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# Judicial Selection Methods, Tribal Politics, & Strong Government: Navajo Nation at the Crossroads

**Bethany Sullivan\***

## INTRODUCTION

The Navajo Nation is widely recognized as one of the preeminent models of American Indian tribal sovereignty. At the heart of this success is the Navajo Nation judicial branch—a striking example of how tribal courts can thrive in the present legal environment while remaining faithful to customary law and traditional methods of dispute resolution. However, in a common tale that transcends all cultural, geographic and temporal boundaries, internal power struggles between different branches of the Navajo government once again swept the judiciary into the political fray. The 2010 debate, which focused on how members of the judiciary are selected, had the potential to fundamentally restructure the Navajo judicial system and is representative of a historic and ongoing clash between the Navajo governmental branches over judicial selection methods. While the particular legislation raising the issue has been invalidated, this history indicates that the issue will likely rise again. But before drastic action is taken by either the Navajo Nation Council or the Navajo electorate, it is essential that all parties pause and reflect - reflect on their current judicial system, the overt and covert reasons for change, and the potential effect such change may have on the Navajo Nation as a whole.

In an attempt to facilitate such reflection, this Article compares the various methods of judicial selection and, in light of the unique history and culture of the Navajo people, ultimately argues for the maintenance of the existing appointive method. Section I introduces the 2010 political push for judicial elections as embodied by the Judicial Elections Referendum Act.<sup>1</sup> Section II then provides an overview of judicial selection methods in the United States and highlights the pervasive criticism of judicial elective systems. Section III hones in on the Navajo Nation court system by describing the historical evolution of the Navajo courts and the central role that judicial appointment has played in that development. Section IV returns to the Judicial Elections Referendum Act and critically evaluates both the manner in which the Navajo Nation Council presented this legislation and the potential effect of its substantive provisions on the Navajo people. In conclusion, the Article warns against current or future efforts to reform the Navajo appointive system, particularly where such efforts lack serious consideration of the social, political and economic ramifications on Navajo Nation.

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\* J.D. 2011 University of Arizona James E. Rogers College of Law. The Author would like to thank Professor Ray Austin for his considerable guidance and unparalleled knowledge of the Navajo Nation.

<sup>1</sup> Navajo Nation Council. Leg. No. 0359-10, *An Act Relating to Judiciary; Approving the Judicial Elections Referendum Act of 2010; Referring a Referendum Measure to the November 2, 2010 Navajo Nation General Election Ballot with a Question Whether to Amend Titles 2, 7, and 11 of the Navajo Nation Code to Provide for the Election of Navajo Nation District Court Judges and Supreme Court Justices* (Navajo Nation 2010) [hereinafter *Judicial Elections Referendum Act*].

## I. The Judicial Elections Referendum Act of 2010

Although judicial elections have repeatedly been considered and rejected by the Navajo Nation Council in the past, the issue resurfaced on June 17, 2010, in the form of the Judicial Elections Referendum Act of 2010. While proponents of the referendum espoused democratic principles and the Navajo public's choice, the legislation was wrought with political overtones and reflected an on-going power struggle among the three branches of government. Perhaps more importantly, the legislation aimed to fundamentally re-structure the Navajo judiciary and could have triggered consequences that extend to the Navajo Nation as a whole. Due to the cyclical emergence of this issue, it is imperative that the matter of whether to institute judicial elections is thoroughly evaluated and discussed by the Navajo people and their leaders—a call that rings true for any tribal nation considering the best method for selecting members of its judiciary.

### A. Description of the Referendum and its Current Status

The Judicial Elections Referendum Act sprung into life in June 2010 via a proposed Navajo Nation Council resolution.<sup>2</sup> The Act's main objective was to add a referendum ballot question in the November 2010 elections that would give the Navajo people an opportunity to decide “whether to change the positions of all Navajo Nation District Court Judges and all Navajo Nation Supreme Court Justices from their current status as appointed probationary and permanent positions to elected positions subject to retention elections.”<sup>3</sup> However, this description belies the full thrust of the Act. As the legislation's descriptive summary suggests, judges and justices would become subject to contested elections, followed by four-year terms and retention elections.<sup>4</sup> In order to switch to an elective system, all current judges and justices would be forced to resign or retire.<sup>5</sup> Campaign expenditures would be limited to a specified amount—for Supreme Court justices, the maximum would be \$1.50 per registered voter, while District Court judges would be limited to \$4.00 per registered voter within their election precinct.<sup>6</sup> In addition to removal from office due to good cause or loss of a retention election, judges and justices would also become subject to voter-initiated removal via recall petitions.<sup>7</sup>

The Act also included a host of other changes that do not directly relate to judicial selection methods. First, the Act provided for the elimination of judicial retirement benefits, excepting those judges and justices who accrued retirement benefits under the prior appointment system.<sup>8</sup> The Act also removed all current judicial qualification requirements from Title 7 and relocated them to the election code.<sup>9</sup> Rather than simply relocating the judicial qualifications verbatim, the Act actually modified what is and is not required of judicial candidates. Importantly, the Act eviscerated the required knowledge of Navajo culture and traditions, while

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 19-20 (proposed 7 N.N.C. § 355(B)-(C)).

<sup>5</sup> *Id.* at 15 (proposed 7 N.N.C. § 355(A)).

<sup>6</sup> *Id.* at 31 (proposed 11 N.N.C. § 205(A)(1)-(2)).

<sup>7</sup> See *Judicial Elections Referendum Act*, *supra* note 1, at 33 (proposed 11 N.N.C. § 241).

<sup>8</sup> *Id.* at 11-15 (proposed 7 N.N.C. § 353).

<sup>9</sup> *Id.* at 18 (proposed 7 N.N.C. § 354).

maintaining the Navajo language requirement.<sup>10</sup> This alteration echoed a failed effort by the Council to pass legislation prohibiting the courts from using Navajo customs and traditions as law, a response to a prior Supreme Court ruling upholding the people's right to reduce council membership from 88 to 24 under Navajo custom.<sup>11</sup> Lastly, the Act removed mandatory periodic evaluations of judicial performance.<sup>12</sup> Collectively, these proposed changes represented a dramatic departure from the existing structure of the Navajo court system, particularly in the manner of judicial selection.

## II. An Overview of Judicial Selection Systems

There is no one-size-fits all prescription for how a jurisdiction should select the members of its judiciary. Governments across the world use a plethora of judicial selection methods. Within the United States alone, substantial variation exists among the judicial selection systems employed by the federal government, states, and tribes. These systems are loosely categorized into three general types: elective, appointive, and merit-based.

An elective judicial selection system provides the electorate, a jurisdiction's voting populace, with the authority to choose its judges and justices.<sup>13</sup> Following an initial election, a judge then becomes subject to either retention elections or contested elections after a set term. Retention elections simply ask voters whether or not the incumbent judge should remain in office. Alternatively, contested elections open up the ballot to any other willing judicial candidates.

