HJR

47

3/9/98

HOUSE JUDICIARY STANDING COMMITTEE

DATE: 3/9/98 ISSUE: move HJR 47

	YEA	NAY	PRESENT
Representative Porter	✓		
Representative James		✓	
Vice Chair Bunde (w/ strict no further support)	✓		
Representative Berkowitz		✓	
Representative Croft		✓	
Representative Rokeberg	✓		
Chairman Green (w/ strict no further support)	✓		
TOTALS:	4	3	

PASSED 4-3 FAILED

Interim:
Suite 320, 716 W. 4th Ave., Anchorage,
AK 99501

Phone: 907 258-8188
Fax: 907- 258-8727

Session:
Suite 416, State Capitol Bldg
Juneau, AK 99801

Phone: 907-465-3879
Fax 907-465-2069
Toll Free: 1-888-269-3879

Representative
John J. Cowdery

March 3, 1998

Honorable Joe Green, Chairman
House Judiciary Committee
118 State Capitol Building
Juneau, Alaska 99801

Dear Mr. Chairman and Members of the House Judiciary Committee:

I would appreciate your vote to move and pass HJR 47 from committee. The issues involved in this Resolution are apparent to all. In fact, if you will review my testimony, attached, you will see that I anticipated the primary arguments against the bill and effectively answered them.

All testimony from the public was in favor of HJR 47, except for two organized lawyer/judge groups and former Senator Vic Fischer who was voted out of office in favor of a more conservative senator. Those who spoke or left written statements supporting HJR 47 include former Lieutenant Governor and Constitutional Convention Delegate, Jack Coghill, former Anchorage Mayor Tom Fink, Attorneys Ken Jacobus, Rob Reiman and Wayne Anthony Ross, Mr. Jerald Des Jarlais, Ms. Sue Fischetti, Mr. Ross Dunfee and many others who came to the LIO's but departed before we could get to them.

HJR 47 is so popular with the public that I can fill many hours of hearings with favorable testimony. But it would be redundant because the issues are few and fundamental. I would like to recap them for your consideration.

First, I need to address the extraordinary testimony of Chief JusticeWarren Matthews. Chief Justice Matthews' personal participation was intended to

convey the considerable influence of his high office against HJR 47. He wanted to make a statement and he did it twice. He made his statement at the committee hearing and again in the Joint Session on the State of the Judiciary. His testimony lacked in both form and substance. I will elaborate.

As to form, Chief Justice Matthews had the opportunity to apprise himself in advance of the contents of the legislation, the sponsor statement and the supporting testimony which preceded his. Yet, he chose to not engage the arguments presented. Instead he offered parallel arguments that did not intersect with information already on the record.

As legislators, we publish our sponsor statements. We lay bare our reasoning and motivation in public testimony. We endure the slings and arrows of debate, sometimes contentious debate, to arrive at the truth and value of the premises contained in our legislation. We do this as a necessary part of the democratic process. We are not especially trained in the fine points of rhetoric and debate. But we are driven by our public responsibility to test ourselves, our thoughts and our principles in a crucible of diverse and public argument.

The judiciary, unlike the legislature, is especially trained in the art of rhetoric, argumentation and debate. There are few who can hold their own against the Judiciary's superior education, training and acumen. And, one must suppose, too, that members of the Supreme Court are the supreme representatives of their craft. Having regard for the safety of my own ego, I do not relish being pitted against someone who is so much better trained than I. Yet, legislative accountability demands that I answer all arguments on the issues that I adopt. The Chief Justice is not so obligated. He is free to pick and choose which issues to engage, which to ignore, which venues to participate in and which ones to ignore; all in all a royalist approach to public responsibility.

Chief Justice Matthews advanced no argument that was not, or could not be. advanced by other officials of the Bar Association, Judicial Council, his lobbyist or administrative staff. Why, then, was it necessary for him to take the extraordinary step to personally testify against HJR 47? If he brought no unique information to the debate, then his only purpose could have been to see what legislative mettle might wither under the influence of his high

office. It was a political stroke through and through! For all his argument against politicizing the process, it seems he is quite willing to be political on his own terms.

Further, as to error of form, whenever a member of the Judiciary pre-judges a legislative issue, the integrity of the judicial forum is compromised if the issue is thereafter litigated. It is simply bad judgement for the judiciary to directly advocate in the legislative process The Judicial Council's Executive Director testified. The Chief Justice is Chairman of the Judicial Council. There is a variety of ways for the Judiciary to get their arguments on record without compromising the public process they administer.

As to substance, Chief Justice Matthews presented three lines of argument against HJR 47. First, he contends that legislative confirmation of judges will politicize the selection process. As evidence, he offered the parallel of the federal system's judicial appointments. He says whenever the President and the U.S. Senate are controlled by different political parties there is always a controversial vote that goes down party lines. He pointed to the Clement Haynesworth, Robert Bork and Clarence Thomas nominations as examples. He says a judge who is championed by one political party and opposed by the other could be suspected of being partisan in cases with political issues at stake.

Two key flaws exist in his "politicization" argument. First, he assumes politics is necessarily bad. Second, he totally mischaracterizes the federal judicial confirmation system.

This argument, that legislative confirmation equates to politicization of the judicial selection process, is true. Black's Law Dictionary helps us define our terms:

> **"Political**. Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its

public policy; having to do with organization or action of individuals, parties, or interests that seek to control appointment or action of those who manage affairs of a state."

"**Politics:** The science of government; the art or practice of administering public affairs."

If "politicization" means exposing judicial candidates to the rough and tumble that sometimes results from a public process, then it is of course true. It is true and it is GOOD!

There is nothing inherently evil or untoward in politics. Politics, like justice, is as good as the people who administer it. Politics is simply a shorthand word for going about the public business. Surely, it is easier to be aloof from the public, as is the judiciary. They are the closest thing to royalty we have in our society.

However, the Chief Justice must have a different meaning in mind for the word 'politics'. His meaning has a degrading meaning, suggesting something sinister about the political process. Any suggestion that public involvement inherent in the legislative process is somehow debasing, is too royalist a view for our democratic society. It is further testimony that the Judiciary is out of touch with the people of Alaska. Public confirmation hearings would be an in-touch experience for judicial nominees.

Apparently, CJM only recognizes 'politics' as occurring in the legislative branch. He admits to no political considerations being played out in the executive branch during the appointment process. Does not the White House look for judicial candidates who are philosophically compatible and supportive of its major precepts? Aren't there special interest groups, politicians and people of influence who advocate to the White House for or against certain candidates? The point here is that politics does indeed play a prominent role in the executive branch's appointment process, and it largely excludes the public. Public involvement doesn't occur until an appointment becomes a nomination and is sent to the legislative branch, i.e., the U.S. Senate. Public involvement is the key difference between the executive and legislative branch's appointment processes. This is the step missing in Alaska's current system that HJR 47 will remedy.

The Judiciary and the Alaska Bar Association have their own, rich history in judiciary politics. A former Chief Justice tied up Bar Association funds. In retribution, the Bar Association actively worked to defeat the 1964 Supreme Court Justice Arend, who was up for retention election. (See Bar Rag..date)

Chief Justice Matthews advanced the Haynesworth, Bork and Thomas appointments as examples of politicization of the federal process that we should avoid at the state level. He selected these three appointments from a span of about 25 years. In fact, they are not representative of the federal appointment process. During the past 25 years, they are the nominations which commanded the most news coverage. After Clarence Thomas's appointment, another Justice was appointed to the U.S. Supreme Court. Most people can't remember his name because no controversy attended his confirmation. Haynesworth, Bork and Thomas are not typical of the federal process. There are about 800 federal judgeships. About 68, on average, are politically confirmed each year, routinely and without fanfare

Contrary to Chief Justice Matthews' argument about 'politicization,' politics smooths out the confirmation process. By no written rule, but only as a matter of political expediency, the Senate and the White House have an informal arrangement whereby the senior U.S. Senator from each state concurs in the federal judicial nominees from their respective states. This process is a political compromise that results in the overwhelming preponderance of federal nominees to be confirmed without controversy. Politics, it is shown, facilitates the appointment process.

Further analogizing the federal system with HJR 47, CJM said that when the executive and legislative branches are controlled by different parties, the vote always tends to go down party lines. Again, the votes on Haynesworth, Bork and Thomas are simply not indicative of the pattern of congressional approval. In fact, party line votes are rare in the appointment process, both at the federal and state level. One need only review the President's and the Governor's cabinet and other political appointments submitted for legislative confirmation. The overwhelming preponderance of the their appointees are confirmed without regard to party considerations. Legislative confirmation is not the bugaboo that CJM claims it is.

In answer to a query from a member of the committee, CJM said,

"I don't accept the premise that there is partisanship inherent in the appointment of Alaskan judges."

He offered that his own appointment by Governor Hammond was an example of a cross-party, therefore non-partisan, appointment. The Chief Justice presumes that party affiliation is the only basis for partisanship. In fact, we know a variety of bases for partisanship including conservative vs. liberal, urban vs. rural, development vs. no-growth, pro-governor vs. anti-governor, etc. CJM's appointment by Governor Hammond would have been much less likely if his client list included aggressive development interests instead of the Sierra Club. His main benefactor for the appointment was the Governor's Administrative Assistant who also was his former law partner. Some would say he had 'political' connections. CJM would have us believe that politics is something that happens in the legislature's back yard, never in the governor's or the judiciary's.

If appearance of partisanship is an issue that truly concerns CJM then perhaps he should resign and revisit the appointment process without political support. As one member of the Judiciary Committee said, "politics is inherent in the process." To deny this fact is extremely naive. To contend that it is base, is an insult to the body-politic in general and to the legislature in particular.

As for his concern that a judge could appear to be obligated to the legislative party that champions his confirmation, why is it not a concern to him that a judge could appear to be obligated to a governor who appoints him. Uncontested partisanship should not be confused with non-politicization.

The second line of argument employed by CJM against HJR 47, was that it could result in confirmation delays and bottleneck the courts' work flow. He noted that he was appointed in the month of May. If he could not take office until after legislative confirmation seven months later, it would prolong the vacancy and impede the court's productivity.

This argument is somewhat disingenuous because it ignores the adaptability of people and organizations. With legislative confirmation in place, most

resignations and retirements will simply schedule themselves around the legislative calendar. As a matter of administrative efficiency the Court System could require a one-year notice for judgeships that require confirmation. It can be argued that unforeseen vacancies due to accidents or death could still present a problem. The record shows that these occurrences are rare. And, inasmuch as the Judicial Council's process takes from three to six months, the risk of being out of sync with the legislature is statistically insignificant.

Also, although CJM expressed reluctance to use temporary fill-in appointments for the high court, the Constitution gives him the authority to do so. Alaska has a repository of retired judges who can perform this temporary function. The Chief Justice need only exercise the power given to him in the law.

Finally, Chief Justice Matthews third argument against HJR 47 was that it would "degrade" the "merit system" now in place. Nothing could be further from the truth. HJR 47 maintains the current system in total. The Judicial Council and the Bar Association will still go through the same polling and grading processes. They will still interact with the governor in the same way they do now. When all their work is done, and after the governor makes his decision. HJR 47 simply gives the legislature and public a role to play in the appointment process.

However, CJM warned that if the legislature rejected the top two nominees, working down the list to other candidates would result in inferior quality of judges. One can only note that this argument is built on an inflated opinion of the precision and objectivity of the selection process. In all probability, a different set of raters would yield a different set of results. Many attorneys refrain from submitting their applications for judgeships because they believe the selection panel as biased against them.

In summary, HJR 47 retains the existing merit selection system. It adds public participation via the legislative forum. It requires legislative approval of attorney members of the Judicial Council and judges for the Court of Appeals and the Supreme Court. Confirmation will result in appointees who are acceptable to a broader segment of the public than only the narrow constituency of the appointing authority. In effect, legislative confirmation

adds a "whole man" review of the nominee's suitability for appointment. This is a proposition that we can recommend to the General Election ballot for final determination by the voters of Alaska.

Yours truly,

Signed 44C

John J. Cowdery
Representative

TESTIMONY BY REPRESENTATIVE JOHN J. COWDERY
BEFORE
HOUSE JUDICIARY COMMITTEE, FEB. 19, 1998
HJR 47
Relating to Legislative Confirmation of Appointees to the Supreme Court, Court of Appeals and the Judicial Council

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HJR 47 provides for the legislative confirmation of judges appointed to Alaska's Supreme Court and the Court of Appeals. It also provides for legislative confirmation of all members of the Judicial Council.

47

HJR is crafted to apply to appointments to both the Supreme Court and the Court of Appeals. It does so by adding constitutional language referencing courts of record with appellate jurisdiction that are established by the legislature, and, requiring all such appointments to be presented for legislative confirmation.

