

# 24<sup>th</sup> NAVAJO NATION COUNCIL NAABIK'ÍYÁTI' COMMITTEE REPORT Second Year 2020

The **NAABIK'ÍYÁTI' COMMITTEE** to whom has been assigned:

## **NAVAJO LEGISLATIVE BILL #0166-20**

An Action Relating to Naabik'iyáti' Committee; Reaffirming the Position of the Navajo Nation Opposing the Death Penalty and the Sentence Imposed in United States v. Lezmond Michell, Case Number CR-01-1062-PCT

*Sponsored by: Honorable Carl R. Slater*

Has had it under consideration and reports the same that the legislation **EXPIRED**.

Respectfully Submitted,



*Honorable Seth Damon, Chairman*  
**NAABIK'ÍYÁTI' COMMITTEE**

### **30 August 2020**

*On August 13, 2020, Legislation 0166-20 was tabled to have Public Hearings and was to be brought back to the next Regular or Special Naabik'iyáti' Committee Meeting. As of August 30, 2020, Legislation 0166-20 has not been acted on by the Naabik'iyáti' Committee. Per Navajo Nation Standing Committee Rules of Order, Rule 18, H., "Any legislation not taken up from the table in the manner provided herein or at the time directed by the Committee shall be deemed to have expired and shall be eliminated from the agenda of the Committee." Legislation 0166-20 was not added to the August 29, 2020 Naabik'iyáti' Committee Special Meeting agenda; therefore, it is expired and will be closed out.*

## LEGISLATIVE SUMMARY SHEET

Tracking No. 0166-20

**DATE:** August 6, 2020

**TITLE OF RESOLUTION:** AN ACTION RELATING TO NAABIK'ÍYÁTI' COMMITTEE; REAFFIRMING THE POSITION OF THE NAVAJO NATION OPPOSING THE DEATH PENALTY AND THE SENTENCE IMPOSED IN *UNITED STATES V. LEZMOND MICHELL*, CASE NUMBER CR-01-1062-PCT

**PURPOSE:** This resolution, if adopted, would state the position of the Navajo Nation on the death penalty. Further, the resolution opposes the death penalty sentence imposed in *United States v. Lezmond Michell*, case number CR-01-1062-PCT.

This written summary does not address recommended amendments as may be provided by the standing committees. The Office of Legislative Counsel requests each Council Delegate to review each proposed resolution in detail.

5-DAY BILL HOLD PERIOD: Johnson  
Website Posting Time/Date: 6:26pm 08-06-20  
Posting End Date: 08-11-20  
Eligible for Action: 08-12-20

PROPOSED STANDING COMMITTEE RESOLUTION  
24th NAVAJO NATION COUNCIL -- Second Year, 2020

INTRODUCED BY

  
(Prime Sponsor)

TRACKING NO. 0166-20

AN ACTION

RELATING TO NAABIK'ÍYÁTI' COMMITTEE; REAFFIRMING THE POSITION  
OF THE NAVAJO NATION OPPOSING THE DEATH PENALTY AND THE  
SENTENCE IMPOSED IN *UNITED STATES V. LEZMOND MICHELL*, CASE  
NUMBER CR-01-1062-PCT

WHEREAS:

A. The Naabik'iyáti' Committee is a standing committee of the Navajo Nation Council. 2 N.N.C. § 700. The committee is empowered to coordinate all federal and state programs with other standing committees for purposes of providing the most efficient delivery of services to the Navajo Nation. 2 N.N.C. § 701(A)(4).

B. The Diné of the Navajo Nation believe that iina, life, is sacred, must be protected, and must be cultivated to fulfill the purposes of each life form according to the Diné bee behazaanii.

C. Understanding this sacred principle expounded upon by the Diné's hataaliis, practitioners, and other spiritual leaders, the Navajo Nation opposes capital punishment in all forms.

1. The Diné have long believed in rehabilitative and restorative justice, practiced in many forms. Punitive justice, as expressed by western and United States' influences, by definition, does not create harmony and serves to primarily reinforce discord within society.

1 D. In 1994, the US Congress passed the Federal Death Penalty Act, which created a  
2 tribal opt-in provision for guiding the US Government's decision in whether to seek  
3 the death penalty in the sentencing of American Indians.

4 1. The Navajo Nation has consistently opposed the sentence of death for  
5 prosecutions of its citizens by the federal government.

6 2. At this time, only one American Indian tribe (out of 577), the Sac and Fox  
7 Nation, has "opted-in" to federal death penalty sentencing prosecutions.

8 E. Since the Diné emerged into the Fourth, or Glittering World in Dinétah, they have  
9 exercised sovereign authority over Diné Bikeyah, between the Four Sacred  
10 Mountains.

11 F. From 1868 to the present, the United States government has recognized the Navajo  
12 Nation's right to practice self-government over its land and its citizens, including  
13 handling many intra-Indian criminal matters.

14 G. There is perhaps no higher expression of sovereign authority than the ability of a  
15 sovereign to deliver justice on matters between its citizens occurring on the  
16 sovereign's lands, including the sense of the sovereign before other sovereigns on  
17 matters of justice where other sovereigns have asserted jurisdiction.

18 1. While the Navajo Nation understands it has the inherent authority to settle  
19 justice issues between its citizens on matters occurring on its lands, the United  
20 States has asserted jurisdiction over many intra-Indian criminal matters on the  
21 Navajo Nation. The Navajo Nation possesses the right to intercede on such  
22 matters.

23 2. The Federal Death Penalty Act affirms and defines the right of the Navajo  
24 Nation to intervene and express its views on death penalty prosecutions of  
25 Navajo Nation citizens.

26 H. The Navajo Nation has and will continue to express its opposition to the death penalty  
27 conviction of Mr. Lezmond Mitchell.

28 1. In 2001, 20-year-old Lezmond Mitchell and a juvenile co-defendant, both  
29 Navajo citizens, were charged with killing two other Navajo people.  
30



2. The federal government prosecuted this crime in the U.S. District Court in Arizona.
3. Although the co-defendant, Johnny Orsinger, was the primary assailant in the case, he was under 18 at the time of the crime and thus ineligible for a death sentence.
4. Mr. Mitchell, barely out of his teens, became the focus for then-Attorney General John Ashcroft's desire to prosecute this case as a capital crime.
5. On at least three separate occasions, the Nation formally petitioned the federal government not to subject Mr. Mitchell to a death sentence.
6. Marlene Slim, a Navajo citizen who is the daughter and mother of the victims, asked the federal government not to pursue a death sentence. **Exhibit A.**
7. Even the local U.S. Attorney's office opposed capitally prosecuting Mr. Mitchell out of respect for the position of the Navajo Nation and its people. **Exhibits B, C, and D.**
8. Instead of respecting tribal sovereignty – let alone the wishes of the victims' family or the local prosecutors' views – the federal government in its zeal to seek a death sentence found a work-around.

- a. The federal government prosecuted Mr. Mitchell for "carjacking resulting in death," a capital crime of general federal jurisdiction for which tribal consent was not required.

- I. The Navajo Nation acknowledges that peculiarities exist within the federal government's prosecution of Mr. Mitchell and these peculiarities compromise the integrity of Mr. Mitchell's death penalty conviction.
  1. After his arrest, the federal government abused the tribal court system to deny Mr. Mitchell his federal due process rights.
    - a. Specifically, Mr. Mitchell was held in a tribal jail for 25 days while the Federal Bureau of Investigation continually interrogated him. It was only after they allegedly obtained a full confession that Mr. Mitchell was brought to federal court, presented to a magistrate, and appointed counsel.

1 b.The FBI neither tape-recorded Mr. Mitchell's alleged confession, nor  
2 allowed him to write a statement in his own hand.

3 c.In fact, in his only recorded statement, Mr. Mitchell fervently denies  
4 having a direct role in the capital offenses.

5 d.Were Mr. Mitchell a non-Indian, the federal government would not  
6 have been permitted to use these alleged confessions against him.

7 2. There are strong indications that federal prosecutors worked to keep American  
8 Indian people off of Mr. Mitchell's jury and played to anti-Indian biases  
9 during the trial.

10 a.Mr. Mitchell was not served by a jury of his peers; he was convicted  
11 by a jury of eleven white persons and one Navajo person.

