No. SC-CV-68-14

SUPREME COURT OF THE NAVAJO NATION

Dale Tsosie and Hank Whitethorne,
Petitioners,

v.

Navajo Board of Election Supervisors and
The Navajo Election Administration,
Respondents.

OPINION

Before, YAZZIE, H., Chief Justice, SHIRLEY, E., Associate Justice, and PLATERO, W.J., Associate Justice by Designation.

An original action for a writ of mandamus against the Navajo Board of Election Supervisors and the Navajo Election Administration concerning Cause Nos. OHA-EC-005-14 and OHA-EC-007-14, Chief Hearing Officer Richie Nez, presiding.

David R. Jordan, Gallup, New Mexico, for Petitioner Dale Tsosie; Justin Jones, Farmington, New Mexico, for Petitioner Hank Whitethorne; Michael P. Upshaw, Scottsdale, Arizona, for Respondent Navajo Election Administration; Kellie A. Peterson and James Griffith, Flagstaff, Arizona, for Respondent Navajo Board of Election Supervisors; Steven C. Boos, Durango, Colorado, and Marianna Kahn, Window Rock, Navajo Nation, for the Navajo Nation Council; James Zion, Albuquerque, New Mexico, for Candidate Joe Shirley, Jr., Candidate Russell Begaye, Window Rock, Navajo Nation, pro se; Amicus Frankie Davis, Provo, Utah, pro se.

This case concerns the review of two legislative actions concerning the postponed 2014 presidential election. Under the Court's authority of judicial review, the resolutions calling for an entirely new primary election and the pardoning of removed elected officials are hereby invalidated.

I

On October 23, 2014, the Court entered a Permanent Writ of Mandamus against the Navajo Election Administration (NEA) and the Navajo Nation Board of Election Supervisors (Board) to compel performance of statutory responsibilities under the Navajo Election Code and

to postpone the general election. As to statutory duties, the writ enforced the disqualification of Christopher Clark Deschene (Deschene) by the Office of Hearings and Appeals (OHA) and ordered compliance with 11 N.N.C. § 44 requiring the candidate with the next highest votes (Russell Begaye) to automatically be placed on the general election ballot. On October 13, 2014, the Board voted not to remove Deschene's name from the ballot and to not postpone the election.[1] The NEA commenced absentee voting with an unaltered ballot. On October 27, 2014, petitioners filed for an order to show cause (OSC) proceeding. On October 31, 2014, at the conclusion of the OSC proceeding to enforce the permanent writ, the Court found Wallace Charley, Jonathan Tso, Norman L. Begay, Harry D. Brown, Sr., Michael Coan, Lenora Fulton, Frannie George, Ruth Watson and Tom M. White, Jr. in indirect civil contempt for their open defiance and removed them as Election Supervisors for failing to comply with the Court's October 23, 2014 order, and violating Navajo Nation Election laws.

In the latest turn of events, on December 30, 2014, the 22nd Navajo Nation Council enacted two pieces of legislation: Res. CD-80-14 and Res. CD-81-14. Resolution CD-80-14 essentially nullifies the 2014 primary election for the office of the Navajo President, calling for a new presidential run-off election that allows all candidates who ran in the primary election to run for office again, including disqualified Deschene. Resolution CD-81-14[2] purports to pardon all previously removed members of the Board, who were held in indirect civil contempt by order of this Court and reinstate all of them to their positions. The Council purports to reinstate these

[1] The Board appeared to regard itself as an independent political policy-making body free of judicial review. This Court previously said the Board is no longer a hearing body with the authority to independently interpret election laws. *Permanent Writ*, slip op. at 4-5 (October 23, 2014). The Board can no longer claim independence from judicial decisions or judicial review. *Id.* at 9.

[2] The Court takes judicial notice that Res. CD-81-14 was not considered by the Naabik'íyáti' Committee as required by law before it was hastily added to the Council's agenda as an emergency action on December 30, 2014. The legality was raised by the Speaker Pro Tem but was challenged by Delegate Leonard Tsosie and simply voted on for inclusion. The disregard of legal requirements undermines the legal sufficiency of Res. CD-81-14 from the onset.

members despite the installment of four new Board members who were elected in the 2014 primary election. In response, petitioners filed a *Motion for Contempt* on January 12, 2015, challenging the validity of the two resolutions. Furthermore, petitioners ask that this Court address financing of the special election and reaffirm an expedited deadline to hold the Navajo Nation Presidential Election.

