HJR

17

Alaska State Legislature

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Read

Representative John Coghill

Date: March 23, 1999

To: Representative Pete Kott, Chairman
House Judiciary Committee

From: Rynnieva W. Moss, Legislative Aide RWMoss

Re: Committee Hearing of HJR 17

Representative Coghill is requesting that HJR 17, "Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges. ", be heard in the House Judiciary Committee at your earliest convenience.

I have attached the sponsor statement and some back up information on the resolution.

Thank you for your assistance.

Representative_John_Coghill@LEGIS.state.ak.us

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Representative John Coghill

HJR 17 Legislative Confirmation of Judges

Sponsor Statement - March 23, 1999

HJR 17 provides for legislative confirmation of judges appointed to Alaska's Supreme Court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings. Presently the Article IV, Section 5 of the Constitution provides that:

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

Because the Supreme Court was created in Alaska's State Constitution, a constitutional amendment is necessary to change the process for selection of the Supreme Court Justices. I have introduced HJR 17 to enable the public to be included in the process of appointing judges.

The public has less input into the judicial branch than into the executive and legislative branches. The governor and the legislature have elections and compulsory public input in their decision-making processes. The governor's cabinet appointees and his appointments to boards and commissions are subject to legislative confirmation.

In recent years, court decisions have had the effect of rewriting statutes or changing legislative intent. Checks and balances must be implemented to enable the legislature and the public to review the qualifications and the values of newly appointed judges in Alaska.

"[O]ur judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical & impartial control; and that this, to be imparted, must be compounded of a mixture of State and Federal authorities. It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence."[1]

Thomas Jefferson

By providing for a legislative confirmation of judges, HJR 17 would allow the public to participate in confirmation hearings, the judicial candidates can present their philosophical approach to the law, and the public will have a voice in their selection.

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[1] Thomas Jefferson, Autobiography, in THE WRITINGS OF THOMAS JEFFERSON, 121 (Andrew A. Lipscomb ed., 1903)

Representative_John_Coghill@LEGIS.state.ak.us

Legislative Research Report 98.052
March 16, 1998

Selection of Judges in State Courts of Last Resort and Intermediate Appellate Courts (Revised)

Legislative Research Services
Division of Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature

Prepared by Patricia Young, Legislative Analyst

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SELECTION OF JUDGES IN STATE COURTS OF LAST RESORT AND INTERMEDIATE APPELLATE COURTS (REVISED)

You wished to know how the process used in Alaska for selecting judges compares with that in other states. Specifically, you wished to know the number of states in which judges are appointed as compared to the number of states in which judges are elected. You also wished to know the number of states in which the legislature is involved in the selection process.

States typically use a variety of methods to select judges, depending on the court; however, the most commonly used selection process involves nomination of qualified candidates by a special, nonpartisan nominating body (usually composed of both attorneys and nonattorneys); appointment by the governor; and periodic voting by the electorate in regard to judges' retention of office. According to the most current available information, Alaska is among 25 jurisdictions using the merit, or commission, system for selecting judges.[1] Among these jurisdictions, the legislature (or the senate) confirms the governor's selection in Hawaii, Maryland, New York, Rhode Island, Vermont, and the District of Columbia; in Connecticut, the legislature appoints judges from nominations selected by the governor from among candidates submitted by the nominating commission; in South Carolina, the legislature elects judges from among candidates selected by a judicial merit selection commission.

Use of the merit, or commission system, appears to be on the increase, but election of judges is almost as common. Twenty-one states elect judges, either on partisan (8 states) or on nonpartisan (13 states) ballots.

Judges are selected without the use of a nominating commission in the remaining five states. The legislature elects or confirms judges in three of those states—Maine, New Jersey, and Virginia. Thus, the legislature is part of the judicial selection process for courts of last resort and intermediate appellate courts in a total of 11 jurisdictions across the country. The greatest involvement on the part of the legislature appears to be in South Carolina and in Virginia. In South Carolina, the process involves both a nominating commission and a majority vote of the full legislature. In Virginia, judges are elected by majority vote of the legislature.