An additional feature of the HJR 47 is that it also requires confirmation of all members of the Judicial Council. This council is also created in the constitution at Article 4, Section 8. It provides that three public members appointed by the governor shall be confirmed by the legislature. However, it also provides that three attorney members appointed by the Alaska Bar Association do not have to be confirmed. HJR 47 requires all members of the Council to be confirmed by the legislature.

The motivation for the constitutional amendment is to include the public in the process of appointing judges. The public has less input into the judicial branch of government than in either the executive or legislative branches. These other branches have elections and compulsory public input in their decision-making processes. Even the governor's cabinet appointees are subject to legislative confirmation. By providing for legislative confirmation of judges, the public will be able to participate in confirmation hearings. Judicial candidates will be able to present their philosophical approach to jurisprudence. The public will have a voice in their selection.

There are two popular arguments against legislative confirmation of judges. First, the argument that legislative confirmation politicizes the process of selecting judges is true, and it is a positive strength of HJR 47.

- The legislature is a partisan political body. Republican or Democrat labels are only short-hand for political values that voters identify with. Legislative screening is a screen of values. The public expects the governor, legislators, and all public officers including judges, to have a value system supportive of their own. If politics is the process by which potential judges values are revealed to the public, then politics is a good thing.

- But, there is politics in the present process too. The politics of the Alaska Bar Association is legendarily robust. Any large organization has politics in the election of its officers, the selection of its programs, the expenditure of its money, the causes it supports and opposes. Indeed, the Bar Association has an election ballot process. Elections are the epitome of politics. Additionally, the Bar Association's ballots are secret. Are Bar elections and politics somehow sacrosanct while legislative elections and politics are presumed inferior in some way?

  The only difference is that the Legislature admits to its politics. Its politics are a public affair. The Bar Association claims it is not political; it's non-politics are a closed affair.

  HJR 47 will allow the Bar Association and the Judicial Council to continue their current role in judicial selection. We are only adding a public element to the process.

The second popular argument that the Bar Association is better qualified to evaluate judical nominees than are lay people or the legislature.

- The argument that the Bar Association is best qualified to determine the qualifications of judges is false.

- The Bar Association may be in the best position to determine the "lawyering" capability of another lawyer. However, the public has a higher standard for judges than just lawyering ability. Call it the Whole Man Measure (man in the inclusive sense of humankind.)

- We want to know the moral fiber of judicial nominees. We don't attempt to prescribe it. We just want to know what he/she believes in. For example, does he believe in economic principles that support private property rights, gun control, publicly funded abortions?

- Would he be soft on repeat offenders or would he a 'hanging judge? Does he believe that judges should strictly interpret laws based on legislative intent, or that they should apply law the way they would prefer. There is more to selecting a judge than just his or her lawyering ability. The Bar Association is rightfully concerned about lawyering ability. A judge needs that. But the public needs the Whole Man Measure and only the Legislature can try to illumine that.

ARTICLE 04
THE JUDICIARY

Section 4.1 - JUDICIAL POWER AND JURISDICTION.

The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Section 4.2 - SUPREME COURT.

(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.
(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office.

Section 4.3 - SUPERIOR COURT.

The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

Section 4.4 - QUALIFICATIONS OF JUSTICES AND JUDGES.

Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

Section 4.5 - NOMINATION AND APPOINTMENT.

The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

Section 4.6 - APPROVAL OR REJECTION.

Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

Section 4.7 - VACANCY.

The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

Section 4.8 - JUDICIAL COUNCIL.

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

Section 4.9 - ADDITIONAL DUTIES.

The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

Section 4.10 - COMMISSION ON JUDICIAL CONDUCT.

The Commission on Judicial Conduct shall consist of nine ' 'bers, as follows: three persons who are justices or judges of state courts, elected by the justi .nd judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

Section 4.11 - RETIREMENT.

Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

Section 4.12 - IMPEACHMENT.

Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

Section 4.13 - COMPENSATION.

Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

Section 4.14 - RESTRICTIONS.

Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

Section 4.15 - RULE-MAKING POWER.

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Section 4.16 - COURT ADMINISTRATION.

The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

George M. Sullivan
1345 West 12th. Avenue ☐ Anchorage, Alaska 99501
(907) 272-2918 FAX: 276-1345

2-20-98

Rep. John Cowdery

John

Sorry I couldn't testify on H.J.R. 47 as I was tied up in a previous meeting. The Resolution makes a lot of sense to me. At present the Legislature confirms other of the Governors Appointments including his Cabinet and other State Appointed Boards.

Good Luck on getting it passed

Geo. Sullivan

February 19, 1998

Representative John Cowdery
State Capitol, Suite 416
Juneau, AK 99801

Dear Representative Cowdery:

I want to offer my support for HJR47 regarding legislative confirmation of judges. I feel it is very critical that the people of Alaska have a voice in this confirmation process in order to avoid a star tribunal atmosphere. Administrative law is one of the greatest threats to individual rights; and your legislation is a step in the right direction to protect those rights. Your insight and hard work is very much appreciated.

Sincerely,

Gus Andress

Gus Andress, P.E.

February 18, 1998

Honorable John Cowdery
416 State Capitol Bldg.
Juneau, Alaska 99801

Dear Representative Cowdery:

I've lived in Juneau for 33 years. I support HJR 47 because I believe the voters of Alaska should have the right to participate in legislative hearings on the confirmation of judges for the Supreme Court and the Appellate Court. I believe this would be good for all Alaskans and would urge the passage of this bill.

Thank you.

Yours truly,

Eugene B. Dau

Eugene Dau
523 Kennedy St.
PO Box 20995
Juneau, Alaska 99802

Paul A. L. Nelson Pro Se
Box 858
Haines, Alaska
99827

800-766-5406 Days
907-766-2392 Evenings
907-766-2460 Fax

January 26, 1998

The Honorable John Cowdery
Fax #465-2069
Juneau, Alaska
99801

RE: Your resolution changing the way Judges are chosen.
HJR 47.

Honorable Representative Cowdery,

Thank you for filing the resolution to change the way Judges are chosen. A change is needed.

My own experience with the Courts (1JU-85-1188DR) is a on going destruction of family with the Supreme Court ruling (No. S-7760, September 5, 1997 - page No. 8):

"Nelson raises constitutional first and fifth amendment violations..... We decline to review these issues."

I have not seen my daughter in over 10 (ten) years because of the Courts ruling that I must admit to a Unclassified felony (sexual abuse of a minor) in exchange for visitation or contact (phone or mail) with my daughter This is a divorce case. I did not abuse my then 2 1/2 (two and one half) year old daughter. I have no criminal record.

Please contact me if I can do anything to help you or you have any ideas how to end the violation of Civil Rights suffered by my Family.

Sincerely,

Paul A. L. Nelson

cc: Faxed to Jerry Ward, Jerry Mackie and Albert Kookesh.

HJR 47 Information Packet

I. Sponsor Statement

II. Alaska Constitutional Provisions

III. Confirmation System by State

IV. Bar Association Correspondence from other States

V. Articles on Judicial Activation

HJR 47

Relating to Legislative Confirmation of Appointees to the Supreme Court, Court of Appeals and the Judicial Council

SPONSOR STATEMENT

HJR 47 provides for the legislative confirmation of judges appointed to Alaska's Supreme Court and the Court of Appeals. It also provides for legislative confirmation of all members of the Judicial Council.

The Supreme Court was created in Alaska's constitution and therefore a constitutional amendment is necessary to change the process for selection of Supreme Court Justices.

Presently, the constitution says, at Article 4, Section 5:

> **"The governor shall fill any vacancy in an office of Supreme Court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."**

The Court of Appeals was established by statute, A.S. 22.07. It is a court of record with appellate jurisdiction in actions commenced in the superior court.

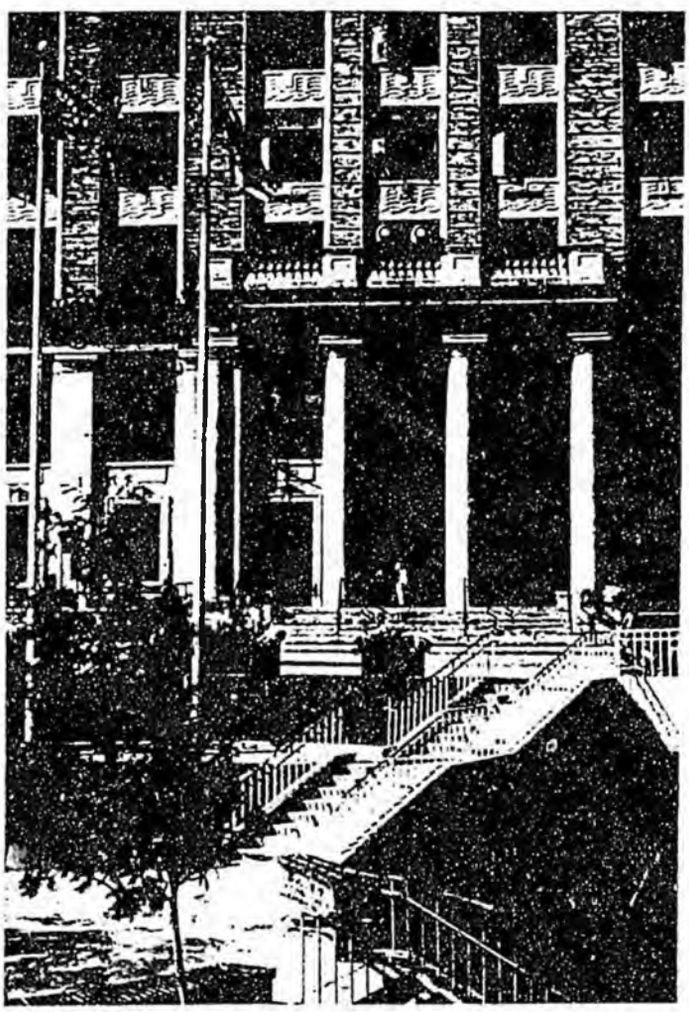
A.S. 22.07.70 says,

> **"The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of judge of the court of appeals within 45 days after receiving nomination from the judicial council, by appointing one of two or more persons nominated by the council for each actual or impending vacancy."**

HJR is crafted to apply to appointments to both the Supreme Court and the Court of Appeals. It does so by adding constitutional language referencing courts of record with appellate jurisdiction that are established by the legislature, and, requiring all such appointments to be presented for legislative confirmation.

An additional feature of the HJR 47 is that it also requires confirmation of all members of the Judicial Council. This council is also created in the constitution at Article 4, Section 8. It provides that three public members appointed by the governor shall be confirmed by the legislature. However, it also provides that three attorney members appointed by the Alaska Bar Association do not have to be confirmed. HJR 47 requires all members of the Council to be confirmed by the legislature.

The motivation for the constitutional amendment is to include the public in the process of appointing judges. The public has less input into the judicial branch of government than in either the executive or legislative branches. These other branches have elections and compulsory public input in their decision-making processes. Even the governor's cabinet appointees are subject to legislative confirmation. By providing for legislative confirmation of judges, the public will be able to participate in confirmation hearings. Judicial candidates will be able to present their philosophical approach to jurisprudence. The public will have a voice in their selection.



Alaska's Constitution

A CITIZEN'S GUIDE

Third Edition

Alaska Legislative Research Agency • Gordon S. Harrison

ARTICLE IV

THE JUDICIARY

Alaska's judiciary article, like the legislative and executive articles, is short, flexible and incorporates modern constitutional concepts. It creates a unified court system with centralized administration; it provides for merit selection of judges; it balances the need for judicial independence with the need for judicial accountability to the people; and it gives the legislature carte blanche to expand the court system to keep pace with a growing state.

Alaska's court system is efficient when compared to many others because it is unified. This means that all of the courts are part of a single state system: they are administered from one place, they all operate under the same rules and they are all financed by the state legislature. We recognize this type of organization in the federal courts. Indeed, Alaska's judicial experience until statehood in 1959 was with the federal court system. In many states the court system is fragmented into municipal courts, courts of special jurisdictions, county courts and state appellate courts, each with its own peculiar jurisdiction, its own rules and procedures, its own administration and its own source of finance. Also, in many states, legislative power to create new courts or modify the jurisdiction of the constitutional courts is restricted or ambiguous. Judicial reforms long sought in these older states are embodied in Alaska's constitution.

The independence of Alaska's courts is protected by various means. Most important is the method of selecting judges. Article IV requires that judges be appointed by the governor from a list of nominees submitted by an independent body, the judicial council, described in Section 8 below. Thus, judgeships are removed from the spoils of office. Also, judges are not elected; the majority of constitutional convention delegates had no confidence in the electoral process to produce qualified judges. Appointed judges do not need to worry about how their decisions will affect their immediate chances of re-election, nor do they need to finance expensive campaigns from donations by private interests (usually attorneys who appear before them).