12 b.Mr. Mitchell's lawyers have sought for years to investigate these  
13 issues, but the federal courts refuse to allow them to interview the  
14 jurors

15 **NOW THEREFORE BE IT RESOLVED:**

16 A. The Navajo Nation hereby opposes the death penalty against any of its citizens.

17 B. The Navajo Nation requests the President of the United States to commute Mr.  
18 Lezmond Mitchell's sentence to life in prison without the possibility of release.

Marlene Slim Statement-  
Daughter to Alyce Slim  
& mother to Tiffany  
Lee

December 28, 2001



Marlene S. Slim  
P.O. Box 2247  
Window Rock, Arizona 86515

U. S Department of Justice  
United States Attorney  
District of Arizona

RE: UNITED STATES VS. LEZMOND MITHCHELL  
Court Number: CR-01-1062-PCT-MHM

This is regarding the questionnaire for punishment for the conviction of Carjacking First Degree Murder. Below are my thoughts and concerns regarding the Lezmond Mitchell.

- 1) What sentence do you feel each defendant should receive? Please explain below.

My daughter was only nine years old, with her whole life ahead of her. I certainly will miss the mother-daughter relationship watching her grow up. And my mother was about to retire after 30 years of devotion to the Window Rock Unified School District #8 as a Bus Driver.

My daughter and mother's lives and future were taken from them in a instant. This horrific action effected many lives, including our family, and many other families, adults and kids alike. For our family, there is a significant void that is evident on an everyday basis. It is a extremely difficult situation, one in which we will never get over and shattering our lives.

Therefore, due to the savageness and unhuman murders of my daughter, Tiffany N. Lee and my mother, Alyce R. Slim, who posed no threat what-so-ever to anyone, the sentence called for would be his natural life in prison, with no chance of parole. A sentence that is harsh enough to send a message that such offenses will not be tolerated by society. These organized band of beast, who's whole sole purpose was to get what they wanted through the hurting of others with no remorse, what-so-ever.

My mother's truck, which was stolen and later used in a armed robbery in Red Valley, AZ, was driven around in which to gloat their bad deeds. I can only imagine these perpetrators enjoyed themselves while joy riding and thinking they wouldn't get caught. Lezmond Mitchell as indicated in my father's statement, knew right from wrong, including the other suspect, Jason Kinlicheenie for Carjacking and he also should be responsible and indicted, because he was as much involved for being there, and knowing right from wrong. All of



them should be accounted, due to their knowledge as to what happen and committed. This organized band of gangs should all be given the maximum penalty of life imprisonment and therefore, suffer the consequences of their actions.

- 2) Other comments or information you would like the Assistant U.S. Attorney to know:

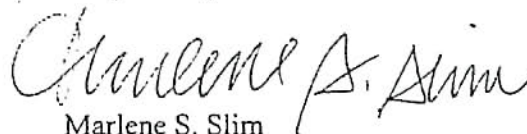
Though, I am not familiar with the laws of crimes within the Arizona State and the Navajo Nation Criminal laws, however, I am learning day by day.

As my father indicated, I filed a report on them missing on Tuesday, October 30, 2001. It seem that the Navajo Police Department did not really do anything as in looking for them. Other than people are missing all the time. And that whole week, we searched and looked for them, even the School Bus Drivers, friends and relatives, posting their pictures and where they might have last been seen. It wasn't until one of the Ranger's or Resource Enforcement Officers found my mother's vehicle in the Wheatfields area, that the Navajo Police and Criminal Investigators finally responded and became involved, when before, they were sitting at idle.

Their responsibility in taking the situation over, their attitude was they didn't really care, perhaps because it wasn't any of their relatives nor anybody they knew. There main objective is to serve and protect, and our family never saw that. When the FBI's showed up and became involved. They handled the situation very professionally and expeditiously in apprehending the suspects, in which they traumatize are family greatly. Through this, my family and I are very thankful to the FBI, in regards to this tragic ordeal in which effected us tremendously, and would like to see that justice is done, so that our lives may be put at ease, however, never the same with our losses.

This will conclude my thoughts and concerns regarding the above matter. If any other questions or concerns, please contact me at my address or telephone number. Thank you.

Respectfully Submitted

  
Marlene S. Slim





NAVAJO NATION DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

LEVON B. HENRY  
ATTORNEY GENERAL



BRITT E. CLAPHAM II  
DEPUTY ATTORNEY GENERAL

2002 JAN 28 A 4:51

U.S. ATTORNEY  
PHOENIX, AZ

January 22, 2002

Paul Charlton, United States Attorney  
U.S. Department of Justice  
Two Renaissance Square  
40 North Central Ave., Suite 1200  
Phoenix, Arizona 85004-4408

RE: U.S. v. Nakai, Nakai, Jr., Leal and Orsinger,  
No. CR-01-1072-PCT  
U.S. v. Mitchell and Kinlicheenie, No. CR-01-1062-PCT

Dear Mr. Charlton:

As you requested, this letter will express the current position of the Navajo Nation with respect to the possibility of the United States seeking capital punishment in the above cases. The Nation realizes that your office is not necessarily seeking whether the Nation wants to "opt in" to the idea of capital punishment under 18 U.S.C. 3598; rather the question is whether the Nation would support the death penalty sentencing option under 18 U.S.C. 2119 in these specific instances. Although the Nation has not adopted a comprehensive policy on capital punishment, in these cases, the Nation would not support a death penalty option.

I wish to thank you for the information you provided on the pending cases, although the details of the cases were shocking it was, nevertheless, helpful in our decision making process. The information which you provided was shared with the Speaker of the Navajo Nation Council, members of the Public Safety Committee of the Navajo Nation Council, and members of the Judiciary Committee of the Navajo Nation Council. Pursuant to your request the information was kept privileged and all copies which were distributed were collected at the conclusion

Letter to: Paul Charton  
January 22, 2002  
Page 2

of our meeting. It is with this understanding and based on the cultural reasons outlined below that the Navajo Nation's position on the capital punishment sentencing option remains unchanged at this time. The Navajo Nation would not support and therefore requests that the U.S. Attorney's Office not seek capital punishment in either of these cases. This position is limited solely to the two cases listed.

Previously the Public Safety Committee of the Navajo Nation Council initiated public hearings on the issue of capital punishment in light of 18 U.S.C. § 3598. The Committee, unfortunately, has not yet completed the hearings due to factors beyond their control. In light of the issue you raised, the Committee, in conjunction with the Judiciary Committee of the Navajo Nation Council, may have an opportunity to address the issue. At the present time, however, it is the consensus of all Committee members to hold to the Navajo Nation's previous position on capital punishment.

The three branch chiefs of the Navajo Nation - the President, the Speaker of the Navajo Nation Council, the Chief Justice - adopted two guiding principles, one of which speaks to the preservation of Diné culture, language and values. As part of Navajo cultural and religious values we do not support the concept of capital punishment. Navajo holds life sacred. Our culture and religion teach us to value life and instruct against the taking of human life for vengeance. Navajo courts recognize traditional peacemaking as part of the judicial system. It is through traditional peacemaking that harmony is restored in situations which have been disturbed through an act of crime. Committing a crime not only disrupts the harmony between the victim and the perpetrator but it also disrupts the harmony of the community. The capital punishment sentence removes with any possibility of restoring the harmony in a society.

The Navajo Nation leadership is looking for solutions to address crime on the Nation. The Nation's leadership emphasizes

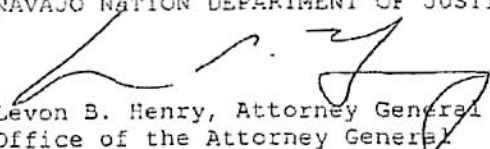
Letter to: Paul Charton  
January 22, 2002  
Page 3

preventative and rehabilitative services for the offenders and counseling and support services for the victims and the communities. This positive approach is in keeping with Navajo culture and values.