Table 1 provides a synopsis of the selection methods most predominately used by states for courts of last resort and intermediate appellate courts. A more detailed description and comparison of the selection processes used by states for judges at the various court levels is provided in Attachment A. Attachment B contains an as yet unpublished update of this information, provided by the American Judicature Society. These documents also show the term of office for judges at the various court levels. Attachment C contains a brief discussion of the advantages and disadvantages of appointments versus elections, and a longer discussion of the advantages and disadvantages of various systems.

I hope you find this information useful. Please contact us if you have questions or need additional information.

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[1] This system or plan has also been known as the *Kales* plan, after one of the persons suggesting the idea; as the *Missouri* plan, after the first state adopting it; and more frequently as the *merit* system or *commission* system after the impartial body or commission responsible for evaluating applicants and submitting names for appointment.

List of Attachments

Attachment A – Council of State Government, Book of the States, 1996-97 (pp. 127-128 and 133-135).

Attachment B – American Judicature Society, "Judicial Selection in the States: Appellate and General Jurisdiction Courts, 1997," unpublished draft update of 1997 revision.

Attachment C – "Election of Supreme Court Justices," House Research Agency Memorandum 85.042; and Peter D. Webster, "Selection and Retention of Judges: Is There One 'Best' Method? Florida State University Law Review, 1995.

Special Report

Above the Law

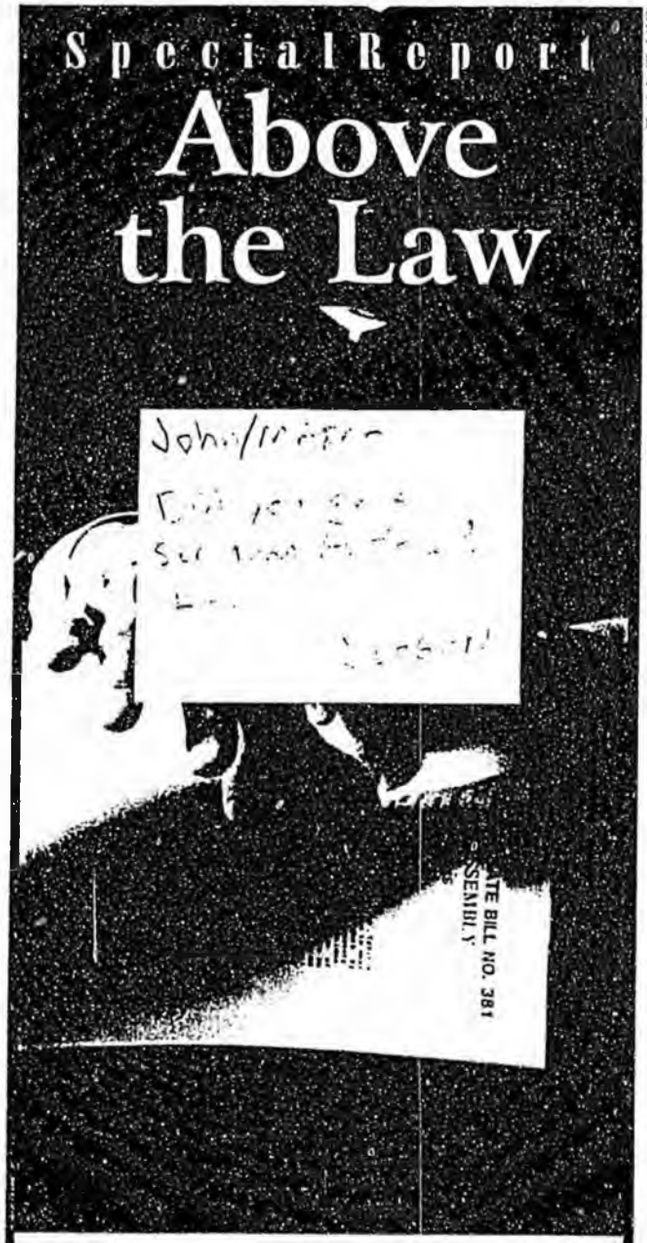


Photo by Todd Cook/ALEC

State Courts are Increasingly Flexing Their Judicial Muscles by Overruling State Legislatures and Making Policy

by Michael Hotra

The unprecedented level of judicial activism in our state courts begs the question: with state judges making public policy, do state legislators matter anymore?