Accountability of appointed judges to the people is provided by periodic "retention elections" in which judges stand before the electorate on their own records, without party labels. The question before the voters is simply whether a particular judge should remain in office. Retention elections for a judge occur at the first general election three years after the judge is appointed (except in the case of district court judges, where it is the first

general election one year after appointment) and at four, six, eight, and ten-year intervals thereafter, depending on the court level. A judge can be impeached by the legislature for "malfeasance or misfeasance" in the performance of duties. A judge can be removed from the bench through action of the Council on Judicial Conduct and the supreme court for mental or physical incapacitation or breach of ethics. However, a judge may not recalled by the voters (see Article XI, Section 8).

Article IV is flexible because it specifies only the rudimentary structure of the court system and gives the legislature wide latitude to expand and shape the system to meet the future needs of the state. The delegates created only two constitutional courts -- an appellate court (the supreme court), and a trial court of general jurisdiction (the superior court). Unlike the supreme court, which is a single body with all of the justices sitting together to hear cases, the superior court has many judges in each of the four judicial districts of the state who hear cases sitting alone. At the time a more elaborate (and more costly) structure was unnecessary. Yet the delegates anticipated the future by authorizing the legislature to expand the court system by adding judges and creating new courts.

These progressive features of Article IV, notably the unified court system and merit selection of judges, did not debut with the Alaska constitution: New Jersey pioneered the unified court system in its 1947 constitution, and Missouri the merit selection of judges in its 1946 constitution (this mechanism is generally referred to as the Missouri Plan). Yet Alaska's judiciary article is notable because it incorporated so many of the innovations hailed by constitutional reformers of the day. Many states have embraced these judiciary reforms in the years since Alaska's constitution was written.

Article IV has been amended five times, more than any other article, but the changes have not been fundamental. The basic features of the article have proven workable and remain unaltered. Today, Alaska's judiciary system is recognized nationally as one of the best in the United States.

Section 1. Judicial Power and Jurisdiction

> **The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.**

This section vests the judicial power of the state in the court system and creates the basic structure of that system. It consists of the superior court, which is a trial court, and the supreme court, which hears appeals from the trial court. This section also authorizes the legislature to create additional courts. The legislature has created the district court, which is another trial court that relieves the superior court of hearing lesser criminal and civil matters. It has also created the court of appeals, an intermediate appellate court that helps reduce the number of criminal appeals reaching the supreme court. Alaska's constitution gives to the legislature the task of prescribing the jurisdiction of the various courts, and in this respect it is not unusual, except perhaps in the clarity of its directive.

Importantly, this section also specifies that Alaska's court system is to be unified. Thus, any courts the legislature may create must be administered by the supreme court as part of a centralized state judicial system.

Judicial districts are commonly established in constitutions, but the delegates preferred to leave this matter to the legislature so districts could be easily modified from time to time with changing administrative needs of the judicial system. During territorial days the federal courts were organized in four judicial districts -- district one, southeast Alaska; district two, northwest Alaska; district three, southcentral Alaska; and district four, interior Alaska. The legislature has adopted these four districts for the organization of the state judicial system (see AS 22.10.010 for the boundaries of each district).

Article IV

Section 2. Supreme Court

> **(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.**
>
> **(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office**

Paragraph (a) of this section creates the "court of last resort" in the state judicial system. It sets the number of supreme court justices at three, but allows the legislature to increase that number "upon the request of the supreme court." This proviso (modeled on a similar proviso in the Puerto Rico constitution) was included to prevent the legislature from "packing" the supreme court with new justices as a means of changing a prevailing interpretation of the law. At the request of the court, the legislature expanded the number of justices to five in 1967 (16 other state supreme courts have five justices, 26 have seven justices, and 7 have nine justices).

Paragraph (b) was added by amendment in 1970. Notice that paragraph (a) is silent on how the chief justice is to be selected. Prior to the 1970 amendment, the governor designated the chief justice. The change was precipitated by bitter conflict during the late 1960s, which rent the court and the state bar association over the chief justice's exercise of his administrative prerogatives. The amendment was designed to prevent the accumulation of excessive power by one justice and to make the chief justice accountable to the other members of the court.

This section is, comparatively speaking, simple and terse. Absent are a number of provisions found in other constitutions pertaining to the supreme court, such as authorization to render advisory opinions at the request of the governor or legislature; a requirement for a supermajority vote to declare a legislative act unconstitutional; formal authorization to exercise the power of judicial review (i.e., to scrutinize the constitutionality of acts of the other branches of government); permission for "divisions" of the court (panels of fewer justices than the full bench) to hear and render decisions on

cases; assignment of original jurisdiction to the court in certain cases (reapportionment cases, for example); or a requirement for broad geographical representation on the court.

Section 3. Superior Court

The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

The superior court is the trial court with original jurisdiction over all civil and criminal matters. To facilitate the work of the court, particularly in small communities without a superior court judge, the legislature immediately after statehood established a set of lower trial courts called district magistrate courts. Deputy magistrates were authorized to assist district magistrates by serving primarily in outlying areas. In 1966, the magistrate courts became the district courts of the present day, and deputy district magistrates became today's magistrates. (The history of the district court and the role of magistrates is discussed in *Buckalew v. Holloway*, 604 P.2d 240, 1979.) Thus, there are now two trial courts, the superior court and the district court.

The superior court deals with serious criminal offenses (felonies) and civil cases involving claims for recovery of money or damages in excess of $50,000. It hears cases on appeal from the district court, and it handles family and juvenile matters. The district court hears minor criminal cases (misdemeanors), violations of municipal ordinances and civil cases involving sums less than $50,000. Magistrates are appointed by and serve at the pleasure of the presiding superior court judge in each district. They assist, primarily but not exclusively in outlying areas, with routine district court matters such as issuing marriage licenses, summons and search and arrest warrants; setting bail; and solemnizing marriages.

Each superior and district court judge, and each magistrate, is assigned to one of the four judicial districts. One superior court judge in each district is designated presiding judge to coordinate administrative matters. In 1992 there were 30 superior court judges, 17 district court judges and 52 magistrates.

Section 4. Qualifications of Justices and Judges

> **Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.**

The legislature has required that, in addition to meeting these minimum qualifications, supreme court justices and superior court judges must have been residents of the state for three years immediately preceding their appointment and engaged in the active practice of law for eight and five years respectively prior to their appointment (AS 22.05.060 and AS 22.10.090). Court of appeals and district court judges must meet the same minimum qualifications and must have been in the active practice of law for eight and three years respectively [AS 22.07.040 and AS 22.15.160(a)]. Magistrates, however, do not have be licensed lawyers and they need be residents of the state only six months prior to their appointment [AS 22.15.160(b)].

Section 5. Nomination and Appointment

> **The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.**

A variety of methods is used to select judges in the states (indeed, a variety of methods may be used to select judges of the different courts within the same state). Some judges are elected by the voters on either a partisan or nonpartisan basis; others are appointed, either by the legislature, the judiciary or, more commonly, the governor. The trend is toward appointment as a method of selection, coupled with the use of an impartial body that screens applicants on the basis of their qualifications. This body is referred to variously as the judicial council (as in Alaska), the judicial selection commission, the commission on judicial appointments and judicial nominating commission. In California, appellate court judges are appointed by the governor and confirmed by the commission on judicial appointment. Usually, however, a judicial selection commission evaluates candidates for office and submits several nominees to the governor who makes the final appointment. In some states (not Alaska) the legislature must confirm the governor's

appointments (in Connecticut, the legislature does the appointing from the list of nominees).

Alaska was one of the early states to adopt this "merit selection" method of appointment by the governor from a list of nominees submitted by an independent body which evaluates the qualification of applicants. When a judicial vacancy occurs, the Alaska Judicial Council receives applications from those interested in filling the position. It then evaluates the candidates on the basis of information derived from a poll of the bar association, letters of reference, background investigations, public hearings and interviews. The council must forward at least two names to the governor; frequently it sends more than two (on one occasion it sent nine names to the governor for a single vacancy).

The legislature has provided for judgeships in the two statutory courts -- the district court and court of appeals -- to be filled by this method too, although the constitution does not require it (AS 22.07.070 and AS 22.15.170). The legislature has also directed the judicial council to evaluate candidates for the state public defender's office (AS 18.85.050). Composition of the judicial council is specified in Section 8 of this article, and other duties are assigned in Section 9.

Section 6. Approval or Rejection

> **Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.**

The merit selection method of filling judgeships is usually coupled with the retention election procedure outlined here. Under this procedure, the voters may remove a judge they believe is unfit for office, but, because the judge's name appears on the ballot only at certain intervals, it does not allow them to sweep away a judge on a sudden whim or impulse, and it gives a new judge sufficient time to establish a record which can be fairly evaluated. Thus, the retention election is designed to balance the need for judicial independence with the need for public accountability.

Only rarely are judges rejected at the polls, and the vote in favor of retention is usually between 60 and 75 percent of the total. This may be evidence of the generally high caliber of Alaska's judges. It must be noted, however, that the form of the retention elections tends to encourage a yes vote: there is no opposition to the judge standing for election, and the judge is nonpartisan and has the advantage of already being in office.

Recognizing the difficulty of the voting public in critically evaluating a judge's performance, and mindful of the vulnerability of judges to last-minute smear campaigns, the legislature in 1975 directed the judicial council to evaluate judges standing for election and publish the results prior to the election. Between 1976 and 1990 there have been over one hundred retention elections. Several judges were deemed unqualified by the judicial council, but only two of these were rejected by the voters. (Prior to 1976, one judge was rejected by the voters, a supreme court justice in 1964.) The process used by the council to evaluate judges is described in the commentary on Section 9.

By statute, judges of the district court and court of appeals are also evaluated by the judicial council prior to their retention election. Only supreme court justices and judges of the court of appeals stand for retention on a statewide basis. Superior and district court judges stand in the judicial district they serve.

The date of a judge's "appointment" is the day the governor makes the appointment rather than the day the judge is installed in office (see *Division of Elections of State v. Johnstone*, 669 P.2d 537, 1983).

Section 7. Vacancy

> **The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.**

This section is intended to give a judge leaving office sufficient time to wind up judicial business in an orderly manner and to minimize transition time by allowing the process for appointing a successor to commence in advance of the vacancy.