The appointive and merit-based methods, while theoretically distinct, are often utilized in conjunction with one another, resulting in hybrid systems that incorporate elements from both. In a "pure" appointive system, judges are selected by an expressly authorized governmental body, often the executive branch.<sup>14</sup> Once appointed, judges either serve for life, set terms, or become subject to retention elections. In contrast, merit-based systems involve an independent commission that selects a pool of qualified candidates, which is then submitted to the executive

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<sup>10</sup> Compare 7 N.N.C. § 354(A)(5) (requiring applicants to have "practical knowledge of the fundamental laws of the Diné" and be able to demonstrate "[a]n understanding of K'éd, including the Diné clan system; and [a] basic understanding of traditional Navajo religious ceremonies; and [a]n understanding of the traditional Navajo lifestyle"), with *Judicial Elections Referendum Act*, *supra* note 1, at 24-26, (proposed 11 N.N.C. § 8) (silent on the issue of knowledge of Navajo culture and traditions, but requiring judicial candidates to speak both Navajo and English).

<sup>11</sup> See Navajo Nation Council Resolution No. CJA-08-10 (Jan. 29, 2010), subject to Presidential veto on Feb. 13, 2010. This legislation was ultimately held invalid by the Navajo Nation Supreme Court. See *Office of Navajo Nation President & Vice President v. Navajo Nation Council*, No. SC-CV-02-10 (Navajo 2010).

<sup>12</sup> *Judicial Elections Referendum Act*, *supra* note 1 at 21, (proposed 7 N.N.C. § 357).

<sup>13</sup> Elective systems are nuanced among states. One further typological divide in these systems is between bipartisan or nonpartisan judicial elections.

<sup>14</sup> The United States' system provides a familiar example of this approach. In that system, the president is charged with appointing federal judges subject to confirmation by the senate. U.S. CONST. art. II, § 2. State appointive systems vary between gubernatorial appointment and legislative appointment. AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN THE STATES: APPELLATE & GENERAL JURISDICTION COURTS* 1263 (2007), available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> [hereinafter *Judicial Selections Chart*].

body for final appointment.<sup>15</sup> Following initial selection, judges may become subject to retention elections depending on the jurisdiction.

As previously noted, much variability exists in judicial selection mechanisms on the federal, state, and tribal governmental levels. Nonetheless, the majority of state jurisdictions favor appointment or merit-based approaches over elective systems, at least when it comes to their appellate courts.<sup>16</sup> Among Indian nation judicial selection methods, there is immense variability. Some tribes select their judges and justices via appointment (both legislative and executive), while others provide for direct election.<sup>17</sup> A thorough examination of the nuances in Indian nation judicial selection methods is beyond the scope of this paper; suffice to say, there is no standardized approach. Additionally, the existence of judicial elections on both the state and tribal level stands in stark contrast to judicial selection methods used in the rest of the world—particularly since *not one* other country utilizes a purely elective model of judicial selection.<sup>18</sup>

### A. Critique of Elective Systems

A review of the academic literature on judicial selection methods reveals broad criticism of judicial elections. Much of the criticism stems from concern over maintaining the independence and integrity of the judiciary. Specifically, critics ask whether judges will form decisions based on public opinion, rather than on impartial applications of the law.<sup>19</sup> This concern is particularly pronounced when

<sup>15</sup> See ARIZ. JUDICIAL BRANCH *Judicial Nominating Commissions*, <http://www.azcourts.gov/jnc/Home.aspx> (last visited May 9, 2012).

<sup>16</sup> A 2009 survey compiled by the American Judicature Society divides selection systems into gubernatorial appointment, legislative appointment, partisan elections, nonpartisan elections, and merit selection. For purposes of this Article, gubernatorial appointment, legislative appointment, and merit selection will be grouped together as “non-elective systems,” while partisan and nonpartisan elections will be referred to collectively as “elective systems.” The survey reveals that on the highest appellate court level, twenty-nine states employ non-elective systems as opposed to twenty-one states that use elective systems. See *Judicial Selections Chart*. Within jurisdictions that have an intermediate appellate court, the judges are chosen through non-elective systems in twenty-four states, while elective systems are used in eighteen states. *Id.* On the trial court level the pattern reverses with twenty states utilizing non-elective systems and twenty-seven states preferring elective systems. *Id.* The remaining states use a mixture of elective and non-elective systems, depending on the particular county. See, e.g., *id.* at 4 (data for Arizona indicates that counties with populations greater than 250,000 maintain non-elective systems, while counties with populations less than 250,000 maintain elective systems for trial judge selection).

<sup>17</sup> See, e.g., CHOCTAW NATION CONST. art. XII, § 1 (the Choctaw Nation provides for executive appointment of tribal judges with the advice and consent of the tribal council); CSKT Laws Codified§ 1-2-202 (the Confederated Salish and Kootenai Tribes appoint judges by the majority of quorum of tribal council); HO-CHUNK NATION CONST. art. VII, §§ 10, 11 (the Ho-Chunk Nation provides for popular election of Supreme Court justices, while trial court judges are appointed by the legislature).

<sup>18</sup> See Daniel J. Meador, *Selecting Alabama's Appellate Judges—A Better Way*, 68 ALA. LAW. 135, 140 (2007) (“[N]owhere in the world outside the United States are judges popularly elected.”); see also John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), available at <http://www.nytimes.com/2009/12/24/us/24judges.html> (statement by retired Supreme Court Justice Sandra Day O'Connor emphasizing that no other nation elects its judges; also recalling international legal conferences where other sovereigns have expressed their amazement at this popular selection method in the United States).

<sup>19</sup> James A. Gardner, *New York's Judicial Selection Process is Fine—It's the Party System that Needs Fixing*, 79 SEP. N.Y. ST. B.J. 42, 43 (2007); see also Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1259 (explaining that insulating judges from political and personal pressures better enables them to uphold the law, maintain separation of powers, and ensure due process).

considering judicial reliance on campaign funds to successfully obtain or retain office.<sup>20</sup> The influence of campaign financing on actual and perceived judicial bias is of such importance that it has sparked the development of recusal protocols and has also been the subject of consideration by the United States Supreme Court.<sup>21</sup> An additional concern is whether the general public is capable of knowledgeably and effectively evaluating the qualifications of judicial candidates and the performance of incumbent judges.<sup>22</sup>

The American Bar Association (ABA) addresses these issues at great depth in its 2003 report on the United States judicial systems.<sup>23</sup> This report represents the culmination of an ad hoc ABA commission's directive to study and make recommendations on ensuring "fairness, impartiality and accountability" in state judicial systems.<sup>24</sup> Among the Commission's assorted recommendations is the clear preference for judicial selection by a commission-based appointive system. Specifically, the Commission suggests a system whereby a credible, nonpartisan entity deliberates the qualifications of each judicial candidate before compiling a list of finalists from which the governor then chooses an appointee.<sup>25</sup> The merits of such an approach are multifold: guaranteed selection of sufficiently qualified judges;<sup>26</sup> protection against the danger of favoritism inherent in a purely appointive system; and significant reduction of the politicization associated with judicial elections.<sup>27</sup>

The Commission further recommends that judges not be subject to reselection processes, like retention elections; rather judicial accountability should be maintained through regular performance evaluations and disciplinary mechanisms.<sup>28</sup> This recommendation stems from the previously mentioned concern with de-politicizing judicial decisions and reinforcing the independence and integrity of the judiciary. By removing direct accountability to the electorate, judges need not feel pressured to make decisions based on public polls.<sup>29</sup>

<sup>20</sup> See generally Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207 (2010).

<sup>21</sup> See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009).

<sup>22</sup> Gardner, *supra* note 19, at 43.

