February 18, 2015

Re: Testimony on Senate Joint Resolution 3 — Alaska Judicial Council

Dear Senator Stoltze:

My name is John Harmon. I'm a retired attorney and current high school principal who lives in your district. My family originally moved to Alaska in the 1970's and resides in Palmer. I am proud to be an Alaska citizen and support a merit-based system for selecting judges. However, I have concerns about the potential dangers that can occur in an unchecked merit-based system; political dangers that I believe are ingeniously disguised as falsely promoting an 'independent judiciary'.

I am no stranger to the law or the judicial system. It was my privilege to spend nearly 20 years working in the law. I started my legal career as an attorney for one of the largest law firms in the country and spent most of my legal career working as an Associate General Counsel for a Fortune 500 company. I also had the opportunity to experience the working environment of three different court systems from an 'in-side' perspective, including a county municipal court, a state supreme court, and a federal court.

The current supporters of the Alaska Judicial Council (the "Council") quickly defend the Council as a nonpartisan body that acts with judicial accountability and integrity. I too commend the Council in many of its efforts. I also agree that there are many good judges on the bench. However, where we continue to disagree is the degree to which partisanship is involved in the current process. Organizations such as "Justice Not Politics Alaska" wish to convince Alaskans that the system is void of partisan politics. This is not true and is clearly demonstrated in the most recent retention election of Judge Estelle where the Council treated him differently from other judges who were guilty of similar oversights.

Last fall I wrote an opinion piece sharing my personal concerns about Alaska's system for selecting and retaining judges and recommended ideas to make the system better (attached). The article suggests the system is not perfect, but that with more education about the shortcomings of the system, paired with legislative intervention, Alaska can develop one of the best merit-based systems in the country. Special interest groups who benefit from the current system were quick to criticize my opinions without acknowledging the flaws in the system; and, in essence, praised the fact that Alaska has a system that encourages the appointment of activist judges who are better at understanding legislative intent than the legislature itself.

As the legislature looks for ways to improve the judicial system in Alaska, I recommend the legislature explore the potential dangers of a merit-based system that is void of ethics laws and subjectively selects a limited number of candidates without clear direction. The former Chief Justice of the Michigan Supreme Court wrote an insightful article in the *Harvard Journal of Law & Public Policy* exposing the weakness of a merit-based system dominated by special interests, such as attorneys (attached). Although I don't agree that elections are the answer, he clearly articulates my concerns about the inherent dangers of an uncontrolled merit-based system.

In closing, to improve Alaska's system, I believe the legislature should reign in the Council by enacting an ethics law for the Council, require that the Council send up a diverse group of at least five nominees to the governor for each judicial position, and eliminate the Council's role as a lobbying organization for (or against) judges during retention elections. If Alaskans wish for a truly independent judicial branch that desires justice, not politics, it must act now to reform the embattled Alaska Judicial Council.