Table 4.4
SELECTION AND RETENTION OF JUDGES

State or other jurisdiction	How selected and retained
Alabama	Appellate, circuit, district and probate judges elected on partisan ballots. Municipal court judges appointed by the governing body of the municipality (majority vote of its members).
Alaska	Supreme Court, court of appeals, superior court and district court judges appointed by governor from nominations submitted by Judicial Council. Supreme Court, court of appeals and superior court judges approved or rejected at first general election held more than three years after appointment. Reconfirmation every 10, eight and six years, respectively. District court judges approved or rejected at first general election held more than one year after appointment. Reconfirmation every four years. District court magistrates appointed by and serve at pleasure of presiding judge of superior court in each judicial district.
Arizona	Supreme Court justices and court of appeals judges appointed by governor from a list of not less than three nominees submitted by a nine-member Commission on Appellate Court Appointments. Superior court judges (in counties with population of at least 150,000) appointed by governor from a list of not less than three nominees submitted by a nine-member commission on trial court appointments. Judges initially hold office for term ending 60 days following next regular general election after expiration of two-year term. Judges who file declaration of intention to be retained in office run at next regular general election on non-partisan retention ballot. Superior court judges in counties having population less than 250,000 elected on non-partisan ballot; justices of the peace elected on partisan ballot, police judges and magistrates selected as provided by charter or ordinance; Tucson city magistrates appointed by mayor and council from nominees submitted by non-partisan Merit Selection Commission on magistrate appointments.
Arkansas	All elected on partisan ballot.
California	Supreme Court and courts of appeal judges appointed by governor, confirmed by Commission on Judicial Appointments. Judges run unopposed on non-partisan retention ballot at next general election after appointment. Superior court judges elected on non-partisan ballot or selected by method described above; judges elected to full term at next general election on non-partisan ballot. Municipal court and justice court judges initially appointed by governor and county board of supervisors, respectively, retain office by election on non-partisan ballot.
Colorado	Supreme Court and court of appeals judges appointed by governor from nominees submitted by Supreme Court Nominating Commission. Other judges appointed by governor from nominees submitted by Judicial District Nominating Commission. After initial appointive term of two years, judges run on record for retention. Municipal judges appointed by municipal governing body. Denver County judges appointed by mayor from list submitted by nominating commission; judges run on record for retention.
Connecticut	All nonelected judges appointed by legislature from nominations submitted by governor exclusively from candidates submitted by the Judicial Selection Commission. Judicial Review Council makes recommendations on nominations for reappointment. Probate judges elected on partisan ballots.
Delaware	All appointed by governor from list submitted by a judicial nominating commission (which is established by executive order) with consent of majority of Senate.
Florida	Supreme court and district courts of appeal judges appointed by governor from nominees submitted by appropriate judicial nominating commission. Judges run for retention at next general election preceding expiration of term. Circuit and county court judges elected on non-partisan ballots.
Georgia	Supreme Court, court of appeals and superior court judges elected on non-partisan ballots. Probate judges and justices of peace elected on partisan ballots. Other county and city court judges appointed.
Hawaii	Supreme Court and intermediate court of appeals justices and circuit court judges nominated by Judicial Selection Commission (on list of at least six names) and appointed by governor with consent of Senate. Judges reappointed to subsequent terms by the Judicial Selection Commission. District court judges nominated by Commission (on list of at least six names) and appointed by chief justice.
Idaho	Supreme Court and court of appeals justices and district court judges elected on non-partisan ballot. Magistrates appointed on non-partisan merit basis by District Magistrates Commission and run for retention in first general election next succeeding the 18-month period following initial appointment, thereafter, run every four years.
Illinois	Supreme Court, appellate court and circuit court judges nominated at primary elections or by petition and elected at general or judicial elections on partisan ballot. Judges run in uncontested retention elections for subsequent terms. Circuit court associate judges, once appointed by circuit judges for four-year terms, are being converted to full circuit judges.
Indiana	Supreme Court justices, court of appeals judges and tax court judges are appointed by governor from list of three nominees submitted by seven-member Judicial Nominating Commission. Judges serve until next general election after two years from appointment date; thereafter, run for retention on record. Circuit, superior and county judges in most counties run on partisan ballot. Marion County municipal judges appointed by governor from nominees submitted by county nominating commission.
Iowa	Supreme Court, court of appeals and district court judges appointed by governor from lists submitted by nominating commissions. Judges serve until initial one-year term until January 1 following next general election, then run on records for retention. Full-time judicial magistrates appointed by district judges in judicial election district from nominations submitted by county judicial magistrate appointing commission. Part-time magistrates appointed by county judicial magistrate appointing commission.
Kansas	Supreme Court and court of appeals judges appointed by governor from nominations submitted by Supreme Court Nominating Commission. Judges serve until second Monday in January following first general election after one year in office; thereafter run on record for retention every six (Supreme Court) and four (court of appeals) years. District judges in most judicial districts selected by non-partisan commission plan.
Kentucky	All judges elected on non-partisan ballot.
Louisiana	All justices and judges elected on non-partisan basis, but state has open primary which requires all candidates to appear on a single ballot.
Maine	All appointed by governor with confirmation of the senate, except probate judges who are elected on partisan ballot.

See footnotes at end of table.

SELECTION AND RETENTION OF JUDGES — Continued

State or other jurisdiction	*How selected and retained*
Maryland	Court of Appeals and Court of Special Appeals judges nominated by Judicial Nominating Commission, and appointed by governor with advice and consent of Senate. Judges run on record for retention after one year of service. Judges of circuit courts and Supreme Bench of Baltimore City nominated by Commission and appointed by governor. Judges run in first general election after year of service (may be challenged by other candidates). District court judges nominated by Commission and appointed by governor, subject to Senate confirmation.
Massachusetts	All nominated and appointed by governor with advice and consent of Governor's Council. Judicial Nominating Commission, established by executive order, submits names on non-partisan basis to governor.
Michigan	Nominated in party conventions, all are elected on non-partisan ballot, except remaining municipal judges who are selected in accordance with local procedures for selecting public officials.
Minnesota	All elected on non-partisan ballot.
Mississippi	All elected on partisan ballot, except municipal court judges who are appointed by governing authority of each municipality.
Missouri	Judges of Supreme Court, court of appeals and several circuit courts appointed initially by governor from nominations submitted by judicial selection commissions. Judges run for retention after one year in office. All other judges elected on partisan ballot.
Montana	All elected on non-partisan ballot. Judges unopposed in reelection effort, run for retention. Water court judges are appointed by chief justice; Workers' compensation judges are appointed by the governor.
Nebraska	All judges appointed initially by governor from nominees submitted by judicial nominating commissions. Judges run for retention on non-partisan ballot in general election following initial three-year term; subsequent terms are six years.
Nevada	All elected on non-partisan ballot.
New Hampshire	All appointed by governor and confirmed by majority vote of elected five-member executive council.
New Jersey	All appointed by governor with advice and consent of Senate, except judges of municipal courts serving a single municipality who are appointed by the governing body. Judges are reappointed by the governor (to age 70) with the advice and consent of Senate.
New Mexico	Supreme Court, Court of Appeals, district and metropolitan judges appointed by governor from list submitted by a judicial nominating commission. At next general election, after appointment, judges run for full terms in partisan, contested election. The elected judge runs for subsequent terms in uncontested retention elections.
New York	All elected on partisan ballot, except judges of Court of Appeals who are appointed by governor with advice and consent of Senate. Governor also appoints judges of court of claims and designates members of appellate division of supreme court. Mayor of New York City appoints judges of criminal and family courts in the city from list submitted by a judicial nominating commission, established by mayor's executive order.
North Carolina	All elected on partisan ballot, except special judges of superior court who are appointed by governor.
North Dakota	All elected on non-partisan ballot.
Ohio	All elected on non-partisan ballot, except court of claims judges who may be appointed by chief justice of Supreme Court from ranks of Supreme Court, court of appeals, court of common pleas or retired judges.
Oklahoma	Supreme Court justices and Court of Criminal Appeals judges appointed by governor from lists of three submitted by Judicial Nominating Commission. Judges run for retention on non-partisan ballot at first general election following completion of one year's service. Judges of court of appeals, and district and associate district judges elected on non-partisan ballot. Special judges appointed by district judges within judicial administrative districts. Municipal judges appointed by governing body of municipality.
Oregon	All judges elected on non-partisan ballot for six-year terms, except municipal judges who are generally appointed and serve as prescribed by city council.
Pennsylvania	All initially elected on partisan ballot and thereafter on non-partisan retention ballot, except magistrates (Pittsburgh) who are appointed by mayor.
Rhode Island	Supreme Court justices elected by legislature. Superior, district and family court judges appointed by governor with advice and consent of Senate. Probate and municipal court judges appointed by city or town councils.
South Carolina	Supreme Court, court of appeals, circuit court and family court judges elected by legislature from names submitted on a non-partisan basis by judiciary committee of legislature. Probate judges elected on partisan ballot. Magistrates appointed by governor with advice and consent of Senate. Municipal judges appointed by mayor and alderman of city.
South Dakota	Supreme Court justices appointed by governor from nominees submitted by Judicial Qualifications Commission. Justices run for retention at first general election after three years in office. Circuit court judges elected on non-partisan ballot. Magistrates appointed by presiding judge of judicial court with approval of Supreme Court.
Tennessee	Judges of intermediate appellate courts appointed initially by governor from list of three nominees submitted by Appellate Court Nominating Commission. Judges run for election to full term at biennial general election held more than 30 days after occurrence of vacancy. Supreme Court judges and all other judges elected on partisan ballot, except some municipal judges who are appointed by governing body of city.
Texas	All elected on partisan ballot (method of selection for municipal judges determined by city charter or local ordinance).
Utah	Supreme Court, district court, circuit court and juvenile court judges appointed by governor from list of at least three nominees submitted by Judicial Nominating Commission. Judges run unopposed for retention in general election following initial three-year term; thereafter run on record for retention every 10 (Supreme Court) and six (other courts of record) years.
Vermont	Supreme Court justices, superior court and district and family court judges nominated by Judicial Nominating Board and appointed by governor with advice and consent of Senate. Judges retained in office unless legislature votes for removal.

SELECTION AND RETENTION OF JUDGES — Continued

State or other jurisdiction	How selected and retained
Virginia	All full-time judges elected by majority vote of legislature.
Washington	All elected on non-partisan ballot (municipal judges are appointed by mayor).
West Virginia	Supreme Court of Appeals judges, circuit court judges and magistrates elected on partisan ballot.
Wisconsin	Supreme Court, court of appeals and circuit court judges elected on non-partisan ballot.
Wyoming	Supreme Court justices, district and county court judges appointed by governor from list of three nominees submitted by judicial nominating commission. Judges run for retention on non-partisan ballot at first general election occurring more than one year after appointment. Justices of the peace elected on non-partisan ballot. Municipal (police) judges appointed by mayor with consent of Council.
Dist. of Columbia	Court of appeals and superior court judges nominated by president of the United States from a list of persons recommended by District of Columbia Judicial Nominating Commission; appointed upon advice and consent of U.S. Senate.
American Samoa	Chief justice and associate justice(s) appointed by the U.S. Secretary of the Interior pursuant to presidential delegation of authority. Associate judges appointed by governor of American Samoa on recommendation of the chief justice, and subsequently confirmed by the Senate of American Samoa.
Guam	All appointed by governor with consent of legislature from list of nominees submitted by Judicial Council; thereafter, run on record for retention every seven years.
No. Mariana Islands	All appointed by governor with advice and consent of Senate.
Puerto Rico	All appointed by governor with advice and consent of Senate.
U.S. Virgin Islands	All appointed by governor with advice and consent of legislature.

Sources: Warrick, *Judicial Selection in the United States: A Compendium of Provisions*, 2nd Edition (Chicago: American Judicature Society), 1993, "Judicial Selection in the States Appellate and General Jurisdiction Courts," American Judicature Society, 1996; National Center for State Courts, *State Court Organization 1993, 1995*, and state constitutions and statutes.

Note: Unless otherwise specified, judges included in this table are in the state courts of last resort and intermediate appellate and general trial courts.

Maine State Bar Association
124 STATE STREET / POST OFFICE BOX 788 / AUGUSTA, MAINE 04332-0788
Telephone: 207-622-7523 Fax: 207-623-0083 E-mail: info@mainebar.org

February 11, 1998

Representative John J. Cowdery
State Capitol Building, Room 416
Juneau, AK 99801

Dear Rep. Cowdery:

I am writing in response to your request for information relating to the legislative confirmation process for Maine's judiciary. I hope that the following comments will be of use to you in your legislative efforts.

Maine has had legislative confirmation of its judiciary for many, many years, and in that time, I am not aware of any attempt, either through citizen-initiated petitions or otherwise, to change the system. We can only assume that the public supports the system as it now stands.

It is my view that the legislative confirmation of judges eliminates the inherent conflict of interest lawyers face if they wish to make political contributions or play a role in judicial campaign financing. As with any legislative confirmation process, however, this system may, from time to time, allow partisan politics to interfere with the appointment of qualified candidates.

At a recent panel discussion conducted at the 1998 Annual Meeting of the Maine State Bar Association, Maine's top Legislative, Judicial, and Executive representatives all agreed that the legislative confirmation process currently in place was without a doubt the best system for Maine at this time.

Please feel free to contact me if you have any further questions. I wish you the best of luck with your endeavor.

Sincerely,

Julie G. Rowe

Julie G. Rowe
Executive Director

JGR/cgc

CITIZENS CONFERENCE ON JUDICIAL SELECTION

◆ JULY 23, 1993 ◆

P. O. Box 656
Honolulu, HI 96809

Memorandum To: Participants of Citizens Conference on Judicial Selection

From: Lawrence S. Okinaga

Date: June 4, 1996

We are very pleased to make this final report to the Citizens Conference on Judicial Selection. It has been hard work on behalf of all of you but such work has resulted in near total success, efforts resulting in significant improvements in our merit selection process. It was through the efforts of all participants as well as our many legislators, judges, state administration officials, and volunteers, as well as of course our voting citizens in making this all happen. On behalf of the Co-Chairs of the Conference and its Planning Committee, I wish to express my appreciation, as well as congratulations to all.

There is little doubt that fundamental changes have now been imposed on our merit selection process. More public input and accountability, the realignments of how judges are selected, and the composition of Commissioners and their standards of conduct are all reality. The Governor, Chief Justice, legislature, the Commission, and, of course, the electorate, all came forward and responded favorably to our recommendations, and my sincere thanks to all for their commitment and decisions in favor of reform.

Substantially all of the substantive recommendations have been implemented, whether by ratification by voters through constitutional amendments, rule changes by the Judicial Selection Commission itself and by decisions made by the Governor and Chief Justice. Please note that with respect to the recommendations that have been implemented by

Constitutional amendments, these amendments may still be subject to appeal by the State. We understand that a decision on an appeal is pending.

As a result of the work of the Citizens Conference, the following highlights the significant achievements of the Citizens Conference.

- A more open judicial selection process. A key recommendation of the conference was that the list of nominees be made public. Both the Governor and the Chief Justice now disclose all of the nominees that have been forwarded by the Commission.

