

## OPINION OF THE CHIEF LEGISLATIVE COUNSEL

### Opinion No. CLC-01-10

Question: Does Navajo Nation law, as adopted by the Navajo Nation Council, allow a Navajo Nation President who has been elected to two consecutive terms of office as Navajo Nation President and who is serving the second of those two consecutive terms to serve a third consecutive term as Navajo Nation President?

Answer: No. The provisions of Navajo Nation law limit the Navajo Nation President to serve no more than two (2) terms.

### Discussion

The question raised can be answered by the clear and plain language of 2 N.N.C. § 1002 (C), which states, “The President shall serve no more than two (2) terms.” This language was enacted, with proper underscoring, as new statutory language in the passage of Resolution CD-68-89 by the Navajo Tribal Council on December 15, 1989. The proposed language, as originally drafted, stated that “The President **may** serve no more than two terms.” This language was amended by the Navajo Tribal Council on December 14, 1989 to change the word “may” to “shall.” This amendment clarified that adherence to the two term limit is mandatory, and not discretionary.

The plain language of 2 N.N.C. § 1002 (C) states, “The President shall serve no more than two (2) terms.” The Court has previously stated that:

“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 Dine' é Bi Beehaaz'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 Diné) 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.”

Tso v. Navajo Housing Authority, 8 Nav. R. 548, at 557 (Nav. Sup. Ct. 2004). The plain language of 2 N.N.C. § 1002 (C) cannot be overridden or interpreted to be ambiguous in a manner which would allow the Court to declare 2 N.N.C. § 102 (C) invalid. “The Navajo Nation Supreme Court has cited with favor its “plain language” rule in other cases. “[W]e still apply a statute’s plain language when that language is clear.” Begay v. Chief, No. SC-CV-08-03, 8 Nav. R. 654, at 659 (Nav. Sup. Ct. 2005). See also, Yazzie v. Thompson, 8 Nav. R. 693, at 696 (Nav. Sup. Ct. 2005), Navajo Housing Authority v. Clark, No. SC-CV-53-05, slip op. at 4 (Nav. Sup. Ct. April 4, 2006).

Further, the provisions of the Diné Fundamental Law, as amended by Resolution CJA-08-10, Presidential veto overridden by Resolution CF-11-10, state clearly that, “Foundation of the Diné, Diné Law and Diné Government does not supersede Navajo Nation statutory laws or policies.” 1 N.N.C. § 200 (A). The Diné Fundamental Law further provides that it “does not delegate authority to substitute alternatively formulated ‘fundamental laws’ or policies instead of Navajo Nation laws or policies (Diné bipeehaz’áanii) duly-adopted by the leaders of the Legislative Branch.” 1 N.N.C. § 200 (B). Accordingly, it is clear that the clear and plain language of 2 N.N.C. § 1002 (C) cannot be overcome by claims that the Presidential two term limit is invalid on the basis of claimed inconsistency with the Diné Fundamental Law.

While recourse to the laws of the United States and the sundry states is not crucial to this analysis, it should be noted that the laws of these other sovereigns set forth similar two term limitations for the heads of their Executive Branches of government. The 22<sup>nd</sup> Amendment to the United States Constitution states:

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of the President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

United States Constitution, Amendment XXII, ratified February 27, 1951. Likewise, at the state level, there are 36 states which impose a term limit on the elected position of governor. See, attached “Constitutional and Statutory Provisions for Number of Consecutive Terms of Elected State Officials,” The Council of State Governments.

The Arizona State Constitution provides for a two consecutive term limitation on its governor, among other officials of its Executive Branch, as follows:

Section 1. A. The executive department shall consist of the governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction, each of whom shall hold office for a term of four years beginning on the first Monday of January, 1971 next after the regular general election in 1970. No member of the executive department shall hold that office for more than two consecutive terms. This limitation on the number of terms of consecutive service shall apply to terms of office beginning on or after January 1, 1993. No member of the executive department after serving the maximum number of terms, which shall include any part of a term served, may serve in the same office until out of office for no less than one full term.

