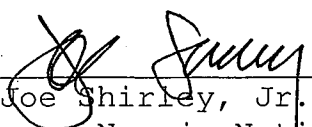
Motion: Davis Filfred  
Second: Lorenzo Curley

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (10), on this \_\_\_\_\_ day of \_\_\_\_\_ 2010.

\_\_\_\_\_  
Dr. Joe Shirley, Jr., President  
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (11), this \_\_\_\_\_ day of **MAY 14 2010** 2010 for the reason(s) expressed in the attached letter to the Speaker.

  
\_\_\_\_\_  
Dr. Joe Shirley, Jr., President  
Navajo Nation



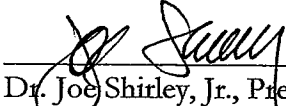
# The Navajo Nation

*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

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