Best Regards,

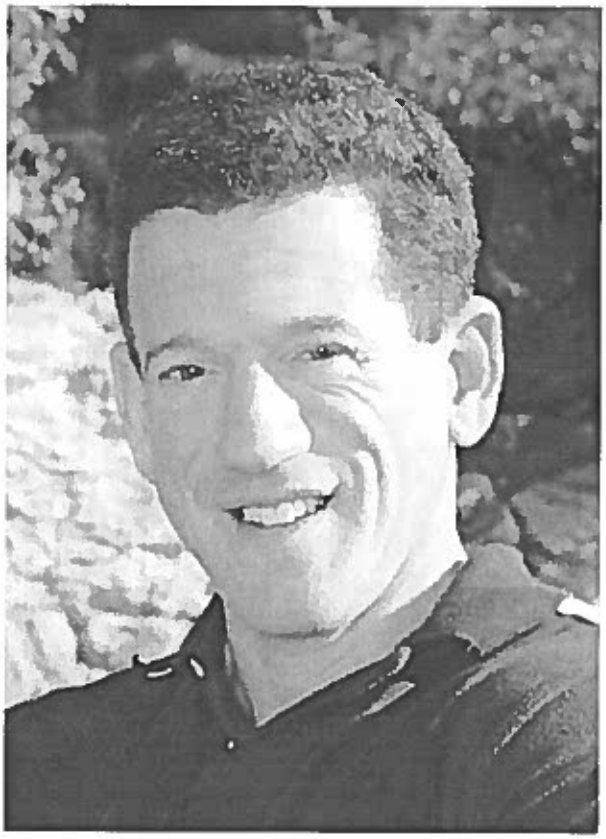
John T. Harmon

John T. Harmon

BA, MS Ed, JD

Judicial Council's conduct troubling

By John Harmon | Posted: Thursday, September 25, 2014 9:37 pm



Judicial Council's conduct troubling

"Absolute power corrupts absolutely."

Unfortunately, this famous quote came to my mind when I thought about Alaska's Judicial Council. The Alaska Constitution established the Council with the intent to conduct studies for improvement of the administration of justice in Alaska and to make recommendations to the Alaska Legislature and Supreme Court. However, over the past decades, we've seen the power of this body expand, as well as its involvement in partisan politics. The Council's role has expanded to be an advocate for or against judges, with no apparent ethics oversight. The Council's conduct is also troubling, as it appears to actively lobby for the nomination and retention of judges it likes and to lobby against judges it would like to replace. To me, based on its most recent actions, the Alaska Judicial Council does not reflect the values of most Alaskans and is no longer a credible body.

Why am I concerned? Let's look at what I believe are the Council's more recent acts of unbridled partisanship in furtherance of a political agenda. In 2010, the Council recommended that a judge who spent time in jail for a second DUI be retained. At the same time, the Council rallied against a judge who received acceptable to excellent scores based on concern of 'constant friction' with other judges.

The same year, the Council recommended for the retention of an activist Alaska Supreme Court justice, ignoring the public concern of many Alaskans. In this case, it took a community organization to advocate against the Alaska Judicial Council's recommendation. The Judicial Council's filings with the Alaska Public Office Commission show that the Judicial Council embarks on advertising sprees to support its recommendations and, in 2012, the Council appeared to use state funds to lobby for the retention of a judge who was under attack by conservative

groups. Alaska promotes its judicial system as 'merit' based, but the actions seen from the Council appear to be those of partisan politics.

So, what is the answer? The first step is to ensure this body is held accountable to the public by an ethics law that covers all members of the Judicial Council and the Council's staff. The second step is to re-evaluate the expanded role of this body – and, return the body to its initial Constitutional borders. There is a delicate balance of power between the three branches of government. However, due to the partisan politics, the Alaska Judicial Council has wandered far off the path envisioned for it by the framers of the Alaska Constitution.

During the last legislative session, Representative Wes Keller introduced a House bill that would curtail the Alaska Judicial Council from engaging in partisan politics and focus it back on the duties provided by the Alaska Constitution. The law would have required the Council to provide impartial and objective information to the public, but not advocate for or against a judge. Although the bill failed to pass the legislature last session, the issue needs to be addressed during the next legislative session — as it will help ensure that 'absolute power' will not corrupt "absolutely."

I am optimistic that the legislature can address the concerns that have plagued the Alaska Judicial Council over recent years. However, until there is change within the Council, Alaskans should do their own research on judicial candidates up for retention and take the recommendations of the Alaska Judicial Council for what they appear to be — elitist partisan opinions with the apparent goal of removing more conservative judges from the bench and retaining the more liberal judges.

John Harmon grew up in Palmer, graduated from Palmer High School in 1985, and is now an Anchorage educator and a former Fortune 500 corporate attorney.

MERIT SELECTION: CHOOSING JUDGES BASED ON THEIR POLITICS UNDER THE VEIL OF A DISARMING NAME

CLIFFORD W. TAYLOR*

Given the dispute in this country about the proper role of judges and how the people perceive what judges are doing, any sophisticated observer must conclude that judicial selection in the United States today is "political."[1] People, whether or not they are educated, sophisticated, or engaged in a legal career, are largely divided into two schools of thought about what judges ought to do. This dispute has at its heart one question: What is the proper scope of a judge's authority?