<sup>23</sup> See Alfred P. Carlton, Jr., *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* (2003), <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> [hereinafter ABA REPORT].

<sup>24</sup> *Id.* at i.

<sup>25</sup> See *id.* at v.

<sup>26</sup> See *id.* at iv ("States should establish credible, neutral, non-partisan and diverse deliberative bodies to assess the qualifications of all judicial aspirants so as to limit the candidate pool to those who are well qualified."); see also *id.* at 27-28 (describing how the public is insufficiently familiar with judicial candidates, judicial qualifications, and the justice system, which in turn leads to low voter turnout in judicial races).

<sup>27</sup> See, e.g., *id.* at 13-18 (discussing the increasing politicization of state courts and subsequent problems).

<sup>28</sup> See *id.* at v.

<sup>29</sup> The Commission waxes eloquent on this point:

The laws that the people establish ... are intended to protect everyone: the rich, the poor, the majority, the minority, the powerful, and the powerless. In order for that objective to be realized—that the law protect the one as well as the many—it is imperative that the administration of justice not become a popularity contest. We need judges who will tell us what the law is and how it applies in individual cases without regard to what the results of the latest opinion poll are, what the

Another noteworthy critic of judicial elections is retired Supreme Court Justice Sandra Day O'Connor. Justice O'Connor has spearheaded the O'Connor Judicial Selection Initiative, a program housed by the Institute for the Advancement of the American Legal System.<sup>30</sup> Similar to the ABA, the Initiative exposes the corrosive effect of contested judicial elections on the integrity and impartiality of the judiciary and, in its stead, recommends commission-based appointive systems.<sup>31</sup> The Initiative differs from the ABA, however, in that it supports the use of retention elections as a device to incorporate citizen participation.<sup>32</sup> Nonetheless, both organizations ascribe to the view that politics do not belong in the courtroom.<sup>33</sup>

### III. The Navajo Nation Court System

The problem of judicial selection has not escaped the Navajo people who, in steering the development of their court system, have repeatedly researched, debated, and decided the issue—resoundingly in favor of an appointment–merit system. As the following sections detail, the Navajo Nation court system has undergone a marked evolution since its early days as an instrument of the federal government. In its contemporary form, the Navajo judiciary is a paradigm of innovation, successfully melding components of traditional dispute resolution with adopted elements from the western legal tradition. Furthermore, as described *infra*, the Navajo's choice of a hybrid appointive–merit judicial selection method has been a critical factor in fostering the Navajo courts' success.

#### A. Evolution of the Navajo Nation Courts

The genesis of the modern Navajo Nation court system can be traced to mid-19th century New Mexico with the unsuccessful founding of the Fort Sumner Court of Indian Offenses.<sup>34</sup> This military court was tasked with maintaining the

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judge's campaign contributors think, or what the political agendas of influential public officials may be. In other words, we need judges who are independent enough to uphold the rule of law, even when the law is unpopular.

*See id.* § 1 at 2.

<sup>30</sup> See John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES, Dec. 23, 2009, available at <http://www.nytimes.com/2009/12/24/us/24judges.html> (interview with O'Connor on her campaign to persuade states to choose judges based on merit, rather than through judicial elections).

<sup>31</sup> See UNIV. OF DENVER, QUALITY JUDGES INITIATIVE, *O'Connor Judicial Selection Project*, <http://iaals.du.edu/initiatives/quality-judges-initiative/oconnor-judicial-selection-project/> (last visited May 9, 2012).

<sup>32</sup> See UNIV. OF DENVER, QUALITY JUDGES INITIATIVE, *The O'Connor Judicial Selection Plan*, <http://iaals.du.edu/initiatives/quality-judges-initiative/recommended-models/the-oconnor-judicial-selection-plan-how-it-works-why-it-matters> (last visited May 9, 2012).

<sup>33</sup> UNIV. OF DENVER, QUALITY JUDGES INITIATIVE, *O'Connor Judicial Selection Project*, <http://iaals.du.edu/initiatives/quality-judges-initiative/oconnor-judicial-selection-project/> (last visited May 9, 2012); see ABA REPORT, *supra* note 23 at 2 (discussing the need for “judges who will tell us what the law is and how it applies in individual cases without regard to what the results of the latest opinion poll are, what the judge's campaign contributors think, or what the political agendas of influential public officials may be”).

<sup>34</sup> This military court was located within the Bosque Redondo Reservation, the barren endpoint of the federal government's forced relocation of Navajo people in 1864. Although called a reservation, Bosque Redondo could more aptly be described as a prisoner-of-war camp that accompanied the United States' devastating military campaign against the Navajo people in 1863–64. See RAYMOND D. AUSTIN,

semblance of law and order on what was essentially a forced relocation camp for the Navajo people. The federal government drafted the rules and criminal code with the notion that Navajo judges, under the supervision of the United States military, would use military law to govern their decisions. However, there is no historical evidence that this military court was ever implemented and operational.<sup>35</sup>

Following the return to their ancestral territory, the Navajo became subject to the authority of the Bureau of Indian Affairs through the creation of the Navajo Agency. As part of a national federal policy to “civilize” Indian people, the Department of the Interior founded so-called “C.F.R. courts”<sup>36</sup> to administer western law on the reservations and, ultimately, destroy native culture. As described in a contemporaneous federal district court decision, these courts were:

[E]ducational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.<sup>37</sup>

The Navajo’s own C.F.R. court was established in 1892.<sup>38</sup> As the name implies, the Code of Federal Regulations officially controlled both the selection of judges and the underlying substantive law.<sup>39</sup> However, the judges themselves were Navajo and frequently incorporated Navajo common law into their decisions.<sup>40</sup> Even though the C.F.R. judicial system was designed to be adversarial in nature, Navajo judges utilized traditional resolution tactics, such as *nályééh*, which provides for apology, forgiveness and restitution in order to compensate harmed parties.<sup>41</sup> Such efforts by the Navajo C.F.R. judges ensured the perpetuation of Navajo common law in the face of abject assimilation.<sup>42</sup>

The Navajo C.F.R. court prevailed until 1958 when the Navajo people assumed control over their judiciary and revolutionized the system by creating “Navajo Courts with Navajo judges who would apply the laws of the Navajo Nation.”<sup>43</sup> Rather than existing as a constituent of the federal government, the

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NAVAJO COURTS & NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 2–3 (Univ. Minn. P. 2009).

<sup>35</sup> *See id.* at 4–5.

<sup>36</sup> This name derives from the administrative regulations, codified in the Code of Federal Regulations, which governed the creation and implementation of such courts. These courts have also been referred to as “Courts of Indian Offenses.”

<sup>37</sup> *U.S. v. Clapox*, 35 F. 575, 577 (D.C. Or. 1888).

<sup>38</sup> *See AUSTIN*, *supra* note 34, at 21.

<sup>39</sup> *See id.* at 21–22.

<sup>40</sup> *Id.* at 22–23.

<sup>41</sup> *Id.* at 23.

<sup>42</sup> *See id.* at 25.