- All District Court appointees now must go through a confirmation process. Now every newly-selected judge must receive confirmation by the State Senate. District Court judgeships, which now comprise the majority of judgeships, are now subject to confirmation. Public input in the confirmation process is now reality.

- The number of nominees set forth in the Constitution to be sent to the appointing authority has been reduced. The Commission now has the option of sending from four to six nominees to the appointing authority, rather than "not less than six," which should enhance the quality of the applicant pool. The Commission no longer has the constitutional authority to submit more than six names to the appointing authorities.

- Appointment of commissioners by Constitutional amendment. Appointment of commissioners has now been changed. The Citizens Conference felt that the appointing authorities (the Governor and Chief Justice) should not have as many appointees (a total of five of the nine commissioners) inasmuch as they appoint the judges from the lists of names submitted by the Commission. The Speaker of the House and the President of the Senate are now each permitted to select two members of the Commission. One of the Commissioners must now be a neighbor islander.

- Commission ethics and communication with Commission. The Commission has adopted its code of conduct in its new Rule 5. The Commission has also strengthened its conflict of interest rule with a new section on conflict of interest which addresses the concerns of

FINAL REPORT
OF THE STATE OF HAWAII
CITIZENS CONFERENCE
ON JUDICIAL SELECTION

We are pleased to provide this final report to the Citizens Conference, which describes each recommendation and how the recommendation was implemented. As seen below, the recommendations of the Conference have substantially been adopted[1]. Congratulations to all for your outstanding work.

A. Recommendations Relating to the Commission.

1. Recommendation Relating to Commission Appointments: The Constitution should be amended to make some change in who appoints the members of the Judicial Selection Commission. The number of appointees named by the Governor and Chief Justice should be reduced.

Concern of the Conference: Concern was raised during discussions at the Conference that the appointing authorities (the Governor and the Chief Justice), in addition to their powers of appointment, also had the collective power to appoint the majority of the Commissioners and had the appearance that both had an inordinate amount of power over the eventual selection of our judges.

Implementation: Under the Constitutional amendment, the Governor's appointments to the Commission have been reduced from three to two and the Chief Justice's appointments from two to one. The President of the Senate and the Speaker of the House will now each select two members of the Commission, whereas in the past they had the power only to appoint one each. (See Exhibit A[1])

2. Recommendation Relating to Neighbor Island Commissioner: The Judicial Selection Commission should have a Neighbor Island member at all times.

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[1]Please note that with respect to the recommendations that have been implemented by Constitutional amendments, these amendments may still be subject to appeal by the State. A decision on an appeal is pending.

THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE VI

APPOINTMENT OF JUSTICES AND JUDGES

Section 3. The Governor [shall], with the consent of the senate, shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six, nominees for vacancy, presented to the governor by the judicial selection commission.

If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment. If the senate shall reject any appointment, the governor shall make another appointment from the list within ten days thereof. The same appointment and consent procedure shall be followed until a valid appointment has been made, or failing this, the commission shall make the appointment from the list, without senate consent.

The chief justice, with the consent of the senate, shall fill a vacancy in the district courts by appointing a person from a list of not less than six nominees for the vacancy presented by the judicial commission. If the chief justice fails to make the appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list [.] with the consent of the senate. The senate must hold a public hearing and vote on each appointment within thirty days of any appointment. If the senate fails to do so, the nomination shall be returned to the commission and the commission shall make the appointment from the list without senate consent. The chief justice shall appoint per diem district court judges as provided by law.

JUDICIAL SECTION COMMISSION

Section 4. There shall be a judicial selection commission that shall consist of nine members. The governor shall appoint two [three] members to the commission. No more than one of the two [three] members shall be a licensed attorney. The president of the senate and the speaker of the house of representatives shall each respectively appoint two members [one member] to the commission. The chief justice of the supreme court shall appoint one member [two members] to the commission. [No more than one of the two members shall be a licensed attorney.] Members in good standing of the bar of the State shall elect two of their number to the commission in an election conducted by the supreme court or its delegate. No more than four members of the commission shall be licensed attorneys. At all times, at least one

THE COMMISSION ON THE FUTURE OF MARYLAND COURTS

FINAL REPORT

December 15, 1996

RECOMMENDATION 8: To make jury service more representative of the community, interesting, and palatable:

I. Jury service should be limited to one trial/one day.

II. Jurors should be selected not only from the voter rolls but also from the list of licensed drivers maintained by the Motor Vehicle Administration.

III. Juries in misdemeanor cases should consist of six rather than twelve persons.

IV. In civil cases, with the agreement of the parties, alternate jurors still serving when the jury begins deliberations should be permitted to serve as regular jurors and take part in deliberating and rendering the verdict.

V. Jurors should ordinarily be allowed to take notes.

RECOMMENDATION 9: Each courthouse should be fully accessible to the public in conformance with the Americans with Disabilities Act. Foreign and sign language interpreters should be reasonably available. Victims and witnesses should be provided safe, non-public waiting rooms and child care facilities. The courts should use information and communication technology to inform litigants and other interested persons about court procedures, requirements, and schedules, and where assistance may be available.

Selection, Tenure, and Evaluation of Judges and Other Court Personnel

RECOMMENDATION 10: Subject to Recommendation 13, the method of selection and retention of the judges and clerks of the Court of Appeals and the Court of Special Appeals should be maintained.

RECOMMENDATION 11: The current method of selecting and retaining Circuit Court judges should be changed. With the exception of the length of the term, the system for selecting and retaining Circuit Court judges should be the same as that used for appellate judges. A Circuit Court judge should be appointed by the Governor from a list submitted by the appropriate trial court judicial nominating commission, subject to confirmation by the State Senate. At the next general election following one year from the creation of the vacancy filled by the appointment, the judge should stand on his or her record for a fourteen-year term in a retention election, the voters voting for or against retention. At the next general election following the expiration of that term, the judge should again stand on his or her record for an additional fourteen-year term in a similar retention election. This would replace the current system that subjects Circuit Court judges to contested primary and general elections.

RECOMMENDATION 12: Subject to Recommendation 13, the method of selection and retention of the judges and clerks of the District Court should be maintained.

RECOMMENDATION 13: To assist the public in the second round of retention elections for appellate and Circuit Court judges (i.e., following the expiration of their initial ten-year or fourteen-year terms), to

County), other equity matters, judicial review of decisions made by administrative agencies, and appeals from the District Court. In FY 1995, there were 262,000 filings in the Circuit Courts—148,000 civil cases, nearly 69,000 criminal cases, and almost 46,000 juvenile cases. There were, in addition, 6,500 appeals from the District Court and 4,100 "appeals" from administrative agencies.

Unlike the District Court, the Circuit Courts are not unified. There is no Chief Judge and, except for a Conference of Circuit Judges created by rule and having no operational authority, there is no central body to coordinate the operations of those courts. Administrative authority seems to be shared by a system of circuit administrative judges—one for each of the eight circuits—county administrative judges, and, to some imprecisely defined extent, by the judges themselves. There is a clerk for each of the 24 courts, elected by the voters in the county. Although the clerk is in substantial charge of the office, some administrative control over the operation of the office is exercised by the Administrative Office of the Courts. Also unlike the District Court, the Circuit Courts are funded in part by the State and in part by the local governments. The State pays the salaries of the judges and the operations of the clerk's office which, together, account for about 60 percent of the aggregate expenditures; the county pays the rest—jurors, secretaries, law clerks, bailiffs, librarians, professional staff, court reporters, and maintenance of the courthouse.

As of October 1996, there were 134 Circuit Court judgeships on the Circuit Courts. Circuit Court judges are appointed by the Governor from a list submitted by the appropriate trial court nominating commission. The initial appointment extends to the next general election following one year after creation of the vacancy filled by the appointment. The appointee then stands in the primary election against any legally qualified person who chooses to run. If the appointee is successful in either primary but does not win both, he or she may face a challenger in the general election as well. Whoever is elected at the general election then serves a 15-year term, at the end of which, he or she may, or may not, be reappointed by the Governor, from a list submitted by the nominating commission, for an additional term extending approximately one year to the next election. The judge may then, again, face challengers in the primary and general elections.

The Court of Special Appeals

The Court of Special Appeals is the State's intermediate appellate court. Created in 1967, it consists of thirteen judges and hears all civil and criminal appeals from the Circuit Courts except criminal cases in which the death penalty has been imposed, certain appeals emanating under the election laws, and appeals from a narrow class of savings and loan receivership orders, which go directly to the Court of Appeals. In all, the court handles about 2,100 appeals each year, of which over 1,600 require opinions. In addition, the court handles about 500 applications for leave to appeal in post conviction cases, violation of probation cases, and convictions based on guilty pleas.

The judges of the Court of Special Appeals are appointed by the Governor from lists submitted by the Appellate Judicial Nominating Commission, subject to confirmation by the State Senate. One judge comes from each of the seven appellate circuits created by the State Constitution; six judges may come from any part of the State. At the next general election following one year from the creation of the vacancy filled

by the appointment, the judge stands in a retention election as a representative of a designated appellate circuit or from the State at large, for a ten-year term. If there are no other candidates in the election, the voters vote for or against retention of the judge in office. At the conclusion of the ten-year term, the judge again faces the voters in another retention election for an additional ten-year term.

The Court of Appeals

The Court of Appeals is the State's highest court. An outgrowth of the colonial provincial court, it was first constitutionally created in 1776. It consists of seven judges selected from among the seven appellate circuits in the same manner described above for judges of the Court of Special Appeals.

The Court has both judicial and administrative/policy making functions. The Court has initial appellate jurisdiction, from judgments entered by the Circuit Courts, in only three areas—criminal cases in which the death penalty was imposed, certain cases arising under the election laws, and a narrow class of orders entered in savings and loan receivership actions. It is authorized by statute to answer specific questions regarding Maryland law certified to it by the federal courts. The great majority of its cases, however, come to it through its discretionary issuance of a writ of certiorari. Those are cases the court chooses, but is not required, to hear. Each year, the court receives between 600 and 800 petitions for certiorari, only about ten to fifteen percent of which are granted. The court attempts to limit its regular docket to about 160 cases per year.

The Court has a special initial jurisdiction to resolve legal challenges to the decennial reapportionment plan adopted by the General Assembly, and it has been required to exercise that jurisdiction with respect to the last two plans.

The administrative responsibilities of the court lie in two basic areas—the promulgation and monitoring of rules governing practice and procedure in the State courts, and supervision over judges, attorneys, and the practice of law. A great deal of the court's time and energy is devoted to those responsibilities. Upon recommendation of the Commission on Judicial Disabilities, the court determines what, if any, sanction should be imposed on judges found to have committed wrongdoing or otherwise should not remain in office because of a disability. Through its power to admit attorneys to practice in Maryland, its appointment and supervision of the Attorney Grievance Commission, and the adoption of both Rules of Professional Conduct and a disciplinary mechanism, the court exercises ultimate supervision over who may practice law in Maryland and how that practice may be conducted.

The Orphans' Courts

Although Maryland generally is regarded as having a four-tiered court system, there is a fifth component of it that dates back to 1777—the Orphans' Courts.

