



## THE NAVAJO NATION

OFFICE OF THE PRESIDENT & VICE PRESIDENT

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# Window Rock District Court denies preliminary injunction to remove 'hidden agenda' referendum from election ballot

*Navajo President Joe Shirley, Jr., says case too important not to appeal*

**WINDOW ROCK, Ariz.** – Window Rock District Court Judge Allen Sloan on Monday denied a motion for a preliminary injunction that would prevent the Judicial Elections Referendum Act of 2010 from appearing on the November 2 election ballot.

Navajo Nation President Joe Shirley, Jr., said he would appeal the decision to the Navajo Nation Supreme Court once the District Court's full explanation of its decision is issued.

A successful appeal would ensure that future Navajo presidents would be able to review referendum measures as they have in the past.

"The Council is legislating by referendum and then asking the people to ratify without participation," the President said.

On Sept. 28, the President filed a motion for preliminary injunction citing Navajo voters' right to a fair, unbiased and untainted election.

He noted that:

- The referendum legislation violates both statutory and *Diné* Fundamental Law because the Navajo Nation Council failed to send it to the President for consideration and review;
- The Council failed to provide funding for the purpose of educating the People about what they will be voting on even though the Navajo Board of Election Supervisors is required to educate the public on referendum items;
- The ballot language approved by NBOES does not include what is contained in the legislation. According to Title 11 Sec. 407 (A) (2), the descriptive summary of the measure "shall provide the registered voters with an objective and unbiased statement of the purpose and principal provisions of the referendum measure or initiative to be voted on."

- The legislation further tilts the balance of power toward the Legislative Branch by giving the Navajo Nation Council control over the Judicial Branch, diminishes the power of the Presidency and Executive Branch, and violates the concept of a separation of powers among the three branches.

*"The reason the Navajo Nation went to appointed judges was to protect the judges and to make sure that politics and friendships and pressures did not enter into their decisions."*

– Former Navajo Nation Supreme Court Associate Justice Raymond Austin,  
Indigenous Peoples Law and Policy Program Distinguished Jurist in Residence,  
University of Arizona James E. Rogers College of Law

Despite Monday's order, Judge Sloan noted at the Oct. 8 hearing that the election of judges legislation appeared to contain "hidden agendas" of the Council.

The 36-page legislative attachment to the referendum legislation would enact 31 sweeping changes to Titles 2, 7 and 11 of the Navajo Nation Code.

None except the election of judges and justices is mentioned in the ballot language or descriptive summary that voters will see in the voting booth.

To date, no information or educational materials about the changes and effects the legislation will have on the Navajo judicial system have been produced or issued by the Navajo Election Administration as is required by law.

The changes would significantly alter the operations of the Judicial Branch, and, in the eyes of numerous legal experts, weaken the Navajo court system by exposing it to political influence as has occurred in the past.

In an analysis of the legislation, former Navajo Nation Supreme Court Associate Justice Raymond Austin noted that when the Navajo Nation took control of its court system in 1958, it changed from electing judges to appointing them “because elected judges had lost competence, fairness and independence, become political, and basically undermined the Navajo court system.”

“So the reason the Navajo Nation went to appointed judges was to protect the judges and to make sure that politics and friendships and pressures did not enter into their decisions,” he said.

Justice Austin’s analysis that the appointment of judges results in a superior court system is substantiated by previous Navajo Tribal Council findings and decisions.

In 1958, the Council noted in Resolution CO-69-58, that “in order to give adequate authority to the judges, insofar as possible, obtain the best qualified personnel for the courts and to remove the judges, insofar as possible, from the pressure of politics in making decisions and enforcing the law, it is essential that Navajo Tribal judges hereafter be appointed rather than elected.”

In May 1978, the “Preliminary Report to the Judiciary Committee” found, “Lifetime appointments increase the independence of the judiciary and make it more likely that future appointees will seek to declare themselves an independent branch of government ... the return to an elected system would be widely perceived as a political attack upon the courts....”

In 1981, Chairman Peter MacDonald authorized the Task Force on the Navajo Judicial System which recommended that the appointment system be kept to ensure qualified judges are appointed to keep politics out of the system.

In 1984, the Navajo Nation Council voted to retain the appointment of judges.