<sup>43</sup> *See* Navajo Nation Council Res. No. CO-69-58, 1 (Oct. 16, 1958); *see also* Navajo Nation Judicial Branch, Office of the Chief Justice, Orientation Materials Prepared for the Judiciary and Government Services Committees of the Navajo Nation Council and the Election Commission, *Issue: Should Navajo*



Navajo Nation court system transformed into a truly Navajo entity, operating under the auspices of Navajo Nation law. The newly created judicial branch consisted of several trial courts, as well as a Court of Appeals led by a Chief Justice.<sup>44</sup> The Chief Justice served as head of the judicial branch and supervised all the judges therein.<sup>45</sup>

In setting up the Navajo Nation court system, the Navajo Nation Council debated at great length the method by which judges should be chosen. Council meeting minutes reveal substantial concern with the ability of judicial elections to undermine a court's independence and integrity. As one councilmember expressed,

It is very important that politics not play a part in our judicial system or in any way influence them to make decisions whereby maybe a Councilman in trouble or something like that, just because he is a Councilman, might get a little lighter sentence than another person on the Reservation. ... If we have the elective system, then there are some pressures that can be applied. A person might say, "Well, if you make this judgment now, I will make sure that you don't get elected again next time."<sup>46</sup>

Furthermore, the Navajo Nation's own dalliance with judicial elections during the time of its CFR court left many members wary because they found that it destroyed the efficacy of judicial processes.<sup>47</sup> This breakdown was so problematic that the Council chose to describe it in the preamble to their resolution establishing an appointive system:

[U]nder the system of elective judges, there has been such a marked breakdown of the court system in failure to enforce orders, enforce collection of debts, protect contracts and secure basic legal rights, that the Reservation may soon confront new pressure to extend State jurisdiction.<sup>48</sup>

Accordingly, the Council determined that trial court judges would be appointed by the Chairman of the Navajo Nation Council with confirmation by the Council. The Chief Justice was to be selected in a similar fashion and vested with power to choose temporary associate justices from among trial judges to serve in particular cases. The Council's rationale for selecting an appointive system is clearly set out in the council resolution:

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*Nation Judges Be Elected?* 2-3 (Mar. 1, 1993) [hereinafter *Should Navajo Nation Judges Be Elected?*], part of Conference Materials for *Conference on the Issues: Election of the Judges of the Navajo Nation* (Mar. 1, & 2, 1993) [hereinafter 1993 Conference Materials]. A number of factors served as the impetus behind this transition, namely the imminent threat of state usurpation of Navajo Nation jurisdiction via Public Law 280, as well as inadequate BIA funding and support for the existing legal system. *Id.*; see also AUSTIN, *supra* note 34, at 28.

<sup>44</sup> See Navajo Nation Council Res. No. CO-69-58, 2-3 (Oct. 16, 1958).

<sup>45</sup> See *id.* at 5-6.

<sup>46</sup> Meeting Minutes, Navajo Nation Council Res. No. CO-69-58, 353 (Oct. 17, 1958).

<sup>47</sup> *Id.* at 352.

<sup>48</sup> Navajo Nation Council Res. No. CO-69-58, whereas cl. 2

In order to give adequate authority to the judges, 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.<sup>49</sup>

The judicial structure created by the 1958 reform has continued largely intact into the present day with a few notable exceptions. In 1978, in response to an appellate court decision establishing the power of judicial review of council legislation, the Chairmen and his supporters attempted to gain control over the courts by creating the Supreme Judicial Council.<sup>50</sup> This quasi-legislative body was bestowed with power of review over appellate court decisions,<sup>51</sup> creating inherent difficulties with the maintenance of separation of powers and judicial independence. Such a system proved to be unworkable and consequently, the Navajo judicial system undertook a major overhaul in 1985 with the enactment of the Judicial Reform Act.<sup>52</sup> The Judicial Reform Act enacted several significant changes, including disbandment of the Supreme Judicial Council, creation of more stringent judicial qualification standards, and redesignation of the Navajo Court of Appeals as the Supreme Court of the Navajo Nation—empowered with appellate jurisdiction as the court of final resort.<sup>53</sup>

This historical trajectory has culminated into the modern day Navajo Nation courts, described as the “flagship tribal judicial system” and studied and emulated by legal scholars and indigenous groups across the world.<sup>54</sup> The Navajo judicial system consists of ten judicial districts containing trial, family, and traditional peacemaking forums. Additionally, the Navajo Nation Supreme Court, seated in Window Rock, Arizona, is composed of two associate justices and one chief justice. The court system administers an impressive caseload, presently averaging 75,000 cases a year.<sup>55</sup> Additionally, the Navajo Nation court system is renowned for its incorporation of Navajo customs and traditions. Utilization of

<sup>49</sup> *Id.* at whereas cl. 4.

<sup>50</sup> Navajo Nation Council Res. No. CMY-39-78, 1-2 (May 4, 1978); *see generally id.* at whereas clauses 1–9 (articulating a perceived threat posed by the judiciary to the Council’s authority).

<sup>51</sup> Navajo Nation Council Res. No. CMY-39-78, 3 (May 4, 1978).

<sup>52</sup> *See* Navajo Nation Council Res. No. CD-94-85, at 1-2 (Dec. 4, 1985) (“If the Navajo Nation is to continue as a sovereign Nation and to move forward toward the reality of a three branch form of government, the Supreme Judicial Council must cease to exist, as Tribal sovereignty requires strong and independent Tribal courts to enforce and apply the law.”).

<sup>53</sup> *See generally* Navajo Nation Council Res. No. CD-94-85.

<sup>54</sup> *See* Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 236 (1987); *see also* Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts & the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 387 (2008–2009) (lauding the Navajo Nation’s development of a “strong legal system and a vigorous, effective judiciary”).

<sup>55</sup> JUDICIAL BRANCH OF THE NAVAJO NATION, *The Courts of the Navajo Nation in the Navajo Nation Government: A Public Guide to the Courts of the Navajo Nation* (last revised Jan. 2010), <http://www.navajocourts.org/publicguide.htm>. The Navajo Nation courts had 73,193 open cases (yearly caseload) for fiscal year 2009 (October 1, 2008 – September 30, 2009). *See* <http://www.navajocourts.org/JBReports.htm> for Quarterly and Annual Reports of the Navajo Nation courts.

peacemaking and Navajo common law, as well as judicial qualification standards that require, among other things, an extensive knowledge of Navajo culture and language, creates a system that for all its western elements is uniquely Navajo. And it works.

### **B. Development of the Appointment Method as a Fundamental Element of the Navajo Judicial System**

A critical component of the modern Navajo judicial system is the method of judicial selection.<sup>56</sup> Navajo judges are selected through a unique appointive system that incorporates participation from all branches of the Navajo government and the public. First, candidate applications are reviewed by the Judiciary Committee, a committee housed within the Navajo Nation Council.<sup>57</sup> Selected candidates are then forwarded to the President of the Navajo Nation who is charged with choosing the final appointee.<sup>58</sup> The appointee is then subject to confirmation by the Navajo Nation Council.<sup>59</sup> Upon appointment, judges undergo a two-year probationary period, after which the Chief Justice and Judiciary Committee again independently review each judge's record and qualifications in order to make a recommendation to the President on whether the judge should receive permanent appointment.<sup>60</sup> Moreover, the Judiciary Committee holds a public hearing where anyone can comment or submit a written statement on whether a judge should receive permanent appointment.<sup>61</sup> The same process is utilized for District Court Judges, Associate Justices, and the Chief Justice.