At the urging of the NEA that "the validity of such legislation should be addressed so Wauneka and NEA can act accordingly[,]" *Respondent Wauneka and NEA Response to Motion for Contempt* (January 15, 2015), the Court allowed briefing on the validity of the resolutions. Briefs were received from the Navajo Election Administration, the Navajo Nation Council, the Navajo Department of Justice (NDOJ), Candidate Joe Shirley, Jr., Candidate Russell Begaye, and Amicus Frankie Davis. The brief from the Navajo Board of Election Supervisors was filed late and not accepted. The Board filed a *Motion for Reconsideration* and the Court allowed time for the parties to respond to the request. Only the Council filed a response that it had no objection to the acceptance of the brief. The Court hereby grants the reconsideration and accepts the brief. On February 11, 2015, this Court denied the Council and NDOJ's request for *baayat'i* with detailed reasons.

Aside from the procedural history, ever since the disqualification of Deschene in accordance with Navajo law, the presidential election has been unnecessarily fraught with delays and legislative maneuvering. The Council passed two legislative actions to amend the Navajo requirements for political offices, which were both vetoed by President Ben Shelly. Council Res. CO-47-14 (vetoed on October 28, 2014) and Res. CD-79-14 (vetoed on December 31, 2014). Furthermore, since this Court issued a Permanent Writ of Mandamus compelling election administrative officials and their political oversight, the Board, to comply with statutory law in

reprinting general election ballots, the Board by official action refused to comply with the OHA and this Court's order as to 11 N.N.C. § 44 and commenced absentee voting with the name of a disqualified candidate for public office in violation of Navajo election laws. *Board Meeting* of October 13, 2014. The Board's open defiance continued at the October 31, 2014 OSC proceeding with the statement that "the general election should be allowed to continue on November 4th with an 'unaltered ballot.'" *Permanent Writ* at 7. The Council has also refused to appropriate supplemental funds to pay for the presidential election. *See* Legislation No. 0249-14 (tabled on December 23, 2014; failed 6-11 on December 30, 2014). Most recently, the Council passed resolutions for a special run-off election, nullifying the primary election previously held on August 26, 2014, and reinstating removed Board members causing confusion as to the newly installed members.

Because of the self-interested actions of the Board and the Council to disregard Navajo laws, the presidential election is now more than three months late. The initial effort of this Court to have the election by January 31, 2015 has been further delayed by the Council's most recent grab for power. The date for the presidential election is still uncertain. According to the NEA, the printing company refused to print the election ballots because "[t]he Navajo Nation Finance Department refused to issue the NEA a purchase order for printing the election ballots without funds in the NEA account for such." *Respondent Wauneka's and NEA Response to Motion for Contempt* at 2 (January 16, 2015). The NEA funding requests have not been approved to date and twice the Council voted not to approve such funding requests during the special sessions convened on December 23, 2014 and December 29, 2014. *Id.* Prior to that, similar requests have been tabled without any action by the Council. *Id.*, at 3. On December 30, 2014, in the passage of Resolution CD-80-14, the Council purported to extend the election to June 2, 2015 (special run-

off election) and August 4, 2015 (special general election) with restricted funding. *Id.* While funds were allocated by Resolution CD-80-14, "that funding is restricted to the holding of the special run-off in June 2015 and special general election in August 2015." *Id.* at 3. On January 12, 2015, the Speaker Pro Temp allocated and released funds to the NEA from his own office fund account that enabled the NEA to order ballots and said ballots have been ordered with candidates Joe Shirley, Jr. and Russell Begaye on the ballots. *Id.* at 2. While funds from the Speaker's office have been provided for ballot printing, to date, there is no funding allocated to the NEA for payment to polling officials, building rentals and security and other related election costs for the election ordered by this Court. *Id.* at 3.

II

Navajo courts have authority to review legislative actions by the Navajo Nation Council. *Halona v. MacDonald*, 1 Nav. R. 189, 204-206 (Nav. Ct. App. 1978). Moreover, "there is a Navajo higher law in fundamental customs and traditions, as well as substantive rights found in the Treaty of 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989 and they set the boundaries for permissible action by the legislative, executive and judicial branches of the Navajo Nation." *Opinion, Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 16 (Nav. Sup. Ct. May 28, 2010). We held that "the Council may not insulate nor exclude any statute, policy or regulation from judicial review." *Id.* at 12. Our holdings make it clear that the Council must comply with these parameters if it wishes to address any of our organic laws, and its actions are subject to judicial review. *Opinion and Order on Reconsideration, Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 12 (Nav. Sup. Ct. July 16, 2010).