In 1990, the Independent Judicial Review Task Force, composed of distinguished jurists from around the country, reported to the Council that “elected judges are less independent. Judicial elections can often turn into popularity contests which have very little to do with judicial skills and judicial temperament.”

In the preparation of the Judicial Elections Referendum Act of 2010, neither the Judicial Branch nor the public was given any opportunity to offer suggestions or make recommendations about the changes contained in the legislation.

No public hearings were held and no public comments were taken.

On Friday, Navajo Board of Election Supervisors Chairman Larry Biltah testified that neither the Navajo Election Administration nor NBOES has taken any steps to educate the public about the referendum as is required.

*“Elected judges are less independent. Judicial elections can often turn into popularity contests which have very little to do with judicial skills and judicial temperament.”*

– Independent Judicial Review Task Force report to Navajo Nation Council, 1990

In *Shirley v. Morgan*, the Navajo Nation Supreme Court held that K’e fosters fairness through mutual respect, and requires that an individual is fully informed and allowed to speak. That opportunity was denied both President Shirley and the public.

Mr. Biltah testified that he was assured by Council delegates that education funding would be provided by the November election despite the Nation having a \$24.3 million budget shortfall and facing the possibility of 45 employee layoffs.

He said that although it is NBOES responsibility to ensure voters are educated about these kinds of referendum questions, he was not aware of any effort to produce pamphlets or other materials to explain to voters the full effect of the referendum.

Instead, he testified that he considers the referendum to be a “candidate,” and that it is a candidate’s responsibility to sell himself to the public.

However, on Aug. 12, 2010, Mr. Biltah wrote to Navajo Nation Council Speaker Lawrence T. Morgan of his concern that “no provision was included in the Council’s referral on funding the referendum.”

“There are substantial changes to the Navajo Nation Code, in various areas of Titles 2, 7 and 11,” Mr. Biltah wrote. “The amendments are extensive and complicated. As we reviewed the proposed changes in the law, it became clear to the Board that voters will have many questions about the provisions seeking changes.”

An unsigned statement from the Navajo Election Administration attached to Mr. Biltah's memo states, "The Board considers the measure referred as a major change in Navajo government. Voters need to be properly informed about what is being proposed. Without adequate funds appropriated for education purposes, we will likely face challenge by voters, regardless of whether the measure is deemed approved or not."

NBOES Vice Chairman Jonathan Tso testified that the NEA will hire additional poll workers to answer voters' questions about the referendum should they have any. However, no poll worker training has been conducted, and the training is expected to take less than one day, raising questions about its adequacy.

President Shirley's attorney Kiersten Murphy of the Gallagher & Kennedy law firm told the court that it took her more than an hour to read the entire 36 pages of legislation. Non-attorney voters who come to the polls not expecting to read about the issue will be far more disadvantaged to fully understand what they're being asked to vote on, she said.

Upon questioning by Ms. Murphy, both Mr. Biltah and Mr. Tso testified that a complete understanding of the changes contained in the legislation are not reflected in the ballot language or the descriptive summary.

"If a referendum can't be boiled down to a statement then there is something wrong with the referendum," Ms. Murphy said. "It's a compound referendum. The people need to know this in advance and this referendum doesn't fairly communicate that to voters."

She said what the legislation contains is new law, new amendments to existing statutes, and new policy that must be presented to the President for his consideration. The only exceptions to sending legislation to the President for consideration are internal procedures of the Council.

By contrast, she said this legislation goes beyond that and affects the entire Judicial Branch.

The referendum question will ask voters to select "yes" or "no" on whether Navajo judges and Supreme Court justices should be elected.

However, neither the ballot question nor the descriptive summary that accompanies it explains the 31 changes that would also occur in addition to the simple question on the election of judges.

The public has not been informed that:

#### **1. The Judicial Elections Referendum Act will change**

#### **Navajo Nation judge and justice positions from being recommended by the Judiciary Committee, appointed by the President and confirmed by the Council to elected offices.**

This amendment eliminates the judicial appointment power of the President, weakens the Executive Branch, and violates the separation of powers among the three branches of government.

It eliminates the extensive vetting and interview process that ensures the best-qualified applicants are appointed by the President and confirmed by the Council.

Instead, experience and documentation show that the election of Navajo judges exposes judges to inevitable political influence, impacts judicial fairness and impartiality, and threatens judicial stability and faith in the judicial system.