The current Navajo judicial selection method is the product of years of study, experience and debate. When the Navajo Nation first assumed complete control of its judiciary in October 1958, it addressed point blank whether an appointment system is superior to judicial elections. The Nation answered in the affirmative, citing individual judges' experiences with political pressure and the resultant degradation of the judicial branch as a whole under the elective system that existed from September 1950 to October 1958 with the Navajo Court of Indian Offenses.<sup>62</sup> Meeting minutes reveal the nature of such pressure, explaining that when a judge is an elected official:

[S]ome precinct captain or election worker might be brought before the judge for some crime, and he puts it this way: "I have made it my work to see that you got elected; I helped to get you elected, and I was this and that, and elected you, and you must look upon me with favor. Cut that sentence in half, or draw it out and dismiss it, because of the favor I extended to you."<sup>63</sup>

<sup>56</sup> See 7 N.N.C. § 355.

<sup>57</sup> *Id.* § 355(A).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 355(B)–(E).

<sup>61</sup> See Judiciary Committee of the Navajo Nation Council Resolution No. JCMY-02-09 Exhibit A ¶ 7 (May 21, 2009) (hearing rules for public testimony regarding the performance of probationary judges).

<sup>62</sup> See, e.g., Meeting Minutes, Navajo Nation Council Meeting Minutes to Res. No. CO-69-58 (Oct. 14, 1958).

<sup>63</sup> *Id.* at 244.

Twenty years later, the Council returned to the issue, soliciting the assistance of Dr. Edgar Cahn and Jean Camper Cahn, Co-Deans of Antioch School of Law, in conducting an evaluation of the judiciary. The Cahns' study reaffirmed many points highlighted in the 1958 reform, primarily the interference with independent, reasoned judicial decision making under the prior system of electing Navajo judges.<sup>64</sup> Furthermore, the Cahn's found that "[l]ifetime 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. Elected judges are less likely to take that risk."<sup>65</sup>

The appointive system was again considered in the 1980s by a special task force, as well as by a joint study conducted by the Judiciary Committee and the Board of Election Supervisors. The 1981 Task Force was created to find the optimal way to structure the Navajo Nation court system to best serve the Navajo people.<sup>66</sup> The Task Force ultimately advocated for retaining the appointment system, and improving it to ensure that only qualified judges are appointed and politics are eradicated from the selection process.<sup>67</sup> The Joint Study arrived at the same conclusion, finding Navajo Nation courts best improved by laws that remove judges from politics, increase judicial qualification requirements, and provide for on-going training and evaluation.<sup>68</sup> The Joint Study specifically advised against switching to judge selection by popular election.<sup>69</sup>

The most recent evaluation of the Navajo judiciary, including judicial selection methods, occurred in 1990 with the Independent Judicial Review Task Force. This entity came into existence via a council resolution to evaluate and make recommendations on the competence and independence of the judicial system.<sup>70</sup> Its membership consisted of a prestigious and diverse group of legal experts, such as a federal district court judge, a state court judge, and the associate dean of the National Judicial College, who solicited input from an exhaustive range of sources, including the general public.<sup>71</sup>

The Task Force considered the issue of judicial selection at length and, similar to its predecessor, unequivocally supported the appointment system. This recommendation was founded in evidence demonstrating the current system's effectiveness in serving the Navajo people and facilitating judicial independence.<sup>72</sup> Conversely, the Task Force determined that elective systems produce judges who

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<sup>64</sup> See generally Excerpt from EDGAR & JEAN CAMPER CAHN, PRELIMINARY REPORT TO THE JUDICIAL COMMITTEE OF THE NAVAJO TRIBAL COUNCIL (undated) [hereinafter CAHN REPORT]. The Cahn Report was made part of the official record of Council proceedings. See Meeting Minutes, Navajo Nation Council Res. No. CMY-39-78, 478-500 (May 4, 1978).

<sup>65</sup> *Id.* at 9.

<sup>66</sup> See Navajo Nation Council Res. No. CO-52-88 (Oct. 28, 1988); see also *Should Navajo Nation Judges Be Elected?*, *supra* note 43, at 7.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> Memorandum from the Navajo Judiciary Committee on Election of Judges to the Joint Committee (Board of Election Supervisor and Judiciary Committee) 3 (Mar. 1, 1993) (on file with the author).

<sup>69</sup> See Navajo Nation Council Res. No. CS-28-83, 3 (Sept. 28, 1983).

<sup>70</sup> Navajo Nation Council Res. No. CO-52-88, *supra* note 66.

<sup>71</sup> *Should Navajo Nation Judges Be Elected?*, *supra* note 43, at 8, 11-12.

<sup>72</sup> Report and Recommendations Concerning the Judicial Branch of the Navajo Nation, Independent Judicial Review Task Force 31 (March 1990) (on file with the author).

are less qualified and more subject to political influence, factors which damage the public's perception of its judiciary.<sup>73</sup> As one task force member testified:

[T]o give judges short term subjective reelection is to make them subject to attempts to control their decisions and that's not a proper exercise of the political function. Those whose cases are going to be decided in your courts have to have confidence that the law and not the public popularity will decide the case, the outcome of that case, because ... part of what courts do...is protect rights of the minority. So they are not supposed to be responsive to the public will and the popular will.<sup>74</sup>

The Council accepted and approved the Task Force's recommendations through Navajo Nation Council Resolution No. CJY-45-90 (July 18, 1990).

As this survey of legislative history demonstrates, the Navajo people have repeatedly considered the merit of their appointive system, utilizing both external and internal evaluation tools to consistently conclude that a move to judicial elections would weaken the integrity of the Navajo courts.

#### IV. Impacts of the Judicial Elections Referendum Act on the Navajo Nation

Regardless of this long history, the Council once again opened the door to judicial elections in 2010 by enacting the Judicial Elections Referendum Act. However, numerous issues accompanied the referendum since its inception, such as the legality of the referendum itself and the lack of public education concerning its effects if voted into law. In September of 2010, the Navajo Nation Attorney General challenged the validity of the referendum, finding that it violated sections 165(B) and 1005(C)(10) and (11) of Title 2 of the Navajo Nation Code.<sup>75</sup> Specifically, the Attorney General found that because the referendum proposed new law and changes to existing law, it should have been submitted to the Navajo Nation's President for his signature or veto.<sup>76</sup> In response to the Attorney General's opinion, the former Chief Legislative Counsel to the Navajo Nation Council stated that the referendum did not itself add or amend Navajo law; rather, it referred the issue to the Navajo people.<sup>77</sup> Therefore, according to the Chief Legislative Counsel,

<sup>73</sup> *Id.* at 31–32.

<sup>74</sup> Meeting Minutes, Navajo Nation Council Res. No. CJY 45-90, 157 (July 18, 1990) (testimony of Laurance M. Hyde, Associate Dean of the National Judicial College) (on file with the author).

<sup>75</sup> See Press Release, Navajo Nation Office of the President & Vice-President, *Attorney General Louis Denetsosie Finds Legislation Invalid; Council Failed to Send to President to Sign, Veto* (Sept. 8, 2010), available at [http://www.navajonnsn.gov/News%20Releases/OPVP/Sep10/100910\\_Atorney%20General%20finds%20election%20of%20judges%20legislation%20invalid,%20for%20Sept.%208,%202010.pdf](http://www.navajonnsn.gov/News%20Releases/OPVP/Sep10/100910_Atorney%20General%20finds%20election%20of%20judges%20legislation%20invalid,%20for%20Sept.%208,%202010.pdf).