The Court considers the validity of Resolutions Nos. CD-80-14 and CD-81-14.

III

A. Resolution No. CD-80-14 (New Special Run-Off Election)

In articulating valued *Dine' Baahane* (oral narratives, generally within the knowledge of the Navajo People), Petitioners assert the Council is wrongfully attempting to throw out the entire 2014 primary election to allow Deschene, a candidate ruled to be disqualified by the OHA (and upheld by this Court), to run in a special runoff election, which essentially nullifies a final court judgment by subsequent legislation in violation of the principle of finality. *Brief of Petitioners* at 15-17 (January 23, 2015). The Council, on the other hand, asserts "citations to the record or to sources for many of the Brief's pronouncements are conspicuously absent." *Brief of the Navajo Nation Council* at 7 (January 30, 2015). The Council makes no other legal arguments as to its authority to selectively nullify an ongoing election.[3] The NEA and the NDOJ did not weigh in on validity of this legislative action.

As a preliminary matter, the Court rejects the Council's feeble attempt to conflate traditional law and Anglo American legal notions in concluding that there is no showing by Petitioners that these *Dine' Baahane* meet minimal judicial notice standards. The Council further asserts this puts the Court in the precarious position of having to decide the *Motion for Contempt* without any discernable standards. These stories are of general knowledge to those who have been taught traditional law. Furthermore, in this case, these oral narratives are being expressed by a *Hataałii*. Our elders and medicine people are the keepers and teachers of *Dine' bi beenahaz'áanii*, 2 N.N.C. § 203(G). This Court will not allow an attack by the Council on the credibility of a *Hataałii* without expressing its own interpretation of these stories, despite being presented with the opportunity to do so.

[3] The Council, however, footnotes several possible legal defenses to Petitioners' *Motion for Contempt,* yet chooses to not to assert them in favor of its request for *baayat'i. Brief of the Navajo Nation Council* at 8-9, fn 16-20. Therefore, the law of the case remains and the principle *ná bináheezláago bee t'áá łahjį́ ałgha' deet'ą́* would apply.

The Court hereby invalidates Resolution CD-80-14 in its entirety. Resolution CD-80-14 sets forth self-serving, unilateral statements in attempt to change the judgments of this Court, thereby infringing on the basic principle of separation of powers and the People's right to participate in the election process. More specifically, Resolution CD-80-14 states that,

> This Resolution does not amend Title 11 of the Navajo Nation Code, and other relevant laws, but shall be interpreted as a Resolution to provide for a special remedy to address the disenfranchisement of Navajo voters pursuant to the authority of the Navajo Nation Council over election matters.
>
> Res. CD-80-14, Section Two.

The Navajo Nation Council relies entirely on 2 N.N.C. § 102(A) as its authority in this matter.

The validity of 2 N.N.C. § 102 and its application by the Council to assert ultimate authority has been invalidated. In *Shirley v. Morgan*, the Court held,

> We have affirmed the power of the people to choose their government by singling out egalitarianism as the fundamental principle of Navajo participatory democracy and explaining its meaning as the ability of the People as a whole to determine the laws by which they will be governed. [*Opinion, Shirley v. Morgan*, No. SC-CV-02-10 (Nav. Sup. Ct. May 28, 2010)] p. 29-30. Most importantly, we have held that "the power over the structure of the Navajo government 'is ultimately in the hands of the People and [the Council] will look to the People to guide it.'" *In re Two Initiative Petitions Filed by President Joe Shirley. Jr .,* No. SC-CV-41-08, slip op. at 9 (Nav. Sup. Ct. July 18, 2008). We have elaborated that the power of the people to participate in their democracy and determine their form of government is a reserved, inherent and fundamental right expressed in Title I of our Diné Fundamental Law and the Navajo Bill of Rights. *In re Navajo Nation Election Administration's Determination of Insufficiency Regarding Two Initiative Petitions Filed by Shirley.* SC-CV-24-09, slip op. at 6, fn 2 (Nav. Sup. Ct. June 22, 2009). This "reserved" right cannot be denied or disparaged except by a vote of the People. *Id.* Additionally, CD-68-89 provided the statutory foundation for principles of checks and balances, separation of powers, accountability to the People, acknowledgement of the People as the source of Navajo Nation governmental authority, and