#### **2. The Judicial Elections Referendum Act will weaken the current qualifications for judges and justices.**

This amendment will dilute existing requirements and eliminate the need for judges and justices to have any knowledge of *Diné* Fundamental Law or Navajo teachings. It will, in effect, transform distinctly Navajo courts into non-Navajo courts.

#### **3. The Judicial Elections Referendum Act will establish a specific number of District Court judges that can be expanded or reduced "as deemed necessary by the Navajo Nation Council" – not the Judicial Branch.**

#### **4. The Judicial Elections Referendum Act will establish 10 Judicial Districts and a specific number of judges for each district.**

These two amendments will severely restrict the authority of the Chief Justice to administer the courts with respect to making assignments or transfers of District Court judges. It will consequently violate the separation of powers among the three branches of government.

#### **5. The Judicial Elections Referendum Act will change how the Navajo Nation Chief Justice is selected.**

As with judges, this amendment eliminates the judicial appointment power of the Presidency, weakens the Executive Branch, and violates the separation of powers among the three branches of government.

It eliminates the extensive vetting and interview process that ensures the best-qualified applicants are appointed by the President and confirmed by the Council.

This amendment is a disincentive that will cause the best-qualified Navajos to seek legal positions off the Navajo Nation.

Lifetime appointment of Navajo judges and Supreme Court justices protects the judiciary from the flux and erratic nature of politics, adds stability and consistency, and promotes the public sense of the judiciary as a deep-rooted, permanent and trustworthy institution.

The American Bar Association has reported on the corrosive effect of money on judicial campaigns that obligate judges to campaign contributors, and the negative effect of attack advertising calculated to remove judges for unpopular rulings in isolated cases, and politicizing of courts.

**6. The Judicial Elections Referendum Act will change the salary structure for judges and justices and require a 2/3 vote of the Navajo Nation Council and ratification by 2/3 of all Navajo Nation chapters for a salary increase.**

**7. The Judicial Elections Referendum Act will eliminate retirement benefit eligibility for any judge or justice elected after Jan. 15, 2013.**

**8. The Judicial Elections Referendum Act will require all current judges and justices to resign or retire no later than Jan. 14, 2013.**

This amendment is the best example of political retaliation and retribution against current judges and judges for recent decisions, will violate the separation of powers among the three branches of government, cause court and governmental instability, and ultimately serve to weaken Navajo sovereignty.

Justice Austin notes that investment by outside businesses and a stable tribal court system go hand-in-hand. Investors become concerned "at the first sign of political tampering with a tribal court system; when major changes are made to a tribal court system that may impact fairness, independence and competence; when judges are removed for political reasons; and when tribal politicians attack tribal judges and courts for political reasons," he said.

**9. The Judicial Elections Referendum Act will allow judges**

**and justices appointed before Dec. 31, 2010, to receive retirement benefits "but only to the extent the Plan is funded."**

This amendment changes the established retirement benefits that serves as an incentive for the best-qualified Navajos to seek appointment as judges and justices.

**10. The Judicial Elections Referendum Act will change the basis for removing judges and justices from office and the processes by which they are removed.**

The Navajo Nation Supreme Court held in *Shirley v. Morgan* that the "office of elected officials belongs to the voting public and once an official takes his or her oath and begins to serve, it is the liberty of the People, under the Navajo Bills of Rights and *Diné bi beenahaz'annii*, to have the continued service of the leader chosen by them, to remove the leader via the polls, and to participate in any sanction process."

**11. The Judicial Elections Referendum Act states that judges and justices would be the only elected Navajo officials who cannot appeal an unfavorable ruling on their removal by the Office of Hearings and Appeals.**

This amendment rescinds the current provision for a judge's removal, including listing of grounds for removal. It eliminates due process, most notably the opportunity for judges to appear before the Council or Supreme Court to present evidence in their own defense.

It will expose elected judges to political retaliation for unpopular decisions or potentially cause elected judges to render unfair or biased decisions to protect themselves from political retaliation.