<sup>76</sup> See *id.*

<sup>77</sup> See Press Release, 21st Navajo Nation Council, *Chief Legislative Counsel Says Referendum to Elect Judges is Valid, Council Is Not Enacting Any Proposed Changes* (Sept. 10, 2010), available at [http://www.navajonnsn.gov/News%20Releases/NNCouncil/Sep10/100913\\_Chief%20Legislative\\_Counsel\\_says\\_referendum\\_to\\_elect\\_judges\\_is\\_valid.pdf](http://www.navajonnsn.gov/News%20Releases/NNCouncil/Sep10/100913_Chief%20Legislative_Counsel_says_referendum_to_elect_judges_is_valid.pdf) [hereinafter *Referendum to Elect Judges*]. It is worth noting that this opinion comes from former Chief Legislative Counsel Frank Seanez, who has since been disbarred by

the referendum took effect upon certification by the Speaker of the Navajo Nation Council and did not need to be submitted for presidential review.<sup>78</sup> The matter was eventually brought before the Window Rock District Court, which invalidated the referendum after finding that it failed to involve the President's veto review as required by Navajo statutory and common law.<sup>79</sup> As a result of this decision, the referendum language remained on the November 2010 ballot but votes were not counted.<sup>80</sup>

Another contentious issue was whether the Navajo people had been properly educated on the referendum's provisions and legal effects thereof. Although public education measures were intended to accompany the referendum prior to voting day, the Navajo Nation Council did not appropriate money for this purpose. The Navajo Board of Election Supervisors (NBOES) initially tabled a resolution approving the ballot language until sufficient funds for public education could be obtained, reflecting concerns that "the referendum the people are being asked to vote on is not simply a 'yes' or 'no' vote on whether the judges and justices should be elected. ... the [ballot] language leaves out information on further amendments that would be enacted with the passage of the referendum."<sup>81</sup> Nonetheless, NBOES later approved the ballot language—in spite of nonexistent public education funding—and both the Navajo Nation Council and NBOES contended that proper public education efforts had been made, citing public hearings on judicial elections from 2002.<sup>82</sup> Others contested whether those hearings did in fact address the general issue of judicial elections and further criticized the dearth of substantial public discussion and written education materials on this specific referendum.<sup>83</sup> In its recent opinion invalidating the referendum, the Window Rock District Court echoed these concerns over the lack of proper education efforts.<sup>84</sup>

Despite these procedural shortcomings, proponents of the referendum claim that it was a necessary step to protect the Navajo people's democratic rights. Specifically, the Navajo Nation Council found:

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the Navajo Nation Supreme Court for engaging in the unauthorized practice of law while on suspension. See also *In re Frank Seanez, Corrected Opinion*, No. SC-CV-58-10 (Nav. Sup. Ct. Jan. 25, 2011).

<sup>78</sup> See generally *Referendum to Elect Judges*, *supra* note 77.

<sup>79</sup> See Office of the Navajo Nation President, et al., v. Navajo Nation Council, et al., No. WR-CV-304-2010 (Window Rock Dist. Ct. Oct. 29, 2010) [hereinafter *NN President v. NN Council*].

<sup>80</sup> *Id.*; see also Press Release, 21st Navajo Nation Council, *Judicial Elections Referendum Act of 2010 Invalidated by Judge Allen Sloan of the Tuba City District Court* (Oct. 28, 2010), available at [http://www.navajo-nsn.gov/News%20Releases/OPVP/Nov10/101102\\_Judge%20Allen%20Sloan%20invalidates%20Judicial%20Referendum%20Act.%20for%20Oct.%2031.pdf](http://www.navajo-nsn.gov/News%20Releases/OPVP/Nov10/101102_Judge%20Allen%20Sloan%20invalidates%20Judicial%20Referendum%20Act.%20for%20Oct.%2031.pdf) [hereinafter *Invalidated by Judge Sloan*].

<sup>81</sup> Press Release, Judicial Branch, *Navajo Board of Election Supervisors Table Ballot Language* (Aug. 16, 2010).

<sup>82</sup> See Press Release, Office of the President & Vice-President, *OPVP Corrects Misinformation Presented During KTNN Forum by Navajo Board of Election Supervisors' Chairman, Vice Chairman 1* (Oct. 26, 2010), available at [http://www.navajo-nsn.gov/News%20Releases/OPVP/Oct10/102710\\_OPVP%20corrects%20NBOES%20misinformation%20from%20forum,%20for%20Oct.%2026.pdf](http://www.navajo-nsn.gov/News%20Releases/OPVP/Oct10/102710_OPVP%20corrects%20NBOES%20misinformation%20from%20forum,%20for%20Oct.%2026.pdf).

<sup>83</sup> See *id.* Regardless of whether they discussed the judicial elections as a general matter, these hearings occurred in 2002—prior to the passage of the Judicial Elections Referendum Act—and therefore could not have addressed the scope and intricacies of that specific piece of legislation.

<sup>84</sup> See *NN President v. NN Council*, *supra* note 79; see also *Invalidated by Judge Sloan*, *supra* note 80.

[T]o ensure the fundamental right and freedom of the Diné to participate in their democracy with an option to choose their leaders in the Navajo Nation courts, and to ensure the people's trust and confidence in the Navajo Nation Judiciary, the Dine should have an opportunity to decide through a referendum vote in the 2010 General Election whether Navajo Nation District Court Judges and Supreme Court justices should be elected positions ...<sup>85</sup>

Similarly, it has been argued that this referendum would strengthen the Navajo people's trust and confidence in the judiciary, ostensibly by providing the public with the power to decide whether or not to make judges elected officials.<sup>86</sup> Another reason, implicit in the overt rhetoric and underlying political struggle, is concern with judicial power and a correlating desire to hold judges accountable for their decisions. Critics of the referendum assert that the Council was retaliating against judges for deciding against the Council in cases involving the council reduction referendum and proposed legislation to prevent use of customary law in Navajo courts.<sup>87</sup> Critics also point to the Council Judiciary Committee's refusal to grant permanent appointment to two associate justices and the Council's proposed legislation to fire the Chief Justice as further evidence of retaliation against the courts.<sup>88</sup>

Political considerations aside, a thoughtful evaluation of the current judicial selection method and the potential consequences of switching to an elective system reveals that the concerns voiced by the referendum's proponents are largely unfounded and fail to outweigh the substantial problems created by the Judicial Elections Referendum Act.

#### A. Democracy and Judicial Accountability in the Present System

While the current system does not involve direct selection of judges by the public, the Navajo people are nevertheless afforded meaningful opportunities to participate in the appointment process; namely through written statements and oral testimony on a judge's qualifications during public hearings to decide whether a probationary judge should be recommended for permanent appointment.<sup>89</sup> Additionally, the appointment process heavily involves each branch of government.

<sup>85</sup> *Judicial Elections Referendum Act*, *supra* note 1 at 1-2.

<sup>86</sup> *Referendum to Elect Judges*, *supra* note 77.

<sup>87</sup> *See, e.g., Felicia Fonseca, Navajo Nation's Most Recent High Court Unraveling*, NATIVE AM. TIMES, Oct. 15, 2010.