> service of the anti-corruption principle. The Council may not amend any portion of the Navajo Nation Code in a manner that disturbs and undermines the above stated principles. The Council may not change, modify, override or amend provisions in which the People have expressed a decision through vote or other trustworthy and publicly accepted mechanism, such as Chapter resolutions, recorded and written comments provided to the Government Reform Project, and signed petitions. In other words, once the people have spoken, their proposition becomes law unless the people have acquiesced otherwise with full information and understanding.
>
> *Opinion and Order on Reconsideration, Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 7-8 (Nav. Sup. Ct. July 16, 2010).

The Navajo Nation Council is reminded that the Court restricted the use of 2 N.N.C. § 102 as the Council's overarching authority in all matters. This reminder is necessary because apparently the Council has not been properly informed, has been ill advised, or chooses to ignore this law.

Moreover, powers granted to the Navajo Nation Council in election matters are likewise limited. Recognizing the need for some independence from political pressure, the Council delegated the power to administer elections to two administrative bodies, the NEA and the Board. Now the Council, through Resolution CD-80-14 is unilaterally and for political reasons undermining those delegations of authority. The Council cannot do this.

The election laws are organic and they are to be protected with a higher standard once they are enacted. If these laws are to be changed, it should be and must be done in consultation with the People. They cannot be unilaterally, single-handedly changed because to do so would change the basic rights of our people to choose their leaders. "People have ultimate authority to determine their governmental structure and amend all provisions that concern doctrines of separation of powers, checks and balances, accountability to the people, and service of the anti-corruption principle." *In the Matter of Frank Seanez*, No. SC-CV-58-10 slip op. at 3-4 citing

Shirley v. Morgan, No. SC.CV-02-10, slip op. at 25 (Nav. Sup. Ct. May 28, 2010) clarified in *Shirley v. Morgan, supra,* at 7 (Nav. Sup. Ct. July 16, 2010).

Here, the Navajo Nation Council attempts to evade consultation with the people using the "disenfranchisement of voters" as a pretext for its disagreement with this Court's application of the very laws the Council created. The obvious flaw in the Council's reasoning is that re-doing the 2014 Presidential and Vice-Presidential primary election in and of itself "disenfranchises" voters. In other words, the 52,047 votes cast in the August 26, 2014 primary election would be thrown out for no other reason than the will of the Council. While the Council may attempt to phrase its action as a "special remedy" to an "emergency" situation which is "entirely the result of a misstatement by Chris Deschene," *Brief of the Navajo Nation Council* at 12, fn 27, the laws of the Navajo Nation already provide a "remedy" in the event that a candidate is disqualified after a primary election was held.

That is 11 N.N.C. § 44, which states:

> In the event of death, resignation, or *disqualification* of *any candidate*, who by virtue of the primary election was placed on the general election ballot, except the candidates for the Office of the Vice-President of the Navajo Nation, the candidate who received the next highest votes in the primary election preceding the general election shall automatically be placed as the new candidate on the official ballot in the general election following said primary election.
>
> 11 N.N.C. § 44 (enacted October 19, 1990) (emphasis added).

The Court previously determined in no uncertain terms that the law clearly provides that Russell Begaye be placed on the 2014 general election ballot in the place of the disqualified candidate Christopher Deschene. *Permanent Writ* slip op. at 8-10 (October 23, 2014).

It is unfortunate that the Council now turns a blind eye to this rather basic application of the law. The Court cannot follow suit. Instead, it remains the Court's decision that the 2014 general election will proceed pursuant to the established laws of the Navajo Nation.

Council suggests that under principles of severability "the Court could clarify that Chris Deschene remains *ineligible* to be a candidate in the election, but uphold the validity of the remainder of the CD-80-14." *Id.*, at 9 (emphasis added). "Deschene remains disqualified as a matter of law" is the conclusion advocated by the Council. *Id.*, fn 19. We reject the Council's odd effort to save the Resolution. The crux of the case is the authority of the Council to enact a law nullifying an ongoing election. To now abandon the Council's effort to keep Deschene on the ballot under principles of severability does not address the Council's lack of authority to enact the Resolution in the first place.