**12. The Judicial Elections Referendum Act will eliminate several powers and duties of the Judicial Branch, including but not limited to the Judicial Branch's current power to develop Judicial Districts.**

**13. The Judicial Elections Referendum Act will eliminate several powers and duties of the President, including but not limited to the President's power to remove probationary judges and justices upon recommendation by the Judiciary Committee, and to designate a Chief Justice of the Navajo Nation Supreme Court.**

This amendment will eliminate an established authority of the Presidency, weaken the Executive Branch, and violate

the separation of powers among the three branches of government.

By sending this legislation directly to the Navajo Board of Election Supervisors for implementation, this is the first time in Navajo history that the Council chose to by-pass a president by not sending referendum legislation to him for consideration and review.

Precedent was established on Feb. 4, 2000, when President Kelsey Begaye signed referendum legislation the Council sent to him regarding reducing the size of the Navajo Nation Council.

On May 7, 2004, President Shirley signed referendum legislation the Council sent to him regarding a referendum on gaming.

On Sept. 8, Navajo Nation Attorney General Louis Denetsosie issued a legal opinion that found the Judicial Elections Referendum Act referendum legislation is invalid because the Legislative Branch failed to send it to the President for signing or veto.

Board Chairman Biltah testified that when he saw an OPVP news release that reported that the Attorney General had found the referendum legislation invalid, he asked for legal advice from Chief Legislative Counsel Frank Seanez.

On Sept. 10, Mr. Seanez issued a legal opinion that conflicted with the Attorney General's opinion. Mr. Seanez wrote, "Resolutions which do not enact new laws, amend existing laws, or adopt a statement of policy do not go to the Navajo Nation President for signature into law, or veto."

Without resolving the conflict – yet having acknowledged in Mr. Biltah's Aug. 12 letter to Speaker Morgan that the referendum legislation makes "substantial," "extensive," and "complicated" amendments to Titles 2, 7 and 11 of the Navajo Nation Code – on Sept. 15 the Navajo Board of Election Supervisors chose to disregard the Attorney General's opinion when it approved ballot language supplied by Mr. Seanez without making any changes to it.

Immediately following NBOES' Sept. 15 meeting, Supervisor LeNora Johnson issued a statement to the press critical of the Board's action to adopt the Seanez ballot language and halt further discussion on the matter.

"The resolution to approve the ballot language had previously been tabled twice," she said. "The first time it was tabled was due to lack of funding for public education and the second time it was tabled was because of the opinion issued by the

Attorney General. While my main concern is with the Attorney General's opinion, I am also concerned that there is still no funding to educate the Navajo people on what exactly the amendments being proposed are and what effect they will have on the Navajo Nation as a whole."

On Friday, Supervisor Bessie Yellowhair-Simpson testified that Mr. Seanez had a conflict of interest because he represented both the Council and NBOES at a time when NBOES was reviewing legislation that came from the Council, drafted by Mr. Seanez's office, and Mr. Seanez was advising both bodies on the same issue.

She said when she shook Mr. Seanez hand at the end of the Sept. 9 meeting, she held it and once asked again for independent legal counsel for the Board to which she received no response.

Both Ms. Johnson's statement, Ms. Yellowhair-Simpson's testimony, and NBOES action to proceed with the referendum despite an unresolved conflict creates the distinct appearance on the part of NBOES and NEA of a lack of independence and accountability to the public, and an unacknowledged deference to the Legislative Branch.

This is corroborated through statements by Council delegates in a Jan. 21, 2010, press release from the Speaker's office titled, "Navajo Election Administration, Board of Election Supervisors get support from Navajo Nation Council."

[navajo.org/News%20Releases/Joshua%20Lavar%20Butler/Jan10/012110sprk\\_NEA\\_meet\\_with\\_NNC.pdf](http://navajo.org/News%20Releases/Joshua%20Lavar%20Butler/Jan10/012110sprk_NEA_meet_with_NNC.pdf)

Ms. Johnson also wrote that she was surprised to learn that the Board's meeting stipends were being paid for by Office of the Speaker.

"Such an action needs to be reviewed and researched," she said. "We as a board are being told there are no funds for us to have our own legal counsel yet our stipends for a special meeting are being paid for. This may be perceived as an attempt to buy our votes."

Former Navajo President Milton Bluehouse, Sr., testified that he did not believe the referendum legislation reflected the Navajo lifeway that calls for harmony and cooperation because it does not fully inform voters about what they will be voting for.

He said every person should be given knowledge and be informed.