On behalf of the Navajo Nation I wish to express the Nation's appreciation for your respect of the government-to-government relationship which exists between the Navajo Nation and the United States. The Navajo leadership values the working relationship established with your office and requests the support of your office in any efforts to address the crime issues here on the Navajo Nation. The Navajo Nation may, at some time in the future, take a formal position on capital punishment generally after full consultation with the governing body and the executive offices. However, in light of the need for a response to your office, it is, at this time, the consensus of the Public Safety Committee of the Navajo Nation Council and the Judiciary Committee of the Navajo Nation Council to maintain the historic position of the Navajo Nation opposing the sentencing option of capital punishment for crimes committed on the Navajo Nation under any section of the United States criminal code.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE



Levon B. Henry, Attorney General  
Office of the Attorney General

xc: Kelsey A. Begaye, President  
The Navajo Nation  
: Edward T. Begay, Speaker  
The Navajo Nation Council  
: Public Safety Committee Members  
: Judiciary Committee Members  
: Navajo Division of Public Safety



### DECLARATION OF LEVON HENRY

I, Levon Henry, hereby declare as follows:

1. My name is Levon Henry. I was the Attorney General for the Navajo Nation from May 1999 to January 2003. I attach my résumé as Exhibit A.
2. Lezmond Mitchell's counsel, the Office of the Federal Public Defender in Los Angeles, California, showed me a letter dated January 22, 2002. I attach the January 22, 2002 letter as Exhibit B.
3. I wrote and sent the January 22, 2002 letter at the request of either Paul Charlton, the United States Attorney for Arizona, or Vincent Kirby, an Assistant United States Attorney in Mr. Charlton's office, asking for the Navajo Nation's position on the issue of the death penalty against one of the Nation's members.
4. When the Nation received this request from the United States Attorney in Phoenix, the United States was pursuing homicide charges against Lezmond Mitchell and other Navajo members in two cases I cited in the letter, *United States v. Nakai, Nakai, Jr., Leal and Orsinger*, No. CR-01-1072-PCT, and *United States v. Mitchell and Kinlicheenie*, No. CR-01-1062-PCT, and it was considering seeking the death penalty in those cases. As I recall, all of the defendants in those two cases were members of the Navajo Nation. The United States' inquiry, and later request for a letter stating our position, caused a discussion among the Nation's

government: I, as the Attorney General, and the Nation's Public Safety Committee and Judiciary Committee discussed whether the Nation should consider opting-in to the application of the death penalty to our members. (The Federal Death Penalty Act leaves it to the individual Tribe to opt-in to the application of the death penalty against its members.) As the January 22, 2002 letter states clearly, the Nation maintained its long-standing position against the death penalty; the Nation still opposes the death penalty.

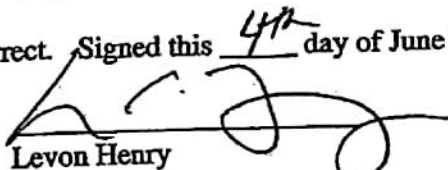
5. After I sent the letter on or about January 22, 2002, I heard nothing more from the United States Attorney's Office until I received either a telephone call or a letter from the United States Attorney's Office informing me that they decided to seek the death penalty against one of our members anyway; I understand they sought it only against Lezmond Mitchell, and not any other Navajo Nation member who was also eligible for the death penalty. That was the last I heard from the United States Attorney's Office about that issue.

6. Until Mr. Mitchell's present attorneys recently showed me a copy of the January 22, 2002 letter, I had never heard from, or spoken to, Lezmond Mitchell's counsel asking about that letter, or the Nation's position on the death penalty. As the Nation's Attorney General, it would have been my and my Office's role to handle such a significant legal issue. Had Mr. Mitchell's trial

counsel asked, I or someone else from the government would have testified at Mr. Mitchell's trial about the Nation's position against the death penalty.

7. Mr. Mitchell's present counsel informed that Mitchell was arrested pursuant to a misdemeanor warrant issued by the Nation; the FBI interrogated Mitchell while he was in custody of the Nation pursuant to that warrant; and, the FBI took Mitchell from the custody of the Navajo Nation. During my term as the Attorney General, and even now, it is not uncommon for the FBI to join the Nation police in arresting a member of the Nation, and for the FBI to walk into the tribal jail and interrogate the arrestee about a federal (non-tribal) crime. It is also not uncommon for the FBI to "badge out" the tribal inmate; they walk in, tell the jailer they are taking the inmate, and the Nation does not know until the inmate misses a tribal court date.

I declare under the penalty of perjury of the laws of the United States of America, the foregoing is true and correct. Signed this 4th day of June 2010.

  
Levon Henry





NAVAJO NATION DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

LEVON B. HENRY  
ATTORNEY GENERAL

BRITT E. CLAPHAM II  
DEPUTY ATTORNEY GENERAL

2002 JAN 28 A 4:51

U.S. ATTORNEY  
PHOENIX, AZ

January 22, 2002

Paul Charlton, United States Attorney  
U.S. Department of Justice  
Two Renaissance Square  
40 North Central Ave., Suite 1200  
Phoenix, Arizona 85004-4408

RE: U.S. v. Nakai, Nakai, Jr., Leal and Orsinger,  
No. CR-01-1072-PCT  
U.S. v. Mitchell and Kinlicheenie, No. CR-01-1062-PCT

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Letter to: Paul Charton  
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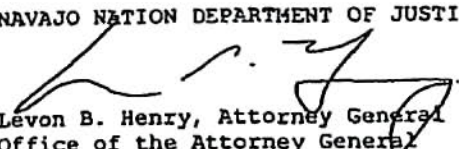
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On behalf of the Navajo Nation I wish to express the Nation's appreciation for your respect of the government-to-government relationship which exists between the Navajo Nation and the United States. The Navajo leadership values the working relationship established with your office and requests the support of your office in any efforts to address the crime issues here on the Navajo Nation. The Navajo Nation may, at some time in the future, take a formal position on capital punishment generally after full consultation with the governing body and the executive offices. However, in light of the need for a response to your office, it is, at this time, the consensus of the Public Safety Committee of the Navajo Nation Council and the Judiciary Committee of the Navajo Nation Council to maintain the historic position of the Navajo Nation opposing the sentencing option of capital punishment for crimes committed on the Navajo Nation under any section of the United States criminal code.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE



Levon B. Henry, Attorney General  
Office of the Attorney General

xc: Kelsey A. Begaye, President  
The Navajo Nation  
: Edward T. Begay, Speaker  
The Navajo Nation Council  
: Public Safety Committee Members  
: Judiciary Committee Members  
: Navajo Division of Public Safety



Report on the Death Penalty  
Presented to the 20th Navajo Nation Council  
Summer Session  
Window Rock, Navajo Nation, Arizona  
by the Public Safety Committee

Honorable Delegates of the 20th Navajo Nation Council, Mr. President, Mr. Vice President, the Honorable Chief Justice, distinguished guests and visitors, the Public Safety Committee is honored to present the Death Penalty Report.

We are making history today, as this is the first Council Session that will hear its first ever report on the Death Penalty.

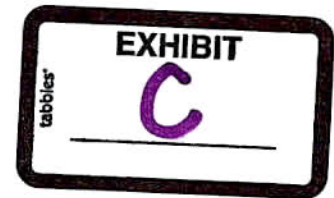
THE PUBLIC SAFETY COMMITTEE HELD EXTENSIVE PUBLIC HEARINGS THROUGHOUT THE NAVAJO NATION ON THE QUESTION OF WHETHER THE NATION SHOULD OPT-IN TO THE FEDERAL DEATH PENALTY.

The Navajo Nation, the largest Indian tribe in the United States, through the Public Safety Committee of the Navajo Nation Council held hearings across the Navajo Nation to consider "opting in" on the federal death penalty. Hearings were held on the following dates and locations:

September 11, 2003: Shiprock, New Mexico  
September 15, 2003: Crownpoint, New Mexico  
September 18, 2003: Ft. Defiance, Arizona  
September 23, 2003: Chinle, Arizona  
September 29, 2003: Tuba City, Arizona  
November 12, 2003: Tohajiilee, New Mexico  
November 21, 2003: Kayenta, Arizona

We heard from 106 witnesses, including Navajos from around our Nation, ranging from high school students to tribal council members, and experts from outside the Nation. An additional 200 or so persons who attended the hearings, but did not testify, submitted their comments in writing. The purpose of the hearings was to allow full public input on the question of whether the Nation should allow federal prosecutors to pursue capital punishment for first degree murders that occur on tribal lands.

