

Justice Raymond D. Austin  
(Retired Associate Justice)

September 22, 2011

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Comments on Proposed Legislation No. 0388-11

Title: Amending 7 N.N.C. § 354(B) to Require that Future Navajo Nation Supreme Court Justices hold a Juris Doctor Degree and be State Licensed Attorneys in Good Standing

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I don't believe that having a Navajo Nation Supreme Court comprised solely of state-licensed attorneys ensures quality in the administration of justice on the Navajo Nation. The judges who decided Halona v. MacDonald (Navajo Supreme Court, 1978) were not law school graduates, but that decision is considered a classic among decisions of American Indian nation courts. The Halona case is sometimes referred to as the Navajo Marbury v. Madison, an important U.S. Supreme Court decision. Some characteristics that are more important to the administration of Navajo justice than having attorney judges are 1) judges are fair in making decisions, 2) judges are free of political influence from the political branches of Navajo government, and 3) the Navajo people respect their courts.

Question: Should all Navajo Nation Supreme Court justices be state-licensed attorneys?

1. Is there a pool of qualified Navajo applicants? Title 7, section 354(A)(1) requires an applicant for a judge position to be an enrolled member of the Navajo Nation, and section 354(A)(5) requires an applicant to speak the Navajo language and have certain Navajo cultural knowledge. Although there is an adequate pool of enrolled Navajos who are state-licensed attorneys, the question remains whether there are enough attorneys in the pool who speak the Navajo language and have the required cultural knowledge to satisfy the proposed amendments. If the Navajo Nation wants more state-licensed attorneys on the bench, the Navajo language requirement at section 354(A)(5) may have to be removed. Removal of the language requirement, however, creates an additional problem because lack of Navajo language speakers on the Supreme Court (and trial courts) would mean less availability of Navajo cultural knowledge to court decision-making. Speaking the Navajo language is crucial to understanding Navajo cultural concepts which provide the basis for Navajo common law (customary law). Most Navajos graduating from law schools today do not speak the Navajo language and are marginal in Navajo cultural knowledge.

Having all state-licensed attorneys on the Navajo Nation Supreme Court may look good to non-Indians but would it sit well with Navajos, the people who are served by the Navajo courts. The more tribal courts look like state or federal courts, the more they are accepted by non-Indians but that does not equate to unconditional acceptance by

members of a tribe. It is far more important to have judges who speak the Navajo language and are fluent in Navajo culture on the bench than non-Navajo speaking (and lack cultural knowledge) judges because it is the use of Navajo customary law which distinguishes the Navajo courts from state and federal courts.

2. Salary. In the past, state-licensed Navajo attorneys were not willing to apply for judge positions (both Supreme Court and trial courts) because of the low salary. The Council will have to make the salary of Navajo judges (including Navajo justices) comparable to state judges to generate enough interest among state-licensed Navajo attorneys to apply for judgeships.

3. Indian Civil Rights Act (ICRA) Amendments of 2010. The enhanced sentencing provisions of the ICRA requires a tribal judge who presides over a criminal proceeding to be licensed to practice law “by any jurisdiction in the United States.” 25 U.S.C. § 1302(c)(3). This provision can be interpreted to mean that a tribal court judge, who meets the “sufficient legal training” requirement to preside on criminal matters, 25 U.S.C. § 1302(c)(3)(A), can be licensed by a tribal bar association such as the Navajo Nation Bar Association. In other words, “any jurisdiction in the United States” can include Navajo jurisdiction.

Nonetheless, if “any jurisdiction” is interpreted to require state-licensed attorneys on the Navajo Nation Supreme Court, then the Navajo Nation can still fulfill that interpretation by giving the Chief Justice authority to appoint pro tempore justices for the Supreme Court to decide criminal cases where the defendant has been sentenced to more than a year of incarceration. As it is now, only a fraction of the criminal caseload before the Supreme Court fits the enhanced sentencing category of the ICRA. The state-licensed pro tempore justices can be Navajo members of the Navajo Nation Bar Association.

Conclusion: There should be a mixture of state-licensed attorneys and non-state licensed attorneys on the Navajo bench, including the Navajo Nation Supreme Court. Judges who are not attorneys, but can speak the Navajo language and know Navajo culture, are important to the development of Navajo common law and to the respect the Navajo people have for the Navajo courts. In spite of what outsiders think about Navajo justice, the Navajo courts have primary responsibility to the Navajo people, the Navajo Nation, Navajo statutory and common law, and Navajo Nation sovereignty.