He said he believed the legislation is inconsistent with K'é because it does not show respect to the leader who was elected to be the voice of all the people when the legislation was not sent to him for his consideration.

Had the President vetoed the legislation, Mr. Bluehouse said,

he would have explained his reasons in his veto message to the Speaker which might have influenced delegates not to override a veto. It would have also given the President the opportunity to explain to the public why he believed the legislation needs further consideration and public participation.

When asked why the Council is referring a referendum for the election of judges, Mr. Bluehouse said, "It appears to me there is a retaliation."

He said government leaders should be unbiased.

"It is the right of the people to understand but for some reason that is not happening now," he said.

In her closing argument to the District Court, Ms. Murphy cited the Fundamental Law principle in the Navajo Nation Supreme Court's July 16, 2010, opinion in *Shirley v. Morgan* that:

"A leader must always speak the truth and has a responsibility to communicate it to the people ... When words are said, they must be meant. The People must be able to hold the Navajo Nation Council to the whole of its words, not simply a portion thereof."

She noted, however, that through the Judicial Elections Referendum Act and the actual purpose behind it, the Council is not communicating its true intent to the People.

That intent, she said, was motivated by the recent Supreme Court decisions in *Shirley v. Morgan*, which upheld the District Court's decision that the Council had no authority to place the President on administrative leave, and *Nelson v. Shirley*, which upheld the decision that the Council could not overturn the results of the Dec. 15, 2009, initiative special election to reduce the size of the Council.

Consequently, the true intent of the Council was not motivated by the best interests of the Navajo People, Ms. Murphy said.

She said the Supreme Court held that it should be left up to the People to determine the structure of their government but in this instance that the Council has dictated the restructuring of an entire branch of government while intentionally weakening another.

That is directly contrary to the new direction reiterated by the Court because both the People and the Judicial Branch have been intentionally excluded from crafting or refining the intent of the legislation.

Judge Sloan asked the respondents, the Council, NEA and NBOES, "What's the hurry? And if the People really want it, they're going to ask for it. Why not let this be an initiative?"

In the Navajo Supreme Court's ruling in *Tuba City Judicial District v. Cecelia Sloan*, Associate Justice Sloan wrote:

"The government of the Navajo Nation belongs to the Navajo people. A government cannot operate effectively unless the citizenry has confidence in its government. Public confidence comes when citizens believe that their government can protect them from tyranny and from violations of their rights. Even the least aware among us know that those who hold powerful government positions are not always trustworthy and honorable."

"Separation of functions is a concept that is so deeply-rooted in Navajo culture that it is accepted without question. It is essential to maintaining balance and harmony. ... If one branch oversteps its powers, and infringes on the role of another branch, the integrity of the government is ruined. In Navajo society, the integrity of the government is the key to its vitality. If the governed cannot trust that their government is essentially just and accountable, then there arises widespread belief that the government benefits only a few."

Ironically, when he was introducing the referendum legislation last May, Council Delegate Thomas Walker, Jr., told the Judiciary Committee that the legislation would revitalize the Navajo government's transparency.

Although Mr. Walker was one of several Council delegates who sought to overturn the Dec. 15, 2009, initiative special election that successfully reduced the Council from 88 to 24 members, he told the committee his intention was to now join the government reform initiatives begun by President Shirley by asking the Navajo public to vote on whether to make Navajo Nation judges elected positions.

Despite neglecting to provide for funding to educate the public about the referendum election, Mr. Walker supported using \$150,000 of government money to pay Flagstaff attorney John Trebon to represent Tim Nelson and his group, Diné for Fairness in Government, to fight the election results.

Notwithstanding statements about government transparency, a confidential Sept. 13, 2010, memorandum from Council Delegate Lorenzo Curley to Mr. Seanez states, "As we previously discussed, Honorable Raymond Joe is willing to take over sponsorship of the legislation to remove the Navajo Nation Chief Justice."

Mr. Joe's legislation, No. 0661-10, will amend the hearing rules of the Judiciary Committee to recommend removal of permanent Justices and Judges from office.

On Tuesday, the Judiciary Committee voted 4-3 *not* to recommend Associate Justice Eleanor Shirley as a permanent justice, citing her performance as unsatisfactory despite no negative public comments and numerous laudatory recommendations praising her ability.

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