



THE NAVAJO NATION

OFFICE OF THE PRESIDENT & VICE PRESIDENT

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OPVP corrects misinformation presented during KTNN forum by Navajo Board of Election Supervisors' chairman, vice chairman

NBOES representatives keeps Council's 'hidden agenda' in legislation hidden

WINDOW ROCK, Ariz. – The Office of the President and Vice President is obliged to correct misinformation and address omissions of fact by the Navajo Board of Election Supervisors during a KTNN radio forum on Friday evening.

The two-hour-long call-in show about the Judicial Elections Referendum Act of 2010 featured NBOES Chairman Larry Biltah, Vice Chairman Jonathan Tso, and Shiprock Agency representative Alfred L. Jim.

In closing comments, Mr. Tso stated that public hearings about the election of Navajo judges were held in 2002, and that electing judges was discussed during the Statutory Reform Convention held at Red Rock State Park May 14-15, 2002.

This is untrue.

There is no record of public hearings having been held about the election of Navajo judges or the Judicial Elections Referendum Act.

There have been no Navajo Election Administration or NBOES-sponsored educational meetings to inform the public about how the legislation would restructure the Judicial Branch; the election of judges would be just one of 31 major changes.

Unlike reducing the size of the Navajo Nation Council, which was discussed at the 2002 Statutory Reform Convention, the election of Navajo Nation Supreme Court justices and District Court judges was not discussed

during the convention.

Discussion of electing judges was not on the agenda, and was not one of 26 reform recommendations sent to the Navajo Nation Council for its consideration.

“There are substantial changes to the Navajo Nation Code, in various areas of Titles 2, 7 and 11. The amendments are extensive and complicated. Voters need to be properly informed about what is being proposed.”

– Navajo Board of Election Supervisors Chairman Larry Biltah,
Aug. 12, 2010 memo to Speaker Lawrence T. Morgan

Since adoption of the Judicial Elections Referendum Act by the Council in July, there has been no substantive public discussion of it conducted by NEA or NBOES.

Neither NEA nor NBOES has informed the public about how the restructuring of the Judicial Branch would affect Navajo government, impact the Navajo judicial system and weaken the Nation's sovereignty should Navajo voters approve the referendum on Nov. 2.

In 2002, the Navajo Government Development Office produced no written materials about the election of judges but produced volumes of other material about reforming the Navajo government.

No news stories at the time of the convention contained any information regarding electing Supreme Court justices or District Court judges.

During the KTNN forum, none of the NBOES representatives reported to the public what Mr. Biltah told Navajo Nation Council Speaker Lawrence T. Morgan in an Aug. 12 memo:

“There are substantial changes to the Navajo Nation Code, in various areas of Titles 2, 7 and 11. The amendments are extensive and complicated.”

None of them mentioned what the NEA reported in an attachment to the NBOES letter to the Speaker:

“The Board considers the measure referred as a major change in Navajo government. Voters need to be properly informed about what is being proposed.”

To date, neither NEA nor NBOES has produced any written educational materials to explain that:

- 1) The 36-page Judicial Elections Referendum Act would enact 31 sweeping changes to restructure the Navajo Judicial Branch;
- 2) None of the changes were sought by the public;
- 3) The Judicial Branch opposes the referendum, why that is, and that the branch had no role in defining the changes that would result.

Throughout Friday’s two-hour forum, none of the officials mentioned that Navajo Nation President Joe Shirley, Jr., also opposes the Judicial Elections Referendum Act because of the damage it will do to the Judicial Branch and Navajo sovereignty.

Neither Mr. Biltah, Mr. Tso nor Mr. Jim mentioned the length of the legislation, explained how it would amend Titles 2, 7 and 11 of the Navajo Nation Code, or elaborated on numerous specific changes to the Judicial Branch it would cause.

None mentioned that the law would require the forced resignation of Supreme Court justices and the 17 District Court judges.

Forcing the resignation of the justices and judges is considered the clearest example of the Council’s political retaliation against them for recent decisions the Council did not like.

In his 1999 book, *The Navajo Political Experience*, Professor David Wilkins wrote that the Navajo Judicial Branch “is unarguably the most respected institution in Navajo Nation government.”

Political interference with stable tribal court systems thwart investment by outside businesses, according to former Navajo Nation Supreme Court Associate Justice Raymond Austin.

Investors become nervous “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.

Neither Mr. Biltah, Mr. Tso nor Mr. Jim mentioned that the legislation would weaken the current qualifications for judges and justices by eliminating the need for them to have any knowledge of *Diné* Fundamental Law or Navajo teachings.

Approval of the referendum by voters would, in effect, transform distinctly Navajo courts that have developed over decades into non-Navajo courts.

In a Feb. 11, 2010, letter to the Navajo Times, four Navajo leaders wrote that “lessening *Diné* Foundational Laws in the operation of Navajo Nation government and *Diné* society would set us back to the dark days when U.S. federal authorities completely ruled our lives.”