Constitution of the State of Arizona, Article V. Executive Department, § 1. Term limits on Executive department and state officers; term lengths; election; residence and office at seat of government; duties.

The New Mexico State Constitution, similarly provides for a two consecutive term limitation on its governor, among other officials of its Executive Branch, as follows:

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served two terms in a state office, be ineligible to hold that state office until one full term has intervened.

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Upon the adoption of this amendment by the people, the terms provided for in this section shall apply to those officers elected at the general election in 1990 and all state executive officers elected thereafter.

Constitution of the State of New Mexico, Article V. Executive Department, § 1. Executive department composition.

It should be noted that the provisions of the Navajo Nation Election Code do not address the two term limitation within the qualifications for Navajo Nation President, as set forth in 2 N.N.C. § 1002( c). The application of the residency qualification for the Navajo Nation President, as currently set forth within 11 N.N.C. § 8(A)(1), was invalidated under particular facts by the Navajo Nation Supreme Court in the case captioned Begay v. Navajo Nation Election Administration, 8 Nav. R. 241 (Nav. Sup. Ct. 2002). The Court, in discussing the disqualification of presidential candidate Edward T. Begay stated that the “Navajo Nation Bill of Rights recognizes liberty as a fundamental right. (1 N.N.C. § 3 (1995)). Liberty cannot be taken away unless it is done using a fair process (“due process”) and the law must be evenly applied (“equal protection of the law”).” Begay at 249. The Court further accepted the “rule adopted in other jurisdictions that if any ambiguities exist in an election statute, the presumption lies in favor of the candidate.” Id. The Court announced that, “our decision in this case is based on the unequal application of the Election Code.” Id. Accordingly, any disqualification of a presidential candidate must meet the dual requirements of due process and equal protection.

The Court in Begay placed special emphasis on the failure of the Navajo Election Administration to apply the residency qualification of 11 N.N.C. § 8(A)(1) in an equal and fair way. The Court stated in dicta that the residency requirement “was read one way for two candidates, read differently for Appellant, and not read at all for a third candidate. If law is to mean anything, it must be consistent in the way people are treated. In this case, the candidacy definitions were unequally applied. We recommend that the NNEA develop a consistent and fair procedure for enforcing these provisions of the Election Code. We emphasize the importance of developing such a procedure well in advance of the next election.” Begay at 253. Of course, it will be crucial to the conduct of the 2010 Navajo Nation primary election that the Navajo Election Administration apply the Presidential two term limit in a manner which is consistent and fair to all persons who file their applications for candidacy for the position of Navajo Nation President.

It should further be noted that the Court later invalidated the residency requirement set forth at 11 N.N.C. § 8(A)(1) for “irreconcilable conflict with the fundamental rights of voters and candidates.” In the Matter of the Appeal of Vern Lee, No. SC-CV-32-06, slip op. At 7 (Nav. Sup. Ct. August 11, 2006). The Court stated in Vern Lee that, “The Council may establish requirements for elected offices, but such requirements must conform to *Diné bi beenahaz’áanii*. There is a basic right, highlighted in the Fundamental Law statute, that the *Diné* have the right to choose leaders of their choice. 1 N.N.C. § 203(A) (2005). Further, under *Diné bi beenahaz’áanii*, Navajo candidates have a liberty interest to participate in the political process by running for office.” Vern Lee at 5. It is possible that a person who files an application for candidacy for the position of President who would be determined ineligible under the two term limit of 2 N.N.C. § 1002 ( C), might challenge the determination of ineligibility under a similar argument.

However, the Navajo Nation law adopted by the Navajo Nation Council as of the date of this legal opinion is clear in this matter. The plain language of 2 N.N.C. § 1002 ( C) states, “The President shall serve no more than two (2) terms.” Accordingly, a Navajo Nation President who has been elected to two consecutive terms of office as Navajo Nation President and who is serving the second of those two consecutive terms shall not serve a third consecutive term as Navajo Nation President.

cc: President Joe Shirley, Jr.  
Speaker Lawrence T. Morgan  
Chief Justice Herb Yazzie  
Navajo Nation Council Delegates