In many states, and across a broad spectrum of issues, state courts and state court judges have undermined legislatures' ability — and constitutional charge — to represent the voters and craft public policy. In the next decade the largest battles in state capitals will likely be power struggles between legislatures and courts.

Each branch of state government, the legislature, the executive, and the judiciary, is a creation of the state constitution, which is, in most cases, a lengthy, detailed and highly prescriptive document.

Precisely because state constitutions are so prescriptive, it is incumbent upon the judiciary to exercise restraint in its interpretations of certain clauses and phrasing.

When the state courts attempt to use clauses in state constitutions as the predicate for an activist agenda, the result is an infringement on the role of the legislature, and bad public policy.

As final arbiters of state constitutions, state courts trump legislatures with their decisions. Legislatures then have little recourse, short of amending the state constitution — a lengthy and complicated process that can occupy significant portions of time in more than one legislative session. Even then, at least one state appellate court — Pennsylvania's — has thrown out constitutional amendments using highly controversial interpretations of the state constitution. The notion of judicial restraint has seemingly disappeared.

Gone are the days when state court judges, in particular state supreme court judges, saw their role as limited, principled arbiters of the cases and controversies before them. Today, state courts prescribe school district funding levels (and in one state, curriculum), levy taxes, trash criminal sentencing guidelines, and discard reasonable liability reforms. If the courts make state policy, what is left for the legislature to do?

Equally disturbing is the chilling effect of judicial activism on the spirited and worthy public policy debate that occurs between organizations such as ALEC and those organizations and individuals holding dissimilar views. If state courts create our public policy, then lively policy and issue debates become a purely rhetorical exercise.

When state supreme courts make policy, they do so in the course of deciding the case or controversy before them. They hear from lawyers pleading their respective cases; they review briefs and deliberate behind closed doors. The court's policy making is a by-product of the case or controversy before it.

State legislatures, by contrast, make policy in full public view. Any interested citizen can watch the legislature in action, testify at hearings, and choose their representatives to make the laws, a characteristic critical to the proper administration of a representative government.

State Constitutions Are Subject to Almost Any Interpretation

State constitutions afford judges and courts tremendous leverage. Constitutions are literally chock full of vague clauses, catchall phrasing and obscure rules that have been recently used by the courts as a predicate for making policy. Unlike the U.S. Constitution, which is about 10 letter-sized pages long, state constitutions can run on for 200 to 300 pages.

The California Constitution, for example, contains the obscure "right to fish" in state waters. But, as the *Madison Review* wryly notes, "There is no comparable right to camp,

Hotra is Director of ALEC's Civil Justice and Criminal Justice Task Forces

to hunt, or to walk in the woods; hence, California's state statutes and local ordinances in managing fish have constitutionally restricted status compared to similar laws and regulations that manage other recreational activities."

The Illinois State Constitution contains the peculiar requirement that three of the seven state Supreme Court Justices be drawn from Cook County — Chicago. Florida's Constitution contains the following catchall: Article II, Section 7, which reads: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." Using this clause, a state court judge could ban billboards, smokestacks, pink flamingos on front lawns, and sport fishing — the very same right protected by California's Constitution.

As one attorney familiar with state constitutions has jokingly observed, "If you look carefully, you can find a ham sandwich in state constitutions."