There is a traditional approach to judging that is advanced by conservatives and judges in the Scalia and Bork model. According to this traditional approach, judges are to interpret constitutions and statutes by attempting to discern the original understanding of the drafters or ratifiers and judges are then to follow that original understanding.[2] There is very little latitude

---

* Judge in Residence, Ave Maria School of Law; Chief Justice, Michigan Supreme Court, 2005–08; Justice, Michigan Supreme Court, 1997–2005. I would like to thank my intern, Bradley Fowler, for his invaluable assistance. Remarks originally delivered to the Twenty-Seventh Annual National Federalist Society Student Symposium, held at the University of Michigan Law School in Ann Arbor, Michigan.

1. *See, e.g.*, AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMM'N ON THE 21ST CENTURY JUDICIARY 13–18 (2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf (describing "recent developments that have politicized the American judiciary"); ZOGBY INT'L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4–5 (2007), *available at* http://www.ced.org/docs/report/report_2007judicial_survey.pdf ("[F]our in five executive-level respondents from the companies surveyed (79%) indicat[ed] a belief that campaign contributions have an impact on judges' decisions."); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1569 (2008) ("[F]our Supreme Court Justices [(Souter, Stevens, Ginsburg, and Breyer)] recently voiced concern about the effects of politicization on state courts.").

2. *See, e.g.*, Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 27–28 (2003); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

in this approach to judicial interpretation. The judge's role is important but constrained.[3]

The other approach, advanced by liberals, including almost the entire legal academy, supports a more aggressive role for judges. This model—the Douglas-Brennan-Breyer model—sees judges as possessing a greater capacity to make policy in politically contentious areas such as the death penalty, affirmative action, abortion, religion in the public square, sexual liberty, same-sex marriage, and so on through vehicles such as living constitutions, unenumerated rights, and the infamous emanations and penumbras.[4]

The point not to be missed, then, is that a split exists on the issue of the role of a judge. Moreover, few would doubt that this is an important public policy issue, as the titanic battles of the last twenty years in the United States Senate over the confirmation of federal judges demonstrate.[5] Those battles inescapably turn on the potential judge's position in this debate.[6]

Everyone wants judges who agree with them on the proper role of a judge. This reality cannot be wished away. Any effort to construct a judicial-selection system that acts as though this is not the current state of affairs ignores the proverbial elephant in the room. Yet the merit-selection approach—which asserts that all a state has to do is find the best-qualified lawyers and make them judges[7]—asks the states to operate as though there is no elephant. Indeed, that is the fatal flaw of a merit-selection approach.

---

3. *See* Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199, 201–02 (2005).

4. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 6 (2005); Michael Waldman, *Introduction for the Brennan Center for Justice and Thomas Jorde Living Constitution: A Symposium on the Legacy of Justice William J. Brennan, Jr.*, 95 CAL. L. REV. 2185, 2185–86 (2007); Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55–70 (Steven G. Calabresi ed., 2007); Travis A. Knobbe, Note, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265, 1269–70 (2008).

5. *See, e.g.*, David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1033 (2008) (book review).

6. *See, e.g.*, Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 434 (2008).

7. *See, e.g.*, Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 352–53 (2008).

I am not in favor of merit selection, even though it has the benefit of an appealing title. I am, with certain misgivings, an advocate for the popular election of judges, with the elections being full of robust debate as anticipated by the Supreme Court decision in *Republican Party of Minnesota v. White*.[8] There are certainly problems with the election of judges, as there are problems with all elections. These include voter ignorance and voter misdirection by clever partisans.[9] Although the electoral system has these problems, at least it acknowledges this reality. Rather than having elites make the decision while operating in a "good government" fog—which is also a largely political decision—judicial elections give the choice to ordinary, rank-and-file voters.

It is common in the modern age to condescend to regular folks, but this attitude should give us pause because the notion that citizens can make wise choices is unquestionably at the very heart of our system of government.[10] In considering this recent bias against elections, it is useful to recall the famous quip by William F. Buckley, Jr., who said he would rather entrust the government of the United States to the first 2000 people listed in the Boston telephone directory than to the faculty of Harvard University.[11] There is wisdom in that quip.