B. Resolution No. CD-81-14 (Pardon)

Petitioners argue that absent a statutory delegation by the Navajo people to the Navajo Nation Council, the Council has no inherent nor statutory power to pardon any person, official, board, or body and, likewise, there is no concept of pardoning in Diné Culture and Beliefs that would support the Council's action. The Council, on the other hand, simply argues that "the best approach is to leave the current state of affairs in effect, with both the President and the Council having pardon and amnesty powers[,]" *Brief of the Navajo Nation Council* at 16 (January 30, 2014), referring to the pardoning of Peter MacDonald, Sr. as having established legislative precedent. The Council also asserts forgiveness and pardoning is a core Navajo value. Nevertheless, under principles of severability, the Council urges this Court to uphold the validity of Resolution CD-81-14 and invalidate Section Three that requires removed Board members to be reinstated.

In 1995, the Council passed Resolution CAP-30-95 pardoning Peter Mac Donald, Sr. of convictions in the Navajo Nation courts. That pardon was never challenged in this Court. With the present petition, Petitioners directly challenge the right of the Council to grant a pardon without an express authorization of such power from the Navajo people. *Brief of the Petitioners* at 18 (January 23, 2015). There being no statutory provision for the power to pardon in the Navajo Nation Code, we consider whether the Navajo Nation Council has any authority to pardon for offenses against the Navajo Nation.

Title II of the Navajo Nation Code, which "separated governmental powers into three separate and equal branches to decentralize power, limit the functions and powers of each branch, and provide for checks and balances among the branches[,]" *Tuba City District Court v. Sloan*, 8 Nav. R. 159 (Nav. Sup. Ct. 2001), does not bestow the power to pardon on any particular branch.[4] In asserting the power to pardon inherently lies with the Council as demonstrated by unopposed legislative precedent, the Council in its brief erroneously stated "then Attorney General of the Navajo Nation, Herb Yazzie did not question the pardon of the Council to use its amnesty power to grant a pardon to Peter MacDonald, Sr." *Brief of the Navajo Nation Council* at 16, fn 46. Actually, the Council's action was seriously questioned and the Council was verbally advised against the pardon without statutory authorization. Audio Recording of Legislative Session on April 20, 1995. Then Chief Legislative Counsel, the late Claudeen Bates Arthur, also cautioned against the pardon expressing additional concerns of interference with judicial proceedings. The Council was also advised by legal memorandum as follows:

[4] In other jurisdictions the power to pardon is expressly provided for by statute and most often in their respective Constitutions. The Navajo Nation does not have a Constitution by choice, therefore, any such delegation would have been included in Title II of the Navajo Nation Code.

> *The Navajo Nation Council is cautioned as to what power of governance it is being asked to exercise in this matter.* The Navajo Nation Government does not have an extensive history under the present three branch government with its concomitant separation of powers concept. If the Council exercises the power of pardon in this incident, it will be establishing precedence. From a practical standpoint, it is probably more appropriate to have the Council to first establish a statutory system in exercising the power of pardon before it acts.

Memorandum to the Navajo Nation Council from Attorney General Herb Yazzie regarding SAS No. 4057 (April 17, 1995) (emphasis added).[5] Because it had only been six years since the 1989 Title II Amendments establishing the three branch government, the Council was explicitly advised "to first establish a statutory system in exercising the power of pardon before it acts." *Id.* In expressing applicable Navajo fundamental law, the Attorney General explicitly

> advised not to consider or approve this resolution until it has heard from the victims of the criminal conduct for which this individual was convicted. This must necessarily involve all of these victims who were physically injured by these individuals who were convicted. The concept of *K'e*[6] is not fulfilled in situations such as these, if the perpetrator and the victim do not acknowledge one another and express compassion.
>
> *Id.*

Despite the Council being explicitly advised to first pass legislation to establish the power to pardon before it exercised such authority, the Council did not enact such legislation. We can only deduce from the non-action that the Council addressed the pardon of MacDonald as a one-time thing. Since the Navajo People themselves have not enacted such a law, no pardon power exists in Navajo government.

Proponents of Resolution CD-81-14 claim that the power to pardon is supported by 2 N.N.C. § 102(A) and can be found in 2 N.N.C. § 102(B), which states "all powers not delegated

---

[5] Then Council's Chief Legislative Counsel also advised that it would be improper to pass the resolution as presented because it did not follow the Council's own policy calling for compliance with traditional law. Res. CAP-45-94. The Chief Legislative Counsel also supported the Attorney General with regard to traditional law.