<sup>88</sup> *See, e.g., id.; Marley Shebala, High Court in Council's Crosshairs: Both Associate Justices Out, Council Taking Aim at Chief Justice*, NAVAJO TIMES, Oct. 14, 2010.

<sup>89</sup> *See* Judiciary Committee of the Navajo Nation Council Resolution No. JCMY-02-09 Exhibit A ¶ 7 (May 21, 2009) (hearing rules for public testimony regarding the performance of probationary judges); *see also, e.g., Press Release, Navajo Nation Council, Judiciary Committee Encourages Public Comment on Work Performance of Probationary Judge William J. Platero, Reschedules Hearing to Sept. 30* (Sept. 21, 2010), available at [http://www.navajonnsn.gov/News%20Releases/NNCouncil/Sep10/100921\\_JC\\_encourages\\_public\\_comment\\_on\\_work\\_performance\\_of\\_probationary\\_District\\_Court\\_Judge\\_William\\_Platero.pdf](http://www.navajonnsn.gov/News%20Releases/NNCouncil/Sep10/100921_JC_encourages_public_comment_on_work_performance_of_probationary_District_Court_Judge_William_Platero.pdf) (soliciting public feedback on probationary judge).

No single government branch or official exercises unilateral discretion in judge selection; rather, the process begins with the Judiciary Committee, a committee of the Navajo Nation Council, then moves to the Executive, and finally ends with confirmation or non-confirmation back in the Navajo Nation Council.<sup>90</sup> Furthermore, the Judicial Branch, acting through the Chief Justice, has the opportunity to weigh in at the conclusion of a judge or justice's probationary period.<sup>91</sup> Accordingly, the Navajo appointment system manifestly incorporates each branch of government and the Navajo people in a meaningful way. Underlying this process is the fact that each selected judge must pass muster with a range of public officials who have been elected by the Navajo people to serve as their representatives, and represent their voice. This reality diminishes the argument for increasing democracy via direct election of judges.

Additionally, there exist numerous institutional checks against judicial overreaching or malfeasance. Upon initial appointment, judges and justices are placed on a 2-year probationary period during which they may be removed at any time.<sup>92</sup> At the conclusion of the probationary period, judges and justices are either permanently appointed or removed from office.<sup>93</sup> Permanent appointment requires a satisfactory review and recommendation by the Chief Justice and Judiciary Committee, then presidential appointment, and finally council confirmation.<sup>94</sup>

Individual accountability continues even after permanent appointment through a myriad of mechanisms. Permanent judges and justices are subject to yearly evaluations by the Chief Justice and members of the Navajo Nation Bar Association.<sup>95</sup> Additionally, the Judiciary Committee and the Chief Justice, respectively, may recommend the removal of judges and justices for malfeasance, neglect of duty, or mental or physical incapacity to perform judicial duties.<sup>96</sup> The Judiciary Committee and Chief Justice may also recommend removal where there is substantial evidence that a judge or justice willfully or negligently made significant misrepresentations or omissions regarding his or her qualifications on his or her application for a judicial position.<sup>97</sup> Lastly, another important check against the judiciary is the authority of the Navajo Nation Council to create or modify legislation in response to court decisions finding prior laws illegal or defective.

### B. Potential Consequences of Switching to an Elective System

A number of practical difficulties would likely arise upon a switch to judicial elections. First, there would be the danger of judicial disconnect and inefficient case management. Specifically, if judges become subject to elections every four years, it creates the risk that judges will be replaced in the midst of complex, on-going cases. New judges would need to familiarize themselves with

<sup>90</sup> See 7 N.N.C. § 355.

<sup>91</sup> See 7 N.N.C. § 355(C).

<sup>92</sup> 7 N.N.C. § 355(B), (D).

<sup>93</sup> 7 N.N.C. § 355(E).

<sup>94</sup> 7 N.N.C. § 355(C), (E).

<sup>95</sup> 7 N.N.C. § 357.

<sup>96</sup> 7 N.N.C. § 352(A).

<sup>97</sup> 7 N.N.C. § 352.



massive caseloads that often include cases which span years, involve convoluted issues of fact or law, or both. Such a daunting familiarization process would undoubtedly create case management problems and delay in case resolution.

Additionally, judges are currently required to successfully complete a training course through either the National Judicial College in Reno, Nevada, or the National Indian Justice Center in Petaluma, California. This requirement creates a stable, experienced and well-trained judiciary; therefore, elections and judicial turnover would result in the loss of experienced and knowledgeable judges. Furthermore, the time and expense involved in training new judges every four years would not be insignificant and would only challenge an already overburdened and underfunded judiciary.<sup>98</sup>

Another problem with switching to judicial elections would be ensuring that the Navajo people are provided with the knowledge and tools to effectively evaluate the qualifications of judicial candidates and performance of incumbents. Presently, there are limited media communications in Navajo country and, with the exception of the Navajo Nation-owned radio station KTNN, most do not convey information in the Navajo language, which is still the primary language for a majority of the Navajo population. Furthermore, the average Navajo voter arguably lacks proper understanding of which qualities make for a competent judge and therefore would either select a candidate on the basis of irrelevant factors, in effect creating a popularity contest, or would not participate in voting at all.<sup>99</sup> This concern over insufficient voter education is only buttressed by the discord surrounding public education for the Referendum itself.

Perhaps the most worrisome effect of judicial elections would be the increased politicization of the judiciary. Under Navajo law, the judicial branch is an integral part of the three-branch governmental structure, alongside the legislative branch (the Navajo Nation Council) and the executive branch (the Navajo President and Vice-President).<sup>100</sup> Inherent to this system is the separation of powers doctrine, which authorizes each branch to exercise its duties without interference from the other two branches.<sup>101</sup> This doctrine requires the existence of an independent judiciary that is able to make decisions based on unbiased applications of the law, which in turn provides an important check on other governmental branches.

Switching to an elective method of judicial selection raises serious threats to the maintenance of an independent judiciary. As part and parcel of an elective system, judges must maintain sufficient public approval in order to keep their jobs. Therefore, it is unavoidable that elected judges are cognizant of public sentiment

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<sup>98</sup> Training courses are not inexpensive: a single three-day course with the National Indian Justice Center costs \$485, while a four-day course at the National Judicial College costs more than \$1,200. These estimated costs do not include lodging, transportation, or other miscellaneous expenses. *See, e.g.*, Nat'l Indian Justice Ctr., *2011 Training Schedule*, <http://www.nijc.org/training.html> (last visited May 9, 2012); Nat'l Judicial College, *Courses: Court Management for Tribal Judges and Personnel*, <http://www.judges.org/courses/2012/tcm0412.html> (last visited May 9, 2012).

<sup>99</sup> *See, e.g.*, Gardner, *supra* note 19, at 43 (doubting the electorate's ability to meaningfully evaluate the qualifications of judicial candidates and performance of incumbents); ABA REPORT, *supra* note 23, at 27–28 (discussing how the public is often insufficiently familiar with judicial candidates, judicial qualification and the justice system, which frequently leads to low voter turnout for judicial races).

<sup>100</sup> *See Morgan v. Shirley*, No. SC-CV-02-10, slip op. at 19–20 (Navajo Sup. Ct. June 2, 2010) (describing the importance of Navajo Nation Council Resolution No. CD-68-89, which established the present three-branch form of government in the Navajo Nation).