Edmund Burke, the eighteenth-century English statesman and political philosopher, made one of his many penetrating and arresting observations when he argued for something akin to popular government. Burke maintained that although individual Englishmen could make poor choices, as a whole and over time the English people would not.[12] Thus, popular government could work. It is a simple but nonetheless sophisticated notion. Indeed, American and English history proves the truth

---

8. 536 U.S. 765, 772, 781–82 (2002).

9. *See, e.g.*, Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 917–18 (2008); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 331 (2008); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1291–93 (2004).

10. *See* THE FEDERALIST NO. 71 (Alexander Hamilton).

11. *See* Lino A. Graglia, Grutter *and* Gratz*: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037, 2040 (2004).

12. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 185 (London, J. Dodsley 1790).

of that insight. Americans should be reluctant to assume incompetence in their fellow citizens to make judicial choices, especially because history has shown them competent to make other difficult electoral choices in other branches of government.

Moreover, upon closer examination, even merit-selection advocates would have to admit that their favored system in practice is also driven by politics. The difference is that in merit selection the politics are driven underground, whereas the politics of elections are public and obvious. Studies of the flagship merit-selection process in Missouri indicate that merit selection does not remove politics from the process but instead makes the politics harder to unearth by hiding it from public scrutiny and voter reaction.[13]

The classic study of the first twenty-five years of Missouri merit selection, *The Politics of the Bench and the Bar*, indicates that the attorneys who chose the lawyer members of the nominating commissions—merit selection is always lawyer-dominated—tended to split into two groups, the plaintiffs' bar and defense attorneys.[14] Their choices were founded in part on their clients' broad socioeconomic interests. No one should be surprised that lawyers would consider their clients' interests, or their own, in choosing those who choose judicial nominees. In other words, one type of politics—the politics of self-interest—replaced another.

Recently, when Justice O'Connor contended that judicial elections have become "political,"[15] one was tempted to respond, "You say that as if it is a bad thing." For those who advocate merit selection, "political" seems to be code for having the people involved in the selection of their judges. I am not persuaded that the reputation or quality of state courts suffers because the people have that choice. Moreover, there is little evidence that states with merit selection have better judicial decision-making than those that elect their judges.[16] How then

---

13. RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 352 (1969).

14. *See id.* at 21–22.

15. Sandra Day O'Connor & RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23–24 (2008).

16. *See* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN J.L. & PUB. POL'Y 386, 396–97 (2008).

can we justify taking the choice away from voters and placing it in the hands of a select few? The arguments presented so far are unconvincing.

What must be acknowledged, even if perhaps unwelcome, is that there is an increasing national perception that courts are out of control.[17] The appropriate response to that concern is not to take the people out of the selection process. Notice who is not calling for merit selection: it is not the business community, not labor unions, not farmers, teachers, retirees, or church pastors. Merit selection calls come only from either lawyers or advocacy groups who are opponents of judicial elections.[18] They are hardly the only people who care about justice; they simply want the whip hand in choosing who dispenses it. These people do not truly want to preserve judicial independence, which is not really threatened. They want to make sure that candidates who share their views in the great debate over the role of judges will have a selection system that strengthens their prospects of making it to the bench.

Merit selection is a solution that fails to acknowledge the real problem. Politics will always play a role in the selection of judges. Do we want it openly and robustly present in the public square or behind closed doors with phony proclamations that the process is looking for the best person using impartial measures? In sum, all selection systems for the foreseeable future will be political. We need to acknowledge that reality and evaluate methods of selection with that truth in mind. Public elections, though not flawless, appear better in that regard compared to the alternative merit-selection system.

---

17. *See, e.g.*, Leita Walker, *Protecting Judges from* White*'s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 382–83 (2007) ("[F]orty-six percent of [survey] respondents agreed that judges were 'arrogant, out-of-control and unaccountable.'").

18. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 309 (2008).