There are other vague constitutional clauses, such as "separation of powers," "special legislation" and "open courts" that many courts use to run roughshod over the legislature. These amorphous, ill-defined clauses are subject to varying and highly inconsistent interpretations, even within the same state.

A Constitutional Crisis in Pennsylvania

The most egregious case of imperialistic judicial policy making has occurred in Pennsylvania. There, the Commonwealth Court has decided to ignore the voters, legislature and common sense while playing fast and loose with the state Constitution.

In the mid-1980s, the Pennsylvania legislature and the Governor, in an attempt to spare children the horror of reconfronting their attackers face to face, enacted legislation to permit children victimized by sexual abuse to testify in court by videotape. The law was struck down by the Pennsylvania Supreme Court on the basis of a clause in the state Constitution that one has the right to "face" one's accuser. Videotaped testimony in sex crimes, the Court felt, didn't meet that standard. "Face to face," meant "in person," or so the Court ruled.

In 1993, Senator Stewart Greenleaf, an ALEC member, spearheaded efforts to amend the Pennsylvania Constitution and permit videotaped testimony in sex offense cases involving victims who are minors.

The hurdles that one must clear to amend Pennsylvania's Constitution are set high. Any proposed amendment must pass two votes held in two consecutive sessions of the legislature. Then, the amendment must be approved by Pennsylvania's voters in a ballot initiative.

Greenleaf's amendment passed in both the 1993-1994 session of the legislature and the 1995-1996 session. In November 1996, the Pennsylvania voters spoke. They approved Greenleaf's amendment by a 3-1 margin. This should have been the end of the story. Unfortunately, it is not.

In May 1997, the Pennsylvania Commonwealth Court invalidated the ballot initiative. It accepted a petition from three lawyers who had no standing (no actual case) before the Court. While the amendment directly changed the "face-to-face" provision in sex offense cases, which was its intent, the Court decreed that the amendment also *implicitly* changed the court's rulemaking authority, which is — you guessed it — constitutionally protected.

Greenleaf- Even though his amendment to protect children testifying again· pedophiles jumped all the constitutional hurdles, the Pa. Supreme Court still voided it

The Pennsylvania Constitution prohibits any ballot initiative that changes more than one section of the Constitution. According to the creative reasoning of the Commonwealth Court, this amendment affected two portions of the Constitution — one explicitly, one implicitly — and was therefore invalid.

"This is absurd," said Greenleaf, Chairman of the Pennsylvania Senate Judiciary Committee. "If the Court will not properly defer to the legislature on policy matters, even constitutional amendments, then I have to question the Court's commitment to a three-branch government."

In Pennsylvania, as in other states, all three branches of government are creations of the state constitution, and therefore derive their powers from it. By invalidating a legitimate ballot initiative to amend the constitution, the Commonwealth Court has, in effect, declared itself superior to, and exempt from, Pennsylvania law.

The lower Court ruling is being appealed to the Pennsylvania Supreme Court, which has an activist agenda on par with the Commonwealth Court's. The Pennsylvania Supreme Court has the constitutional authority to suspend any statute passed by the legislature that it believes impinges upon its rulemaking authority. It has applied this doctrine inconsistently, but with increasing regularity, much to the frustration of the Pennsylvania General Assembly. In Pennsylvania and in 19 other states, there is no check on the Supreme Court's ability to enact such suspensions.

Recently, the Pennsylvania Supreme Court has suspended a state law expediting death penalty appeals that would have required parties appealing death sentences to file all appeals within one year of initial sentencing. The Court found this to be a judicial rulemaking function. Under existing Pennsylvania law, the legislature has no recourse. The Court also suspended Pennsylvania's *Post-Conviction Release Act* on similar grounds.

Greenleaf and others have tried to work constructively with the courts to fashion reasonable standards and rulemaking procedures beneficial to both branches of government; so far, they have had little success. Right now, the legislature is under court order to implement by July 1 a statewide funding plan for trial courts.