Of the 106 persons who testified, 75 people (71%) recommended that the Nation should not opt-in to the federal death penalty, and 31 people (29%) recommended that the Nation should opt-in. Some organizations testified, including the Dineh Medicine Association, Incorporated, the National Association of Criminal Defense Lawyers, the Arizona chapter of the National Association of Social Workers, the Coalition of Arizona to Abolish the Death Penalty. Each of these organizations and Fredric Kay, the then-Federal Public Defender for Arizona, Jon Sands, the new and current Federal Public Defender for Arizona, Stephen



Report on the Death Penalty  
Presented to the 20th Navajo Nation Council  
Summer Session  
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Of the 106 persons who testified, 75 people (71%) recommended that the Nation should not opt-in to the federal death penalty, and 31 people (29%) recommended that the Nation should opt-in. Some organizations testified, including the Dineh Medicine Association, Incorporated, the National Association of Criminal Defense Lawyers, the Arizona chapter of the National Association of Social Workers, the Coalition of Arizona to Abolish the Death Penalty. Each of these organizations and Fredric Kay, the then-Federal Public Defender for Arizona, Jon Sands, the new and current Federal Public Defender for Arizona, Stephen



McCue, the Federal Public Defender for New Mexico, Richard Burr, Federal Death Penalty Resource Counsel, Geri Singer Hale, a Navajo who is a public defender in Tucson, and Esther Yazzie Lewis, who is the federally-certified Navajo language interpreter in the federal courts, urged the Navajo Nation not to opt-in to the federal death penalty.

In addition, two committee members and the legislative advisor attended a public forum organized by Native American law students Catherine Bryan and Vincent Knight at the University of New Mexico Law School in Albuquerque on December 5, 2003.

Here are some examples of individuals' testimony in our committee hearings:

Juan Melendez was a poor non-English speaking farmworker when he was charged in Florida with a murder he did not commit. He was convicted and spent 18 years on death row, several times coming close to execution, until it was discovered that all along the prosecutor had a tape-recording of the real killer confessing to the murder. He was released in January, 2002, but lost 18 years of his life unjustly. He described to the committee the devastating impact of being wrongly convicted and urged the committee not to opt-in to the death penalty.

Wallace Dale's 16 year old daughter, Diedra Dale, was murdered near Crownpoint. He attended several of the committee's hearings, and tearfully testified to the terrible impact this crime has had on his family. At the earlier hearings, he urged the committee that the Nation should opt-in to the death penalty. However, he later testified that he now believes the Nation should not opt-in to the death penalty; rather he urged that the Navajo Nation provide grief counseling and assistance to the families of murder victims.

Marlene Slim of Crystal, New Mexico, the daughter of Alyce Slim and mother to Tiffany Lee, testified before the Committee. She stated that she is a victim of homicide because both her mother and daughter were murdered in the mountains of Tsaile, Arizona. This incident really affected and impacted the family, relatives and friends. She attended the sentencing hearing of Lezmond Mitchell in Phoenix, Arizona, who murdered her mother and daughter. Ms. Slim indicated that the issue of the Death Penalty is a very touchy issue, and opting-in would diminish the sovereignty of the Navajo Nation, and that she opposes the Nation opting-in to the death penalty. Her request to the federal prosecutor to have the murderer of her mother and her daughter serve life without parole was ignored and dishonored.



LEGISLATIVE HISTORY: IN 1994 THE U.S. CONGRESS ALLOWED INDIAN TRIBES/NATIONS TO CHOOSE WHETHER TO HAVE THE FEDERAL DEATH PENALTY APPLY TO FIRST DEGREE MURDERS ON THAT TRIBE OR NATION'S LAND.

The United States Supreme Court ruled in 1972 that the arbitrary way executions were carried out violated the Eighth Amendment of the United States Constitution. The Eighth Amendment bans the use of cruel and unusual punishment. Many states reacted by enacting laws designed to reduce the arbitrariness, and in 1976, the Supreme Court allowed capital punishment to continue. In 1989 and 1990 the U.S. Congress considered legislation to resurrect the federal death penalty.

Tova Indritz, Attorney, on behalf of the National Association of Criminal Defense Lawyers, Native American Justice committee, testified before the Committee on the legislative history of the Death Penalty. Ms. Indritz is a criminal defense attorney from Albuquerque, New Mexico. Formerly Federal Public Defender for New Mexico, she has been a lawyer since 1975, is recognized by the New Mexico Board of Legal Specialization as a trial specialist in criminal law, and has been in private practice since 1995. Ms. Indritz provided testimony before the Committee that the United States Attorneys in the three states within the Navajo Nation already have the power to decide which felony cases arising on Navajo reservation to prosecute. Under current law tribal courts can only hear misdemeanor and petty misdemeanor cases. However, if the Navajo Nation opts-in to the death penalty it will be giving those United States Attorneys the power and authority to decide whether to seek the death penalty against a member of the Navajo Nation, and the Nation will have no power to decide on any particular case or even have the right of consultation with the U.S. Attorney in any case. Further, juries who decide whether an individual Navajo would be put to death would include few, if any, Native Americans.

When Congress was considering the shape of legislation to resurrect the federal death penalty after the U.S. Supreme Court had invalidated the prior method for imposing the death penalty, Ms. Indritz had the privilege of testifying before the U.S. Senate Judiciary Committee, and the U.S. House of Representative Judiciary Committee's Subcommittee on Crime regarding the impact on Native Americans of the death penalty provisions of the pending crime bills. At those hearings, Ms. Indritz testified to Congress if there was "truth in labeling" Congress should call the proposed law to resurrect the death penalty the "Indian Death Penalty Act" because it would primarily affect Native Americans. This is based on the fact that most murder cases go to the State courts, and Native Americans are among the few peoples who live on land over which there is federal jurisdiction. Further, all of the tribes who testified on this issue before Congress stated that the death penalty is against their religious beliefs and urged Congress to exempt Indian Country from the death penalty. Due to the testimony and suggestion of then-Navajo Nation Chief Justice Tom Tso, Congress in enacting the Violent

Crime Control and Law Enforcement Act of 1994, which became federal law on September 13, 1994, exempted murders in Indian Country by the following language:

"18 U.S. Code §3598. Special provisions for Indian Country"

"Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction."

Thus, this provision allows a tribe the choice to opt-in to the federal court having power to impose the death penalty in first degree murder cases arising on that tribe's land.

The ability of tribes to make a choice about the death penalty allows tribes to take into account traditional tribal beliefs about how social conflict should be handled and how wrong-doers should be punished.

Of the 520 federal recognized tribes, thus far the only tribe that has opted-in to the Death Penalty is the Sac and Fox Tribe of Oklahoma, a small tribe of a few hundred members. This decision was made only by the Tribe's Business Committee and not by their Tribal Council.

#### THE HISTORY OF THE DEATH PENALTY INCLUDES ITS EARLY APPLICATION TO NATIVE AMERICANS.

The first recorded execution in America occurred in 1608. The victim was George Kendall, a Virginian accused of plotting to betray the colony to the Spanish. Hanging was the preferred method of execution in the colonies at that time, although slaves and Indians were sometimes burned at the stake.

The United States' largest mass execution was the simultaneous hanging of 38 Santee Sioux on December 26, 1862, in Mankato, Minnesota; in fact 303 Native Americans were sentenced to death but President Abraham Lincoln reduced that number to "only" 38. After the hanging it was found that two Santees were executed by mistake.

OUR CHOICE: THE NAVAJO NATION CAN CHOOSE TO SUBJECT ITS MEMBERS TO THE FEDERAL DEATH PENALTY OR CAN CHOOSE TO REFUSE TO ALLOW FEDERAL PROSECUTORS AND FEDERAL JURIES TO KILL NAVAJOS.

Here, the Navajo Nation has two choices:



- 1) to take no action, and thus to continue to have the maximum penalty for first degree murder on Navajo land, as it now is, life without parole. Persons convicted spend their whole life in prison and never come back to our community.
- 2) The second choice is to opt-in to have the death penalty apply to any first degree murder, thereby giving the federal prosecutors, specifically the Attorney General after hearing the recommendation of the local U.S. Attorney, authority to decide against whom to pursue the death penalty, and in which cases not to go after the death penalty, and a non-Indian jury decide whether a Navajo should die.

Either way, the Tribe will have no choice over which murder cases are death penalty cases.