Former Navajo Nation President Peterson Zah, former Navajo Nation Supreme Court Chief Justice Robert Yazzie, Justice Austin and Dr. Manley Begay, director of the Native Nations Institute at the Udall Center for Studies in Public Policy at the University of Arizona, were responding to the Council’s legislation to prevent Navajo judges from using *Diné* Fundamental Law in their decisions.

“We urge Navajo Nation leaders to fully support *Diné* Foundational Laws (also known as *Diné* Fundamental

Law) in its application to our government and society,” these leaders wrote. “We caution that to weaken *Diné* Foundational Laws in any manner for political expediency will disrespect the intent of our elders and medicine people and lessen who we are as *Diné*.”

The principle justification cited by Council advocates in favor of the legislation is that it invites public participation through a referendum. However, one of the many criticisms of the legislation is that the Council approved it without public hearings, and without public comment or participation as the legislation was crafted.

In addition, there was no input, recommendations, comment or participation by either the Judicial or Executive branches.

To date, no news story has thoroughly discussed the changes the referendum would bring to the Judicial Branch.

While the KTNN forum was intended to educate the public about the referendum in order for voters to make an informed decision, none of the NBOES representatives mentioned recent events which include :

- The Navajo Nation Bar Association asked Navajo Nation Council Speaker Lawrence T. Morgan to have the Council wait until the association could explain the law's impacts before approving it for voters. That never happened.
- Navajo Nation Attorney General Louis Denetsosie issued a legal opinion that found the law invalid because the Legislative Branch failed to send it to the President as required by sections 165(B) and 1005(C)(10) and (11) of Title 2.
- NBOES said it disregarded the attorney general's opinion when it approved ballot language during its Sept. 15 meeting.
- District Court Judge Allen Sloan noted during an Oct. 8 hearing that the legislation appeared to contain “hidden agendas” of the Council.
- NBOES Chairman Larry Biltah testified on Oct. 8 that neither the NEA nor NBOES had taken any steps to educate the public about the referendum.

- Mr. Biltah said he was assured by delegates the Council would allocate funding to pay for educational materials, although the Council failed to consider such legislation during its fall session that ended Friday.

- Mr. Biltah told Speaker Morgan in an Aug. 12 memo that, “There are substantial changes to the Navajo Nation Code, in various areas of Titles 2, 7 and 11. 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.”

- The NEA also informed the Speaker, “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.”

- And no mention was made that legal experts, as well as earlier Councils that studied the effects of electing judges, have repeatedly warned against the danger of politicizing courts and compromising judges and justices through elections.

In 1958, the Navajo Tribal Council held in Resolution CO-69-58, that “in order to give adequate authority to the judges... obtain the best qualified personnel for the courts and to remove the judges... 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 that 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, in a report to the Council, the Independent Judicial Review Task Force, composed of distinguished federal and state judges from around the country said, "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."

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.

President Shirley opposes the referendum on grounds that:

- *Diné* Fundamental Law was violated because the Navajo Nation Council failed to send the law to the President for consideration and review;
- The Council, NBOES and NEA failed to educate the public about what they will be voting on.
- The ballot language approved by NBOES does not say what is contained in the legislation or the complete effect it will have on the Judicial Branch.
- The legislation tilts the balance of power even further toward the Legislative Branch by giving the Navajo Nation Council control over the Judicial Branch and further limiting the authority of the Executive Branch.
- The legislation diminishes the power of the Presidency, and violates the concept of a separation of powers among the three equal branches of Navajo government.

Associate Justice Austin has also cautioned against the election of Navajo judges. Justice Austin is the Indigenous Peoples Law and Policy Program Distinguished Jurist in Residence at the University of Arizona James E. Rogers College of Law and author of the 2009 book, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*.

When the Navajo Nation took control of its court system in 1958, created an independent judicial branch, and replaced the BIA's Navajo Court of Indian Offenses, it changed the system from electing judges to appointing them "because elected judges had lost competence, fairness and independence, become political, and basically undermined the Navajo court system," Justice Austin said.

"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.

In an article this year titled, *Displacing the Judiciary: Customary Law and the Threat of a Defensive Tribal Council*, Ezra Rosser, associate professor at the American University Washington College of Law, states, "The biggest threat to Navajo common law comes not from non-Indian judges but from the Navajo Tribal Council."

"Having lost the battle over whether there should be a referendum on the size of the Tribal Council and not having had success with the Navajo Nation President's suspension, the Tribal Council is now taking aim at the third branch of government, the judiciary," Professor Rosser said.

"My hope is that *Diné* voters will hold their elected officials accountable for trying to make the Council the sole arbiter of law on the Navajo Nation and failing to live up to their obligations as tribal leaders," he said.

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