In 21 counties and Baltimore City there is an Orphans' Court consisting of three judges elected by the voters in the subdivision. The persons serving as judges need not be lawyers, and, except in Baltimore City, most of them are not lawyers. The positions are part-time; in most of the counties, the courts sit only a few days a week. In Montgomery and Harford counties, although the Orphans' Court has been retained in name, its functions have, in effect,

FINAL REPORT OF THE COMMISSION ON JUDICIAL REFORM

TO

THE GOVERNOR AND THE GENERAL ASSEMBLY OF MARYLAND

December 31, 1974

COMMISSIONERS

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Julien Hecht, Research Assistant
Thomas Kwaitkowski, Research Assistant

Please address all reactions to this Report to the Commission on Judicial Reform:

500 West Baltimore Street
Baltimore, Maryland 21201
Telephone: 301-528-7579

The Commission worked closely and effectively with the 1974 Special Committee on Judicial Selection and Tenure of the Maryland State Bar Association which drafted a bill which implements the District Court selection method. The following description of the bill is taken from that Committee's report in 79 Transactions of the Maryland State Bar Association, 36-37 (1974):

> The proposal calls for the appointment of judges of the Court of Appeals and any intermediate courts of appeal by the Governor subject to Senate Confirmation. Hearings, deliberations and debate on the confirmation of appointees to these courts must be public. Confirmation is made upon a majority vote of all members of the Senate. If a judge appointed by the Governor is rejected or fails to be confirmed by the Senate, then he ceases to hold office. These provisions are the same as those governing selection and confirmation of District Court judges.
>
> The term of each appellate judge is 15 years from his qualification for the office or until he attains the age of 70 years, if that occurs first. The Governor is required to reappoint a judge, subject to Senate confirmation, following the expiration of a term for which he has been both appointed and confirmed.
>
> A new section is proposed which would provide that members of the General Assembly would not be disqualified for judgeships created while they are members of the General Assembly solely for that reason. This is a permanent provision and would avoid the necessity of so providing each time a constitutional amendment of the Judiciary Article passes the General Assembly.
>
> Interim provisions propose that each appellate judge holding office on the effective date of the amendments for an elected term shall continue in office for the remainder of his elected term and then shall be appointed by the Governor subject to Senate confirmation; that each appellate judge then holding office pursuant to appointment following the termination of an elected term shall continue in office until the general election occurring next after the effective date of the amendments and then shall be reappointed by the Governor subject to confirmation by the Senate; and that each appellate judge

The Danger of More Activist Judges

The Washington Times, January 28, 1997
by JSMP Director Thomas L. Jipping

Last week U.S. District Judge Shira Scheindlin declared unconstitutional the new federal law prohibiting the sale of pornography on military bases. President Clinton nominated her, and the Senate unanimously approved her appointment. Two Clinton appointees to the U.S. Court of Appeals have recently ruled that judges requiring drunks to attend Alcoholics Anonymous amounts to an unconstitutional "establishment of religion." The Senate unanimously approved their appointment as well. Remember the infamous U.S. District Judge Harold Baer, the one who threw out 80 pounds of heroin and cocaine evidence? He said it was perfectly natural and not suspicious at all for people to sneak around in the wee hours of the morning and run away as soon as they saw the police. President Clinton nominated him and the Senate unanimously confirmed his appointment.

President Clinton has named an almost unbroken string of activist judges to the federal bench, adding to the many already there. The Senate has offered no resistance, holding only four roll call votes while approving 202 Clinton judges. The Senate approved the rest by unanimous consent, without any debate or a whisper of concern. All of these roll call votes occurred before the Republicans became the majority.

This rubber stamp suggests that it matters little who sits on the federal bench. It matters very much, however, and yesterday the largest coalition ever to organize in opposition to judicial activism said so. President Clinton and each Senator that day received a letter signed by 260 national and state grassroots organizations, representing millions of Americans, pledging to "promote judicial restraint and fight judicial activism with whatever tools and resources are legitimately at our disposal." Its members represent crime victims, property owners, women, law enforcement, small business, family advocates, minorities, religious denominations, senior citizens, and many others. At least half of these organizations have never previously been actively involved in this cause.

This cause is restoring the federal judiciary to its proper place. Two of the most unique things about America are that it is a system of self-government under a written Constitution. Those features require that the lawmakers be the people themselves or those who the people elect to represent them in the political branches and are accountable to them. When judges have unrestrained power to make up the meaning of our laws, however, they become the lawmakers. In doing so, they violate their own oath of office. Judges, like other public officials, take an oath to support and defend "the" Constitution of the United States. Not "a" Constitution, or "their" Constitution, or "some" Constitution, but the Constitution. They do not have the power to make up the law.

Yet make up the law they do. Activist judges feel free to impose their own preferences or priorities on the country, regardless of what the real lawmakers have done. Judge Thelton Henderson in California thought Proposition 209, which prohibits race and sex discrimination, was a bad idea so he said it violated the Constitution's 14th Amendment guarantee of equal protection. Most people probably thought banning discrimination was the essence, rather than the antithesis, of equal protection. The Supreme Court thought Amendment 2, a ballot measure that would prohibit quotas and special rights for homosexuals, was a bad idea. Justice Anthony Kennedy, appointed by a Republican president, said that it too violated the equal protection clause. He completely disregarded the justifications for Amendment 2 offered by the state of Colorado and said he knew the real motivation behind the measure was hatred of homosexuals. That's right, the Supreme Court said that the people of Colorado were not only bigots but had lied about it too and the Court was going to set the record straight.

This kind of judicial arrogance must stop if the American system of self-government and liberty is to survive. It will only happen if those tasked by the Constitution to select federal judges make it happen. President Clinton's political supporters need activist judges because their political agenda often fares poorly in the ordinary political process. President Clinton has heeded their demands and appointed activist judges. The Senate has so far virtually laid down and played dead.

This new coalition, however, has said enough is enough. It contains more organizations opposing the kind of judges President Clinton has appointed than there exist judges President Clinton has appointed. They are joined by talk show hosts whose programs are aired collectively on nearly 3000 radio stations. Every aspect of the Senate's record in judicial selection will be communicated to this coalition and reported on talk radio. The coalition will work to educate the American people, the media, and the Senate about what judicial activism is and how it threatens self-government and liberty.

The legal establishment and political left are as predictable as tomorrow's sunrise. They will say this threatens the independence of the judiciary. Yet the real threat to judicial independence comes from within the judiciary, not outside it. It comes from judges who act like politicians and philosopher kings, going beyond their proper role and attempting to rearrange society to their liking. The effort to expose judicial activism and bring the judiciary back to its proper place, then, will re-establish rather than threaten true judicial independence. The predictable Chicken Little cry that these efforts threaten judicial independence are nothing but a smokescreen; the left simply wants a judiciary free to run the country in peace.

The Senate must make both procedural and substantive changes as it pursues its constitutional duty of advice and consent. Procedural changes include taking roll call votes on judicial nominees. In fact, starting with the 105th Congress the coalition will consider unanimous consent approval of nominees as affirmative votes for nominees. The Senate should also separate consideration of judicial nominees from either the legislative process or its consideration of executive branch nominees. It should no longer trade judges--who are far more important than legislation because they have the power to define and, therefore, to make legislation--for legislative favors. It should no longer treat nominees to the judicial branch, who serve during good behavior and must only decide legal cases, with the same deference as nominees to the executive branch, who serve at the pleasure of the president and deal with policy issues.

Substantively, the Senate should use judicial philosophy as its basic criterion for evaluating nominees. As Senate Judiciary Committee Chairman Orrin Hatch put it in a speech to the Federalist Society on November 15, 1996, "a judicial activist...is not...qualified to sit on the federal bench." Every Senator should take the same pledge that Senator Hatch made in that speech: "Those nominees who are or will be judicial activists should not be nominated by the president or confirmed by the Senate, and I personally will do my best to see to it that they are not." They should not only take this pledge, they should keep it, for in Washington talk is not even cheap, it's free.

Nothing less than self-government and liberty are at stake in the choice between judicial activism and restraint. This unprecedented grassroots coalition today made a clear and unmistakable statement of its choice and what it expects. The unprecedented size of this coalition is only the beginning; efforts to bring more grassroots organizations and talk radio into this coalition will continue indefinitely. As it says in the Gospel of Matthew, he that hat ears to hear, let him hear.

If you have any questions or would like more information about judicial activism, please contact us at Judges@fcref.org.

Killing Democracy One Judge at a Time

The Washington Times, February 18, 1997
by JSMP Director Thomas L. Jipping

Judicial activism is both simple and complex. On the one hand, judicial activism is really not difficult to define or understand. In fact, Humpty Dumpty defined it when he said: "When I use a word it means what I choose it to mean--neither more nor less." Judicial activists believe they can make up the meaning of our laws, re-writing statutes and the Constitution to suit their own ends. On the other hand, judicial activism is complex in its devastating consequences. It emasculates democracy, self-government, and the rule of law. It subverts the very principles of republican government that the Constitution itself guarantees.

Senators take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic." Not some constitution, or any constitution, but *the* Constitution. Judicial activists, however, do not really believe there is such a thing as *the* Constitution, but only a constitution that they may fashion at a particular time. This renders judicial activists unqualified to sit on the federal bench and Senators, by virtue of their oath of office, have an obligation to oppose their appointment. The judicial selection process, therefore, should be structured to determine whether nominees will more likely than not exercise judicial activism or restraint on the bench.

On January 30, 1997, Senator Orrin Hatch, Judiciary Committee chairman, promised on the Senate floor to "do what it takes to weed out those nominees who pay lip service to judicial restraint, but then think they can do anything they want to once they don their robes." He said he was "serving notice that we do not intend to allow this rising tide of judicial activism to continue." He can start with some of those President Clinton has re-nominated after the Senate failed to approve them last year.

William Fletcher, for example, has been re-nominated to the U.S. Court of Appeals for the Ninth Circuit. He is a Berkeley law professor with no courtroom experience of any kind who advocates sweeping judicial power and rejects traditional limits on that power.

In a 1982 article, he wrote of a "discretionary constitution" that allows judges to declare legislatures "in default" and substitute "judicial discretion...for political discretion" to achieve desired policy results. His own examples showed how judges could use this approach to restructure the political process, operate school systems, micromanage prisons, and even run mental hospitals.

In a 1987 article, Fletcher rejected the most fundamental restriction on judges, the Constitution's own separation of powers. He wrote that a "workable arrangement" prompted by "political circumstances" should take precedence over the text of the Constitution.

In a 1988 article, Fletcher also rejected more practical restraints on judges. The Constitution limits judicial power to actual "cases" or "controversies." Judges may not issue rulings in the abstract, but only decide real cases brought by a party whose legal rights have concretely been violated. Fletcher argued for abandoning this requirement.

President Clinton has also re-nominated Margaret McKeown to the U.S. Court of Appeals for the Ninth Circuit. Her record demonstrates a clear belief that the courts can and should be used to achieve political goals. In one case, she was lead counsel on behalf of the ACLU in a lawsuit to keep a citizen initiative off the Washington state ballot that would have denied special legal status to homosexuals. McKeown did not simply lobby against the measure, she went to court to deny the citizens of Washington the chance to

decide that policy issue for themselves.

In court filings bearing her signature, McKeown argued that the process of direct democracy itself--gathering signatures and placing the measure on the ballot--would be unconstitutional. She claimed that merely gathering signatures would, by itself, cause hate crimes, emotional suffering, and suicides, as well as increase sexually transmitted diseases, substance abuse, and depression. If she, as a lawyer, would seek to deny citizens the right to vote on such a policy issue, why would she, as a judge, not strike down an initiative citizens might actually enact?

McKeown signed a report that was used to help persuade the already-politicized American Bar Association to adopt a radical abortion-rights agenda in 1992. With the ABA's latest extremist position on the death penalty, more Americans than ever are seeing it for the liberal interest group it has become.

McKeown was a member of the so-called gender bias task force that sparked a movement to impose political correctness on the judicial process. These panels have become so controversial that the Judicial Conference of the United States no longer supports them. Though McKeown's task force claimed to have found rampant bias and urged sweeping politicized changes, the General Accounting Office concluded in March 1996 that the group's methods "were not appropriate to draw such conclusions or to support such recommendations." She tried to manipulate the courts to engineer politically correct results, exactly the work of the judicial activist.

President Clinton has also re-nominated Margaret Morrow to the U.S. District Court for the Central District of California. In a 1995 article, she expressed an aggressively activist approach to the law: "For the law is, almost by definition, on the cutting edge of social thought. It is the vehicle through which we ease the transition from the rules which have always been to the rules which are to be."

In a 1983 article, Morrow opposed any restrictions on the aggressively political agenda of the Legal Services Corporation. She wrote that "we lawyers...will undoubtedly be called upon to battle once again for a cause at the very center of the political, philosophical and social fabric of America." Just as activist judges have increasingly blocked citizen initiatives after their adoption, and activist nominees such as Margaret McKeown have tried to use the courts to declare democracy itself unconstitutional, Morrow argued in a 1988 article for limitations on citizen initiatives. She scoffed at her fellow citizens, writing that "any real hope of intelligent voting by a majority" was "ephemeral" at best. In a 1989 article, Morrow adopted the same sort of statistical approach to race discrimination that has led activist judges to impose quotas, grant race preferences, or permit racial firing in the name of so-called "diversity."

Combining her belief that the law is a vehicle for moving society toward new rules with her consistently liberal views on other issues compels the conclusion that she would, if confirmed, be another in a long string of liberal activist Clinton judges. Unfortunately, the Senate Judiciary Committee never asked her about these or other articles outlining her activist credentials when she appeared before them on June 25, 1996. That brief hearing included six nominees but only two of 18 committee members attended.

The gravity of the crisis and the Senate's lack of past scrutiny has led nearly 300 grassroots organizations to state their opposition to judicial activism and urge Senators to sign a pledge to prevent confirmation of activist nominees. The American people deserve a place at the table rather than at the back of the bus in the judicial selection process. On February 12, Senator Patrick Leahy, ranking Democrat on the Judiciary Committee, openly attacked this effort to organize and inform Americans about the loss of their liberty at the hands of judicial activists. He denounced as a "thinly veiled threat" the efforts by coalition leaders to better educate Americans about the dangers of judicial activism. Senator Leahy apparently believes that a better informed and more involved electorate is a bad thing. The only thinly veiled threat is Senator

Leahy's attempt to censor and intimidate the American people into silence. The leaders of this coalition, on the other hand, have not made a thinly veiled threat at all, but a completely unveiled promise. If Senators choose to ignore their oath of office and continue approving activist judges, their constituents will know about it.

