STATEMENT
of
Robert B. Flint

Before the House Judiciary Committee on
HB200
An Act relating to the Alaska Judicial Council
and to judicial retention elections

April 10, 2013

My name is Robert Flint. I am an attorney who practiced law in Alaska for 47 years before retiring in 2010. I testify today in favor of HB200 which would remove the Judicial Council and one-sided public funding from judicial retention elections.

In 1955 the Alaska Constitutional Convention adopted the Missouri Plan for the selection of Alaska judges. The Missouri Plan shifts the power of selection from the public or publically elected officials, to a panel, a majority of whom are lawyers whom the public does not control.

The reason for the adoption of a method which reduces the public to a minority and gives power to an unelected majority is clear from reading the Convention proceedings. The Chairman of the Judiciary Committee, Delegate George McLaughlin, himself an elected judge, was determined to keep politics out of judicial selection. "What we are trying to prevent," he said, "are some of the travesties which have existed in some of the states where our judges are picked and plucked directly from the ward political office." There are few, if any, today who would disagree and wish to return to a partisan selection process, either specific or covert. Yet, I believe the result of the Missouri Plan was to dangerously overcompensate by largely removing the public from the control of their own government. We are a democracy, and the Missouri Plan is not democratic.

Nevertheless, the one check on the judiciary left to the public is the retention election. "The popular will should be exercised even in the control of the judiciary," McLaughlin said, "but the way to control it is to put the judge on a nonpartisan ballot."

An election involves a campaign. A campaign is over issues. The public takes sides on issues. That's what elections are for, including judicial retention elections. The Constitution, in creating the right of the people to campaign and vote for or against judges, grants no authority to the Judicial Council to intervene in that election. I have little doubt that, having done its best to eliminate political money and influence from the judicial selection and retention process, it would have wished it to return in the form of government funding and campaigning on one side of a retention election. You have a legal opinion with the obvious conclusion that such campaigning is clearly not authorized by the Constitution.

No statutory authorization existed before 1975 when a statute was enacted at the request of the Judicial Council allowing the publicizing of Council recommendations. Given the evident desire of the Council to take sides in retention elections, it is wise to return to original status where the Council did not intervene. Unlike the recent active interventions by the Council, its original status resulted in no known problems and certainly no mischief.

Judges who have been opposed in the past have not been left bare of support in an election, financial or otherwise. A "Friends of Judge Blank" group is easy to form and not difficult to raise money for considering that attorneys and other interest groups who support the direction that the judiciary has taken are not poor. To substitute a government funded and run campaign for or against an incumbent judge is one big actual step to making sure the popular will, as Delegate McLaughlin puts it, has lost even this small way to govern itself.

It should be noted that the Judicial Council reviews the performance of judges on legal ethics, courtesy and similar matters, but not on judicial philosophy and separation of powers issues. It is on the latter issues, not the former, that retention elections are contested. Even by its own Charter, the Judicial Council should stay out of influencing an election contested on such issues. The way to ensure that a future Judicial Council won't make the same mistake the current Council did is to enact this bill.

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