[6] The concept of *K'e* is not be confused with a pardon.

are reserved to the Navajo Nation Council." In *Shirley v. Morgan*, this Court stated that "2 N.N.C. § 102(B) relating to powers reserved to the Council is *invalid* under principles of egalitarianism, and the reserved, fundamental and inherent right of the People to make laws and determine their form of government as previously elucidated by this Court." *Opinion and Order on Reconsideration, Id.*, slip op. at 11 (Nav. Sup. Ct. July 16, 2010) (emphasis added) (referring to Council's failure to carry out the People's mandate in government reform (*Shirley v. Morgan*, No. SC-CV-02-10, slip. op at 27-28 [Nav. Sup. Ct. effective May 28, 2010]). All powers not delegated are reserved to the Navajo People, not the Navajo Nation Council. This "reserved" right cannot be denied or disparaged except by a vote of the People. *In re Navajo Nation Election Administration's Determination of Insufficiency Regarding Two Initiative Petitions Filed by Shirley.* SC-CV -24-09, slip op. at 5 (Nav. Sup. Ct. June 22, 2009). Additionally, the Council may not amend any portion of the Navajo Nation Code in a manner that disturbs and undermines the statutory foundation for principles of checks and balances, separation of powers, accountability to the People, acknowledgement of the People as the source of Navajo Nation governmental authority, and service of the anti-corruption principle. *Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 7-8 (Nav. Sup. Ct. July 16, 2010). If the Navajo Nation is to enact the power to pardon, particularly in the Navajo Nation Council, it must do so by referendum.[7]

As to Council's response to Petitioners argument that there is no concept of pardoning in Diné fundamental laws, the Council asserts that "forgiveness, or pardoning is a core Navajo value." *Brief of the Navajo Nation Council*, at 12. In Navajo, forgiveness is a core Navajo value, but, as a value, it is not equivalent or even interchangeable with the *bilagaana* word "pardon" to

[7] Careful thought must be taken by the Navajo People if they were to delegate by referendum the power to pardon to a government authority. In 2011, several members of the Council and a few other persons in public office were criminally charged in what is commonly referred to as the slush fund cases. The Nation continues to work through this difficult period. The People must seriously consider whether it will permit our politicians to police themselves to the ultimate extent of wiping the slate clean for each other.

further conclude that pardoning is a core Navajo value. We reject the use of semantics to elucidate Navajo concepts that can only be truly understood through *diné bizaad.* In the *bilagaana* world, the power to pardon derived from the English system[8] in which the king under royal prerogative had the right to pardon his subjects of penalties and punishments. Navajos do not share in that history. The closest Navajo word to the legal effect of a pardon is *tóó háhoo'a* or *t'óó ha'ałeet'á.* At the 1995 council session concerning the MacDonald pardon, the term *há bik'i adoodzhoh* was used. All of these words imply condoning the poor behavior. The conduct is not condoned, *haala ei t'áá bee hak'e'ashchíí łeh.*

There being no concept of pardoning in Navajo, there is Navajo fundamental law under the concept of *k'e* (as mentioned in the April 17, 1995 AG memorandum), *supra*, that paves the way to *hózhó* and even *nalyeeh*, so as to permit individuals who caused harm and discord to apologize, seek compassion and return to society. Navajo law expresses the importance of taking individual responsibility. The Council was therefore advised "the Navajo custom, values and concepts referred to also includes the necessity of the person asking for compassion to speak to the Navajo people and the Navajo Nation Council in order for the Navajo People through the Navajo Nation Council to act." *Memorandum to the Navajo Nation Council from Attorney General Herb Yazzie regarding SAS No. 1516* (April 14, 1995) (about a supporting request to President William J. Clinton to grant MacDonald and others a pardon of federal offenses). "If the objective is to restore harmony, then the individuals who caused harm and discord, must acknowledge their deeds and ask for compassion, that is the Navajo way." *Id.* The Diné way was accepted as policy by the Council in Resolution CAP-45-94 (May 2, 1994). Our way requires *ha'át'e' bee ádaanahojilneh* demanding the offender to be more self-critical than anyone else

[8] *Ex parte Grossman,* 267 U.S. 87, 110 (1925) (the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives to the colonies.).

around him. The offender has to own up to his/her actions in a manner more complete than expected, offer an apology as an extension of utmost respect to the people harmed, and slowly rebuild relationships to restore harmony so as to not lower social standards.