#### WHAT FACTORS SHOULD THE 20TH NAVAJO NATION COUNCIL CONSIDER IN MAKING ITS CHOICE?

##### 1. NAVAJO TRADITION, BELIEF, AND MORALITY HOLD THAT THE CREATOR AND THE HOLY PEOPLE MADE LIFE AND WE HUMANS CANNOT TAKE ON OURSELVES THE POWER TO TAKE AWAY LIFE. CHRISTIAN BELIEF IS SIMILAR.

The Navajo Medicine Men's Association testified and also submitted written testimony. They gave eloquent testimony, attached hereto, prepared after four years of "intimate and public discussion" that

"Nothing in our traditional laws give us direction and procedures for killing our own as a punishment to correct behavior which is not ours. . . .

It is the negative force of the Creator to extract, destroy that which is not in the good interest of Dineh society, we have been created for goodness. This negative force is the domain of destruction is best left to the Creator and in its power and wisdom. . . .

History has indicated [the death penalty] does not work as a deterrent or prevention. As medicine people of the Dineh, and as Dineh we are in a position to advocate only for Life and healing. The "Penalty of Death" is best to be left to the beings who strongly use such measures. It is not a part of our society to use goodness to Kill another. . . .

Death and destruction are the teachings of punishment, which are not ours, and ought to be left outside of our domain and jurisdiction, outside of our Four Sacred Mountains. This is the position of the Dineh Medicine People."

The Catholic Church is also against the death penalty. For example, Sister Margaret Sullivan of Shiprock, New Mexico, came to our first hearing and wrote, in her own words, "It isn't the right of humans to take away another person's life. God gives Life and it is only He who calls that life back in His timing."



## 2. A DECISION TO OPT-IN TO THE FEDERAL DEATH PENALTY WILL DIMINISH THE SOVEREIGNTY OF THE NAVAJO NATION.

Professor Kenneth "Kip" Bobroff of the University of New Mexico Law School, an expert in Indian law and a member of the Navajo Nation Bar Association, testified that the U.S. government has consistently used its authority to take power away from the Navajo Nation and that opting-in to the federal death penalty will further diminish Navajo sovereignty. Opting-in to the death penalty would mean that non-Indians, instead of Navajos, would be making critical decisions about justice both for Navajo victims and defendants. If the Navajo Nation opts-in, then any changes in federal law or procedure pertaining to the death penalty would apply to Navajos, regardless of the wishes of the Navajo Nation, since the Nation would have already surrendered its sovereignty over those decisions.

The Navajo Nation, if it opts-in to the federal death penalty, would be giving over to the U.S. Attorneys for Arizona, New Mexico, and Utah, and to U.S. Attorney General John Ashcroft complete power to decide which accused Navajos to charge with the death penalty. If the Navajo Nation opts-in, it will not have the power to make a decision about the death penalty in any particular case; the Nation would have no voice on whether the case is prosecuted as a death penalty case or whether a particular tribal member is executed. The Nation would be relinquishing more of its sovereignty to the federal government.

As stated above, a 1994 expansion of the federal death penalty allows for a Tribe or Nation to opt-in to the federal death penalty. Once a Nation chooses to "opt-in", the decision to apply the death penalty in a particular case is no longer in the hands of the tribe, but in the hands of the federal government. Although the appointed United States Attorney (in our case the United States Attorneys for the Districts of Arizona, New Mexico, and Utah) can recommend to the U.S. Attorney General John Ashcroft whether or not to seek the death penalty in any particular case, Attorney General Ashcroft has rejected the local U.S. Attorney's recommendation not to pursue death in far greater proportion than any prior Attorney General, and in many cases has required the local U.S. Attorney to seek the death penalty, even where the local U.S. Attorney recommended not to do so.

When the U.S. Department of Justice decides to try to execute a Navajo, the actual decision would be made by a federal court jury on which there would be few, if any, Navajos. Who would be on juries that would consider whether a Navajo should be executed? The cases will be tried in a federal court before a jury on which Native Americans may well be underrepresented and certainly on which Native Americans will not be the majority. The actual decision of whether an individual is to be executed is up to the federal jury. Even where Native Americans are fully represented in the jury pool, they are usually a small percentage of the state's population, and thus a small percentage of a federal jury. Native Americans are often under-represented on the federal court jury rolls, particularly in those federal court

districts where the jury rolls are taken exclusively from the state's voter list, as is the case in federal court in Arizona, New Mexico, and Utah. For example, the U.S. District Court Clerk for the District of New Mexico's own figures show the great under-representation of Native Americans who are 8% of the New Mexico adult population and only 3% of the state-wide jury pool (a 166% comparative disparity), and in the Albuquerque/Santa Fe division, the location where the cases arising on the New Mexico portion of the Navajo Nation would be tried, Native Americans are 11% of the adult population but only 3% of the jury pool (a 266% comparative disparity). Also, federal trials are always held off the reservation, in cities such as Phoenix, Albuquerque, and Salt Lake City. As the federal court clerk in Arizona noted, many Native Americans live far from the places where court is held, have difficulty traveling, or insufficient money to pay for their travel, so they seldom serve on juries. Native American defendants in federal court seldom have other Native Americans, no less from their own tribe, on their juries.

To the extent that the death penalty may be in conflict with traditional Navajo beliefs and values, Navajos will be excluded from serving on juries in which a Native American is facing the death penalty. Any Navajo called to jury duty who expresses the view, explained by the Dineh Medicine Association, that the death penalty is inconsistent with Navajo customs and beliefs, and thus those Navajo's traditional or religious beliefs prevent them from ever imposing the death penalty, they will be excluded from jury duty in any death penalty case, under the U.S. Supreme Court's holdings in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985).

### 3. THERE IS A LONG-STANDING HISTORY OF RACIAL PREJUDICE IN THE IMPOSITION OF THE DEATH PENALTY AND A DEFINITE PATTERN OF FEDERAL PROSECUTORS SEEKING THE DEATH PENALTY DISPROPORTIONATELY AGAINST MINORITY RACE PERSONS.

The death penalty is racist in its application. Racial minorities in the United States receive the death penalty far out of their proportion to the population, especially where the victim is a white person. Study after study has shown that race of the defendant or the race of the victim, or both, influence the decision to apply the death penalty more than any other factor.

According to a U.S. Government General Accounting Office study done in February, 1990, on death penalty sentencing, "in 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty".

Any tribe whose members have felt the sting of discrimination by the non-Indian community may be aware that racial stereotypes and prejudices have been reflected in



statistical patterns of imposition of the death penalty, although they may be hard to prove in any individual case.

More than half of the defendants now on death rows in the U.S. are racial minorities.

Currently 20 of the 29 people on the federal death row, 69%, are minorities, including Lezmond Mitchell, a Navajo. Of the three federal prisoners already executed, one was Hispanic and one was Black.

Of the 300 people against whom the federal death penalty has been authorized since its reinstatement in 1988 to 2000, 75% are members of minority racial groups. From 1995-2000, 80% of all the federal cases submitted by U.S. Attorneys involved defendants from minorities. Under Attorney General Janet Reno, 72% of the defendants against whom the federal death penalty was sought were minorities. Under current Attorney General John Ashcroft 74% of the defendants against whom the federal death penalty was sought were minorities. This problem of racism in the application of the death penalty continues; even after review by the Attorney General, 72% of the cases approved for death penalty prosecution involved minority defendants.

The National Association for the Advancement of Colored People (NAACP) in 2000 called for a moratorium on all death sentences.

As described above, juries in any Navajo death penalty case in federal court in Arizona, New Mexico, or Utah, will be almost exclusively non-Indians.

The Navajo Nation's election for the death penalty may subject a Navajo to harsher punishment than is available in the state court. For example, New Mexico's death penalty is not available in all first degree murder cases, but only in the presence of certain circumstances, such as the killing of a witness, police officer, or prison guard, or murder for hire, or a killing while escaping from prison, NMSA §31-20A-5, whereas opting-in to the federal death penalty allows the prosecutor to seek the death penalty in any first degree murder case.

If the Navajo Nation opts-in to the federal death penalty, Navajos would be subject to the death penalty in cases where a non-Indian would not. For example, if the victim of the murder were a non-Indian (a circumstance in which classically there is a greater risk of imposition of the death penalty on a minority person), a non-Indian co-defendant would be prosecuted in state court even though the crime happened on a federal jurisdiction Indian reservation, whereas an Indian co-defendant in the same case would be subject to the death penalty if the tribe had opted to have the death penalty apply on their land.