Judicial activism threatens the very heart of what makes America the best political and social system in the world. If Humpty Dumpty can define it, and Senators have an obligation to oppose it, the people have a right to demand that they do so.

If you have any questions or would like more information about judicial activism, please contact us at Judges@fcref.org.

Back to Free Congress

The Imperial Judiciary. . . And What Congress Can Do About It

By Edwin Meese III & Rhett DeHart

Policy Review: The Journal of American Citizenship
January-February 1997, Number 81

Under the modern doctrine of judicial review, the federal judiciary can invalidate any state or federal law or policy it considers inconsistent with the U.S. Constitution. This doctrine gives unelected federal judges awesome power. Whenever these judges exceed their constitutional prerogative to interpret law and instead read their personal views and prejudices into the Constitution, the least democratic branch of government becomes its most powerful as well.

America's Founding Fathers created a democratic republic in which elected representatives were to decide the important issues of the day. In their view, the role of the judiciary, although crucial, was to interpret and clarify the law -- not to make law. The Framers recognized the necessity of judicial restraint and the dangers of judicial activism. James Madison wrote in *The Federalist Papers* that to combine judicial power with executive and legislative authority was "the very definition of tyranny," and Thomas Jefferson believed that allowing only the unelected judiciary to interpret the Constitution would lead to judicial supremacy. "It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions," said Jefferson. "It is one which would place us under the despotism of an oligarchy."

Unfortunately, the federal judiciary has strayed far beyond its proper functions, in many ways validating Jefferson's warnings about judicial power. In no other democracy in the world do unelected judges decide as many vital political issues as they do in America. We will never return the federal government to its proper role in our society until we return the federal judiciary to its proper role in our government.

The doctrine of judicial review gives unelected federal judges awesome power to usurp the democratic process.

Supreme Court decisions based on the Constitution cannot be reversed or altered, except by a constitutional amendment. Such decisions are virtually immune from presidential vetoes or congressional legislation. Abraham Lincoln warned of this in his First Inaugural Address when he said:

"[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."

When the most important social and moral issues are removed from the democratic process, citizens lose the political experience and moral education that come from resolving difficult issues and reaching a social consensus. President Reagan explained how judicial

activism is incompatible with popular government:

"The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not -- as it is not -- will we have liberal courts or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. *The question was and is, will we have government by the people?*" [Emphasis added.]

Judicial Excesses

When federal judges exceed their proper interpretive role, the result is not only infidelity to the Constitution, but very often poor public policy. Numerous cases illustrate the consequences of judicial activism and the harm it has caused our society. Activist court decisions have undermined nearly every aspect of public policy. Among the most egregious examples:

Federal judges have diverted our civil-rights laws from a color-blind ideal to a complex and unfair system of racial and ethnic preferences.

Allowing racial preferences and quotas. In *United Steelworkers of America v. Weber* (1979), the Supreme Court held for the first time that the Civil Rights Act of 1964 permits private employers to establish racial preferences and quotas in employment, despite the clear language of the statute: "It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race, color, religion, sex, or national origin." Had the Court decided Weber differently, racial preferences would not exist in the private sector today. The Weber decision is a classic example of how unelected government regulators and federal judges have diverted our civil-rights laws from a color-blind ideal to a complex and unfair system of racial and ethnic preferences and quotas that perpetuate bias and discrimination.

Creating a "right" to public welfare assistance. In *Goldberg v. Kelly* (1970), the Supreme Court sanctioned the idea that welfare entitlements are a form of "property" under the Fourteenth Amendment. The Court's conclusion: Before a government can terminate benefits on the grounds that the recipient is not eligible, the recipient is entitled to an extensive and costly appeals process akin to a trial. Thanks to the Court, welfare recipients now have a "right" to receive benefits fraudulently throughout lengthy legal proceedings, and never have to reimburse the government if their ineligibility is confirmed. The decision has tied up thousands of welfare workers in judicial hearings and deprived the truly needy of benefits. By 1974, for example, New York City alone needed a staff of 3,000 to conduct *Goldberg* hearings.

Hampering criminal prosecution. In *Mapp v. Ohio* (1961), the Supreme Court began a revolution in criminal procedure by requiring state courts to exclude from criminal cases any evidence found during an "unreasonable" search or seizure. In so holding, the Court overruled a previous case, *Wolf v. Colorado* (1949), which had allowed each state to devise its own methods for deterring unreasonable searches and seizures. The Supreme Court in effect acted like a legislature rather than a judicial body. As a dissenting justice noted, the *Mapp* decision unjustifiably infringed upon the states' sovereign judicial systems and forced them to adopt a uniform, federal procedural remedy ill-suited to serve states with "their own peculiar problems in criminal law enforcement."

In fact, nothing in the Fourth Amendment or any other provision of the Constitution mentions the exclusion of evidence, nor does the legislative history of the Constitution indicate that the Framers intended to require such exclusion. Instead we ought to explore other means of deterring police misconduct without acquitting criminals, such as permitting civil lawsuits against reckless government officials and enforcing internal police sanctions against offending officers with fines and demotions.

Since *Mapp v. Ohio*, the exclusionary rule has had a devastating impact on law enforcement in America. One recent study estimated that 150,000 criminal cases, including 30,000 cases of violence, are dropped or dismissed every year because the exclusionary rule excluded valid, probative evidence needed for prosecution.

Lowering hiring standards for the U.S. workforce. In *Griggs v. Duke Power Co.* (1971), a plaintiff challenged a company's requirement that job applicants possess a high-school diploma and pass a general aptitude test as a condition of employment. The lawsuit argued that because the diploma and test requirements disqualified a disproportionate number of minorities, those requirements were unlawful under the Civil Rights Act of 1964 unless shown to be related to the job in question.

The Court ruled that under the Act, employment requirements that disproportionately exclude minorities must be shown to be related to job performance, and it rejected the employer's argument that the diploma and testing requirements were implemented to improve the overall quality of its work force. Moreover, the Court held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In fact, the Act explicitly authorizes an employer to use aptitude tests like the one challenged in *Griggs*. This insidious court decision has lowered the quality of the U.S. workforce by making it difficult for employers to require high-school diplomas and other neutral job requirements. It also forced employers to adopt racial quotas in order to avoid the expense of defending hiring practices that happen to produce disparate outcomes for different ethnic groups.

"Discovering" a right to abortion. In *Roe v. Wade* (1973), the Court considered the constitutionality of a Texas statute that prohibited abortion except to save the life of the mother. Although the Court acknowledged that the Constitution does not explicitly mention a right of privacy, it held that the Constitution protects rights "implicit in the concept of ordered liberty." The Court ruled that "the right of personal privacy includes the abortion decision," and it struck down the Texas statute under the Due Process Clause of the Fourteenth Amendment. The Court then went on, in a blatantly legislative fashion, to proclaim a precise framework limiting the states' ability to regulate abortion procedures.

The dissenting opinion in *Roe* pointed out that, in order to justify its ruling, the majority had to somehow "find" within the Fourteenth Amendment a right that was unknown to the drafters of the Amendment. When the Fourteenth Amendment was adopted in 1868, there were at least 36 state or territorial laws limiting abortion, and the passage of the Amendment raised no questions at the time about the validity of those laws. "The only conclusion possible from this history," wrote the dissenting justices, "is that the Drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to

legislate with respect to this matter."

One of the most pernicious aspects of the *Roe* decision is that it removed one of the most profound social and moral issues from the democratic process without any constitutional authority. For the first two centuries of America's existence, the abortion issue had been decided by state legislatures, with substantially less violence and conflict than has attended the issue since the *Roe* decision.

Overturning state referenda. In *Romer v. Evans* (1996), the U.S. Supreme Court actually negated a direct vote of the people. This case concerned an amendment to the Colorado constitution enacted in 1992 by a statewide referendum. "Amendment 2" prohibited the state or any political subdivisions therein from adopting any policy that grants homosexuals "any minority status, quota preference, protected status, or claim of discrimination." The Court ruled that the amendment was unconstitutional because it did not bear a "rational relationship" to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment.

The state of Colorado contended that this amendment protected freedom of association, particularly for landlords and employers who have religious objections to homosexuality, and that it only prohibited *preferential treatment* for homosexuals. But the Court rejected these arguments and offered its own interpretation of what motivated the citizens of Colorado, claiming that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

The Supreme Court has desecrated the principle of self-government and appointed itself the arbiter of the nation's moral values

The dissenting opinion argued that Amendment 2 denies equal treatment only in the sense that homosexuals may not obtain "preferential treatment without amending the state constitution." Noting that under *Bowers v. Hardwick* (1986), states are permitted to outlaw homosexual sodomy, the dissent reasoned that if it is constitutionally permissible for a state to criminalize homosexual conduct, it is surely constitutionally permissible for a state to deny special favor and protection to homosexuals. The Court's decision, the dissent charged, "is an act not of judicial judgment, but of political will."

It is hard not to regard the *Romer* decision as the pinnacle of judicial arrogance: Six appointed justices struck down a law passed by 54 percent of a state's voters in a direct election, the most democratic of all procedures. In one of the most egregious usurpations of power in constitutional history, the Court not only desecrated the principle of self-government, but appointed itself the moral arbiter of the nation's values.

Turning the Tide

Fortunately, Congress has a number of strategies at its disposal to confine the judiciary to its proper constitutional role:

1. The Senate should use its confirmation authority to block the appointment of activist

federal judges.

When a president appoints judges who exceed their constitutional authority and usurp the other branches of government, the Senate can properly restrain the judiciary by carefully exercising its responsibilities under the "advise and consent" clause of Article II, Section 2 of the Constitution.

Normally, the Senate Judiciary Committee conducts a hearing on the president's nominees. Those nominees who are approved by the committee or submitted without recommendation go to the full Senate for a confirmation vote.

Unfortunately, the confirmation process in recent years has been relatively perfunctory. The Senate has been reluctant to closely question a nominee to ascertain the candidate's understanding of the proper role of the judiciary. The Senate committee hearing provides an excellent opportunity to discern a judicial candidate's understanding of a constitutionally limited judiciary. It also provides a public opportunity for judicial watchdog organizations to testify in support of or against a particular nominee.

The Constitution established Senate confirmation to ensure that unqualified nominees were not given lifelong judgeships. In carrying out this important responsibility, senators should ascertain a prospective judge's commitment to a philosophy of judicial restraint and fidelity to the Constitution. In so doing, they should carefully review all the opinions, legal articles, and other materials authored by the candidate, the personal background report prepared by the Federal Bureau of Investigation, and the testimony of judges and other attorneys who have had ample opportunities to view a candidate's work. In the name of efficiency, the full Senate sometimes votes to confirm judicial nominees in bundles. This practice should cease. Senators should vote on each nominee individually, in order to remind the prospective judge and the public of the awesome responsibility of each new member of the judiciary and to hold themselves accountable for every judge they confirm to the federal bench.

2. Congress should strip the American Bar Association of its special role in the judicial selection process.

The American Bar Association (ABA) has shown itself to be a special-interest group, every bit as politicized as the American Civil Liberties Union or the National Rifle Association. In the 104th Congress, for example, the ABA officially supported federal funding for abortion services for the poor, racial and ethnic preferences, and a ban on assault weapons; and it opposed a ban a flag-burning, reform of the exclusionary rule and of death-penalty appeals, and a proposal to restrict AFDC payments for welfare mothers who have additional children. Hence it should be removed from any official role in evaluating judicial nominees. It would still be free to testify before the Senate Judiciary Committee concerning potential judges, but it would not have any special status or authority.

The Senate will always need the impartial assessment of judges and lawyers who have a detailed knowledge of the work and background of a judicial candidate. In place of the ABA, the Senate should appoint a special fact-finding committee in each of the 94 federal judicial districts. These lawyers would be selected for their objectivity, ideological neutrality, and understanding of the constitutional role of the judiciary. They would obtain the detailed

information the Senate needs to evaluate a candidate, and would give that information directly to the Judiciary Committee without subjective comments or evaluation.

3. Congress should exercise its power to limit the jurisdiction of the federal courts.

Congress has great control over the jurisdiction of the lower federal courts. Article III, Section 1, of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish.*" [Emphasis added.] It is well-established that since Congress has total discretion over whether to create the lower federal courts, it also has great discretion over the jurisdiction of those courts it chooses to create. In fact, Congress has in the past withdrawn jurisdiction from the lower federal courts when it became dissatisfied with their performance or concluded that state courts were the better forum for certain types of cases. The Supreme Court has repeatedly upheld Congress's power to do so.