In this case, Council states it "takes no position as to whether the former Board members made the proper expression to the predecessor Council." *Brief of the Navajo Nation Council* at 16, fn 46. From the legislation itself, there is no record that a proper expression had ever been offered to the Council *and* the Navajo People for presenting a disqualified candidate to the public in the primary election, causing unnecessary expenses in litigation and considerable delays. As a matter of fact, certain Board members stated in public Board meetings that if given the opportunity, they would do it again. The concept of *k'e* was not fulfilled at the passage of the Resolution.

Under Navajo law, Navajo Nation courts have *inherent* power to punish someone who shows contempt for the judicial process, orders, or proceedings. *In re Contempt of Mann*, 5 Nav. R. 125, 126 (Nav. Sup. Ct. 1987). Contempt is either civil or criminal. *Id.* It is not the fact of punishment but rather its purpose that distinguishes between the two kinds of contempt. *Id.* at 127. Civil contempt proceedings are used to preserve and enforce the rights of litigants, and to compel obedience to the orders, writs, mandates and decrees of the court. *Id.* Criminal contempt proceedings are used to preserve the authority and vindicate the dignity of the court. *Id.* For criminal contempt, the punishment is punitive in nature and for the public's interest to vindicate the authority of the Court and to deter other like derelictions. For civil contempt, "the punishment is remedial [in nature] and for the benefit of the complainant, and a pardon cannot stop it." *Ex parte Grossman*, 267 U.S. 87 (1925). Even if the power to pardon was reserved to

the Council, which it was not, only criminal but not civil contempt would be subject to pardon. This being a purported attempt to pardon civil contempt, the resolution cannot stand.

Under the principle of separation of powers, "No branch of the Navajo Nation government can perform or infringe on the essential functions of another branch." *Tuba City Judicial Dist. v. Sloan*, 8 Nav. R. at 168. Of particular application here, is the following established law rendered six years after the MacDonald pardon in 2001:

> One of the basic tenets which derives from the doctrine of separation of powers is judicial independence. *The judiciary's function is to render judgments and to enforce its judgments and orders. No other branch or office of the government may legally interfere with the judiciary's duty to render judgments and enforce judgments in any way. Likewise, no other branch, office, or entity of the government may influence a court with the intent of altering its decision. Outcomes of cases that are before the courts must be free of any form of political influence.* Justice for the Navajo people means the courts' decisions must be free of influence or pressure from the Executive and Legislative Branches.
>
> *Sloan*, 8 Nav. R. at 168 (emphasis added).

Simply put, the Council cannot control or affect the result of litigation by legislation passed after causes of action have been submitted to the courts for judicial determination. The Council's reliance on decisions rendered in other jurisdictions is misplaced.

We hereby hold that Resolution No. CD-81-14 is invalid.

IV

The Court hereby invalidates Resolution Nos. CD-80-14 and CD-81-14. They are null and void and have no legal effect.

The Director of the Navajo Election Administration shall commence with the general election as soon as possible and without further delay. The Director shall immediately set the date for the general election between Joe Shirley, Jr. and Russell Begaye, order the ballots, commence absentee voting at the earliest possible date, and tentatively schedule the inauguration

of the new leadership. The Director of the Navajo Election Administration shall now request the Council to appropriate the necessary funds needed to conduct this election. This Court, on behalf of the Navajo People, requests the Speaker of the Council to convene a Special Session and the Council to quickly consider the funding request.

The judgment of indirect civil contempt against the former Navajo Board of Election Supervisors included in the Permanent Writ (October 31, 2014) stands. The four members sworn into office on January 13, 2015 are properly installed. There are currently six vacant positions to be filled on the Board. The election for these vacancies shall be held in conjunction with the presidential election as proposed by the NEA. *Response Brief of the Navajo Election Administration* at 7-8. In affirming our judgment of indirect civil contempt, the removed former Navajo Board of Election Supervisors are prohibited from running for the remaining vacant positions.

In the interests of finality, the Court denies all requests to hold the Council Delegates and election officials in contempt and/or removal from office. The parties are responsible for their own costs and fees.

Dated this 20th day of February, 2015.

Chief Justice

Associate Justice

Associate Justice