Although the 1994 crime act requires that the jurors certify that they did not take into account the race of the defendant or the victim in deciding to impose the death penalty, this certainly does not guarantee the lack of racism. First, the mere fact that people say they did not take racial issues into account does not necessarily, in human experience, mean that they did not. More importantly, in order for a federal court to have jurisdiction over an Indian Country murder in the first place, one of the elements of proof is that the government prove beyond a reasonable doubt that the offense occurred in Indian country and that either the defendant or the victim is an Indian. Thus, the jury will hear evidence on this and have to be convinced beyond a reasonable doubt that the defendant is an Indian or that the victim was an Indian. Then the same jurors would be asked to turn to the death penalty phase of the trial and to totally erase from their minds the fact that the defendant is an Indian or the race of the victim in deciding whether to impose the death penalty. This is simply an unsustainable fiction.

#### 4. MURDER RATES ON THE NAVAJO NATION ARE HIGHER THAN THE NATIONAL AVERAGE AND RECENTLY THERE HAVE BEEN HIGH PROFILE NON-TYPICAL MURDERS.

The number of murders on the Navajo Nation increased in the last ten years, peaking in 1996. Although the number of murders has dropped slightly since then, and appeared to stabilize, the murder rate is higher on the Navajo Nation than it is nationwide.

The Navajo people have recently heard or read about several high-publicity tragic murders. Several examples of recent violent crimes on the Navajo Nation include a father who gunned down his four daughters, a mother who opened fire on her three children, a man who strapped on an ammunition belt and opened fire on his family Hogan, killing four relatives. Such high profile violent crimes have brought forth discussions of capital punishment on the Navajo Nation.

The worst case involved a young Navajo man with no prior criminal record who was prosecuted for murders which occurred on Navajo Indian land, but he was prosecuted based on the jurisdictional basis that it was a murder in the course of a carjacking. The facts of this case are highly unusual for a Navajo murder case, and quite upsetting. In the fall of October, 2001, 65 year old Alyce Slim and her 9 year old granddaughter, Tiffany Lee, drove to New Mexico to visit a medicine woman. Ms. Slim had a leg ailment and went to see a traditional Navajo medicine woman to seek relief. That evening, while driving home, their pickup truck was hijacked at a local gas station by 19 year old Lezmond Mitchell, a Navajo from Rock Point, Arizona. Ms. Slim's truck was later used to rob the Red Valley Trading Post for \$5,000. According to information provided by the Federal Bureau of Investigation, Mr. Mitchell stabbed Ms. Slim thirty-three (33) times with butterfly knives in a wooded area in the Tsailie mountain. Ms. Slim, according to the autopsy reports, put up a fight against her hijackers. Tiffany, according to testimony provided by one of the attackers indicated that she

did escape from her attackers, but was recaptured. They then shoved her body in back of her truck along with her grandmother Alyce. Mitchell then slit the throat of 9 year old Tiffany and told her to "lay down and die". They then stoned her to death with a 20 pound rock. A few days later, they returned to the bodies, chopped off their heads and hands, buried them in a hole and burned their clothes. In September, 2003, Lezmond Mitchell was sentenced to die by a federal jury in Phoenix, Arizona. He is the first Native American to be sentenced to death by a federal court since the federal death penalty was reinstated nine years ago.

**5. THE COUNCIL MUST CONSIDER WHETHER PREVENTIVE MEASURES OR THE DEATH PENALTY WILL BE MORE EFFECTIVE IN COMBATING THIS PROBLEM IN THE LONG TERM.**

In many communities, the public would be better served by measures such as the hiring of additional police officers, the implementation of community policing, drug interdiction programs, early childhood intervention programs, weapon control programs, or better funded probation and parole departments, than by an occasional death sentence on an isolated individual, to be carried out, if at all, only many years later. The death penalty may fascinate the media and the public, but it is truly peripheral to our efforts to make our society safer.

During the hearings several of the family members of murder victims testified to their great grief and loss, and that they had to go outside of the Navajo Nation to receive any grief counseling services. This lack of services presents particular problems to those who wish to express their grief and family disruption in their own Navajo language and to persons sensitive to Navajo culture. The Public Safety Committee recommends that the Navajo Nation establish grief counseling and family services to the survivors of homicide throughout the Nation, at no cost to those seeking such services, and with appropriate training for service providers and adequate resources to address the backlog of unaided victims' families over many years.

**6. THE DEATH PENALTY DOES NOT DETER MURDER.**

Another expert who testified before the Committee was Professor Michael Radelet, a Professor of Sociology at the University of Colorado. For 22 years before that, he was a professor at the University of Florida in Gainesville. While in Florida he worked with approximately 50 men and woman who were executed. He has worked extensively with families of homicide victims and currently serves on the Board of Directors of an organization called "Families of Homicide Victims and Missing Persons". Professor Radelet addressed three issues before the Committee: deterrence, erroneous convictions and disparities in the application of the death penalty. He submitted a paper showing that leading scholars have concluded that the "available evidence remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder", that there is widespread agreement among leading criminologists and law



enforcement officials that capital punishment has no effects on homicide rates that are superior to long term imprisonment, and that 85% of leading experts agree that the empirical research on deterrence has shown that the death penalty never has been, is not, and never could be superior to long prison sentences as a deterrent to criminal violence.

7. IN THE UNITED STATES THERE HAVE BEEN MANY INNOCENT PEOPLE SENTENCED TO THE DEATH PENALTY. EXECUTIONS ARE PERMANENT; MISTAKES CANNOT BE CORRECTED.

"Perhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent."

Justice William J. Brennan, Jr., U.S. Supreme Court, 1994

Since 1973, 114 men and women in 25 states have been exonerated and released from death row with evidence of their innocence, including one Native American. Six innocent people were exonerated in Arizona and four in New Mexico.

There were 10 such releases in 2003, and already 4 more in 2004. Thus it is clear that even in very serious cases, or maybe even especially in serious cases where the community desires to punish someone for a heinous crime, sometimes it is the wrong "someone" who is convicted. DNA evidence was a significant factor in only about 10% of the exonerations; the problems are erroneous eye-witness identifications, false testimony by jailhouse informants, false confessions, incorrect forensic evidence, and sometimes inadequate defense resources.

The possibility for such errors increases where there are language difficulties, cultural differences, communications problems between investigators and the potential witnesses, and technological problems with the collection of physical evidence, all factors present in Navajo cases.

At least 23 innocent people have been executed in the U.S. in the 20th century.<sup>1</sup> Federal court review of state court death penalty cases have found that error occurred in 40% of the cases.

If the wrong person is convicted during hysteria over an ugly crime, or if a person's rights are violated, or if it later turns out that the person was innocent, there is no way to undo an execution.

Because of such mistakes, the Governor of Illinois placed a moratorium on the imposition of the death penalty, and then later granted clemency for all the people on death row. Maryland has now also placed a moratorium on the death penalty, and other States have to consider that people on death row were wrongfully convicted and were in fact innocent. The American Bar Association, a

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<sup>1</sup> Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, One Hundred Third Congress, First Session, October, 1993, see also Radelet and Bedau, In Spite of Innocence, Northwestern University Press, 1991.



conservative national organization of lawyers, has called for a nationwide moratorium on the death penalty.

**8. FIRST DEGREE MURDER ON NAVAJO LAND IS ALREADY PUNISHABLE BY LIFE WITHOUT PAROLE.**

The current alternative to the death penalty in a first degree murder case in federal court is life without parole. Under federal law and the Federal Sentencing Guidelines, if a person is convicted of first degree murder, he or she will receive a life sentence and cannot be paroled. Thus, the tribe is not facing return of an individual in such a circumstance to the community. The person will be banished and therefore incapacitated from any future harm to the community.

**9. IMPOSITION OF THE DEATH PENALTY IS MORE EXPENSIVE THAN IMPOSITION OF A LIFE SENTENCE.**

A 1993 Duke University study showed that the Death Penalty in North Carolina costs \$2.16 million dollars more per execution than a non-death penalty murder trial. Research in other states indicates executions are three to six times more costly than life imprisonment.