Education: A New Frontier of Judicial Activism

Since 1989, 18 state supreme courts have declared state education funding formulas unconstitutional (See March 9,

FYI). Most state constitutions contain provisions that entitle students to "adequate and equitable education," or some similarly amorphous standard.

Courts have used these vague standards as mandates for school funding reform, despite the dubious correlation between school funding and educational quality.

According to ALEC's 1994 *Report Card on American Education*, which analyzed data from all 50 states and the District of Columbia, "It is also true that none of the states that rank in the top 10 in performance rank in the top 10 states in per-pupil expenditures. Utah ... ranks in the top 10 in all measures of academic achievement. Yet in expenditures per pupil, Utah ranks 51st."

The Vermont State Supreme Court admits as much in its decision declaring Vermont's educational funding system unconstitutional: "We recognize that equal dollar resources do not necessarily translate equally in effect. ... Money is clearly not the only variable affecting educational opportunity, but it is the one that government can effectively equalize."

The Vermont Supreme Court has ruled that a school district funding formula that is 60 percent reliant on local taxes is unconstitutional because it deprives children of an "equal educational opportunity" and violates the Vermont Constitution.

Unfortunately the Court only considered funding when it examined the question of "equal educational opportunity." Lacking in the 16-page decision is any indication that the Court considered other potential factors in ensuring equal educational opportunity such as class size, dropout rates, test scores, teacher certification or pupil performance.

These important factors were absent from the Court's deliberations because they weren't at issue in the narrow case before the court — only public education and property taxes were at issue.

New Jersey Judges Dictate School Programs

The New Jersey State Supreme Court has gone even further. There, the Court has used its decision to overturn state education funding schemes as a predicate to dictate actual school programs.

After striking down the state's school funding formula, which had already appropriated $2.3 billion in state funds (about half of what the state spends on public education, according to the *New York Times*) for poor schools, the legislature appropriated an additional $248 million.

Judge King- Recommended the New Jersey legislature come up with $3.1 billion in new funding for poorer schools

The Court then instructed New Jersey education officials to identify additional educational programs and curricula to be implemented in poor districts, as well as assess the conditions of buildings and facilities in these districts.

New Jersey Appellate Judge Michael Patrick King has also been asked by the New Jersey Supreme Court to recommend new programs and services that poor school districts should implement. The cost of his recommendations, which include all-day preschool and a long-term building improvement fund: $3.1 billion.

Not surprisingly, New Jersey Attorney General Peter Verniero and the legislature are growing incredulous. Referring to the involvement of judges in school management, Verniero said in the *New York Times*: "It's the question of which branch of government shall determine, control, and ultimately implement the educational policies of New Jersey." In a letter to the Supreme Court, New Jersey Assembly Speaker Jack Collins and Senate President Donald DiFrancesco reminded the Court that the legislature "doesn't have a blank check when it comes to funding education."

Said one legislator of his state's education funding morass, "We are in special session right now responding to a court order related to education funding. When you're trying to please the court rather than improve education, you're going to have people displeased with the result."

According to Dr. Lewis Solomon of the Goldwater Institute, courts enter a policymaking minefield when they begin to prescribe programs to ensure "adequacy" in education

"Implicit in this view of adequacy is the belief that there is some consensus about what is adequate in terms of buildings, facilities and equipment for public schools," says Solomon. "Of course, every interest group will find an expert to testify that more of what they want is necessary and appropriate to achieve adequacy."

Illinois Courts: Soft on Crime, Tough on Tort Reform

Illinois' partisan judiciary has also become quite adept at making policy by fiat. In two recent decisions, Illinois courts have struck down important laws using inconsistently applied and vague clauses in the Illinois Constitution.

On March 4, the Illinois 4th District Appellate Court overturned the state's truth-in-sentencing law (which specifies the minimum percentage of an inmate's sentence he or she must serve before becoming eligible for parole) because the Illinois Constitution prohibits a state statute from containing more than a single issue — the Constitution's so-called "single-subject rule."

