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CENTER FOR CONSTITUTIONAL LITIGATION

November 10, 2010

Commission on Appellate Court Appointments
1501 W. Washington
Suite 221
Phoenix, AZ 85007

RE: Application of Paul Bender for Independent Redistricting Commission

Dear Commission Members:

I write to raise concerns about the eligibility of Prof. Paul Bender, a candidate for the independent slot on the Independent Redistricting Commission.

Ariz. Const. Art. IV, part 2, § 1(3) sets forth eligibility criteria for the Commission. Among them, it restricts appointments to individuals who can apply the provisions of the section in an “honest, independent and impartial fashion” and uphold “the integrity of the redistricting process.” The section goes on to specifically exclude persons who have held “any public office” within the past three years, except for school board members and officials. The first provision pertains to conflicts and the appearance of conflicts that may undermine the integrity of the redistricting process, while the second is a comprehensive ban on having held public office in the preceding three years.

Prof. Bender states in his application and vitae that for longer than the past three years and continuing to the present, he serves as Chief Justice of the Supreme Court of the Fort McDowell Yavapai Nation and as Chief Judge of the Court of Appeals of the San Carlos Apache Tribe. He reports that he serves in those offices both for compensation and pro bono. I believe that these are public offices encompassed within the comprehensive ban, and thus disqualify Prof. Bender from serving on the Commission.

Moreover, serving as a public official for two tribes raises the fact or appearance of a conflict so as to undermine the integrity of the redistricting process. The interests of tribes often play an important role in redistricting processes, especially in Arizona. See, e.g., *Brown v. U.S.*, 486 F.2d 658 (8th Cir. 1973); *Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976 (D.S.D. 2004); *Goddard v. Babbitt*, 536 F. Supp. 538 (D. Ariz. 1982); *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1976). The presence on the Independent Redistricting Commission of a public

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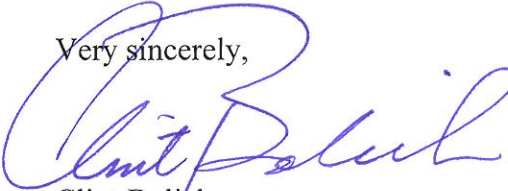
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official in the service of two tribes over a long duration gives rise to concerns of independence and impartiality that would call into question the integrity of the Commission's vitally important work.

I write this letter reluctantly because although I disagree with many of Prof. Bender's positions on legal issues, I respect him tremendously. However, Arizona's system was carefully designed to be truly independent to earn the confidence of the people of Arizona. Its qualifications are clear and exacting, and they deliberately exclude many highly qualified individuals in order to maintain the public trust. In this instance, I believe that Prof. Bender does not meet the requisite qualifications for membership on the Commission.

Thank you for your service and for considering these comments.

Very sincerely,



Clint Bolick
Director, Scharf-Norton Center
For Constitutional Litigation