**10. MOST CIVILIZED NATIONS IN THE WORLD HAVE REJECTED THE DEATH PENALTY.**

Since the United States reinstated the death penalty in 1976, over 40 countries have abolished it. In December 1998, the European Parliament called for immediate and global abolition of the death penalty, with special notice to the U.S. to abandon it. Abolition is a condition for acceptance into the Council of Europe, leading countries such as Russia and Turkey to abolish the death penalty. Recently, South Africa, Canada, France and Germany have ruled against extraditing prisoners to the U.S. if death sentences would be sought. The World Court, in a unanimous decision reached on February 5, 2003, ruled that the United States must delay the execution of three Mexican citizens while it investigates the cases of all 51 Mexicans on death row in the U.S. The Mexican government asserts that the U.S. has violated the Vienna Convention by not informing its citizens that they have the right to contact their consulate when arrested. The death penalty has long been a source of tension between the U.S. and countries that oppose capital punishment.

The United States faces international pressure to eliminate the death penalty. Amnesty International, the international human rights watchdog, reports that while 112 countries have abolished the death penalty by law or practice, 83 countries continue to utilize capital punishment. In 2002, 81 percent of all known executions took place in three countries: China, Iran, and the United States. Other countries that use the death penalty include Afghanistan, Iraq, Egypt and Kuwait. International human rights treaties prohibit executing

children or anyone under 18 years old at the time the crime was committed. Since 1990 seven countries executed children: Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the country with the greatest number of child executions, the United States. In 2002, Amnesty International recorded three child executions; all three were in the state of Texas.

The Public Safety Committee has received international attention from as far away as the country of Germany. Their interest in the Navajo Nation's decision is closely monitored.

### CONCLUSION AND RECOMMENDATION

Should the Navajo Nation "opt in" to the death penalty? Put another way, should the Navajo Nation Council allow the federal government to pursue the death penalty against Navajos before non-Navajo, and indeed non-Indian, federal juries? The Public Safety Committee recommends to the 20th Navajo Nation Council the following:

1. That the Navajo Nation establish a program to provide grief counseling and direct service assistance to the families of victims of homicide on the Navajo Nation.
2. That the Navajo Nation, for all the reasons set forth above, adopt legislation stating that the Navajo Nation rejects the federal death penalty and chooses not to opt-in to the federal death penalty.

Respectfully submitted,

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Hope MacDonald-LoneTree, Chairperson  
Public Safety Committee

June \_\_\_\_\_, 2004

# JUDICIAL BRANCH OF THE NAVAJO NATION

HERB YAZZIE  
Chief Justice of the Navajo Nation

Eleanor Shirley, Associate Justice



## Supreme Court

P.O. Box 520 ♦ Window Rock, Arizona 86515  
Telephone 928-871-7669 ♦ Fax 928-871-6866

July 21, 2014

John Leonardo  
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Re: *United States v. Lezmond Mitchell*, No. 11-99003

Dear Mr. Leonardo and Mr. Kirby:

Counsel for Mr. Mitchell have advised us of the pending mediation ordered by the Ninth Circuit Court of Appeals in this matter. We wanted to take this opportunity to, once again, express our view that Mr. Mitchell should not be subject to the federal death penalty. By this letter, we formally request that the Department of Justice stipulate to a re-sentencing whereby Mr. Mitchell would receive a sentence of less than death.

The United States Attorney's Office for the District of Arizona sought input from the Navajo Nation in 2001 as to whether we would support a capital prosecution against Lezmond Mitchell. We considered this issue carefully. We held discussions with various members of our government including the Speaker of the Navajo Nation Council, the members of the Public Safety Committee of the Navajo Nation Council, and the members of the Judiciary Committee of the Navajo Nation Council. After careful thought and deliberation, on January 22, 2002, the Navajo Nation formally requested that the Department of Justice not seek the death penalty against Lezmond Mitchell. Attachment A, Letter from Levon Henry, Attorney General of the Navajo Nation to Paul Charlton, United States Attorney, 1/22/2002.

Over the objection of the Navajo Nation, Mr. Mitchell was charged with federal capital crimes and formally sentenced to death in September 2003 in the Federal District Court for the District of Arizona.





Letter to John Leonardo  
United States Attorney  
July 21, 2014

While considering Mr. Mitchell's case, the Navajo Nation was separately considering the broader issue of whether the Nation would "opt in" to the federal death penalty act under 18 U.S.C. § 3598. After Mr. Mitchell's conviction and sentencing, the Public Safety Committee of the Navajo Nation Council held hearings to gauge public opinion and accurately report the stance of its citizens. Seven public hearings were held, at which over 100 witnesses testified, 200 more submitted written comments, and various organizations participated, including the Dineh Medicine Association, Incorporated. Of particular relevance to the matter at hand is the testimony of Marlene Slim. Ms. Slim, who is the daughter of Alyce Slim and the mother of Tiffany Lee (the two victims in Mr. Mitchell's case), testified as to her opposition to opting-in to the death penalty. She explained how she requested that the United States Attorney's Office not seek death against Mr. Mitchell, but her request was not heeded. Attachment B: Report on the Death Penalty Presented to the 20th Navajo Nation Council Summer Session. The Navajo Nation elected not to opt-in to the Federal Death Penalty Act.

In the twelve years since we originally offered our views of this case, the Navajo Nation's position on the death penalty has not changed: we oppose capital punishment in all circumstances. We have not opted-in to the Federal Death Penalty Act and we have never supported a capital prosecution for any of our citizens, including Lezmond Mitchell.

Capital punishment is a sensitive issue for the Navajo people. Our laws have never allowed for the death penalty. It is our belief that the negative force that drives a person to commit evil acts can only be extracted by the Creator. People, on the other hand, are vehicles only for goodness and healing. By subjecting Mr. Mitchell to capital punishment, the Department of Justice has violated our laws and our belief system, and impeded the healing process our tribe must undertake in the wake of this tragic crime.

In addition to the moral issues laid out in the previous paragraph, capital prosecutions of Navajos implicate issues of tribal sovereignty that are troubling to the Navajo Nation. One of the primary reasons we chose not to opt in to the federal death penalty act was the fear of losing authority over prosecutions. Attachment B at 6. The United States government has consistently used its power to reduce the Navajo Nation's sovereignty. Had the Nation opted-in to the federal death penalty act, our sovereignty would have been further diminished. The decision whether to seek the death penalty against a Navajo would have been solely left to the discretion of the United States Attorney for the relevant district and the United States Attorney General. We would have had no voice in the discussion for justice regarding Navajo victims and defendants. This was not a tolerable reality for the Navajo people, and fueled our decision to reject the federal death penalty. However, despite our wishes, this was precisely the reality of Mr. Mitchell's case. After we made clear that we would not support a capital prosecution for Mr. Mitchell, the Department of Justice relied on a technicality to bypass us. Instead of respecting the opt-in provisions, the Department of Justice sought death against Mr. Mitchell not for murder, but for carjacking resulting in death. The difference was in name only. The federal jurisdictional basis for first-degree murder was based on the fact that the crime took place on Navajo land, thus implicating the Federal Death Penalty Act's requirement of the tribe's approval. But the jurisdictional basis for the carjacking charge was interstate commerce, which

Letter to John Leonardo  
United States Attorney  
July 21, 2014


allowed the Department of Justice to disregard our wishes. This loophole allowed the federal government to bypass our wishes, and we view this action as both a moral and political affront to Navajo sovereignty.

The Navajo Nation has separate concerns about other issues regarding Mr. Mitchell's trial. The fact that Mr. Mitchell was held in tribal custody, but repeatedly interrogated by the FBI to develop evidence later used to support a federal death sentence, illustrates once again the Department of Justice's reliance on a technicality to disrespect the Navajo Nation. Moreover, Mr. Mitchell was tried before an Arizona jury in a federal district court. He was not tried on Navajo land or by a Navajo jury. Indeed only 30-36 of the 207 venirepersons called for potential jury service in this case were Native American. *United States v. Mitchell*, 502 F.3d 931, 950 (9th Cir. 2007). Of these, all but one were excluded from sitting on Mr. Mitchell's jury before the court even reached the peremptory challenge phase of jury selection. The prospective Navajo jurors were excluded from the jury panel for: (1) reservations regarding capital punishment consistent with Navajo religion and culture, *id.* at 953; (2) use of Navajo as a first language (e.g. Veniremembers I and II); and (3) hardship. These rationales are troubling to us. The hardship exclusions were a direct consequence of the trial being transferred from Prescott to Phoenix, which is considerably further from Navajo land. No special arrangements were made or offered to alleviate the hardships such that Navajos could serve on the jury. No translation services were offered to the non-English speaking Navajo venirepersons. No respect was afforded to the venirepersons who expressed their religious beliefs. When we decided not to opt-in to the Federal Death Penalty Act, all of these issues were a concern to us. Attachment B at 6-7. Mr. Mitchell's trial represents a reality we expressly attempted to avoid.