The Court struck down Illinois' truth-in-sentencing legislation, sponsored by Senator Kirk Dillard, now Chair of ALEC's Civil Justice Task Force, because it found that the law, as enacted in 1995, contained matters relating to both civil and criminal law — truth-in-sentencing and reimbursement of hospital costs from plaintiff personal injury awards.

"If this reasoning holds up, the Court might as well toss Illinois' statutes from the last 50 years," said Michael Flynn, Director of ALEC's Tax and Fiscal Policy Task Force, and a former policy analyst for the Illinois legislature. "Every day was Christmas in the statehouse. Attaching riders and amendments to popular legislation was not only common, it was considered something of an art form," Flynn added.

Illinois estimates that some 1,500 criminal sentences will have to be recalculated because of the Court's ruling.

including the case of a murderer who repeatedly stabbed his victim, slit her throat, and left her to die. Under Illinois' truth-in-sentencing law, the killer would be required to serve a minimum 30 years of a 36-year sentence. Now, after serving only three years, he's eligible for day-for-day good-time credits and could be released in another 15 years.

According to Dillard, as quoted in the *Chicago Tribune*, "This is just another example of the Illinois Court wanting to substitute its judgment for that of the legislature."

On December 18, 1997, the Illinois State Supreme Court struck down the *Civil Justice Reform Amendments* of 1995 — Illinois' comprehensive tort reform package. That package, also sponsored by Dillard, reformed damage awards in tort cases, abolished joint and several liability, and raised standards of proof in certain types of tort cases.

In its decision, the Court struck down portions of the Illinois *Civil Justice Reform Amendments* — abolishing joint and several liability — not even at issue in the case before it. No other state supreme court has struck down as unconstitutional tort reform that abolishes joint and several liability. The Illinois Supreme Court reasoned that since the legislation was enacted as a package, it had to be struck down as a package, despite the insertion of a severability clause into the bill.

According to the Court, "Determining whether portions of an Act are severable is a matter of statutory construction, and the existence of a severability clause within the statute is not conclusive of the issue."

In his eloquent dissent from the Court's opinion, Justice Miller writes, "Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule by judicial fiat the considered judgment of the legislature."

Tort Reform: an Unprecedented Level of Judicial Activism

In striking down tort reform, the Illinois Supreme Court joins 72 other courts that have used obscure, vague and little-understood clauses in state constitutions to strike down tort reform. In all of these cases, state courts have based their decisions solely on clauses appearing in state constitutions, and not in the U.S. Constitution. Not coincidentally, state court justices effectively lock their decisions at the state level. There can be no appeal to the U.S. Supreme Court.

A recent monograph published by the Washington Legal Foundation entitled *Who Should Make America's Tort Law: Courts or Legislatures?* discusses the rise of state constitutionalism and its impact on tort reform:

"Never before have state constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The pace is unparalleled in American history, without precedent, and simply wrong. In addition, some judges have, on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy. The courts have, in some instances, acted as legislators."

Possible Solutions

Arizona faced problems similar to those found in other states: its judges were creating entirely new causes of action, and overturning tort reform. At the request of both chamber's leadership, Senator John Kaites has convened a study commission consisting of judges, legislators and members of the legal community to examine some of the issues raised by ALEC's *Separation of Powers Act*, and the proper role of the legislature and the courts.

Arizona's John Kaites - at the request of leadership, he created a study commission of judges, legislators and members of the legal community to examine contentious issues between courts and legislatures

"It has been a real interesting debate, at times a fight, to keep the work of the committee going," said Kaites. "This committee of experts, legislators and judges was set up and started a dialogue on the proper role of the courts versus the Governor and the legislature. The trial bar sees this as a tort reform issue rather than an issue of judicial activism. Some of these issues happen to be tort, but the focus of the committee is clearly separation of powers," Kaites emphasized.

In other states, such as Alabama, legislators have filed amicus briefs in cases that challenge their policymaking prerogative.