Congress also has some authority to limit the jurisdiction of the Supreme Court and to regulate its activities. Article III of the Constitution states that the Supreme Court "shall have appellate jurisdiction, both as to law and fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" [Emphasis added.] Although we recognize that the scope of Congress's power to regulate and restrict the Supreme Court's jurisdiction over particular types of cases is under debate, there is a constitutional basis for this authority.

In the only case that directly addressed this issue, the Supreme Court upheld Congress's power to restrict the Court's appellate jurisdiction. In *Ex Parte McCardle* (1869), the Court unanimously upheld Congress's power to limit its jurisdiction, stating:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; *and the power to make exceptions to the appellate jurisdiction of this court is given by express words.* What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction, the court cannot proceed at all in any case." [Emphasis added.]

Although some respected constitutional scholars argue that Congress cannot restrict the Supreme Court's jurisdiction to the extent that it intrudes upon the Court's "core functions," there is no question that Congress has more authority under the Constitution to act than it has recently exercised. The 104th Congress displayed an encouraging willingness to assert its authority over the jurisdiction of the lower federal courts. For example, the Prison Litigation Reform Act of 1995 reduced the discretion of the federal courts to micromanage state prisons and to force the early release of prisoners. The Act also makes it more difficult for prisoners to file frivolous lawsuits. (An incredible 63,550 prisoner lawsuits were filed in federal court in 1995 alone.) Congress also passed the Effective Death Penalty Act of 1995. This Act limited the power of the federal courts to entertain endless habeas corpus appeals filed by prisoners on death row, significantly expediting the death-penalty process.

Other issues are due for some congressional muscle-flexing to restrain an activist judiciary:

Congress should consider restricting the courts' jurisdiction over school choice, same-sex marriage, and other issues best left to the people.

Private-school choice. Some radical groups like the American Civil Liberties Union argue that the government would violate the First Amendment's Establishment Clause if it gave a tuition voucher to a family who uses it at a religious school. Under current Supreme Court precedents, school vouchers are almost certainly constitutional. Nevertheless, some federal judges have indicated that they would invalidate private-school choice plans under the Establishment Clause. Moreover, if more activist justices are named to the Supreme Court, a liberal majority could crush one of the most promising educational initiatives in recent years by judicial fiat. To ensure that the issue of private-school choice is decided through the democratic process, Congress should consider restricting the Court's jurisdiction over this issue.

Judicial taxation. "Judicial taxation" refers to federal court orders that require a state or local government to make significant expenditures to pay for court-ordered injunctions For example, one federal judge ordered the state of Missouri to pay for approximately $2.6 billion in capital improvements and other costs to "desegregate" the school districts of St. Louis and Kansas City, which in recent years had lost many white students. To attract white students back into the system, a federal judge required Kansas City to maintain the most lavish schools in the nation, and actually ordered the city to raise property taxes to pay for his court-ordered remedies.

There's a name for tax increases imposed by appointed, life-tenured federal judges: taxation without representation. Under the Constitution, only Congress can lay and collect taxes; our Founding Fathers would be appalled at the thought of federal judges doing so. In *Federalist No. 48*, James Madison explained that in our democratic system, "the legislative branch alone has access to the pockets of the people." To codify this principle, Congress should consider restricting the federal courts' authority to order any government at any level to raise taxes under any circumstance.

Use of special masters. Federal judges sometimes appoint "special masters" to micromanage prisons, mental hospitals, and school districts. In the past, these special masters have been appointed to carry out the illegitimate excursions of judges into the province of the legislative and executive branches. Moreover, the use of special masters has been a form of taxation, in that state and local governments are required to pay their salaries and expenses -- which have often been extravagant. In some cases, special masters have hired large staffs to help execute the court order. Congress should outlaw special masters; without them, federal judges would be constrained by the limits on their time and resources from managing prisons or other institutions.

Same-sex marriage. No area of the law has been more firmly reserved to the states than domestic relations. Nevertheless, the Court's reasoning in *Romer v. Evans* suggests the possibility that some federal judges will "discover" a constitutional right to homosexual marriage, and thus remove the issue from the democratic process.

The Hawaii Supreme Court recently indicated that it would soon recognize homosexual marriages, which all other states would then have to recognize under the Full Faith and Credit Clause of the Constitution (Article IV). This possibility motivated Congress

to pass the Defense of Marriage Act, which authorized any state to refuse to recognize a same-sex marriage performed in another state. The Act does not, however, prevent the federal judiciary from usurping this issue. Congress should consider going one step further to remove the jurisdiction of the lower federal courts over same-sex marriages to ensure that this cultural issue is decided by the legislative process in each state.

4. The states should press Congress to amend the Constitution in a way that will allow the states to ratify constitutional amendments in the future without the approval of Congress.

One reason judicial activism is so dangerous and undemocratic is that reversing or amending federal court decisions is so difficult. When a decision by the Supreme Court or a lower federal court is based on the Constitution, the decision cannot be reversed or altered except by a constitutional amendment. Such constitutional decisions are immune from presidential vetoes or congressional legislation.

The existing means of amending the Constitution, however, are seldom effective in halting judicial activism. The amendment procedure set forth in Article V of the Constitution is difficult and lengthy for good reason: to avoid hasty changes spurred by the passions of the moment. But history has shown that even the most egregious court decisions -- particularly those that affect the balance of power between the national government and the states -- have been impervious to correction by constitutional amendment. One reason for this is that Congress, which must initiate such amendments, is loath to give up federal power.

Judges with life tenure show less restraint when their chances of being overruled by constitutional amendment are slight.

The amendment procedure of the U.S. Constitution led Lord Bryce to conclude in his 1888 study, *The American Commonwealth*, that "[t]he Constitution which is the most difficult to change is that of the United States." This difficulty has encouraged judicial activism and allowed the unelected federal courts to "twist and shape" the Constitution, as Jefferson predicted, as an "artist shapes a ball of wax." The reason that the difficult amendment procedure encourages judicial activism is simple: Life-tenured judges are less likely to show restraint when the possibility that their rulings will be rejected is slight.

Consequently, one strategy to rein in the federal judiciary is to revise the amendment procedure in Article V of the Constitution to allow the states to amend the Constitution without Congress's approval and without a constitutional convention.

Here's how it would work: When two-thirds of state legislatures pass resolutions in support of a proposed amendment to the Constitution, Congress would have to submit it to all the states for ratification. The proposal would then become part of the Constitution once the legislatures of three-fourths of the states ratify it. Congress's role would be purely ministerial. This process would give the states equal power with Congress to initiate an amendment and would further check the power of the federal courts and of Congress.

5. Congress should stop the federalization of crime and the expansion of litigation in

federal court.

Whenever Congress enacts a new federal criminal statute or a statute creating a cause-of-action in federal court, it enlarges the power and authority of the federal courts and provides more opportunities for judicial activism. At the same time, the federalization of crimes that have traditionally concerned state and local governments upsets the balance between the national government and the states. The following steps can help reduce the federalization of the law and once again restore balance to the federal-state relationship.

Recodify the U.S. Code. In the present federal criminal code, important offenses like treason are commingled with insignificant offenses like the unauthorized interstate transport of water hyacinths. The Federal Courts Study Committee found that the current federal code is "hard to find, hard to understand, redundant, and conflicting." Ideally, Congress would start with a blank slate, recodifying only those offenses that truly belong under federal jurisdiction. Due to the highly political nature of crime, such an undertaking might require the creation of an independent commission, modeled after the recent commission for closing unneeded military bases.

Require a "federalism assessment" for legislation. This idea would require that all federal legislation offer a justification for a national solution to the issue in question, acknowledge any efforts the states have taken to address the problem, explain the legislation's effect on state experimentation, and cite Congress's constitutional authority to enact the proposed legislation.

Create a federalism subcommittee within the judiciary committees of the House and Senate. First proposed by President Reagan's Working Group on Federalism, federalism subcommittees would attempt to ensure compliance with federalism principles in all proposed legislation.

Judicial activism has harmed virtually every aspect of public policy in America. Liberalism has accomplished much of its agenda in the last 30 years not through the electoral process, but instead in the federal courts. Conservatives will never be able to shape public policy until they can curb activist judges. Congress can and should move to do so.

***Edwin Meese III**, the 75th attorney general of the United States (1985-1988), is currently the Ronald Reagan Fellow at The Heritage Foundation. **Rhett DeHart** is special counsel to Mr. Meese. This article is adapted from* Mandate for Leadership IV, *published by The Heritage Foundation in January 1997.*

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Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name

committee on HJR 47 bill/subject, dated 2/20/98.

In addition to my verbal testimony, I would like to add that those who don't want this amendment are those that would lose power or control and be called on the carpet to decide lives. This is currently a political area and not much will change with this. Please remember Alaska Rec can lobby, the public only has the legislature to lobby for them. What worked forty years doesn't work now. Judges are viewed as godlike and many judges believe to some extent they are, just look at their decisions. Please allow the public to have the opportunity to know and voice their concerns in the judicial appointment.

Signed: Marci Schmidt
Testifier

Parents United for Custodial Justice
Representing (Optional)

2040 Wasilla Fishhook Rd, Wasilla, AK 99654
Address

907-357-3618
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee
committee name

committee on HJR #47 . dated February 20, '98.
bill/subject

I'm representing myself, Carol Palmer, & "Parents United for Custodial Justice" and are in favor of & support of HJR #47.

I would suggest that the public needs to have an input in the selection & appointment of judges for all the Lower Courts, Appellate Courts, & Supreme Courts.

We believe this judicial system is BROKE. My concern is judges presiding over family matters. I feel that family matters should not be decided in Courts. The judge who rules ~~against~~ against a parent in custody, visitation, & Child Support issues presents CONTROL over that parent - to a negative life changing degree.

This bill needs to be extended further. It's more apparent to me to find a more appropriate process to eliminate ineffective judges. What worked 40 years ago does not work now. Our society has drastically changed & people (parents) are abusing the judicial system. Term limits needs to be placed on judges rather than allowing a Life term occupation when judges becomes complacent, biased, & unfair.

Let's get the public more involved - as it's the individuals who takes the BRUNT of a Judge's decision. We are destroying families.

over →

Signed: _____
Testifier

Carol Palmer, representing "Parents United"
Representing (Optional)

P.O. Box 2402, Palmer, AK 99645
Address

(907) 746-2863
Phone No.

9:85 Legislative Information Office

Carol Paine -Page 2-

as this HJB #47 stands we are in favor of, but Please further its ramifications.

2/20/98
(from Stevens Bar's behalf)
HJR 47

JUNEAU BAR ASSOCIATION RESOLUTION NO. 98-01

Whereas, before Statehood there was considerable debate in the Alaska Constitutional Convention about the best way to select justices of the Alaska Supreme Court; and

Whereas, the subcommittee which drafted the Judiciary article of the Alaska Constitution considered many different ways to select Justices, including judicial elections, gubenatorial appointments with legislative confirmation, and selection by the Governor from a list submitted by a judicial council; and

Whereas, in order to make the judicial selection process as non-political as possible, the subcommittee and the Convention determined that a Judicial Council should screen potential Justices and make short-list recommendations to the Governor, that the Governor should make a selection from the list, and that the newly appointed Justice eventually should face the voters at a retention election; and

Whereas, the system the Alaska Constitutional Convention chose has worked well with respect to both Supreme Court Justices and Judges of the Court of Appeals, prompting even the more partisan Governors of Alaska to make judicial appointments on a nonpartisan and generally non-political basis; and

Whereas, if it ain't broke, don't fix it; but

Whereas, pending in this session of the Legislature are House Joint Resolution 47 and Senate Joint Resolution 34, which would ask the voters to amend Alaska's Constitution to inject into the judicial selection process a requirement that the Legislature confirm Supreme Court Justices, Judges of the Court of Appeals, and attorney members of the Judicial Council; and

Whereas, this change is not necessary, and threatens to introduce partisan strife into a process which should not be partisan;

Now, Therefore, Be It Resolved that the Juneau Bar Association OPPOSES House Joint Resolution 47 and Senate Joint Resolution 34 and recommends to the Alaska Bar Association that it express similar opposition; and that copies of this resolution be sent to the Honorable Gail Phillips, Speaker of the House, to the Honorable Mike Miller, President of the Senate, to the chairs of the House Judiciary and Finance and Rules Committees, and to the chairs of the Senate Judiciary and Finance Committees, to the Honorable Tony Knowles, Governor of Alaska, to the Honorable Warren Matthews, Chief Justice of the Alaska Supreme Court, and to William Cotton, Esq., Executive Director of the Judicial Council.

Approved this 13th day of February, 1998.

President