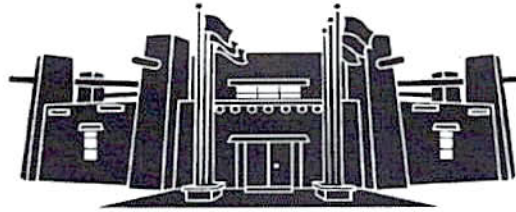
By this letter, the Navajo Nation asks the Department of Justice to right the wrongs of previous administrations and honor our Nation's sovereignty. We thus formally request, on a government-to-government basis, that this case be removed from the death penalty context and Mr. Mitchell be permitted to plead to a sentence of less than death.

Thank you for your consideration.

Yours sincerely,

  
Herb Yazzie  
Chief Justice





## MEMORANDUM

To : Hon. Carl Slater, Delegate  
Navajo Nation Council

A handwritten signature in black ink, appearing to read "Ron Haven".

From : \_\_\_\_\_  
Ron Haven, Attorney  
Office of Legislative Counsel

Date : August 6, 2020

Re : AN ACTION RELATING TO NAABIK'ÍYÁTI' COMMITTEE; REAFFIRMING  
THE POSITION OF THE NAVAJO NATION OPPOSING THE DEATH  
PENALTY AND THE SENTENCE IMPOSED IN *UNITED STATES V.  
LEZMOND MICHELL*, CASE NUMBER CR-01-1062-PCT

As requested, I have prepared the above-referenced proposed resolution and associated legislative summary sheet pursuant to your request for legislative drafting. As to format, the resolution as drafted is legally sufficient. Regarding substance, as with any legislation, it can be subject to review by the courts in the event of proper challenge. Please ensure that this particular resolution request is precisely what you want.

If you are satisfied with the proposed resolution, please sign it as "sponsor" and submit it to the Office of Legislative Services where it will be given a tracking number and sent to the Office of the Speaker for assignment. If the proposed resolution is unacceptable to you, please contact me at the Office of Legislative Counsel and advise me of the changes you would like made to the proposed resolution. Ahéhee'.

OLC # 20-279-1



THE NAVAJO NATION  
LEGISLATIVE BRANCH  
INTERNET PUBLIC REVIEW PUBLICATION



LEGISLATION NO: \_0166-20\_\_

SPONSOR: Carl Slater

TITLE: An Action Relating to Naabik'iyáti' Committee; Reaffirming the Position of the Navajo Nation Opposing the Death Penalty and the Sentence Imposed in United States V. Lezmond Michell, Case Number CR-01-1062-PCT

*Date posted:* August 6, 2020 at 6:26PM

Digital comments may be e-mailed to [comments@navajo-nsn.gov](mailto:comments@navajo-nsn.gov)

Written comments may be mailed to:

Executive Director  
Office of Legislative Services  
P.O. Box 3390  
Window Rock, AZ 86515  
(928) 871-7586

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

**Please note:** This digital copy is being provided for the benefit of the Navajo Nation chapters and public use. Any political use is prohibited. All written comments received become the property of the Navajo Nation and will be forwarded to the assigned Navajo Nation Council standing committee(s) and/or the Navajo Nation Council for review. Any tampering with public records are punishable by Navajo Nation law pursuant to 17 N.N.C. §374 *et. seq.*

THE NAVAJO NATION  
LEGISLATIVE BRANCH  
INTERNET PUBLIC REVIEW SUMMARY

LEGISLATION NO.: 0166-20

SPONSOR: Honorable Carl R. Slater

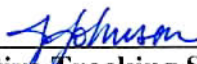
TITLE: An Action Relating to Naabik'iyáti' Committee; Reaffirming the Position of the Navajo Nation Opposing the Death Penalty and the Sentence Imposed in United States V. Lezmond Michell, Case Number CR-01-1062-PCT

Posted: August 6, 2020 at 6:26PM

5 DAY Comment Period Ended: August 11, 2020

Digital Comments received:

Comments Supporting	<i>None</i>
Comments Opposing	<i>None</i>
Inconclusive Comments	<i>None</i>

  
\_\_\_\_\_  
Legislative Tracking Secretary  
Office of Legislative Services

08/12/20      8:47AM  
\_\_\_\_\_  
Date/Time

# **24<sup>th</sup> NAVAJO NATION COUNCIL NAABIK'ÍYÁTI' COMMITTEE REPORT Second Year 2020**

The **NAABIK'ÍYÁTI' COMMITTEE** to whom has been assigned:

## **NAVAJO LEGISLATIVE BILL #0166-20**

An Action Relating to Naabik'iyáti' Committee; Reaffirming the Position of the Navajo Nation Opposing the Death Penalty and the Sentence Imposed in United States v. Lezmond Michell, Case Number CR-01-1062-PCT

*Sponsored by: Honorable Carl R. Slater*

Has had it under consideration and reports the same that the legislation **WAS TABLED AND STAYS WITH THE NAABIK'ÍYÁTI' COMMITTEE.**

Respectfully Submitted,

  
*Honorable Seth Damon, Chairman*  
**NAABIK'ÍYÁTI' COMMITTEE**

**13 August 2020**

### **TABLING MOTION**

Motion to table Legislation 0166-20 to have Public Hearings. Legislation will be brought back to the next Regular or Special Naabik'iyáti' Committee Meeting.

*Motioned by: Honorable Amber Kanazbah Crotty*

*Seconded by: Honorable Vince R. James*

*Vote: 12 in Favor, 08 Opposed (Chairman Damon Not Voting)*

### **DIRECTIVE MOTION**

Request for Office of the Speaker to send a letter with OPVP stating the Navajo Nation opposes the imposition of the death penalty on Mr. Mitchell and seeks his sentence be commuted from death to life in prison without the possibility of release. The Navajo Nation has never opted into the Federal Death Penalty Act (never consented to it).

*Motioned by: Honorable Carl R. Slater*



*Seconded by: Honorable Charlaine Tso*

*Vote: 17 in Favor, 00 Opposed (Chairman Damon Not Voting)*

**MAIN MOTION**

*Motioned by: Honorable Daniel E. Tso*

*Seconded by: Honorable Otto Tso*

*Vote: VOTE PENDING*

# NAVAJO NATION

616

Navajo Nation Naabikiyati Regular Meeting

8/13/2020

01:51:52 PM

Amd# to Amd#

Table Legis No. 0166-20

PASSED

MOT Crotty

SEC James, V

Yeas : 12

Nays : 8

Excused : 2

Not Voting : 1

## Yea : 12

Brown  
Crotty  
Daniels

Freeland, M  
Halona, P  
Henio, J

James, V  
Nez, R  
Stewart, W

Wauneka, E  
Yazzie  
Yellowhair

## Nay : 8

Begay, E  
Begay, P

Charles-Newton  
Slater, C

Smith  
Tso, C

Tso, D  
Tso, O

## Excused : 2

Begay, K

Tso, E

## Not Voting : 1

Walker, T

Presiding Speaker: Damon

# NAVAJO NATION

618

Navajo Nation Naabikiyati Regular Meeting

8/13/2020

02:41:49 PM

Amd# to Amd#	Directive to Speaker's Office	PASSED
MOT Slater, C	to send a letter to the	
SEC Tso, C	President	

Yeas : 17

Nays : 0

Excused : 2

Not Voting : 4

Yea : 17

Begay, E	Halona, P	Smith	Tso, O
Begay, P	James, V	Stewart, W	Walker, T
Charles-Newton	Nez, R	Tso, C	Wauneka, E
Crotty	Slater, C	Tso, D	Yellowhair
Freeland, M			

Nay : 0

Excused : 2

Begay, K	Tso, E
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Not Voting : 4

Yazzie	Henio, J	Daniels	Brown
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Presiding Speaker: Damon