Unfortunately, in many instances, legislators simply throw up their hands in despair. They feel powerless in their struggles with the judiciary. But the solution is two-fold. Legislators need to shed light on the decisions of the judiciary, and in states with popularly elected judges, those judges need to be held accountable for their decisions.

ALEC's *Separation of Powers Act* can help. This innovative model bill was developed by former Arizona Senate President John Greene and his counsel to clarify little-understood clauses in state constitutions and discern the proper relationship between courts and legislatures. It recognizes that in many cases, state supreme court judges defer to the legislature, and in those cases, the court should be acknowledged for its principled restraint. But in other cases, the courts need to be constrained from creating new causes of action.

In response to unprecedented judicial activism, state legislators may even need to consider "trimming the fat" from their constitutions. Statutes can clarify legislative intent, and in extreme cases, constitutional amendments might be needed to rein in runaway judges.

Perhaps Thomas Jefferson, referring ironically to the constitution within each of us, said it best:

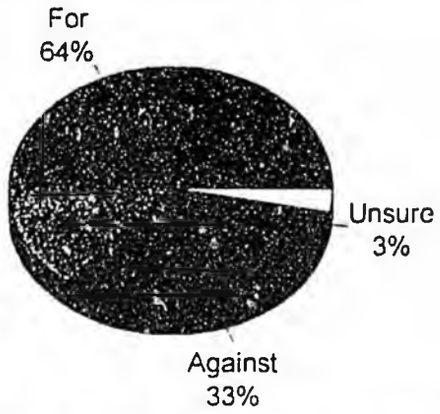
"Men by their constitutions are naturally divided into two parties: (1) Those who fear and distrust the people and wish to draw all power from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist; and in every one where they are free to think, speak, and to write, they will declare themselves." ■

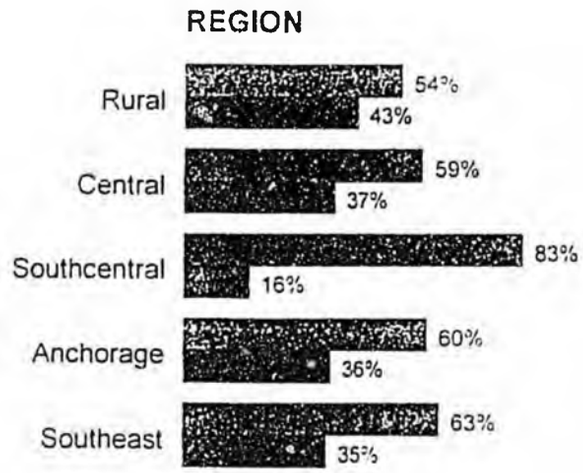
HJR 47

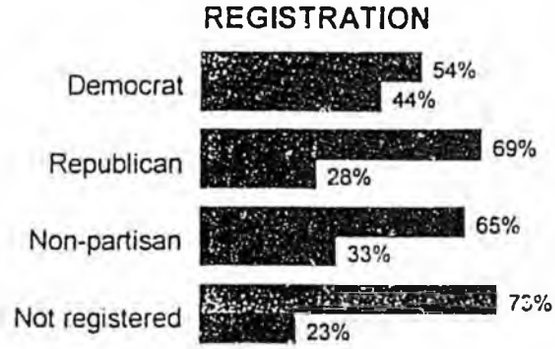
Legislative Confirmation of Judicial Appointments

Similarly, approximately two out of three Alaskans (64%) report they support legislative confirmation of judicial appointments...

"At the present time in Alaska, judges on the Supreme Court and Courts of Appeal are nominated by a judicial council and appointed by the Governor. If there were a constitutional amendment on the ballot that would require a majority vote of the Legislature to confirm judicial appointments, do you think you would vote for or against that constitutional amendment?"