<sup>101</sup> *See id.* at 20.

when making decisions and consequently feel influenced to decide in a way that garners public favor, as opposed to the way demanded by an objective application of the law. This influence can arise from the parties themselves, special interest groups, and the general public, particularly with cases concerning controversial, highly publicized issues. Such an influence is not academic conjecture, but rather the well-documented experience of judges from within and without Navajo country.<sup>102</sup> Furthermore, this problem is only exacerbated when considering the importance of campaign financing in securing judicial elections and the influence campaign contributors can have on recipient judges' decision making.<sup>103</sup>

A weakened judicial branch can also have devastating impacts on the Navajo Nation economy. On-reservation economic growth and stability are inextricably tied to the functioning and independence of the tribal court system.<sup>104</sup> Harvard professor Joseph Kalt, an expert in the field of native nation building, explains that:

[T]here is strong evidence that, in both Indian Country and around the world, a judiciary and dispute resolution system that is independent of legislatures and executives is critical for economic development, social recovery, and maintenance of political sovereignty. Investors—from the outside corporate investor to the new college graduate trying to decide whether to move “back home” and invest in a career building his or her nation—require security in the rules of the game. When the rule of law erodes into the rule of raw politics, investment in the community is discouraged, and encouraged to go to the multitude of other locales where it feels more secure.<sup>105</sup>

<sup>102</sup> See, e.g., *infra* Part III.B (describing the Navajo judiciary's negative experience with judicial elections). One prominent example of this problem is the recent ousting of three Iowa Supreme Court justices by the Iowa electorate after the court unanimously decided to legalize same-sex marriage. The impetus for their removal came largely from non-resident interest groups who expended large amounts of time and money in a concerted removal campaign. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench* N.Y. TIMES, Nov. 3, 2010.

<sup>103</sup> See, e.g., Brandenburg, *supra* note 10. While the suggested caps on Navajo judicial campaign expenditures somewhat ameliorate this problem, candidates may still raise up to \$165,967 if they are vying for a position on the Navajo Nation Supreme Court. See *Judicial Elections Referendum Act*, proposed 11 N.N.C. § 205 (capping Supreme Court justices at \$1.50 per registered voter and District Court judges at \$4.00 per registered voter within their election precinct); see also Bill Donovan, *Lovejoy First, Shelley Second*, NAVAJO TIMES, Aug. 5, 2010, available at <http://www.navajotimes.com/politics/election2010/080510primary.php> (estimating 110,645 registered voters in the Navajo Nation in 2010).

<sup>104</sup> See generally Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding* [hereinafter *Native Nation Courts*], essay in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE & DEVELOPMENT (ed. Miriam Jorgensen 2007); see also *id.* at 118 (highlighting the statistical correlation between court independence and tribal enterprise profitability and noting that “[a]n indispensable foundation [of successful business enterprises in Indian Country] is a capable, independent tribal judiciary that can uphold contracts, enforce stable business codes, settle disputes, and, in effect, protect business from politics”) (citation omitted).

<sup>105</sup> JOSEPH P. KALT, HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE ROLE OF TRIBAL CONSTITUTIONS IN NATIVE NATION BUILDING: A WHITE PAPER FOR INDIAN COUNTRY 20 (2005).

Navajo and non-Navajo investors and business owners want assurance that their business activities will be governed in a uniform, predictable, and unbiased fashion.<sup>106</sup> Even the perception of improper influence over Navajo courts or of the courts' incapacity to handle cases in a timely and efficient manner may discourage business development on the Navajo Nation.

A prime example of this dynamic has already unfolded within the Navajo Nation. In response to council initiatives to remove key Navajo officials from both the executive and judicial branches, Key Bank—a non-tribal lending institution—has threatened to restrict its previously strong business relationship with the Navajo Nation. Specifically, Key Bank officials sent Navajo leaders a letter expressing concern over reports of the potential termination of the Navajo Nation's Attorney General, Deputy Attorney General, Chief Justice and two Associate Justices of the Navajo Nation Supreme Court.<sup>107</sup> The following excerpt from the Key Bank letter emphasized this concern:

The independence and separation of the legislative, executive, and judicial branches of the Navajo Nation's government were critical in Key [Bank]'s extension of a Full Faith and Credit loan to the Navajo Nation and Key [Bank]'s landmark agreement to have Navajo Law govern the transaction and have disputes heard in the courts of the Nation. ... The exercise of influence by a separate branch of the Nation's government on its judiciary will have an adverse impact on the perception of the independence of the judicial branch, and its ability to evaluate any unforeseen disputes solely on the merits of the relevant facts and law and to enforce its rulings.<sup>108</sup>

Under Key Bank and Navajo Nation's loan agreement, the removal of these Navajo officials could be deemed "material adverse events," thereby allowing Key Bank to freeze the release of additional loan money and demand an accelerated repayment of money already loaned to the Navajo Nation.<sup>109</sup> These actions would seriously impair current development projects, such as the construction of new judicial and correction facilities in Crownpoint and Tuba City.<sup>110</sup>

Consequently, switching to judicial elections has the potential to do much more than re-structure the manner in which Navajo judges are selected. The implications are far-reaching and include increased administrative burdens, loss of institutional knowledge, an inadequately educated electorate, increased politicization and decreased independence of the judiciary, and destabilization of the Navajo economy.

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<sup>106</sup> See *Native Nation Courts*, *supra* note 104, at 118–19.

<sup>107</sup> Nov. 17, 2010 Letter from William M. Lettig, National Executive, Key Bank Native American Financial Services [hereinafter Lettig Letter]; see also Marley Shebala, *Council's Actions Damaging Tribe's Image, Controller Says*, NAVAJO TIMES, Dec. 9, 2010, available at <http://www.navajotimes.com/politics/2010/12/10/0120910image.php>.

<sup>108</sup> Lettig Letter, *supra* note 107.

<sup>109</sup> See Shebala, *supra* note 107.

<sup>110</sup> See *id.*

#### CONCLUSION

The Navajo Nation has persevered, and thrived, in spite of a long history of socio-political persecution and oppression. A critical element to the Nation's present and future wellbeing is the maintenance of its judiciary—in particular, the safeguarding of judicial independence through insulation of the courts from Navajo politics. It is imperative that Navajo citizens and non-Navajo governments, business entities, and individuals view the Navajo Nation court system as worthy of respect and confidence, rather than as a mere puppet of other political branches or leaders. Therefore, any movement to alter the structure of the judiciary must be evaluated with a critical eye.

The changes proposed by the Judicial Elections Referendum Act had the potential to adversely impact the efficacy and impartiality of the Navajo Nation court system. Direct election of judges and periodic retention elections insert judges into the political process and subject judges to improper influence by constituents. Furthermore, increased turnover of Navajo judges creates a loss of institutional knowledge, disrupts case management, and raises training costs. The large-scale impacts include an overall weakening of the Navajo Nation judicial branch and stunted on-reservation economic development. Although the Judicial Elections Referendum Act is dead, the historical reoccurrence of the judicial elections movement indicates that this issue will undoubtedly surface again in the future. Therefore, Navajo Nation leaders and the Navajo public should carefully consider the extensive ramifications before allowing internal politics and misguided agendas to undermine the integrity of their esteemed judicial system.