For Against

Confirmation process would curb judicial abuse

By REP. JOHN COWDERY, District 17

COMPASS
POINTS OF VIEW FROM OUR COMMUNITY

I am responding to the Compass piece written against HJR 47 by William Cotton, executive director of the Alaska Judicial Council (Daily News, Opinion, March 28). If passed by the voters, HJR 47 would make the governor's nominees to the Supreme Court, the Court of Appeals and the attorney members of the judicial council subject to legislative confirmation as the three public members of the judicial council are now.


Cowdery

Mr. Cotton feels that the judicial council sends only the most qualified applicants to the governor. He didn't mention that many attorneys refuse to apply for judgeships because of the council's perceived liberal bias. Mr. Cotton would have us believe that politics occurs only in legislative provinces but never in the executive or judiciary branches. Indeed, bar association politics in Alaska, like elsewhere, is legendarily robust.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council. With so much power at stake, you can bet your bottom dollar that legislative confirmation — public accountability — is the last thing it wants.

HJR 47 is the best of both worlds. It keeps the current merit system in place while adding the crucial step of legislative review to the appointment process. Through legislative hearings, judicial nominees would be given the opportunity to discuss their views on taxation, private property rights, child abuse, crime and punishment, environmental protection, etc. Some sitting judges are adamantly against this idea because they would not have been confirmed if the public knew what they stood for in advance of their appointment.

Mr. Cotton said that judges are accountable directly to the voters through "retention elections." When was the last time you reviewed a judge's record before voting? Retention elections are uncontested. They are a formality. There is no adversarial debate, no platform and no competition for ideas. Information is scarce. It is scantily distributed.

For instance, did you know that Chief Justice Allen Compton was found guilty of sexual harassment incidents in 1995 and 1996? Yet, Justice Compton was retained in November 1996 by a margin of 2 to 1. Voters did not have all the facts because the full story wasn't released until mid-1997 — after the election. When Justice Compton was found guilty he stepped down as chief justice, but stayed on the bench. It will be 10 years before he comes up for retention again. No one responsible for administering the law should enjoy that level of elite privilege.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council.

Mr. Cotton asserted that we are just trying to "control judges." This is the classic bogeyman tactic. Once a judge is confirmed, the Legislature would be out of the picture forever. I began work on HJR 47 in August of last year, months before the courts began their latest assault on publicly made law. The only thing I want to contain is the unfettered power of the judicial council to which Mr. Cotton is, understandably, very attached.

Mr. Cotton wrote that those who accuse the courts of "lawmaking" are just complaining because they do not agree with the decisions. This statement is based on the premise that justices have the authority to create constitutional law with a wave of their pen. Isn't the constitution supposed to be written by the people and interpreted by the judiciary? Mr. Cotton's attempt to trivialize our assertions is counterproductive to a meaningful discussion. I refuse to be painted into a corner.

No matter what side of the issue one is on, when the Alaska Supreme Court says that the privacy provision in Alaska's constitution guarantees a person's right to possess marijuana, despite statutes passed by the Legislature, that is lawmaking (Ravin vs. State).

When the judiciary specifies the dietary, educational and space needs of Alaska's criminals down to the food group, class and square foot, that is lawmaking (Cleary vs. Smith).

When the Alaska Supreme Court says that we cannot lease off-shore lands because the state did not consider the effect on caribou, that is bad judgment, not lawmaking (Trustees for Alaska vs. State).

There are many decisions I may not agree with; sometimes they are lawmaking, sometimes they're not. Mr. Cotton would have us blindly follow black robes and gavels all the way to judicial domination.

Alaska is a new state. Our judicial selection process is largely unproven by the test of time. The processes in 12 other states, as well as the federal confirmation process, do not violate the separation of powers doctrine. Neither would HJR 47. The Alaska judiciary's capricious use of authority and failure to appropriately censure the conduct of its members reveal a recurring pattern of power abuse. Legislative confirmation is not a panacea for all of Alaska's judicial ills, but I believe it is a measured step in the right direction.

Rep. John Cowdery of Anchorage is serving his third term in the state House of Representatives.